REPORTS OF CASES

ARGUED AND DETERMINED

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Supreme Court of Law and Equity

OF THE

STATE OF ARKANSAS.

BY ALBERT PIKE,
Counsellor at Law.

VOL. IV.

LITTLE ROCK:
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JUDGES

OF THE

SUPREME COURT OF LAW AND EQUITY

OF THE

STATE OF ARKANSAS,

DURING THE TIME OF THE FOURTH VOLUME OF THESE REPORTS.

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

* The constitutional term for which Judge DICKINSON was elected, having expired in November, 1842, GEORGE W. PASCHAL, Esq., of Crawford county, was elected, by the Legislature, on the thirtieth day of November, 1842, in his place, for eight years.

CIRCUIT JUDGES.

FIRST CIRCUIT,
WILLIAM K. SEBASTIAN,*
JOHN C. P. TOLLESON.†
SECOND CIRCUIT,
ISAAC BAKER.
THIRD CIRCUIT,
THOMAS JOHNSON.

*Resigned 1st March, 1842.
†Appointed by the Governor, 1st March, 1842, and succeeded by JOHN T. JONES, Esq., Dec. 1st, 1842, who was elected for four years.

FIFTH CIRCUIT,
JOHN J. CLENDENIN.
SIXTH CIRCUIT,
WILLIAM CONWAY B.‡
SEVENTH CIRCUIT,
RICHARD C. S. BROWN.‖

‡Resigned 24th Nov., 1842; succeeded by JOHN FIELD, Esq., who was elected Dec. 1st, 1842, for four years.
‖Re-elected December 1st, 1842, for four years.

ROBERT W. JOHNSON, *Attorney General.*

A TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

☞ The letter *v* follows the name of the Plaintiff.

A.

Allhime, Pirani et al. v. 440
Alston v. Brashears, 422
Ashley et al., Crary v. 203
Ashley v. Dunn, 516
Auditor, Taylor et al. v. 574

B.

Bailey, State Bank v. 453
Bailey v. Ralph, 591
Baker v. The State, 56
Bank of Louisiana v. Watson, 518
Beard, *in the matter of*, 9
Beebe v. Real Estate Bank, 124, 546
Beirne et al., Knox v. 460
Bennett, Stone v. 71
Bennett et al., Dardenne v. 458
Bennett et al. v. Brickey, 460
Bertrand v. Byrd, 187, 195
Billings v. Billings, 90
Bizzell, Real Estate Bank v. 189
Blackmore et al. v. President and Directors, &c., 454
Blevins v. Blevins, 441
Bradley v. Farrington, 532
Brashears, Alston v. 422
Brent v. Fenner, 160
Brittin v. Mitchell, 92
Brookfield, Cail v. 554
Brooks v. Palmer, 159
Brown v. Peevey, 442
Brown et al., Porter v. 535
Brummell, Williams v. 129
Buckner et al. v. Real Estate Bank, 440
Buford v. Real Estate Bank, 520
Burks v. Dickson, 87
Burnett v. Menifee, 140
Buzzard, State v. 18
Byrd, Bertrand v. 187, 195

C.

Cail v. Brookfield, 554
Calico et al. v. The State, 430
Calloway, Robinson v. 94
Campbell, Hanly v. 562
Carradine et al., Crary v. 216, 225
Carson's Ex'r, McLain & Badgett v. 164
Carter v. Menifee, 152
Caruthers v. Real Estate Bank, 447
Causin v. Taylor, 55, 408
Chase, Pullen v. 210
Clark, Johnson's Ex'r v. 235
Clark v. Oakley's Adm'r et al., 266
Conway, Rogers v. 70
Conway et al. *ex parte*, 361
County of Pulaski v. Irvin, 473
" " v. Taylor et al., 596
Craig, Sayre v. 10
Crary v. Ashley et al., 203
Crary v. Carradine et al., 216, 225
Cummins, *ex parte*, 103
Cummins v. Webb, 229
Cummins et al. v. James et al., 616

D.

Dardenne v. Bennett et al., 458
Day et al. v. Lafferty, 450
Dickinson v. Tunstall, 170
Dickson, Burks v. 87
Dillard v. Evans, 175
Dobbs, Eubanks v. 173
Duncan et al., Richmond v. 197

Dunn, Ashley v. 516

E.

Edwards, Palmer et al. v. 431
Elliott et al. v. Pres't, Directors, &c., 424
Elliott et al. v. State Bank, 427
Engles v. Engles, 286
Eubanks v. Dobbs, 173
Evans, Dillard v. 175

F.

Farrington, Bradley v. 532
Featherston v. Wilson, 154
Fenner, Brent v. 160
Finn, Obaugh v. 110
Fortenberry, Frazier et al. v. 162
Fowler v. Thorn & Wilson, 208
Fowler et al. v. Gibson et al., 427
Fowler v. Moore, 570
Frazier et al. v. Fortenberry, 162
Frazier et al. v. The State Bank, 509
Fritz, Goodrich v. 525
Fulcher v. Lyon, 445, 449

G.

Gibson et al., Moss et al. v. 427
Gilson et al. Fowler et al. v. 427
Goodrich v. Fritz, 525
Governor v. Pleasants, 193
Gray, River v. 425
Gray, Sumner v. 467
Grigg et al. v. Pelham et al., 141

H.

Hanly v. Campbell, 562
Hanly v. The Real Estate Bank, 598
Harrell, Trammell v. 602
Hawk v. Walworth, 577
Hawkins v. Hensley, 167
Hay et al. v. Pres't, Directors, &c., 454
Henry v. Ward, 150
Hensley, Hawkins v. 167
Hickey v. Smith, 161
Hicks v. Vann, 526
Hinchcliffe v. State Bank, 444
Hubbard, State Bank v. 419
Hutchings et al. v. Real Estate Bank, 517

I.

Inglish, Levy v. 65, 591
Inglish et al. v. Watkins, 199
Irwin, County of Pulaski v. 473

J.

James et al., Cummins et al. v. 616
Johnson's Ex'r v. Clark, 235
Johnson et al., Mays et al. v. 613

K.

Knox v. Beirne et al., 460

L.

Lafferty, Day et al. v. 450
Lafflin et al., Woodruff v. 527
Lane v. Levillian, Adm., 76
Lawson v. Main, 184
Lemoyne, Phillips v. 144
Levillian, Lane v. 76
Levy v. Inglish, 65, 591
Lewis et al. v. State Bank, 443
Light, Willson v. 158
Lyon, Fulcher v. 445, 449

M.

Mahoney et al. v. State Bank, 620
Main, Lawson v. 184
Mays et al. v. Johnson et al., 613
McDonald v. Simpson, 523
McDonald et al. v. Watkins, Adm., 624
McFarland v. State Bank, 44, 410
McKiel v. Porter, 534
McKiel et al. v. Real Estate Bank, 592
McLain v. Taylor, 147
McLain et al. v. Carson's Ex'r, 164
McLain et al. v. Smith, 244
McNabb v. State Bank, 555
McPherson et al. v. State Bank, 558
Menifee, Burnett v. 140
Menifee, Carter v. 152
Mitchell, Brittin v. 92
Mitchell v. Walker, 145
" v. Real Estate Bank, 513
Mitchell et al., Reagan et al. v. 630
More, Fowler v. 570
Morrison v. Pitcher et al., 74
Moss et al. v. Gibson et al., 427
Murphree et al. v. State Bank, 448

N.

Neal v. Newland, 459, 506
Neely et al. v. State Bank, 522
Newland, Neale v. 459, 506
Nicks' Heirs v. Rector, 251

O.

Oakey, Pelham v. 71
Oakley's Adm. et al. v. Clark, 226
Obaugh v. Finn, 110
Oldham v. Wallace, 559
Oliver v. Gray, 425

P.

Palmer, Brooks v. 159
Palmer et al. v. Edwards, 431
Palmer, Prather v. 456

Patton et al. v. Walcott, 579
Peevey, Brown v. 442
Pelham v. Oakey, 71
" v. Grigg et al., 141
" v. State Bank, 202
Pelham et al. v. State Bank, 418
Pelham, Adm. v. Wilson et al., 289
Pettit et al., Rives v. 582
Phillips v. Lemoyne, 144
Pirani et al. v. Allhime, 440
Pitcher et al. v. Morrison, 74
" Trowbridge et al. v. 157
Pleasants, Governor v. 193
Porter, McKiel v. 534
Prather v. Palmer, 456
Pres't, Directors, &c., Elliott et al. v. 424
" " v. Hay et al., 454
" " v. Blackmore et al., 454
Pullen v. Chase, 210
Purdy v. Brown et al., 535
Pyeatt v. Spencer, 563

R.

Ralph, Bailey v. 591
Randolph, Ringgold et al. v. 428
Reagan et al. v. Mitchell et al., 630
Real Estate Bank v. Beebe, 124, 546
" " " v. Bizzell, 189
" " " Buford v. 520
" " " Buckner et al. v. 440
" " " Caruthers v. 447
" " " Hanly v. 598
" " " Hutchings v. 517
" " " McKiel et al. v. 592
" " " Mitchell v. 513
" " " Tucker et al. v. 429
" " " " " " 431
Rector, Nicks' Heirs v. 251
Richmond v. Duncan et al., 197
Ringgold et al. v. Randolph, 428
Rives v. Pettit et al., 582
Robinson v. Calloway, 94
Rogers v. Conway, 70

S.

Sanger, Trowbridge et al. v. 179
Sayre v. Craig, 10
Simpson, McDonald v. 523
Smith, Hickey v. 161
" McLain et al. v. 244
" *ex parte*, 601
" State v. 613
" et al. v. Yell, 293
Sorrells v. Sorrells, 296
Spencer, Pyeatt v. 563
State, Baker v. 56
" v. Buzzard, 18
" Calico et al. v. 430
" v. Smith, 613
" Waller v. 87
" Whitfield v. 171
State Bank v. Bailey, 453
" " Elliott et al. v. 437
" " Frazier et al. v. 509
" " Hinchcliffe v. 444
" " v. Hubbard, 419
" " Lewis et al. v. 443
" " Mahoney et al. v. 620
" " McFarland v. 44, 410
" " McNabb v. 555
" " McPherson et al. v. 558
" " Murphree et al. v. 448
" " Neely et al. v. 522
" " Pelham v. 202
" " Pelham et al. v. 418
" " Webster et al. v. 423
Stone v. Bennett, 71
Sumner v. Gray, 467

T.

Taylor, Causin v. 55, 408
" McLain v. 147
" et al. v. The Auditor, 574
" " v. County of Pulaski, 596
Thorn et al., Fowler v. 208
Trammell v. Harrell, 602
Trowbridge et al. v. Pitcher et al., 157
" " v. Sanger, 179
Tucker et al. v. Real Estate Bank, 429, 431
Tully, *ex parte*, 220
Tunstall, Dickinson v. 170

V.

Vann, Hicks v. 526

W.

Walcott, Patton et al. v. 579
Walker, Mitchell v. 145
Walworth, Hawk v. 577
Wallace, Oldham v. 559
Walker v. The State, 87
Ward, Henry v. 150
Watkins, Inglish et al. v. 199
" v. Weaver, 556
" Adm., McDonald et al. v. 624
Watson, Bank of Louisiana v. 518
Weaver, Watkins v. 556
Webb, Cummins v. 229
Webster et al. v. State Bank, 423
Whitfield v. The State, 171
Williams v. Brummel, 129
" *ex parte*, 537
Willson v. Light, 158
Wilson, Featherston v. 154
Wilson et al., Pelham, Adm., v. 289
Woodruff v. Lafflin et al., 527
" *ex parte*, 630

Y.

Yell, Smith et al. v. 293

RULES OF THE SUPREME COURT,

ADOPTED

AT JANUARY TERM, 1842.

ORDERED, by the Court, that the following Rules be added to, and made a part of the standing Rules of this Court:

RULE 17. *Ordered*, That no brief, hereafter filed in this Court, shall contain any thing other or more than a concise statement of the facts of the case; a similar statement of the points or propositions insisted on by the party; and a simple reference to, or citation of the authorities relied on: and the authorities cited in support of each separate point or proposition, must follow immediately after it, and before the statement of any other proposition; and such brief shall be filed at or before the cause is called, and not after, without the leave of the Court.

RULE 18. *Ordered*, That, in every case pending or decided at the present term of this Court, a brief, as directed in the foregoing Rule, shall be made out and filed, before the final adjournment of the term, by the attorney of the parties respectively; and no brief, not made out in the manner above directed, shall be published in the Reports, without the express direction or leave of the Court.

RULE 19. *Ordered*, That, in addition to such brief as above directed and required to be filed, the attorneys, respectively, shall be at liberty to present, therewith, a separate argument, in writing, for the use of the Court, which may remain with the papers of the case, but shall not be filed as any part of the record.

NOTE. In consequence of the adoption of the foregoing Rules, the Reporter has been compelled to omit many arguments, filed at January term, which, if condensed, he would have taken pleasure in presenting to the profession.

CASES
ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

In January Term, A. D. 1842, being the sixty-sixth year of our Independence.

In the matter of BEARD.

The Supreme Court has full power to issue writs of habeas corpus, and to try and determine the same.
But the petition must exhibit a properly certified copy of the warrant, order, or process, by which the prisoner is restrained of his liberty, or show that the demand could be made for it, or has been made and refused.
And if it merely states that prisoner stands indicted for murder, and that there has been a mis-trial, and exhibits a copy of the indictment, the petition will be refused.

THIS was a petition for a habeas corpus, by *William Beard*, indicted for murder in the Bradley Circuit Court.

Fowler, Trapnall and Cocke, for the petitioner.

R. W. Johnson, Atto. Gen., contra.

By the Court, LACY, J. Whether or not a person is entitled to bail, after the finding of an indictment for murder, by a grand jury, is a question of no ordinary import or interest, and one upon which we express no opinion, as that point is not, now, properly before us. That this court has full power to issue writs of habeas corpus, and to try and determine the same, cannot be denied, provided the party applying shows that he is legally entitled to the benefit, and brings himself within the provisions of the statute regulating the proceedings

in such cases. According to the requisitions of the act, the prisoner, or some competent person in his behalf, must apply to the person having him in custody, for a copy of the warrant, order, or process, by which he is detained in prison, or he must show that he has demanded a copy of the causes of such committal, and that it has been refused him. *Rev. Statutes, p.* 434, *sec.* 5.

The showing, in the present instance, is wholly defective, in these particulars: It exhibits no properly certified copy of the warrant, order, or process, by which the prisoner is restrained of his liberty; nor does he show that no demand could be made for such copy, or that it has been refused. The affidavit accompanying the petition merely states that the prisoner stands charged upon an indictment for murder, and that there has been a mis-trial before a traverse jury; and he accompanies this statement with a paper purporting to be the copy of the indictment furnished the prisoner on the trial. Such a showing is wholly defective, as it does not comply with the requisites of the habeas corpus act.

Application denied.

Sayre *vs.* Craig.

Where S., by covenant, sold and agreed to convey to C., by deed in fee simple, and with general warranty, a tract of land, in consideration of which agreement C. agreed to pay S. $8,947 36, at a future day, and $5,000 at another day; and that, to secure the payments, he would deliver to S. bills on New-Orleans, drawn by a third person and accepted by himself, falling due at the dates, and for the amounts, of the respective payments; and it was agreed that possession should be delivered to C. by a day certain, prior to the debts falling due: Held that the covenants were independent, and S. might sue without averring performance or readiness to perform.

The rules as to dependent and independent covenants *quoted and* discussed.

And in a suit for the first payment, a plea that the defendant had paid part, and tendered bills for the residue, offers an immaterial issue.

This was an action of covenant tried in the Chicot circuit court, in January, A. D. 1841, before the Hon. Isaac Baker, one of the circuit judges.

The declaration was founded upon an agreement, of date Sept. 21, 1839, by which it was recited that Sayre had sold, and did thereby agree to convey to Craig, by deed in fee simple, and with general warranty, a certain tract of land; and that, in consideration of the agreement of Sayre, Craig agreed to pay to Sayre, on or before the first day of February, 1841, the further sum of $5000; and, to secure the payments, that he would deliver to Sayre bills of exchange drawn by James Erwin, of Lexington, Ky., accepted by Craig, in favor of Sayre, payable in New-Orleans, for the same, and at the dates, respectively, of the payments: and that posssesion of the land was to be delivered to Craig on or before the first day of January, 1840. The declaration then avers that Sayre has always been ready and willing to convey; and that he put Craig in possession according to the covenant. It then alleges, as a breach, that the first instalment had not been paid, nor the bills of exchange delivered to secure it.

To this declaration the defendant filed two pleas: first, *non infrequit conventionem;* and second, that, on the twelfth day of October, 1839, he paid Sayre $1000, which, with lawful interest and exchage from that day to the 21st February, 1840, the time of the first payment, made the sum of $1051 16, which Sayre then received as and for the sum of $1051 16, part of the first payment; and that, on the same 12th of October, 1839, Craig tendered Sayre a set of bills of exchange, drawn by Erwin, at Lexington, on Craig, dated Sept. 21, 1839, payable at 6 mo's, to the plaintiff, addressed to Craig, at New-Orleans, for $7896 20 cents, accepted by Craig; and also, another set, dated, drawn, and accepted in the same way, payable at New-Orleans on the first of February, 1841, for $5000; and that, upon such tender, he demanded a deed of Sayre, which deed Sayre refused to execute: that he has always been ready to give the bills, or pay the amount in money; and brings the same into court, ready to be paid, if Sayre will execute the deed.

The plaintiff moved to strike out the first plea, and demurred to the second. The grounds of demurrer assigned were, that the plea went to the whole declaration, whereas there should be a separate plea to each breach: that the plea, in averring a tender, offered an immaterial issue: that, as far as it alleged a tender of the bills payable in

1841, it was not responsive to any part of the declaration: that the tender was not of such bills as were provided for by the covenant, and Sayre's refusal to accept them did not waive his right to sue on the covenant, so that it showed no performance, or offer of performance, according to the terms of the covenant; and, finally, that the conveyance was not a condition precedent, and Craig had no right to demand it, as he alleged in his plea he had demanded it.

The first plea was stricken out, and the demurrer was overruled, for error in the declaration, and final judgment went against the plaintiff.

Pike, for the plaintiff.

If a day be appointed for the performance of any act, and such day *is to* happen, or *may* happen, before the performance of the act which is the consideration for the first mentioned act, then the covenants are considered mutual and independent, and an action may be brought without averring performance of the consideration; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is *when no time is fixed* for the performance of the consideration. *Pordage* v. *Cole*, 1 *Saund.* 320 *a.* *Tompkins* v. *Elliott*, 5 *Wend.* 496. *Thorpe* v. *Thorpe*, 1 *Salk.* 171. *Kingston* v. *Preston*, cited in *Jones* v. *Barkley*, *Doug.* 684. *Callonel* v. *Briggs*, 1 *Salk.* 112. *Lock* v. *Wright*, *Str.* 571. *Year Book*, 48 *Edw.* 111, 2, 3, inaccurately cited in *Ughtred's case*, 7 *Co.* 74. *Terry* v. *Duntre*, 2 *H. Bla.* 392. *Campbell* v. *Jones*, 6 *T. R.* 572. *Acherly* v. *Vereon*, *Willes*, 156. *Blackwell* v. *Nash*, *Str.* 535. *Cunningham* v. *Morrell*, 10 *J. R.* 204. *Robb* v. *Montgomery*, 20 *J. R.* 15. *Goodwin* v. *Holbrook*, 4 *Wend.* 377. *Gardiner* v. *Carson*, 15 *Mass.* 501. *Couch* v. *Ingersoll*, 2 *Pick.* 300.

Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance. Otherwise the damages would be unequal. 1 *Saund.* 320 *a.* *Duke of St. Albans* v. *Shore*, 1 *H. Bla.* 278. *Campbell* v. *Jones*, 6 *T. R.* 572.

The plea is bad. It shows no performance of the covenant, or valid excuse for non-performance.

Ashley & Watkins, contra.

1st. There is a material variance between the covenant, which is literally set out in the declaration, and the description of that covenant by the plaintiff, in stating his cause of action. According to the covenant, the defendant agrees to pay the purchase money, and secure the payment thereof by delivering the bills of exchange to the plaintiff, in consideration of Sayre's agreement to convey the land to him by deed in fee simple with general warranty; but the declaration avers that the agreement of the defendant was in consideration of the sale of said land by the plaintiff to the defendant.

Request should be averred. 1 *Chit. Plead.*, *ed.* 1837, *p.* 362, *et seq.*

Performance should have been averred, or an offer so to perform, or a sufficient excuse for not so performing. A mere willingness on the part of the plaintiff to perform, is no sufficient excuse for not performing. He should have averred an offer to make the conveyance, a tender of the deed, or some act or refusal on the part of the defendant which rendered it unnecessary. 1 *Chit. Plead.*, *ed.* 1837, *p.* 358 *et seq.* But this willingness to convey, which the plaintiff avers on his part, is not a willingness "to convey by deed in fee simple with general warranty," as he expressly agrees to do; and the averment is therefore insufficient. And if this averment of a willingness to convey were sufficient, there is not coupled with it any proper averment of notice to the defendant which would be requisite in such case. 1 *Chit. Plead.* 360 *et seq.* 1 *Leigh's Nisi Prius*, *ed.* 1838, *p.* 690.

In most of the older cases, the courts seemed inclined to construe covenants as independent, and to give to each party his right of action; but in the more recent and better advised decisions, the rule is changed, and the courts are disposed to construe covenants to be mutual or dependant; and the reason is, to prevent vexations litigation by circuity of action, and because irreparable injury would in many cases be done to a defendant, by compelling him to perform his cove-

nant and rely upon the personal security of the other party. 1 *East.*, 203. *Jones vs. Barclay*, *Doug.* 690–1. *Bank of Columbia vs. Hagner* 1 *Peters*, 455.

According to the well settled rules which are applied to the construction of covenants, the plaintiff was bound to aver a performance. *Leigh's Nisi Prius*, *ed.* 1838, *p.* 679, *et seq.* The consideration was executory on both sides, and no time is fixed for the performance on either side. That possession of the land was to be delivered to the defendant on a day certain, can make no difference, because possession would follow as a necessary incident to the sale. *Bank of Columbia vs. Hagner*, 1 *Peters*, 468.

The defendant's agreement forms one connected sentence, and the declaration is fatally defective, as it attempts to separate this covenant, and alleges two distinct breaches on the part of the defendant—one, that he did not pay the money; the other, that he did not deliver the bills of exchange.

Covenants are mutual and dependent, where the mutual promises go to the whole of the consideration on both sides. This principle is not affected by the decision in the case of *McPherson vs. Biscoe*, 3 *Ark.* 90; because, in that case, the conveyance was to be made on the final payment of the purchase money, which was payable in three instalments. "In contracts for the sale of land, by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears." *Bank of Columbia vs. Hagner.* See also *Parker vs. Parmele*, 20 *J. R.* 129; *Gardiner vs. Corson*, 15 *Mass. Rep.* 471, *note and cases cited.*

By the Court, Lacy, J.

The question here to be decided turns upon the proper construction to be put upon the covenants or promises of the respective parties to the contract in this suit. It is evident, if the covenants are dependent, that the declaration is bad; and if independent, that it is good, and the breaches well assigned. It is true, as contended, that there is a strong inclination of the courts, in modern cases, to favor the doctrine of dependent covenants, such construction being obviously most just,

and tending to prevent a multiplicity of suits. Still, where the parties by the nature and terms of their contract, clearly show that each intended to look to his own part of the agreement, and to rely upon the remedy it afforded, in such cases the performance of the covenant of the one has no reference to that of the other; and hence the courts are not at liberty, upon such mutual agreements, to make one depend upon the other, but they are bound to construe them separately, and independently of each other. The rules upon this subject are accurately stated by SERGEANT WILLIAMS, in his learned note to the case of *Pordage vs. Cole*, 1 *Saund. R.* 319, in which the English authorities are collated and reviewed. "If," says he, "a day be appointed for payment in full or in part, or for doing any other act, and the day is to happen before thing which is the consideration of the money, or the act which is to be performed, an action will lie for the money, or for not doing such other act before performance; for in such case, it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. And so it is where no time is fixed for the performance of that which is the consideration of the money or other act. *Dyer*, 76, *a in margin*. 1 *Saek.* 177, *Thorp vs. Thorp*. 1 *Lord Raymond*, 665. 1 *Lutw.* 250. And this was the ground upon which the judgment in that case rests; for the money was to be paid in that case upon a given day, which might happen before the lands were or could be conveyed. Another rule laid down is, that where a covenant goes to only a part of the consideration, and a breach of such covenant may be had in damages, it is an independent undertaking, and an action may be maintained for a breach of the covenant, without averring performance. And in support of this rule, it is decided in the Court of King's Bench, (*East.* 17 *Geo.* 3, *Boone vs. Eyre*,) that where a party conveyed an equity of redemption to a plantation, together with a stock of negroes upon it, in consideration of a given sum and an annuity for life, and covenanted that he had good title, the breach assigned was, the non-payment of the annuity, and the plea denied that he was possessed of a valid title to the slaves, and so had no authority to convey. The plea was adjudged bad, and the Court added, if the plea were allowed, then that a failure of any part of the consideration would defeat the action.

Campbell vs. Jones, 6 *T. R.* 570. The reason given for the decision is, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should be permitted to enjoy the part he had without paying for it. The same doctrine is fully recognized in all the American authorities upon the point. And the reason that mutual promises will bear an action without an allegation of performance, is, that the law binds every man to perform his contract according to its true intent and effect. He makes his bargain, and relies upon the other's covenant for performance. In such case, it needs no averment of performance on either side to maintain the action. But if it appear that either party was to have the thing done before performance on the other part, then performance, or a readiness to perform, must be averred. In *Jones vs. Barkley, Douglass*, Lord Mansfield remarks that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, however transposed they might be in the deed. Their precedency must depend upon the order of time in which the intent of the transaction required their performance. *Cunningham vs. Morrell*, 10 *J. R.* 204. *Robb vs. Montgomery*, 20 *J. R.* 15.

The same doctrine is established in *Gardinier vs. Cusan*, 15 *Mass. R.* 501. The application of these principles to the case now under consideration, proves conclusively that the mutual covenants of the respective parties are independent undertakings, and therefore there was no necessity to aver, in the declaration, performance or readiness to perform.

Sayre sold and agreed to convey to Craig, by deed with general warranty, a tract of land described in the covenant; and in consideration of this sale, Craig bound himself to pay the purchase money in two different instalments, the first to become due in March 1840, and the second in February, 1841; and to secure these payments, he was to deliver to Sayre bills of exchange, to be drawn by Erwin and accepted by himself, payable in New-Orleans. Possession was to be delivered to Craig upon the first of January, 1840; and the contract was entered into on the 21st of September, 1839. From these facts, it is perfectly evident that Sayre had a right to demand the bills upon the

execution of the contract, and that Craig had an equal simultaneous right to demand a conveyance. The right of neither depended upon the performance of a condition precedent. Craig agreed to accept and take Sayre's covenant title; and Sayre was bound to convey, and look to Craig's personal obligation alone for the purchase money, and to accept the bills of exchange, if tendered in conformity with the agreement to secure the payment of the purchase money. Their covenants were independent of each other, and each relied upon his own part of the agreement for their performance, and the respective obligations were due presently, and attached immediately upon the execution of the deed. By the terms of the contract, the money was to be paid upon a day certain, which was to happen or might happen before making the conveyance, and part of the consideration was executed by delivering possession; and both these facts bring the agreement within the operation of the rules above stated. The same principle holds good where a day certain is fixed for the payment, and no day certain fixed for the performance, which is exactly the case in the present instance. And so the point was determined in *Cunningham vs. Morrell*, 10 *J. R.* 204, and in *Thorpe vs. Thorpe*, 12 *Modern*, 455.

If these positions be true, then it follows that the declaration is good, and the breach well laid. It consists in the averment of the non-payment of the purchase money on the first instalment, when it fell due. This the plea neither admits nor denies, but seeks to avoid and bar, by alleging the payment of about a thousand dollars on the first instalment, before it was due, and the tender of bills of exchange for the residue of the purchase money due on the first instalment, and all the last, which it states was refused. This is tendering the plaintiff an immaterial matter, which he was not bound to take issue upon. The foundation of the action is the non-payment of the purchase money, and the plea is no answer to that charge. The bills of exchange to be drawn by Erwin and accepted by Craig, were intended, as expressed in the covenant, as collateral security to secure the payment of the purchase money. Sayre had a right to the bills, and Craig was bound to present them. But the cause of action arises out of the non-payment of the first instalment, and the plea, by not

traversing this fact, must be adjudged insufficient: consequently, the Court erred in overruling the demurrer to it.

Judgment reversed.

THE STATE *vs.* BUZZARD.

That clause of the Revised Statutes which makes wearing concealed weapons a penal offence, is not contrary either to the constitution of the United States, or of this State.

THIS was an indictment under the statute against carrying concealed weapons, tried in the Chicot Circuit Court, in November, A. D. 1839, before the Hon. EUCLID L. JOHNSON, one of the Circuit Judges. The indictment was quashed on the motion of *Buzzard*, on the ground that the law was unconstitutional; and the State appealed.

Clendenin, *Atto. Gen.*, for the State.

Pike, contra:

After advisement, the following opinions were delivered:

By RINGO, C. J.

This is a prosecution based upon the 13th section of the first Article, Division VIII., Ch. 44, *Rev. St. Ark.*, p. 280, which declares, that "every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor." The indictment was quashed, and the defendant ordered to be discharged by the Circuit Court; and the State has, by appeal, brought the case before this Court, to revise said decision.

No question as to the sufficiency of the indictment, in point of form, has been raised or argued at the bar, and in this respect it is believed to be substantially good. But the appellee insists that the provisions of the statute above quoted, upon which the prosecution is founded,

are in conflict with and repugnant to the second article of the amendments of the constitution of the United States, which ordains that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The attorney for the State contends that the enactment in question is not prohibited by any fundamental law of the land, and that the Legislature of this State possesses legitimately the power of regulating by law the use of such weapons as are mentioned therein, as that body has assumed to do by said enactment.

In order to arrive at a just conclusion in regard to the question under consideration, it may in the first instance be necessary to recur to some of the primary objects for which the government was instituted, and concisely state what are understood to be its principal obligations, not only in reference to the aggregate community, but also to each individual member of which it is composed; and then consider the extent of its powers, and how far they are limited by this article in the federal constitution.

Among the objects for which all free governments are instituted, may be enumerated the increase of security afforded to the individual members thereof for the enjoyment of their private rights, the preservation of peace and domestic tranquillity, the administration of justice by public authority, and the advancement of the general interests or welfare of the whole community. In addition to which, it is designed that adequate security shall be provided by law for the most perfect enjoyment of these blessings. Consequently, where the people, in forming the government, have not by some fundamental law made such provision as, in every variety of circumstances which may exist, shall be found necessary to the attainment of every object for which it was established, nor expressly, or by necessary or reasonable implication, prohibited the Legislature from supplying by law such omission, the obligation to do so is conceived to be unquestionable; otherwise, the people could not, through the instrumentality and agency of the government, possess and enjoy, in the greatest degree of which they are capable, all of the blessings and advantages which, by its institution, they intended to insure to themselves and posterity.

It results, therefore, that the legislative department, if not so inhi-

bited, possesses adequate powers to provide, by laws adapted to the purpose, the means by which those who compose the community shall aggregately and individually be secured in the full and complete enjoyment of all such benefits as may be derived from the operation or influence of the government. And in the execution of this power, and the performance of the high and important obligations devolved upon it, the Legislature possesses, and must necessarily exercise a discretion as to the means best calculated to attain the object, which in the nature of things is, and must remain, without control, provided no right vested by the constitution, or other authority paramount to that of the Legislature, be by their enactment infringed or divested. Now, if I have not wholly mistaken the objects for which the government was instituted, the trusts confided to it, and the powers with which it is invested, those who subjected themselves to its operation, must, in consideration of the advantages which they trusted and believed would result from it to themselves and posterity, have voluntarily surrendered or subjected to the control of the public authorities provided for the administration of the government many if not all of the rights of which, independent of all government, they would have been possessed without any restriction whatever. For instance, the right of any individual to redress, according to the dictates of his own will or caprice, any injury inflicted upon his personal or private rights by another, is surrendered; and the right of determining not only what his rights are, but also whether they have been invaded, and the kind and measure of redress to which he is entitled, are all referred to the arbitrament of the law. Also the natural right of speech must remain without restraint, if it were not surrendered and subjected to legal control upon the institution of government; yet every one is aware that such limitations as have been found necessary to protect the character and secure the rights of others, as well as to preserve good order and the public peace, have been imposed upon it by law, without any question as to the power of the government to enforce such restrictions. So the liberty of the press, which is based upon the right of speech, is to the like extent subject to legal control. So the right of migration and transmigration, or of every individual to pass from place to place, according to his own free will and pleasure,

when and where he chose, acknowledged no restraint until surrendered upon the institution of government, when it became subject to such regulations as might be found necessary to prevent its exercise from operating prejudicially upon the private rights of others, or to the general interests of the community. These rights are believed to be as essential to the enjoyment of well regulated liberty, and as fully guarded against infringement by the government, as the right to keep and bear arms. Their use, if subject to no legal regulation or limitation whatever, would tend to unhinge society, and most probably soon cause it either to fall back to its natural state, or seek refuge and security from the disorders and suffering incident to such licensed invasion of the rights of others, in some arbitrary or despotic form of government; while their unrestrained exercise, so far from promoting, would surely defeat every object for which the government was formed. And if the right to keep and bear arms be subject to no legal control or regulation whatever, it might, and in time to come doubtless will, be so exercised as to produce in the community disorder and anarchy.

Suppose the constitutional existence of such immunity in favor of the right to keep and bear arms as is urged by the appellee be admitted. By what legal right can a person accused of crime be disarmed? Does the simple accusation, while the law regards the accused as innocent, operate as a forfeiture of the right? If so, what law attaches to it this consequence? Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned. Yet, upon the hypothesis assumed in the argument for the appellee, the act of disarming them must have been illegal, and those concerned in it trespassers, the constitution not limiting the right to such only as are free from such accusation. Nor could the argument of necessity or expediency justify one person in depriving another of the full enjoyment of a right reserved and secured to him by the constitution. Again, the term "arms," in its most comprehensive signification, probably includes every description of weapon or thing which may be used offensively or defensively, and in the most restricted sense, includes guns or firearms of every description, as well as powder, lead, and flints, and such other things as are necessarily used in loading and discharging them,

so as to render them effective as instruments of offence or defence, and without which their efficiency for these purposes would be greatly diminished, if not destroyed. By what authority, then, (if powder is comprehended by the term "arms,") can a person be prohibited from keeping, at such place and in such situation as he may desire, upon his own premises, any amount of powder he may think proper, however much it may endanger the lives or property of others? Certainly none. And yet, the right of inhibiting by law the keeping of powder in places where its explosion would endanger the lives or property of others, has been constantly asserted and enforced, without question as to the legal right or power of imposing such restriction. Still no such prohibition can be legally made or enforced, if the principles asserted in the argument for the appellee be true. Other instances, in which the right to keep and bear arms has been either directly or indirectly subjected to legal regulations and restrictions, without any question as to the power so exercised, could be referred to; but that just mentioned is esteemed sufficient to prove, that in the judgment of the people of the United States, the right in question possesses no such immunity as exempts it from all legal regulation and control.

And here it may not be without utility to inquire for what object the right to keep and bear arms is retained exempt from all legal regulation or control, if in fact it has been so retained, as urged in the argument for the appellee. Is it to enable each member of the community to protect and defend by individual force his private rights against every illegal invasion, or to obtain redress in like manner for injuries thereto committed by persons acting contrary to law? Certainly not; because, according to the fundamental principles of government, such rights are created, limited, and defined by law, or retained subject to be regulated and controlled thereby; and the laws alone are and must be regarded as securing to every individual the quiet enjoyment of every right with which he is invested; thus affording to all persons, through the agency of the public authorities to whom their administration and execution are confided, ample redress for every violation thereof. And to these authorities every person is, in most cases, bound to resort, for the security of his private rights, as well as the redress of all injuries thereto. Hence it has become a maxim in

all well organized governments, that there is no wrong without a remedy, or, in other language, that the law furnishes to each individual some adequate remedy for every invasion of, or injury to, his private rights. Such legal remedies, however, can only be enforced by public authority; yet, from the very institution of the government, every individual is considered as freely assenting to assist in maintaining the laws and executing their mandates. Consequently, the public authorities have a right to demand their aid in enforcing legal remedies, whether they so operate as to prevent or redress injuries, apprehended or suffered. And this obligation of the government to protect every individual in the quiet and peaceable enjoyment of his private rights, and afford him redress for all injuries thereto, including also the power of coercing by public authority the performance of all legal obligations, constitutes not only the most perfect and ample security to individuals for the enjoyment of their private rights, but is believed to have formed one of the great objects for which the government was instituted. Now, is it reasonable to suppose that either those who proposed or those who adopted the article under consideration, doubted the capacity or disposition of the government to discharge every obligation devolved upon it? Surely not. And therefore it is conceived that the right in question could not have been so retained and secured with any view to the protection or vindication of such rights of individuals as are merely private.

Another great object contemplated by the people in the institution of the government, was to establish a more perfect union, by creating a community of interests and a common concert of action in the different members of the State, by which their common interests could be better promoted and defended. And, therefore, the obligation of making, from time to time, such legal provision as shall be found necessary to advance their common or public interests, or to protect, preserve, and defend the free institutions they had established, was imposed upon the legislative department of the government. And in order to perform this important trust, there was necessarily confided to it a discretion as to the means best adapted to the object, over which the judiciary has no control, unless the enactment be repugnant to some law of paramount obligation.

But surely if the government does not possess the power of so regulating and controlling, by law, the acts of individuals, as to protect the private rights of others, preserve domestic tranquillity, peace and order, promote the common interests of the community, provide for the common defence of the country, and the preservation of her free institutions, established for the common benefit of the people, and, in a great measure, committed to its fostering care, its powers are inadequate to the performance of the obligations imposed upon it. Such, however, is not believed to be the case, as the government possesses, in my opinion, ample power to inhibit, by law, all such acts and practices of individuals, as affect, injuriously, the private rights of others, tend to disturb domestic tranquillity, or the peace and good order of society, militate against the common interests, impair the means of common defence, or sap the free institutions of the country; and to enforce the observance of such laws by adequate penalties, the character and quantum of which, in most respects, depend exclusively upon the will and judgment of the legislature.

If these general powers of the government are restricted in regard to the right to keep and bear arms, the limitation, to whatever extent it may exist, will be better understood, and more clearly seen, when the object for which the right is supposed to have been retained, is stated. That object could not have been to protect or redress by individual force, such rights as are merely private and individual, as has been already, it is believed, sufficiently shown: consequently, the object must have been to provide an additional security for the public liberty and the free institutions of the State, as no other important object is perceived, which the reservation of such right could have been designed to effect. Besides which, the language used appears to indicate, distinctly, that this, and this alone, was the object for which the article under consideration was adopted. And it is equally apparent, that a well regulated militia was considered by the people as the best security a free state could have, or at least, the best within their power to provide. But it was also well understood, that the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common

liberties; and therefore, to guard most effectually against such consequences, and enable the militia to discharge this most important trust, so reposed in them, and for this purpose only, it is conceived the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever, was so far limited or withdrawn: which conclusion derives additional support from the well known fact, that the practice of maintaining a large standing army in times of peace, had been denounced and repudiated by the people of the United States, as an institution dangerous to civil liberty and a free State, which produced, at once, the necessity of providing some adequate means for the security and defence of the State, more congenial to civil liberty and republican government. And it is confidently believed that the people designed and expected to accomplish this object, by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those, who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.

The court of appeals of the State of Kentucky, in the case of *Bliss vs. the Commonwealth*, 2 *Littell*, 90, and the argument of this case for the appellee, if I have not misapprehended their premises and reasoning, both assume that the right to keep and bear arms was adopted as well for the purpose of enabling individuals to defend and redress, by their own arms, injuries threatened or suffered in respect to their personal or private rights, as for the security of the State, and is not subject to any legal regulation, restriction, or control whatever; and that, by virtue of it, every person in the community possesses a privilege or immunity, by virtue of which he may keep and bear arms of every description, at all times, in every place, and in any manner, according to his own free will or caprice.

However captivating such arguments may appear upon a merely casual or superficial view of the subject, they are believed to be specious; and to rest upon premises at variance with all the fundamental principles upon which the government is based; and that, upon a more

mature and careful investigation, as to the object for which the right was retained, their fallacy becomes evident. The dangers to be apprehended from the existence and exercise of such right, not only to social order, domestic tranquillity, and the upright and independent administration of the government, but also to the established institution of the country, appears so obvious as to induce the belief that they are present to every intelligent mind, and to render their statement here unnecessary.

I cannot, therefore, indulge the opinion, that they were not distinctly foreseen by those who recommended, as well as those who adopted the article under consideration, or that they intended to incorporate into the charter of their civil policy, a principle pregnant with such dangers. Besides, it cannot have escaped the observation of any person of intelligence, whose mind has been directed to the subject, that to resist, or oppose by force, the constituted public authorities of the State acting in pursuance of law, in the discharge of any public duty enjoined upon them, must, according to the extent and success of such resistance or opposition, either produce some revolution in the government itself, or subject those who so act to such consequences as are denounced against them by law. Suppose a portion of the community consider their private rights invaded by some act or exercise of authority, on the part of the government, which they consider as unauthorized, can they, by virtue of any legal right with which they are invested, either prevent or redress such injury by private force? In my opinion they cannot; their private rights being in this, as in most other cases, committed, as it were, to the care and custody of the law; and to it, so long as our civil liberties and republican institutions remain unimpaired, they are bound to look for protection as well as redress; both of which the government is under a positive obligation to provide.

I also deem it proper to remark here, that, in my opinion, the provisions contained in the article under consideration, were designed to furnish the people of the United States precisely such security for the preservation and perpetuation of their civil liberty and republican institutions, as it was the object of those who framed the constitution of this State to provide for those subject to its jurisdiction, by the 21st

sec. of the 2d *art.* of the Constitution, which declares, "that the free white men of this State shall have a right to keep and bear arms for their common defence;" thus indicating, in terms too plain to be misunderstood, that the sole object of the latter in securing this right, was to provide, beyond the power of legal control, adequate means for the preservation and defence of the State, and her republican institutions. And therefore, without applying to this provision in our Constitution the maxim "*expressio unius, exclusio alterius*," so often applied in the interpretation of laws, I have come to the conclusion, that the legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to injure or endanger the private rights of others, disturb the peace or domestic tranquillity, or in any manner endanger the free institutions of this State or the United States; and that no enactment on this subject, which neither directly nor indirectly so operates as to impair or render inefficient the means provided by the constitution for the defence of the State, can be adjudged invalid, on the ground that it is repugnant to the constitution. The act in question does not, in my judgment, detract any thing from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified. The practice of so bearing them, the legislative department of the government has determined to be wrong, or at least inconsistent with sound policy. So far, that department had a discretion in regard to the subject, over which the judiciary, as I conceive, has no control; and therefore the duty of the courts must be the same, whether the policy of the law be good or bad. In either event it is binding; and the obligation of the courts to enforce its provisions, when legally called upon to do so, is imperative.

In several States of this Union, the Court of the highest authority in the State has adjudicated upon the right to keep and bear arms, under and by virtue of the provisions contained in the respective constitutions of such States, in some of which, the language used appears to be different from and more comprehensive than that used either in the constitution of the United States or of this State. But I am not

aware that this right has ever become the subject of any adjudication in the Federal courts, or that any of the State courts, in adjudicating upon it, have given any exposition of the article under consideration, or attempted to define the right as secured by it. It may therefore be considered as an open question; and being one of interest and importance, and as I conceive clearly within the cognizance of the Supreme Court of the United States, an adjudication of that Court upon it, by which the extent of the right may be distinctly ascertained and definitively settled, can be readily obtained, and the rule of decision in relation to it be made uniform throughout the Union.

I deem it only necessary to remark further, that the constitution of Alabama declares, that "every citizen has the right to bear arms in defence of himself and the State." Yet the Supreme Court of that State, in the case of *The State vs. Reid, Ala. Rep.* 1 *vol. new series, p.* 612, has decided in favor of the validity of a law of that State, which inhibits the right of carrying about the person certain weapons concealed. The constitution of the State of Indiana also provides, "that the people have a right to bear arms for the defence of themselves and the State;" notwithstanding which, the Supreme Court of that State, in the case of *The State vs. Mitchell,* 3 *Blackf. Rep.* 229, has sustained a law of that State, in no respect essentially different from the enactment now in question. In Kentucky, and I believe in Tennessee also, the question has been decided against the validity of such enactments. A conflict between the decisions of the State courts in regard to the question, certainly exists; but so far as I am informed, the preponderance on either side is not very great.

I am therefore, after a careful and deliberate consideration of the question, of the opinion that the enactment of the Legislature, above quoted, is in no wise repugnant either to the constitution of the United States or the constitution of this State, but is in every respect binding as a law of the land. Consequently, the Circuit Court erred in quashing the indictment, and thereupon discharging the defendant from the prosecution. And that judgment ought to be reversed.

By Dickinson, J.

The appellee contends that the law, under which he stands indicted, is unconstitutional, and that a right, secured to him by the 2d article of the amendments to the Constitution of the United States, has been violated. This article declares, that "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The question is one of some importance, not so much, as I conceive, from any difficulty in arriving at a correct conclusion, as from the contrariety of opinions entertained by the different State Courts that have passed upon it. It is conceded by all, that the Federal Government is one of limited powers. It is not contended that the General Assembly of this State could interfere with any regulations made by Congress, as to the organizing, arming, or disciplining the militia, or in the manner in which that militia are either to keep or bear their arms. I shall endeavor to prove that it does not do so. The class of cases to which the constitutional provision applies, is widely different from the right of a private citizen to bear, concealed about his person, deadly weapons or arms. In the one, they are kept and carried in conformity with the constitution and laws of the United States, with a certain specific object in view: in the other, they are kept and carried for private purposes, wholly independent of any constitutional regulation, and to answer private ends, which have no bearing upon the security of the State. If this idea be correct, then it follows, that when arms are not kept or used for the defence of the State or Federal Government, the manner of carrying and mode of using them are subject to the control and authority of the State Legislature. Every citizen owes a double allegiance, and is entitled to the two-fold protection of the General and State Governments. To the first, the Constitution of the United States commits the powers of war, peace, commerce, negotiation, and those general powers relating to our external relations, and also the powers of an internal kind which require uniformity in their operation. To the second, belong all that is not included in the first, of a municipal character, particularly every thing connected with the police and economy of the State. If the provision, when it

speaks of militia connected with the people, knew no exception as to the time, mode, and manner in which the right to keep and bear arms should be exercised, the present question could not have arisen. And as the whole difficulty in this case has arisen out of this blending together the terms "well regulated militia" and "the right of the people to keep and bear arms," so that difficulty will be removed by a close attention to the difference in the nature and character of the constitutional prohibition and the legislative provision, and the result of their operations respectively. Whenever a question arises as to any constitutional provision, it is proper, in order to ascertain its object, to look into the manner in which it has been carried out by Congress, and to the purposes which it was intended to answer. That a "well regulated militia is necessary to the security of a free State," will not be questioned. The manner of regulating, was to organize, arm, and discipline them; to do this, full power is vested in Congress by the declaration or bill of rights, and numerous laws have from time to time been passed by that body, for that purpose; thereby giving a construction to the article in question. The militia being necessarily composed of the people, as our government is opposed in principle to standing armies, the provision that they should have a right to keep their arms and use them, was a wise one, and necessary to carry out the object of the grant, in providing at all times for the security of the States. It is admitted that the laws for organizing, arming, and disciplining the militia, were passed in virtue of the power given by the Constitution of the United States to regulate them. If we look into the history of the country, we shall alike arrive at the conclusion that the power given the militia to keep and bear arms, resulted from the necessity of having a military force at all times at the command of the Federal and State governments, armed and ready to repel force by force, sustain the laws, and enforce obedience to the mandates of their courts.

The motive, then, for granting this power to keep and bear arms, could not be extended to an unlimited, uncontrolled right to bear any kind of arms or weapons, upon any and every occasion; still less the terms, for they are restrictive in their language. That a well regulated militia is necessary for the security of a free State, and that the right

of the people to keep and bear arms ought not to be infringed, are principles not in the slightest degree encroached upon by the legislative enactment of this State prohibiting the wearing of concealed weapons.

One of the objects of the constitution was, "to provide for the common defence." To legislate upon this subject, is clearly within the constitutional charter; and that the States retain the power to legislate in relation to arms, and the mode of carrying and keeping them, provided its exercise is not repugnant to the previous grant to the Federal Government, is incontrovertible. The State Governments are charged with the police of the State. They, considering acts as having a demoralizing tendency, can prohibit them. Could Congress authorize any and every person, by express law, to carry deadly weapons concealed about his person, when not composing one of the militia, and not a part of the regulations ordained for their government? The police of a State is to be regulated by its own laws; and the Federal Government cannot interfere with it, so as to legalize any act which the State prohibits, and which is not necessary to carry out any of the great objects for which it was instituted. So long as the enactments of the General Assembly do not weaken the arm of the Federal Government, impair its power, or lessen its means to protect and sustain itself, and preserve inviolate the freedom of the States, they must be respected and enforced. But the slightest interference with the constitutional regulations and restrictions, in effecting these objects, becomes a violation of the compact between the State and Federal authorities, and ceases to be obligatory upon the citizen. The protection which a government owes to the States is political in its character: the municipal regulations to extend that protection to the citizen in his individual capacity, must be left to the State authority, and are such only as are consistent with the safety of others. Indeed, it is scarcely possible to look into the statute book, and not find written upon almost every page some restraints upon what are considered natural rights. The argument of the appellee, that men swayed by their interests, or governed by their passions, shall be permitted to wear a dirk, butcher-knife, &c., concealed as a weapon, independent of the control or authority of law, and that the General Assembly

cannot, by legal enactment, when the use is at the time not required or necessary for military purposes, prohibit it, is to my mind as mischievous as it is erroneous. To assert that a citizen is entitled to protection from his government, and then deny to that government the means of securing it, is a contradiction in terms, difficult if not impossible to be reconciled.

The provision of the Federal constitution, under which the appellee claims his discharge, is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force. Nor has the General Assembly attempted to interfere with the exercise of that right. The enactment in question is a mere police regulation of the State for the better security and safety of its citizens, having reference to weapons and arms of a wholly different character from such as are ordinarily used for warlike purposes. The principle contained in the provision of our constitution, which declares that "the freemen of this State shall keep and bear arms for their common defence," is precisely similar to that of the United States; it stands upon the same ground, and is declaratory of the same right. The terms "common defence," in ordinary language, mean national defence. The reason for keeping and bearing arms, given in the instrument itself, is clearly explanatory, and furnishes the true interpretation of the claim in question. The militia constitutes the shield and defence for the security of a free State; and to maintain that freedom unimpaired, arms and the right to use them for that purpose are solemnly guarantied. The personal rights of the citizen are secured to him through the instrumentality and agency of the constitution and laws of the country; and to them he must appeal for the protection of his private rights and the redress of his private injuries. To deprive the General Assembly of the power to regulate and control those rights, when not inconsistent with the grant to the General Government, would be to take away from the State the terrors of the law and the restraint of its moral influence, upon which its prosperity mainly depends. It is true, the terms of the grant are affirmative; but affirmative words are often, in their operation, negative of other objects than those affirmed; and in the construction of an article of the constitution, the whole must be taken in view, and that construction adopted,

which will consist with its words, and best promote its general intention. And we are authorized to imply a negative from affirmative words, where that implication promotes the intention. So a limitation on the broad terms of the grant is necessarily implied in other branches of this power, and in the manner in which it has been exercised by Congress.

The grand object of the framers of the Constitution of the United States, was to establish a common government for sovereign States, and to leave that sovereignty unimpaired, wherever it could be so left without impairing the government of the Union. That Congress has never, in any one single instance, even by implication, passed any law relating to the militia, their organization, discipline, or arms, except as in reference to some known or supposed public enemy, *in præsenti* or *in futuro*, where the services of the militia might be requisite for the common defence, and for the security of the States, is to my mind a strong argument that they do not deem themselves authorized to interfere with the police regulations of a State, as to the mode or manner in which arms may be carried in time of peace, and in the ordinary associations of life unconnected with military warfare.

The act of the General Assembly of this State, rendering it penal to carry concealed weapons, does not, in my opinion, conflict with any of the powers of the General Government. On the contrary, I view it as the exercise of a power loudly called for by our citizens, and which, if strictly enforced by the public authorities, would add greatly to the peace and good order of society, the security of our citizens at home, and the reputation of the State abroad.

I therefore concur with the Chief Justice, that the exercise of the legislative power in the enactment of the law in question, does not infringe either the Constitution of the United States or of this State.

By Lacy, J.

The defendant in the court below stands indicted by virtue of the authority of the 13th section of an act of the Legislature, prohibiting any person wearing a pistol, dirk, large knife, or sword-cane, *concealed as a weapon*, unless upon a journey, under the penalties of fine and imprisonment. *Rev. Stat., p.* 280.

The question now to be determined is, does this provision of the statute violate the second article of the amendments to the Constitution of the United States, or the 21st section of our Bill of Rights? The language in both instruments is nearly similar: the two clauses are as follows: "That a well regulated militia being necessary for the security of a free State, the right of the people to keep and bear arms shall not be infringed." "That the free white men of this State shall have a right to keep and bear arms in their common defence." The inquiry is restricted to a single point; but it is not, on that account, wholly free from difficulty. Several of the highest courts of the Union have adjudged it differently, upon the construction of statutes every way like our own; and their opinions are entitled to due consideration. The Court of Appeals of Kentucky has settled the principle against the constitutionality of the act now in question; and in this opinion, if I am not mistaken, the Supreme Courts of Tennessee and Mississippi have concurred. The Supreme Courts of Alabama and Indiana have held a contrary doctrine. They have maintained that the Legislature has the power of prohibiting, by law, the citizen from wearing concealed weapons. I know of no opinion ever delivered of the Supreme Court of the United States, bearing directly upon the point. The question, then, so far as this State is concerned, may be regarded open for investigation, and now brought up for adjudication upon error, for the first time. Both of my brother Judges have just pronounced separate opinions, each maintaining the constitutionality of the act. In their opinions, and the reasons upon which they are based, if I correctly comprehend them, they assert these general propositions: That all just and well regulated governments are instituted for the purpose of establishing justice, preserving domestic tranquillity, providing the necessary means for common defence, securing public liberty, and promoting the general welfare: That, to enable them to perform these high and indispensable obligations, the governments themselves inherently possess, as a portion of their sovereignty, all powers not expressly or necessarily prohibited from them by the grants of their creation: And that, under our frame of government and laws, every citizen has ample remedy and redress for a violation of all his private rights, by means of the public authorities, and to them he is

bound to appeal: That the right of the people to keep and bear arms is restricted by the clause of the Constitution before quoted, and limited to the uses and objects therein specified: That it is given for the protection of public liberty, and for common defence; and that the right itself is subject to legislative control: That the words "a well regulated militia being necessary for the security of a free State," and the words "common defence," clearly show the true intent and meaning of these constitutions, and prove that it is a political and not an individual right, and, of course, that the State, in her legislative capacity, has the right to regulate and control it: This being the case, then, the people, neither individually nor collectively, have the right to keep and bear arms. Now, I take the expressions "a well regulated militia being necessary for the security of a free State," and the terms "common defence," to be the reasons assigned for the granting of the right, and not a restriction or limitation upon the right itself, or the perfect freedom of its exercise. The security of the State is the constitutional reason for the guaranty. But when was it contended before, that the reason given for the establishment of a right, or its uninterrupted enjoyment, not only limited the right itself, but restrained it to a single specific object? According to this construction, the right itself is not only abridged, but literally destroyed; and the security of a free State is made to depend exclusively and alone upon the force of the militia. And, in the opinion of one of my brother Judges, it is the militia alone who possess this right, in contradistinction from the mass of the people; and even they cannot use them for private defence or personal aggression, but must use them for public liberty, according to the discretion of the Legislature. According to the rule laid down in their interpretation of this clause, I deem the right to be valueless, and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia, and direct how they shall be employed in cases of invasion or domestic insurrection. If this be the meaning of the Constitution, why give that which is no right in itself, and guaranties a privilege that is useless? This construction, according to the views I entertain, takes the arms out of the hands of the people, and places them in the hands of the Legislature, with no restraint or limitation whatever upon their power, except their own

free will and sovereign pleasure. Are great affirmative grants of political powers to be determined by this technical rule of verbal criticism? If so, its rigid application to other portions of the Constitution would erase from its pages many of its most important and salutary provisions. Such a principle, I apprehend, should never be recognized or adopted by any judicial tribunal, in determining the inherent and original rights of the citizen. It goes to abridge, instead of enlarging the constitutional guarantees of personal liberty.

If the Legislature have the custody of the people's arms and the treasury of the State, what becomes of the separation and division of the political powers of the government? Are not those powers united in the same body of magistracy? And if this be the case, the balance of the Constitution is overthrown, and the State then possesses no real security for personal liberty. It is no answer to this argument, to say that the people may abuse the privilege or right of keeping and bearing arms. The Constitution thought and ordained it otherwise; and therefore it was deemed far safer to entrust the right to their own judgment and discretion, rather than to the will or ambition of the Legislature; and this right was excepted out of the general powers of the government, and declared inviolate. Now, if the Legislature had the right to forbid the people from keeping arms secretly, may they not prohibit them from carrying them openly or exposed? and if they could do this, may they not appoint the times and places when and where they shall be borne? And as the construction relied on assumes the principle that they can only be used for a specific and single purpose, then of course the whole subject matter, in regard to keeping and bearing either private or public arms, falls within the power of the Legislature, and they can control or regulate it in any manner that they think proper. This principle I utterly repudiate. I deny that any just or free government upon earth has the power to disarm its citizens, and to take from them the only security and ultimate hope that they have for the defence of their liberties and their rights. I deny this, not only upon constitutional grounds, but upon the immutable principles of natural and equal justice, that all men have a right to, and which to deprive them of amounts to tyranny and oppression. Can it be doubted, that if the Legislature, in moments of high political

excitement or of revolution, were to pass an act disarming the whole population of the State, that such an act would be utterly void, not only because it violated the spirit and tenor of the Constitution, but because it invaded the original rights of natural justice? Now, if they are private and not public arms, the Constitution guaranties the right of keeping and bearing them.

The people are secured in their persons, houses, papers, and effects, against unwarrantable searches and seizures; but on probable cause, supported by oath or affirmation. Now, if the Legislature possesses the power claimed for it, it surely has the means of carrying it into effect. Can it, directly or indirectly, invade the sanctuaries of private life and of personal security, by authorizing a public inquisition to search for either open or concealed weapons? Besides, private property cannot be taken for public uses, without due compensation being first made according to law. A man's arms are his private property: how, then, can he be legally deprived of them? If they can forbid him, under the penalty of fine and imprisonment, to keep them concealed or exposed about his person, or on his own premises, although their unrestrained use may be necessary for all the purposes of his ordinary business and of personal defence, then certainly the right of keeping and bearing arms according to his own discretion, is infringed and violated, and his own free will in the management of this property abridged and destroyed.

If it means the public arms, then full power is given by the Constitution to Congress to organize and arm the militia, and prescribe rules for their use and regulation, when mustered into the service of the United States. Now, as full power is given to Congress over the subject, and the same power belongs to the State, which power shall be paramount, and to which of the two governments is entrusted the common defence of the country? Is the grant of the State Constitution void, being repugnant to the Constitution of the United States, or does it abrogate and annul that power? These are questions that are to be found difficult to answer; and I leave their solution to others. But I think it is a fair inference, to presume that any construction, which leads to such consequences, is very likely to be erroneous. I have always been taught to regard the Federal and State governments

as indissolubly connected together, and that their mutual powers and authority acted in perfect harmony and in support of each other, like the great principles incorporated by their enactments. According to the construction I design to give, there can be no conflict between these jurisdictions, nor any discrepancy arising from their action. I hold the doctrine that the Constitution of the United States, and the laws passed in pursuance of its authority, are supreme; and that all State constitutions and laws repugnant to them, are utterly null and void; and that the Constitution and laws of the Federal Government operate directly upon the people and the States, and all are bound to respect and obey them. Again; who compose the militia? Has not the State a right to designate what part or portion of her citizens shall constitute this military corps? Then she can, by indirection, arm only those who are in her interest, or who are swayed by her ambition; and, by denying arms to every other class of her citizens, may she not subjugate the liberties of all, by the very means the Constitution gives for their protection and defence?

By way of testing this principle, suppose the Legislature pass an act, that a man should not keep private arms in his own house secretly, or about his person concealed, although they should be every way necessary, in defence of his life, liberty, or property. Can it be doubted that such an act would be a palpable infraction of the Constitution, as well as an invasion of the natural rights of society? Has not every man a natural and an unalienable right to defend his life, liberty, or property, when a known felony is attempted to be committed upon either by violence or surprise? Can any laws deprive him of this right? Upon what principle has he a right to use force to repel force, and even to slay the aggressor, if he cannot make a successful repulsion otherwise? The laws of the land being unable to protect him, the laws of nature step in, and authorize him to defend himself. Now, it has been often ruled, by the Courts of England, that an act clearly against the laws of natural justice and equity, is not binding; and that if Parliament, which is omnipotent in every thing, pass such acts, they are presumed to have intended no such outrage or wrong. To put this case in its true light—suppose a citizen of the State were indicted upon a charge of murder, and he could

make out a clear case of justifiable homicide, the laws of nature, upon which the laws of society are presumed to be based, instead of punishing, commends him for the act; of course, he stands acquitted of all blame; but, on the trial, the evidence shows that he was compelled to take life with a concealed weapon, and the State thinks proper to indict him for this new offence, which is forbidden by an act of the Legislature; and the proof being clear upon the point, of course he may be convicted and rendered infamous for life. What then becomes of the right of self-defence? Is it not swept away from him by legislative discretion, and the doctrine of self-preservation destroyed, which nature has implanted in the breast of every living creature, and which no laws, either human or divine, can abrogate or annul? In such a case, could there be any hesitation in pronouncing the act that punished him for protecting his own life, absolutely null and void? I think not. All the authorities, upon natural as well as constitutional law, support and prove this position. Would the act forbidding a person to carry concealed weapons be constitutional if he used them in self-defence, and unconstitutional if he did not use them at all, or kept them in a secret manner? If that be the case, then it is the intent, and not the fact of carrying concealed weapons, that makes the law either void or valid. Can so fluctuating a rule be the standard by which to test the constitutionality of the acts of the Legislature? I maintain that the simple fact of a man's keeping and bearing private arms, whether concealed or exposed, is an act innocent of itself, and its freedom secured from all legislative interference. The act being innocent and allowed, cannot be made penal, or prohibited by law. The existence and freedom of a right is one thing, and the culpable and criminal use of it another and a wholly different thing. A right, in itself innocent and guarantied by law, cannot be made illegal or punished as a crime; and the error into which the Court has fallen in the present instance, seems to me to result from confounding these two things, which are wholly separate and independent of each other.

I admit that it is somewhat difficult to determine the exact point where the freedom of a constitutional right stops, and where legislative regulation begins. I take this distinction, however, to run through the whole class of cases; that if the right be innocent of itself, it cannot

be interdicted; but its unlawful exercise, degenerating into licentiousness, is subject to regulation. The principle assumed in this case is, that the fact of private arms being worn concealed is a criminal offence, and capable of being controlled by the Legislature, and that they alone have the right to judge of its criminality. The propositions I do not believe, nor can I subscribe to them. It is true that the Legislature must judge, in the first case, whether the unrestrained freedom or use of a constitutional right is criminal or not; but having passed upon the subject, it then belongs to the Judiciary to examine the question, and to declare the rule of action in regard to it. The citizen, in this instance, complains that his liberty has been improperly restrained, and he has appealed to the Judiciary to shield him from this act of legislative injustice. That department is the last arbiter of his rights; and the point to be settled is, has the Legislature judged wrongfully, or is the mere fact of a person's keeping his private arms concealed, an offence against the State, and liable to be controlled by legislative discretion?

I maintain that the act is not only lawful, but expressly secured by the Constitution, and of course cannot be controlled by ordinary legislation. I admit that, if a man uses his arms improperly, or in an unlawful manner, then it is competent for the Legislature to punish him for the improper and illegal use of them; and it is right to do so; for every one is bound so to exercise his own rights, as not to prejudice those of others. The Legislature, in doing this, does not punish an innocent act, but an unwarrantable one: it does not abridge a natural and constitutional right, or in any manner interfere with its freedom. It merely punishes an unlawful use of a right; and it can do that only when the party has committed, with his own arms, unauthorized aggression upon the person or property of another. And the rights of the Constitution are guarantied upon this principle—that while their perfect freedom and enjoyment are secured, the Constitution utterly forbids any licentious or criminal indulgence in their exercise; for when that is the case, they can no longer be said to be the perfect and inviolable rights of the Constitution, but the unlawful and unauthorized acts of individuals. For example: The freedom of the press, the liberty of speech, and the sacred inviolability of private contracts,

and free toleration in religion, are secured to all men. Still, any one or all these rights may be abused or perverted, and the true object or design of the Convention defeated. But does that authorize the Legislature to place restraints or interdicts upon the rights themselves? Certainly not. Such a power will give them up to the discretion of the Legislature, and take them clearly out of the Constitution. They certainly cannot be infringed or violated, or their obligations or value weakened or impaired. A law declaring that a man might write or speak what he pleased, but should not publish or circulate what he had spoken or written; or that he should worship his Creator only on certain days and at appointed places, would surely be unconstitutional, because it would destroy the freedom and sacredness of these rights. But should he, in the exercise of them, commit any unlawful act, and prejudice the rights of others, then he would be answerable for their unwarrantable use and indulgence. For instance, if in writing or speaking, or in the exercise of his religious opinions, he should prejudice or injure the rights and liberties of others, then this wilful perversion or abuse of these rights becomes a criminal act, and consequently should be controlled. The liberty of speech and of the press, and the freedom of religious toleration, are utterly incompatible, in the true constitutional meaning of those terms, with their licentiousness or criminal indulgence; and these latter or improper acts are in no manner connected with the invaluable franchises out of which they flow. Now, the right of the people to keep and bear arms is as free and unfettered, and as inviolable and important, as the liberty of speech and of the press, or the freedom of religious toleration; and it stands upon precisely the same constitutional ground, and supported by like reasons.

Sic utere tuo, non lædas alienum, is a maxim that runs through the whole body of the English common law, and pervades every part of our entire system of jurisprudence. Our Constitution and laws, construed by this principle, cause all the great and essential rights of civil and religious liberty to coalesce and blend together for the improvement and happiness of our species. If it is disregarded or overlooked, the constitutional guarantees become contradictory or hostile to each other: thence the necessity and importance of the rule in the construction of all laws. The application of this governing rule in the

construction of laws, demonstrates and explains the reasons why it would be unlawful so to keep arms or ammunition of any kind, as to endanger the lives or property of others; and it solves the supposed difficulty, that if there is no limitation or restriction of the power of keeping and bearing arms, then the State has no authority to disarm a criminal for any offence whatever. When a citizen breaks his covenant with his government, he forfeits the protection of her laws; and of course this supersedes or destroys many of his municipal rights and political franchises, which he otherwise would be entitled to receive at her hands.

It is further contended that the right should be restricted, because it is given alone for the security of a free State, which means nothing more or less than the defence of public liberty. Now, what constitutes the security of a free State, or what is public liberty? Does the security of a free State consist alone in repelling foreign aggression, or quelling domestic insurrection? How is the public liberty of a State to be preserved, and what is it? These inquiries seem to me to lead to different results, as we view the subject from different points. The security of a free State, as I imagine, depends not only in upholding all its political institutions, but in sacredly performing all its legal and constitutional obligations, both to the Government and to the people. Public liberty can only be secured and perpetuated by preserving inviolable the personal franchises and immunities of the citizen, as well as guarding and protecting the sovereign attributes of the State. To suppose that public liberty cannot be in danger, except from a foreign foe or internal disorder, is virtually to deny the importance and necessity of written constitutions. If there was no fear of our own rulers, why impose restraints upon them, and why commit the guardianship and care of the great principles of civil and religious liberty to separate and independent departments of the Government, and bind each, by the most solemn injunctions, to preserve and defend them? And why trust the Constitution, in the last resort, to the interpretation of the Courts, to expound its meaning and declare its will? For this plain and obvious reason: because the Judiciary has few temptations to err, and possesses neither patronage or power, to make it popular or dangerous. I cannot separate the political freedom of the State

from the personal rights of its citizens. They are indissolubly bound up together in the same great bond of union, and, to my mind, they are incapable of division. The distinction may be in names, but it cannot be in the nature and essence of things. It is certainly true, that, in one sense of the term, the political rights of the State and the personal privileges of the citizen may be contradistinguished from each other. There is a certain class of rights, which belongs to the State in her corporate character, and cannot be exercised except through the intervention of her authority. By far the most important and largest of the rights of the Constitution appertain exclusively to the person of the citizen, and concern the inherent rights of life, liberty, and property. Many of these rights lie behind the Constitution, and existed antecedent to its formation and its adoption. They are embodied in its will, and organized by its power, to give them greater sanctity and effect. They are written, that they may be understood and remembered; and then declared inviolate and supreme, because they cannot be weakened or invaded without doing the Government and citizen manifest injustice and wrong. Among these rights, I hold, is the privilege of the people to keep and to bear their private arms, for the necessary defence of their person, habitation, and property, or for any useful or innocent purpose whatever. We derive this right from our Anglo-Saxon ancestors, and under the form of that government it has ever been regarded as sacred and inviolable. It is of great antiquity and of invaluable price. Its necessary operation, in times of convulsion and of revolution, has been the only means by which public liberty or the security of free States has been vindicated and maintained. Here, the principles of equal and natural justice, as well as the obvious meaning and spirit of the Constitution, have placed it above legislative interference. To forbid a citizen, under the penalty of fine and imprisonment, to carry his own private arms about his person, in any manner that he may think proper for his security or safety, is, in my opinion, an unauthorized attempt to abridge a constitutional privilege, and therefore I hold the law in question to be of no effect.

[But the majority of the Court being of a different opinion, the judgment was reversed.]

McFarland et al. *vs.* The State Bank.

Under the decision of the Supreme Court of the United States, in *Briscoe* vs. *The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, by which in this case this Court is bound, whatever may be its opinion to the contrary, Held, that the notes issued by the Bank of the State of Arkansas are not *bills of credit*, within the meaning of the Federal Constitution, and that the act incorporating the Bank is constitutional.

A plea of *non est factum*, not sworn to, in an action on a bond, is a nullity, and will be stricken from the files, on motion.

A plea of usury must allege a *corrupt agreement*, or it is defective on demurrer.

If a defendant would object that a Bank cannot discount bonds, he must do it by plea, showing the facts.

Remittitur of part of the interest adjudged, allowed to be entered in this Court.

This was an action of debt, tried in June, 1841, in the Circuit Court of Independence county, before the Hon. Thomas Johnson, one of the Circuit Judges. The Bank of the State sued upon a bond for $255, executed to her by one defendant as principal, and the others as securities, jointly and severally, payable at the Branch at Batesville.

The defendants pleaded, *First*, *non est factum*, not sworn to; *Second*, that the bond was executed for a loan of notes of the Bank, which notes were bills of credit, and unconstitutional; *Third*, a plea of usury, omitting the allegation of *corrupt agreement*. Demurrers to the second and third pleas were sustained, and the plaintiff took judgment for the debt, and interest at the rate of ten per centum per annum, disregarding the first plea. The defendants sued a writ of error.

W. Byers and *Linton*, for the plaintiffs.

The second plea is good in form. *Commonwealth Bank of Kentucky vs. Clark et al.*, *Missouri Pamph. R.*, *A. T.* 1835, *p* 59; and *Byrne vs. The State of Miss.* 8 *Pet. R.* 40.

By the Act of 1836, incorporating the Bank of the State of Arkansas, the capital is raised upon the faith and credit of the State, and becomes the property of the State; its officers are elected by the Legislature; all the funds of the State, held for specific purposes, are deposited in it and become a part of its capital; the profits of the Bank enure the benefit of the State; its losses are sustained by it; its entire

management is under the control of the State, and for its benefit, through officers elected by her General Assembly. And as it is an established principle, that *qui facit per alium, facit per se*, it follows that the bills issued by the Bank were emitted by the State. *Craig et al. vs. The State of Missouri*, 4 *Peters Rep.* 332.

If the bills are in effect emitted by the State, then they are bills of credit, within the meaning of *Art.* 1, *sec.* 10, *Const. United States.* We are aware that the decisions of the Supreme Court of the United States upon this point are in conflict; and that the case of *Briscoe vs. The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, which is the latest, is against us; but we refer the Court to the cases of *Craig et al. The State of Missouri*, 4 *Peters Rep.* 432; *The Commonwealth Bank of Kentucky, vs. Clark et al., Pamph. Rep., A. T.* 1835, *p.* 59; *Byrne vs. The State of Missouri*, 8 *Peters Rep.* 410; and the unanswerable argument in the opinion of Justice Story, in the case of *Briscoe vs. The Commonwealth Bank of Kentucky*, 11 *Peters*, 257.

The demurrer to the third plea assigns for cause that the plea does not allege that the contract was *corruptly* entered into. The plea is as broad as the statute. *Rev. St. Ark., ch.* 80, *sec.* 7, *p.* 470. It is sufficient to plead in the language of the statute. 2 *Pet. Rep.* 537.

The first was a plea of *non est factum*, and is a good plea under the statute, and puts the same facts in issue as if sworn to, except the execution of the instrument. *Bates vs. Hintan, Misso. Pamph Rep., June Term*, 1835, *p.* 78; *Payne vs. Snell, Misso. Pamph. Rep., Oct. Term*, 1835, *p.* 238; *Rep. St. Ark.*, title "*Practice at Law*," *sec.* 102, *p.* 633.

A bad plea is a sufficient answer to a bad declaration; and if the plea is demurred to, the Court will look back into the declaration, and give judgment against him who commits the first error. *Gould on Pleading*, 474, 475.

The declaration is not sufficient.

1st. Because it does not set out the authority of the Bank to sue.

2d. It does not set out the writing obligatory according to its legal effect.

3d. There is a material variance between the writing described in the declaration, and the one given on oyer.

4th. The writing sued on was payable in Bank; and there is no averment in the declaration of protest, and notice to the securities.

5th. The charter does not authorize the Bank to deal in writings obligatory; and the declaration does not aver that the obligation had become due and payable.

The first objection to the declaration raises the question whether the act incorporating the Bank of the State of Arkansas, is a public or private, a general or special law. If a private or special statute, it is necessary that the act should be pleaded authorizing the Bank to sue. The State becoming a partner in a trading company, divests itself, as concerns the company, of its sovereign character. *The Bank of the United States vs. The Planters' Bank*, 9 *Wheaton*, 904. If a private law, the Court is not bound *ex officio* to take notice of it. 6 *Bac. Abr.* 374.

2d. The declaration does not set out the obligation according to its legal effect, because it alleges generally that the defendants promised to pay, and does not describe them as principal and security, according to the obligation given on oyer. The terms principal and security have a definite and fixed legal meaning; and the latter binds himself to pay only in the event that his principal fails and he is notified of the non-payment.

Where the contract does not show that a part of the obligors were securities, they may plead the fact, and avail themselves of their rights as such: where the contract shows it, the holders of the bond and the Court must take notice of the fact. 10 *Peters Rep.* 257. The contract of the security must be construed strictly. *Miller vs. Stewart et al.* 9 *Wheaton*, 680. If an instrument be declared upon according to its legal effect, that effect must be truly stated; and the words of the contract stated in the declaration, must have the same legal construction as they would have in the contract itself. *Sheehy vs. Mandeville*, 7 *Cranch*, 208. *Ferguson vs. Harwood*, 7 *Cranch*, 413. 3 *P. C. R.* 394. The Legislature has declared that the remedy on obligations payable in Bank, shall be governed by the rules of the law-merchant, as to days of grace, protest, and notice. *Rev. St., ch.* 20, *sec.* 14. The securities, before their liability is complete, must be notified of the non-

payment by the principal. 1 *Pet. Rep.* 101. 2 *Pet. Con. Rep.* 66, and cases cited.

3d. If the promise is declared upon as absolute, and it be conditional, to pay if the principal does not, the variance is fatal. 1 *Pet. Con. Rep.* 312. If the undertaking be special, it must be so stated, or the variance is fatal. *Pope et al. vs. Barret*, 1 *Mass. Rep.* 117. *Smith vs. Baker*, 3 *Day's Rep.* 312. Accommodation paper is placed on the same footing as business paper; and a security or endorser's contract must be construed strictly and according to its legal effect, and so declared on. *Walker's Int. to American Law*, 421, 425, 431. 4 *Cranch*, 141.

4th. The writing obligatory given on oyer was payable in Bank; and there is no averment in the declaration of demand, protest, and notice. The *Rev. St., ch.* 20, *sec.* 14, *p.* 151, declares that writings obligatory, payable in Bank, shall be governed by the rules of the law-merchant, as to days of grace, protest, and notice. It was necessary, then, to aver in the declaration and prove on the trial, to fix the liability of the securities, a demand at the place where payable, on the day when payable according to the law-merchant, protest for non-payment, and notice to the securities. 3 *Kent's Com.* 44, 54, 65, 66, 67, 72, 75, 77, 79. *Bank of Columbia vs. Lawrence*, 1 *Pet. Rep.* 578.

5th. A corporation can exercise no powers except those conferred on it by law. 4 *Peters Rep.* 152. 13 *Pet. Rep.* 519. 2 *Cranch*, 127. 4 *Wheat.* 636. By the 6th section of the Charter, the Bank is authorized to deal in bullion, gold and silver coin, promissory notes, mortgages, bills of exchange, public stock, or any other collateral security that may appear expedient to the President and Directors. The right to deal in writings obligatory is not within the grant of her powers, nor is it necessary to carry into effect her banking privileges. A corporation cannot deal in any other matter, or in any other manner, than prescribed by the charter; and if she does so deal, the instrument no more creates a contract, than if the institution had never been incorporated. 2 *Kent's Com.* 226. *Head & Amroy vs. The Prov. Ins. Company*, 2 *Cranch*, 127. *The People vs. Utica Ins. Company*, 15 *J. R.* 358. 2 *Kent's Com.* 240. *Dartmouth College vs. Woodward*, 4 *Wheat.* 593. *Gazzler vs. The Corporation of Georgetown*, 6 *Wheat.*

593. *The Bank af U. S. vs. Dandridge et al.* 6 *Pet. Cond. Rep.* 444. *Head & Amroy vs. Prov. Ins. Company*, 1 *Pet. Cond. Rep.* 375. *Beaty vs. Knowlton*, 4 *Peters*, 168.

The Court below erred in giving judgment for ten per cent. interest from the day the obligation became due; no rate of interest being specified in the contract, nor any averment in the declaration claiming that interest. By the general law, the defendant in error was entitled to only 6 per cent. interest; and if entitled to more, she was bound to aver that fact, so that the plaintiff might have taken issue upon it. The Court cannot give judgment for more than is demanded. *Com. Dig.*, *Title Pleader*, *p.* 369. *Wooster vs. Clark*, 2 *Ark. Rep.*

Hempstead and *Johnson*, contra.

By the Court, Lacy, J.

The facts stated in the record present, at the outset, the question of the constitutionality of the act of the Legislature incorporating the Bank of the State of Arkansas. On the part of the plaintiffs in error, it is contended that this law is repugnant to that clause of the Constitution of the United States, which declares that "no State shall emit bills of credit." For the defendant, it is said, that the issues of the Bank paper are not bills of credit, within the meaning of the Constitution, and therefore they are not included within its prohibition. The meaning of the term "bill of credit" has been defined and settled by the Supreme Court of the United States. We regret to be compelled to add, that a different interpretation has been given to the term, by that distinguished tribunal, upon two separate occasions, and that wholly dissimilar and contradictory principles have been deduced from their exposition. The question was first brought before that Court, upon error, in the case of *Craig et al. vs. The State of Missouri*, reported in 4 *Peters*, 330; and the Court, in laying down the doctrine upon the subject, hold that the term "bills of credit," in their enlarged and perhaps literal sense, comprehends any instrument by which a State engages to pay money at a future day. It is conceded on all hands, that the clause in question was inserted in the Constitution for the purpose of preventing the State governments from creating a paper

medium to circulate as money. The excessive issues of such a currency, both by the Colonies and Continental Congress, prior to and during the time of our revolutionary struggle, was the mischief intended to be remedied. And it may be remarked, that it is among the most extraordinary and memorable events recorded in history, that we should have been able to have achieved our national independence amidst a worthless and depreciated paper currency, and that the wide spread and deep ruin that followed from this state of things, was one of the principal causes that led to the formation and adoption of the Federal Constitution.

It is said that the language of the instrument itself, as well as the mischief designed to be remedied, restricts the term "bill of credit," and makes it signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society; and that the prohibition was inserted to cut up by the roots the emission of paper money by State governments. That the word "emit" conveys to the mind the idea of issuing paper, intended to circulate as money, redeemable at a future day; and that, therefore, the objection that this definition would include all kinds of issues or engagements, by which a State contracts a loan on her credt, or in anticipation of a revenue, or agrees to pay money for services actually rendered, is not well founded. In such cases, it is said, that a *bona fide* engagement to borrow money upon the faith of the State, or to pay it on a valuable consideration rendered by services, is a wholly different and distinct thing from issuing a paper currency to circulate as money; that the Constitution itself forbids the conclusion, that making bills of credit a tender in payment of debt, constitutes an essential quality of such paper emissions: that the same clause of the instrument that interdicts a State in emitting bills of credit, enacts that nothing but gold and silver shall be made a lawful tender in payment of debts. To say that paper issues are not bills of credit, unless by the act creating them they are made a tender, is in effect to expunge this latter distinct and independent prohibition: that while tender laws, enforcing their reception, was one and probably the greatest evil intended to be remedied, still there were others, that fully justified the constitutional enactment, and they are embraced in its provisions; and

that this position was proven by the history of the times; for bills of credit were first made a tender by an act of the Virginia Legislature, in 1777, and that in the year 1781, she enforced as a tender, by statutory regulations, the legality of the paper emissions of the continental Congress. That both prior to those periods and subsequent to them, there were large amounts of paper money issued, without being made a tender; and that they were all redeemable upon a real or supposed fund, provided for that purpose; and some made payable on demand, in gold and silver. Still, these issues were ever held to be bills of credit; and that this is the case, whether issued directly in the name of the State, or indirectly by her authority, and whether with or without a fund for their redemption, the State being the sole and legal owner of such issues.

The application of these principles induced the Court to declare the law of Missouri, creating loan office certificates, to be unconstitutional and void. These certificates were issued in the name and by the authority of the State; a fund was provided for their redemption; and they were made receivable for all public dues, and in payment of the charges of the State. They were signed by the Auditor and Treasurer, and were issued in notes from ten dollars to fifty cents. The Court considered and determined that they were bills of credit, in the proper constitutional sense of that term; for they were issued by a State, as negotiable paper, designed to pass as a currency, and to circulate as money. When the case of *Craig et al. vs. The State of Missouri* was decided, in 1830, there were only seven Judges upon the bench. Four concurred in the opinion which Chief Justice Marshall then delivered; and three denied the doctrine then laid down and settled, and each of them delivered a separate opinion against its authority.

The same question was again brought up, on error to a judgment of the Court of Appeals of Kentucky, in the case of *Briscoe vs. The Commonwealth Bank* of that State. The writ was sued out about the year 1832, and the cause removed to the Supreme Court. When it came on first to be heard, Judge Story remarks, that it was the opinion of a majority of that Court, that the act of Kentucky establishing the Commonwealth Bank was unconstitutional and void, being

repugnant to that clause in the Constitution which forbids a State to emit bills of credit. From some cause or other, the opinion was held up, and the cause was ordered to be re-argued, and was finally settled, at the January Term, 1838, in favor of the constitutionality of the act of the Kentucky Legislature. Before the opinion was delivered in this cause, the number of the Judges of the Supreme Court had been increased, by an act of Congress, to nine members; and death had removed several of those from the scene of their usefulness and great labors, who heard and determined the point in the case of *Craig et al. vs. The State of Missouri;* and among these was Chief Justice MARSHALL, a name ever to be held in respect and reverence. The opinion in the case of *Briscoe vs. The Commonwealth Bank of Kentucky*, was delivered by Justice McLEAN, and all the Judges then present, except Justice STORY, seem to have concurred in the reasons and principles stated. He dissented, and, in an argument of singular ability and learning, nobly vindicated the memory of his illustrious friend, the late and lamented Chief Justice, from the imputation of rashness or a want of deep reflection.

The case of the Commonwealth Bank, reported 11 *Peters*, 311, is attempted to be distinguished from, and taken out of the rule insisted on in *Craig et al. vs. The State of Missouri.* But, like Justice Story, we believe that the two cases stand precisely on the same ground, and turn expressly upon the same principle. If the first decision was right, the latter must be wrong; and the reverse of the proposition is equally true. The principal grounds stated and relied on to uphold the judgment in the latter, are as follows: That the definition given by a majority of the Judges, in the first case, of the term "bills of credit," is too general, as it would embrace every description of paper that circulates as money: That a bill of credit is what it truly purports to be, resting merely on the credit of the drawer, in contradistinction from a paper medium with a fund for its redemption: That the usual quality of such a bill, within the meaning of the Constitution, is that it must be issued by a State directly, and its circulation enforced by law: That the definition which includes all classes of paper emissions by the Colonies or the Continental Congress, is a paper issued by a sovereign power, containing a pledge of its faith, and designed to

circulate as money: That if a State is prohibited by the Constitution from doing by indirection that which she cannot do directly, (and as this is an incontrovertible principle), then it necessarily follows, according to the doctrine laid down in *Craig et al. vs. The State of Missouri*, that a State has no right to borrow money to pay for services actually performed, or to incorporate private banking companies; for all these instruments, being bills of credit, are included in the prohibition: That such a construction would rob her of sovereignty, by cutting off at once her revenues and the means of improvement and security, and would place her powers absolutely under the control of the General Government, by the mere declaration and interdiction of paper issues; for the object of the Convention was to prevent the issue of paper money by State governments, without any fund to redeem it; and to constitute such emissions, the State must authorize the issues on her own credit and in her own name: the agents who act in the management of the corporation, must be capable of binding her in her sovereign character: That, as private banks existed at and before the adoption of the Constitution, they were not included in the prohibition: That to make the constitutionality or unconstitutionality of an act depend upon the amount of the interest that the State has in the incorporation, is to fix a fluctuating and ever varying rule in the construction of that instrument: That the State has the right to incorporate private banks; and this principle being conceded, then may she make herself a stockholder in the incorporation. If it be allowed her to become part owner in a corporation, why may she not be the entire stockholder? at what point is her interest to stop? When she mixes her own credit and capital with that of private individuals, she divests herself of all her sovereign attributes, and partakes of the character of other corporators, and has no more control over the affairs of the corporation than others, or only to the extent fixed by the charter.

These positions and principles led the Court to sustain the constitutionality of the act establishing the Commonwealth Bank of Kentucky. The statute created the President and Directors a corporation, made them elective by the Legislature, and gave them full power and authority to issue bank notes, and to do and perform the usual acts belonging to such corporation. It provided a fund for the redemption

of the notes, and made their issues receivable for taxes. The funds of the Bank were responsible for its liabilities; and, although the State was the entire owner of the Bank, and had unlimited control, through the agency of her Legislature, of its affairs and its operation, still these things, in the opinion of the Court, did not make the Bank issues bills of credit, within the meaning of the Constitution. No two causes probably ever attracted more of public interest or attention, than the two celebrated cases we have been considering; and none ever were decided, in any tribunal, upon more mature deliberation and reflection. For sure, none ever involved higher principles of constitutional law acting upon the sovereignty and independence of the States.

The pleadings in the case now before the Court, unquestionably show, that if the Commonwealth Bank of Kentucky be constitutional, the act establishing the Bank of the State of Arkansas must be valid. The two Banks possess precisely the same essential qualities, and stand upon the same principle. The State, in both cases, is the entire stockholder, and has unlimited control over its affairs, through their Legislatures. Indeed, if there is any difference in the two cases, it is in favor of our own Bank. The Bank of the State is made, as well by the Constitution as by her Charter, the depository of the funds of the State; her capital is raised upon the faith of the State; and her notes made receivable for taxes. She is authorized to deal in bullion, gold and silver, and issue notes, bills, or drafts, of a certain denomination. The gross amount of her issues are not to exceed triple the amount of her capital. This enumeration of her powers and privileges brings the question, so far as the constitutionality of the act of incorporation is concerned, expressly within the principles of the decision of the Supreme Court of the United States.

We have stated the reasons and principles of these two celebrated cases at some length, so that the public and the profession of our State may be in possession of them. It now remains to be seen how far this Court is bound by the authority of the decision of *Briscoe vs. The Commonwealth Bank of Kentucky*. Whatever opinion may be entertained abstractedly of its truth or justice, one thing is clear, that the rule on the subject is finally and conclusively settled by the highest Court in the Union; and there is not the least probability that it will

be shaken or overturned in our time. We have repeatedly held, and that, too, on several important occasions, that the Judiciary is the final interpreter of the will of the Constitution, within its appropriate jurisdiction. This principle lies at the very foundation of our happy systems of government, and constitutes the only means by which their freedom and independence can be preserved for ourselves, and perpetuated for our posterity. A contrary doctrine, in our opinion, tends to anarchy and revolution; and it has been mainly owing to the want of an independent constitutional judiciary in other countries, that mankind have so often been induced to right themselves by force, instead of appealing the the peaceful protection of the laws against the abuses of arbitrary power. All the departments of the government are unquestionably entitled and compelled to judge of the Constitution for themselves; but, in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. The Judiciary speaks last upon the subject; and when it has once spoken, if the acts of the other two departments be unauthorized or despotic, in violation of the Constitution or the vested rights of the citizen, they cease to be operative or binding. The entire systems of our Federal and State Judiciary are intended to act in perfect harmony with each other; and thus these respective governments and the people have a double security for their rights and liberties. The Supreme Court of the United States constitutes the national forum of the last resort, upon all questions involving the construction of the Constitution of the General Government, the acts of Congress, and foreign treaties made in pursuance of its authority. Their decisions and opinions in these cases are final, and must be imperative upon all the State Courts. This must be so in the nature and necessity of things, or there would be no sovereign power, under our forms of government, to prescribe a rule of action possessing uniformity, consistency, and supremacy, which is indispensably necessary to the security of life, liberty, and property, and the pursuit of happiness. We hold ourselves as much bound by the decisions of the Supreme Court of the United States, on these questions, as we do our own State Courts bound by our judgments.

Entertaining these views, and being deeply impressed with their truth and importance, it is with the utmost cheerfulness, and in good

faith, that we conform our opinion, in the case now before us, to the rule laid down and established in the case of *Briscoe vs. The Commonwealth Bank of Kentucky;* and we therefore declare the law incorporating the Bank of the State of Arkansas, to be constitutional.

Having disposed of this question, we will turn our attention to the other points relied on by the plaintiffs in error to reverse the judgment below.

There is no error in the Court below, in treating the plea of *non est factum* as a nullity. The plea was not sworn to, as the statute in such cases requires, and therefore ought to have been stricken from the rolls.

The defendants' plea of usury is fatally defective. It does not allege that there was a corrupt agreement to take more interest than the law allows. The corrupt agreement is of the essence of a usurious contract, which is nothing more than taking more interest than allowed by law. It must be averred and proved, to support the defence, as the authorities in the brief decidedly show.

The objection, that the Bank has no power to take writings obligatory in payment of her debts, we do not think tenable, in the aspect that the case now presents. Under a certain state of facts, it may and probably does possess such authority. We are unable to say upon what consideration the writing obligatory in the record was given. The presumption is, that the Bank acted in conformity with the charter; and if that was not the case, it was the duty of the party below to make that fact appear. His failing to do so, leaves the presumption to stand against him, and of course there is no error upon this point.

The error, if any, in giving judgment for ten per cent. interest from the date of protest, has been corrected by the remittitur entered of record in this Court.

Judgment affirmed.

Causin *vs.* Taylor.

Held, That this Court will not issue a certiorari, on motion of the defendant in error, after he has filed a joinder in error; nor permit him to withdraw his joinder; but they will *ex officio* issue the writ, for the purpose of affirming, though not to reverse.

BAKER *vs.* THE STATE.

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The rule in relation to the joinder of different offences in one indictment, is as plain and well settled as that in relation to the joinder of several causes of action in one declaration.

Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and convicted of one and not of the other.

The law is now well settled, that different offences may be charged in the same indictment, if the offences are subject to the same punishment.

Since the passage of the act "modifying the penal code to correspond with the establishment of a penitentiary," the punishment for maiming, (in which offence shooting or stabbing a person is included), is imprisonment in the penitentiary: for shooting *at* a person, with intent to kill, imprisonment in the common jail of the county.

Still, counts for each of these offences may be joined in the same indictment; or, in any event, if this is objectionable, the objection should have been addressed to the discretion of the Court below, before conviction. That Court, in its discretion, might have quashed the indictment, or compelled the prosecutor to elect on which charge he would proceed.

It is no ground for a motion in arrest of judgment, nor objectionable on demurrer or upon writ of error; and a general verdict of guilty, on both counts, is good.

And upon such an indictment, for shooting at, and for shooting A. B., evidence that A. B. was a constable, then engaged in arresting the prisoner, in the discharge of his official duty, is admissible, although there is no mention of his official character in the indictment.

The statute defining maiming to be "unlawfully disabling a human being, by depriving him of the use of a limb, or member, or rendering him lame, or defective in bodily vigor," it is implied that the act, being unlawful in itself, evidences a malicious intent; and it is immaterial by what means, or with what instrument, the injury is effected, or whether the party is deprived of the use of a limb or member, or rendered *permanently* lame, or whether his bodily vigor is merely affected, by his strength, activity, or the like, being decreased.

And if the proof is that the party was shot, and thereby so far disabled as to be unable to walk at the time, there being no other evidence showing the wound to have been but temporary, or that the party had recovered, the disabling is sufficiently established, and is presumed to have continued.

In the case before mentioned, if the verdict is guilty on both counts, and the jury assess the punishment to be imprisonment in the penitentiary, which punishment could only be inflicted under the second count, if the judgment of the Court is entered on the first count, it is erroneous; but a new trial will not be granted, or the prisoner discharged. The case will be remanded, and the Court directed to enter judgment in conformity to the verdict.

THIS was an indictment tried in the Pulaski Circuit Court, in March, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The indictment contained two counts, one "for shooting at *Jacob Faulkner*, with intent to kill," and the other "for shooting, wounding, and disabling Jacob Faulkner." The jury found the prisoner guilty on both counts, and assessed his punishment at five years imprisonment in the penitentiary. The Court sentenced him accord-

ingly, "for shooting at, with intent to kill." The defendant appealed. When the appeal came into this Court, it was discovered that no valid judgment had been entered; a writ of *procedendo* issued to the Court below, directing them to enter judgment according to law. Judgment was accordingly entered, in September, 1841; and the defendant again appealed.

The facts of the case, as collected from the evidence, were, that the prisoner was charged with robbing one John Day of his pocket-book, containing about four hundred dollars, and a warrant was issued for his apprehension, by Inglish, a Justice of the Peace of Big Rock township. The constable, Faulkner, understanding that Baker was a desperate man, armed himself with a loaded pistol, crossed the river to the house of Henry F. Shaw, and, observing Baker coming towards the house, advised several women and children, who were standing out of doors, to retire, as there might be some shooting: That when Baker came up within reaching distance, witness laid his hand lightly upon his shoulder, and said to him, "I arrest you in the name of the State of Arkansas:" at the same time Baker wheeled off; but, before doing so, witness saw him put his hand in his bosom, for the purpose of drawing a pistol. Witness then drew his own pistol; went off some steps, in an oblique direction, to prevent the women and children from being injured by the prisoner: both fired, the prisoner first, though not exceeding a second of time: one ball or shot of prisoner's pistol struck witness' pocket-book; another entered his thigh: witness, not being able to walk, on account of the shot he had received, was taken back to Little Rock in a yawl. Witness further testified, that he did not read the warrant, nor tell prisoner that he had one; nor did he recollect whether his own pistol, when he drew it, was cocked or not.

Several other witnesses were sworn on the part of the prosecution, whose evidence was substantially the same, with the exception that no one testified that Faulkner was shot. The Attorney for the State then introduced the official bond of Faulkner, as Constable of Big Rock township, his oath of office, the warrant of the Justice, and the affidavit upon which it was founded; all which the counsel for the prisoner moved to exclude, "together with all other testimony that proved or tended to prove that Faulkner was Constable of Big Rock

township, and that he was then acting in that capacity;" which motion was overruled, and the evidence permitted to go to the jury; to which the counsel for the prisoner took his exception.

There were several witnesses examined on the part of the prisoner, but their testimony was immaterial as regarded the questions raised.

Borden, for the appellant.

R. W. Johnson, *Atto. Gen.*, contra.

By the Court, DICKINSON, J.

The objections to the verdict and judgment are, that the two counts in the declaration are incompatible with each other, and that the Circuit Court erred in overruling the motion to exclude the evidence of the official character of Faulkner.

It is a sacred principle of our law, that an indictment must be so framed, and the offence so clearly stated, that the prisoner may not only be informed of the precise nature of the charges alleged against him, to enable him to make his defence, if he has any; but also to protect him from another prosecution for the same supposed offence, upon which he has been once tried. While it is our duty to guard, with great care, this rule of defence so consonant to justice and reason, we must, at the same time, see that it is not perverted from its intended purposes, and made to protect from punishment those whom the law never designed should fall within its operation. The rule, in relation to joinder of different offences in one indictment, is as plain and well settled as the joinder of several causes of action in one declaration. The rules of pleading are as applicable to the one as to the other. Offences of the same character, though differing in degree, may also be united in the same indictment, and the prisoner tried on both at the same time; and, on the trial, he may be convicted on the one, and not upon the other—as murder and manslaughter; forging a check, and for publishing it knowing it to be false. So burglary and larceny may be joined in the same indictment, under different counts. So, also, a count for a burglarious entry, with intent to steal the goods of A., and stealing them; and a count for a burglarious entry, with intent to steal the goods of another person; and a third count might

be added, charging the breaking and entry with intent to kill or murder. 2 *Leach*, 1103. 2 *Swift's Dig.* 382. The introduction of several counts, which merely describe the same transaction in different ways, gives the public prosecutor greater latitude in proof, so as to avoid a variance; for if not sufficient to sustain one count, it might another; and no objection could be taken, either on demurrer, or by motion in arrest. But every separate count should charge the defendant as if he had committed a distinct offence; because it is upon the principle of the joinder of offences, that the joinder of counts is admitted. 3 *T. R.* 106. We believe the law to be now well settled, that different offences may be charged in the same indictment, if the offences are subject to the same punishment. *People vs. Gales*, 13 *Wend.* 312. *People vs. Ryndes*, 12 *Wend.* 430.

Both counts in the indictment are evidently intended to be based upon the statute of maiming. *Rev. St.* 244. The first, upon the 5th section of the act referred to, and charges that the prisoner *shot at* the said Faulkner with intent to kill; the punishment for which, the statute says, shall be the *same as for maiming*. The second count is laid upon the 4th section, that "If any person shall, from malice aforethought, shoot, stab, cut, or in any manner wound and disable, any person, he shall be deemed guilty of maiming." By the 9th section of the act of 17th December, 1838, modifying the penal code to correspond with the establishment of a penitentiary, "Whoever shall be convicted of maiming, shall be imprisoned in said jail or penitentiary house, not less than one nor more than seven years;" but is totally silent, and makes no other provision for the punishment of *shooting at with intent to kill*, than before specified in the Revised Code, which was the same as for maiming, viz: "a fine not exceeding three thousand dollars, and imprisonment not exceeding seven years;" which imprisonment was to be in the common jail of the county, and which the General Assembly has not deemed it proper to change. Consequently, upon the count for maiming, the punishment is imprisonment in the penitentiary; for shooting at with intent to kill, in the common jail of the county. It may perhaps be contended, that from the difference in punishment to be inflicted in two different places, it presents such an incongruity as to be fatal to the joinder of the two counts; or

that the prosecutor should have been required to make an election upon which count he would proceed. If ever there was any thing in this objection, it should have been addressed to the discretion of the Court, before conviction. In cases of felony, where two or more distinct and separate offences are contained in the same indictment, the Court, in its discretion, may quash the indictment, or compel the prosecutor to elect upon which charge he will proceed. In this State, the Attorney is prohibited from entering a *nolle prosequi* on any indictment, or in any way to discontinue or abandon the same, without the leave of the Court. *Rev. St., sec.* 109, *p.* 301. In point of law, it is no objection that two or more offences, upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. It therefore forms no ground of a motion in arrest of judgment; nor can it be objected to on demurrer, or on writ of error. *Rex vs. Young*, 2 *Peake's N. P. R.* 228, *n.* It is every day's practice to charge offences in different ways in the same indictment, for the purpose of meeting the evidence, as it may come out on the trial. Each of the counts on the face of the indictment, purports to be for a distinct and separate offence; and the jury very frequently find a general verdict, as in this instance, on all the counts, although only one offence is proved. If the different counts are inserted in good faith, for the purpose of meeting a single charge, the Court will not even compel the prosecutor to elect; and where the punishment is fine and imprisonment, the prosecutor is permitted to join and try several distinct offences in the same indictment. If, as contended for by the counsel for the prisoner, the two counts, for maiming, and shooting at with intent to kill, could not be united and tried in the same indictment, it would have been necessary to have set out each offence in a separate indictment. In such case, he could have been tried for maiming, and sentenced to the penitentiary for the same term; and, if convicted upon the other, confined for the time specified in the common jail of the county, after the termination of the imprisonment in the penitentiary, or *e converso.* Surely, then, it is no cause of complaint to the prisoner, that he has been tried upon both counts. As, by the finding of a general verdict, the lesser offence is merged in the greater, and the punishment is less than it might be by law, it comes

with a bad grace from the prisoner, who is benefited by the joinder and general verdict. That objection is wholly untenable.

As to the question of the evidence of the official character of Faulkner, and that he was acting in that capacity, we understand the rule to be, that in giving evidence of matter in aggravation, the distinction is, that where the aggravating matter is the immediate consequence of the offence for which the defendant is on trial, it may be shown; but if it is a distinct crime, not necessarily connected with the offence charged in the indictment, it cannot be received. And this doctrine was held in the case of *The King vs. Turner and others*, 1 *Strange*, 140, which was on an indictment for a riot, where the defendant having come in and confessed, the prosecutor, to aggravate the fine, produced affidavits that a young gentleman, who was then in the room and ill, was so frightened that he died, though previously in a fair way to recover. The affidavits were permitted to be read, because this was the immediate consequence of the riot.

The natural leaning of the mind, observes Lord KENYON, 1 *East.* 314, is "in favor of prisoners;" and the mild manner in which the laws of this country are administered, renders it proper that matter in mitigation should be received, lest the punishment should be disproportioned to the offence. On the other hand, offenders should not be permitted to escape too easy; therefore, matter in aggravation may be given, of any of the consequences flowing from the crime. This rule is reasonable and just, and founded upon common sense; otherwise, the punishment in all riots, conspiracies, combinations, assaults and batteries, and the like, without regard to the circumstances, must always be the same, which would be unreasonable.

Generally speaking, it is not competent for a prosecutor to prove a man guilty of one felony, by proving him guilty of another; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to prove the character of the other. *Rex vs. Ellis*, 6 *B. & C.* 145. *Eng. Com. Law Rep.* XIII. 123. 9 *D. & R.* 174. *S. C. Russ. & Ry.* 375. In the case of *Rex vs. Wilie*, 1 *New Rep.* 94; *S. C.* 2 *Leach*, 983, Lord ELLENBOROUGH said, "he remembered a case where a man committed three burglaries in one night: he took a shirt at one place, and left it at another; and

they were all so connected, that the Court went through the history of the three different burglaries." Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. If it be material to show the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus, upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given, that the prisoner, at another time, intentionally shot at the same person. *Rex vs. Lake*, *Russ. & Ry.* 531. All the authorities concur, that the intention and design of the party are best explained by a complete view of every part of his conduct at the time, and not merely from the proof of a single and isolated act or declaration: and it may so happen, that, from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction.

The question then recurs, was the evidence objected to by the prisoner in this case admissible?

In the case of *Rex vs. Thompson*, 1 *Eng. Crown Cases*, 80, the prisoner was charged, upon indictment, first, with maliciously stabbing and cutting Richard Southerdon, with intent to murder; secondly, with intent to disable him; and, thirdly, with intent to do him some grievous harm. The Court permitted evidence that the stabbing was done in attempting to make an arrest as constable. The authorities are so numerous upon this subject, and the principle so clear, that the evidence of the official character of Faulkner, and of his being then engaged in the discharge of his duties as a public officer in arresting a criminal, was, as connected with the whole transaction, legitimate evidence, that we deem any further argument or illustration unnecessary.

There is certainly no good cause assigned by the prisoner for setting aside the judgment of the Court. But the statute requires us to examine the record, and award a new trial, or reverse or affirm the judgment or decision of the Circuit Court, as the case may be. In doing this, it becomes necessary to examine the whole record; for so humane is the law, and so careful of the rights of all under its protection, that

an assignment of errors, or a joinder thereto, is dispensed with, lest there should be an omission to set forth an objection to the proceedings, which might exist, and which, it is presumed, this Court would not overlook or disregard.

We have already stated the result of our convictions, that the crime charged in the count of the indictment for "shooting at with intent to kill," is still punishable as declared by the Revised Code, viz: by fine and also by confinement in the common jail of the county. The second is for maiming, and the punishment confinement in the penitentiary. In the view which we take of the case, it is immaterial, as far as the present inquiry extends, whether the first count was sustained by evidence, or not. It is the second count upon which the whole question turns: and, first, we will consider the offence itself for which the prisoner stands indicted on that count. It is conceded to be for maiming. This offence, at common law, is defined to be "the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary. 4 *Chitty's Black.* 150. But our statute has somewhat changed the common law, and declares maiming to consist "in unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor;" by which we understand, that the act being unlawful in itself, evidencing a malicious intent, it is immaterial by what means, or with what instrument, the injury is effected, provided the crime is consummated by depriving the party of the use of a limb or member of his body, or that the consequences of the injury sustained render him either *permanently lame*, or by any means affect his bodily vigor, by decreasing his strength, activity, or the like.

Having thus laid down what we deem to be the true definition of the term *maiming*, as used in the first section of the statute, and what it was essential to prove to sustain the second count of the indictment, we will now proceed to inquire whether the testimony, as stated in the bills of exception, corresponds with and supports the whole of the material averments in the indictment. For though, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law, yet any material difference

between the statements in the indictment and the evidence, as to the offence charged, will be fatal. The second count of the indictment being founded on the 4th section of the act alone, we have not deemed it necessary to extend our remarks to a prosecution upon the 2d and 3d sections of that act; for, to bring the charge within them or either of them, the indictment must be so framed as to meet their provisions.

The only evidence bearing upon what we consider the gist of the question, is that of Faulkner himself, who testifies that he was shot, and, from the consequences of it, was so far disabled as to be unable to walk at the time. Does this evidence support the averment in the indictment, that he was thereby *disabled* in the sense and meaning of the statute? We think it does. For having proved the effect of the wound, and there being no testimony introduced by the prisoner, rebutting this evidence, where the means were in his power, showing that the injury was but temporary, from which the witness had recovered, furnishes a forcible inference against him; and the existence of the disabling having once been proved, its continuance is presumed, till proof be given to the contrary. *Doe vs. Palmer*, 16 *East*. 55. 1 *Stark*. 55. 2 *ib*. 688. From the fact of a wound having once been given, its nature raises a very strong presumption of its continuance, and that the party did not recover from its effects immediately; and as there is no particular time when the presumption ceases, it still continues. We are therefore bound to presume in favor of the verdict.

There is, however, another question raised by the record itself, as to the proceedings of the Court after the verdict of the jury; and whether the proper judgment thereon has been pronounced by the Court. The judgment is, that the said Franklin T. Baker, *alias* Franklin T. Beiquett, be committed to the jail and penitentiary house of the State, for the full space and term of five years from the twenty-sixth day of March, A. D. 1841, for shooting at with intent to kill, and that he pay all the costs of this prosecution, and stand committed until the sentence of the law is complied with." The objection to this proceeding of the Court, is, that it had no discretionary power as to the punishment, but, in accordance with law, must by regular judgment carry it into effect. Here the prisoner was found guilty upon

both counts in the indictment; for one of which, maiming, confinement in the penitentiary is the proper punishment, and to which he was properly sentenced by the jury. But the Circuit Court, instead of carrying out the verdict, wholly overlooked the second count, and gave judgment that the prisoner be committed to the penitentiary, *for shooting at with intent to kill*, only, thereby wholly disregarding the verdict of the jury upon the only count for which such a punishment can be legally inflicted; and ordered the punishment to be imposed upon the first count, not as stated in the judgment of the Court, in accordance with the verdict of the jury, but, as we conceive, in direct contradiction to it. For the law declares the punishment *for shooting at with intent to kill*, shall be both fine and confinement in the common jail of the county, the Legislature not having made it a penitentiary offence.

There is no such error in the record and proceedings of the Court below, as to entitle him to a new trial. The judgment of that Court, being erroneous in not awarding the judgment upon the proper count, under the verdict of the jury, must be set aside; but there is no sufficient cause for awarding a new trial, or discharging the prisoner.

Case remanded, with instructions to enter up the sentence of the law, in conformity with the finding of the jury on the second count of the indictment, which is for maiming.

Levy *vs.* English.

If the facts set forth in a writ of mandamus do not show a legal title in the relator to the right claimed, the writ may be quashed.

Unless it is quashed, the defendant must return it, and set forth, in his return, either a positive and direct denial of the facts, or state other facts, sufficient in law to defeat the right claimed.

A Justice of the Peace cannot legally refuse to enter a prayer of appeal, in a case decided by him, take a recognizance and grant an appeal, unless the fees for granting the appeal are first paid or secured to him.

He has no right to demand the fees until he has performed the services. If he does, he forfeits the fees, and five dollars for each item demanded, and is liable to an indictment for extortion.

When an appeal is prayed, and an affidavit filed as required by law, it is the magistrate's duty, if sufficient security is offered, to take the acknowledgment of the recognizance, make it out in due form, obtain the signatures of the recognizors to it, approve and attest it, and then grant an appeal, and make an entry of it in his docket.

In performing these duties, he acts *ministerially*, and can exercise no discretion, other than to see that the security is sufficient, the recognizance in legal form, and acknowledged and signed according to law.

It is no excuse for not granting the appeal, upon an alternative mandamus, commanding the appeal to be granted, or cause shown, that *after* the refusal to grant the appeal, the justice discovered that the recognizance was insufficient, for want of a stipulation required by law. That was the justice's own fault. He was bound to take it in legal form.

That the party applying here for a mandamus, could have resorted to the Circuit Court for a *rule* on the justice to send up the appeal, is no objection to the jurisdiction of this Court.

On the application of Jonas Levy, a writ of mandamus issued out of this Court, to William K. English, a Justice of the Peace for Big Rock township, in the county of Pulaski, reciting, in substance, that, on the first day of November, 1841, English rendered judgment in favor of Washington Noel, against Levy, for thirty-six dollars, upon the verdict of a jury then given for that amount, upon a trial had before him, and for costs of suit; that Levy then and there prayed an appeal to the next term of the Circuit Court of Pulaski county, and, on the fourth day of November then following, renewed said prayer, and offered to file the necessary affidavit and recognizance, with good and sufficient security, as required by law; and that English neglected and refused to grant the appeal so prayed by Levy, and to enter the same on his docket, and to admit Levy to file the affidavit and the recognizance for the prosecution of the appeal: and commanding him to grant and allow to Levy an appeal to the Circuit Court, according to his prayer, from the judgment; and to make the necessary entry of appeal in his docket, upon Levy making the affidavit and entering into the recognizance required by him, or to show good cause why he should not do so.

To this writ the Justice made his return, the substance of which, as far as it is necessary to be stated, will be found in the opinion of the Court. To the return Levy demurred.

Ashley & Watkins, for the relator.

W. & E. Cummins, contra.

By the Court, Ringo, C. J.

If the facts set forth in a writ of mandamus, do not show a legal title in the relator to the right claimed, it may be quashed; but unless

it is quashed, the defendant is bound to return it, and to set forth, in his return, either a positive and direct denial of the truth of the facts stated in the writ on which the claim of the relator is founded, or to state other facts, sufficient in law to defeat the right claimed by the relator. The Court having determined upon the application for the writ, and previously to awarding it, that the facts stated in it are *prima facie* true, and that the relator is in that event legally entitled to the right claimed by him, and thereby sought to be obtained or enforced, and that he has no other adequate specific legal remedy for it. *Commercial Bank of Albany vs. Canal Commissioners*, 11 *Wend.* 25.

In the present case, no objection has been made to the writ, with a view to quash it; but the defendant has returned it, and set forth, in his return, not only the fact that he has not obeyed its mandate, by granting the appeal and making the necessary entry thereof on his docket, but he has also stated other facts, upon which he relies as constituting a legal justification of his refusal to do so. In the return, there is no distinct and positive denial of the truth of the facts stated in the writ on which the right of Levy to his appeal is founded, although, from the arguments and inferences of law and fact therein contained, it was obviously the design of the defendant to induce the belief that they are untrue, without distinctly and positively denying that fact. But the most prominent fact stated in the return, and that upon which the defendant appears to rely principally as furnishing him a legal right to refuse the appeal, is this: that neither Levy nor his attorney would pay him his legal fees for entering the appeal on his docket, and taking the recognizance required by the statute in that behalf to be taken before granting the appeal, and such other fees as he was entitled to; and that said attorney would not even verbally promise to pay them, or secure the payment thereof to him: that he replied, when the appeal was prayed for and demanded, that upon such fees being paid or secured, as aforesaid, he was ready and would immediately grant said appeal to said Levy, upon his complying with the requisitions of the statute on the subject; to which the attorney of Levy answered, that he did not consider the defendant entitled to any fees in such case, and that he whould not pay or secure to him

any such fees, but would see if he could not get the appeal without paying any fees, and thereupon left the office of the defendant.

From the facts thus appearing in the return, there can be no doubt that the defendant made the right of appeal depend upon the payment of his fees, or at least upon the payment of the legal fees allowed him for granting the appeal and taking the recognizance; and so, considering the payment thereof as a condition precedent to the legal right of the party to demand an appeal, demanded their payment when the appeal was prayed, and made the refusal to pay or secure their payment to him, the principal if not the sole ground of his refusal to grant the appeal; it being equally clear, that he made no objection at that time either to the affidavit or recognizance then tendered.

By what authority he claims the legal right of demanding any such fees, prior to his performance of the services, for which, when performed, they might legally have been charged, we are wholly at a loss to conceive. No such right has been shown, and it is confidently believed to have no legal existence. The law, on the contrary, so far from establishing such right, considers and makes it a misdemeanor to demand, charge, or receive such fees, before the services for which they are charged have been performed; and not only subjects the officer so demanding or charging them to a forfeiture of the amount of the fees so illegally charged, and five dollars for each item so illegally demanded, charged, or received, but also subjects the officer so offending to an indictment for extortion. *Chap.* 61, *sec.* 39, *Rev. St. Ark. p.* 401. These facts cannot, therefore, justify the magistrate in refusing to grant the appeal.

The right of appeal, in such cases as the present, is perfect, when such affidavit is filed, and such recognizance with security entered into, as the law requires, within the period required by the statute; and in such case, the magistrate has no power to refuse it, nor to encumber it with any other or further condition whatever. Upon the appeal being prayed, and an affidavit being filed, as required by law, if sufficient security be offered, it becomes his duty to take the acknowledgment of the recognizance, make it out in due form, obtain the signatures of the recognizors, approve and attest it, and then grant an appeal, and make an entry thereof on his docket. In performing

this duty, he acts ministerially, and can exercise no discretion, other than simply to see that the security offered is sufficient, and that the recognizance is in legal form, and acknowledged and signed in the manner prescribed by law. Such discretion is possessed by all ministerial officers, and, in the discharge of their official duties, they are constantly called upon to exercise it. This distinction between the judicial and ministerial acts performed by Justices of the Peace, was ruled by the Supreme Court of New-York, in the case of *Tompkins vs. Sands*, 8 *Wend.* 462, where it was held, and we think correctly, that Justices of the Peace, in respect to the granting or allowance of appeals, and in every other matter connected therewith, act ministerially.

It follows, therefore, if we have not entirely misconceived the legal obligation and duties of Justices of the Peace in this respect, that the fact stated in the return, that the defendant, upon a subsequent inspection of the recognizance filed by Levy, discovered that it did not contain any stipulation that the appellant would prosecute his said appeal with due diligence to a decision, as required by the 172d section of chapter 87 Revised Statutes, and that he never did or could approve said recognizance, so as to enter an appeal thereon, furnishes no legal ground for his refusal to grant the appeal; because, if the recognizance was in this respect insufficient, the fault was his, and not of those by whom it was acknowledged before him. In taking it, he was bound to take it in legal form; and if they had refused to enter into it in such form, such refusal would no doubt constitute a sufficient reason for refusing the appeal; but such refusal is not shown by the return, and therefore it is in this respect insufficient.

The facts stated in the return, in regard to the Circuit Court of said county being in session at the date of the judgment, and continuing in session until the first of December next ensuing, even though they should show that Levy, by resorting to that tribunal, could have obtained redress, and coerced the defendant to have granted the appeal, if he was entitled to it, yet, notwithstanding the tribunal awarding it would be different, the remedy, if not precisely, would at least be substantially the same: besides which, it is an attempt to deny to this Court the exercise of a jurisdiction expressly conferred upon it by the

Constitution, the exercise of which, when legally called upon, it is not at liberty to decline.

The return, therefore, does not, in our opinion, show any legal ground for the refusal of the defendant to grant the appeal upon the prayer and demand of Levy; and as the facts set out in the writ unquestionably show in him a legal right thereto, the demurrer to the return must be sustained.

Rogers *vs.* Conway.

A party defendant, by agreeing to a continuance, waives any defect which may exist in the service of the original writ, and makes himself a party to the record. Judgment by default against him thereafter is irregular, but cured by our statute.

This was an action of ejectment, tried in the Circuit Court of Hot Spring county, in August, A. D. 1840, before the Hon. John J. Clendenin, one of the Circuit Judges. At the February Term, A. D. 1840, the case was continued, by consent of parties; and at the next Term, judgment by default was rendered against Rogers, the defendant, who sued his writ of error.

Pike, for the plaintiff, contended that there was no sufficient process or service, to warrant a judgment by default.

Ashley & Watkins, contra.

By the Court, Dickinson, J.

We find none of the objections taken in the Court below tenable. We do not deem it necessary to determine the point, whether the process was sued out in strict conformity with the statute, or not; nor whether the notice was properly served. If there be any defects on these points, which we think questionable, there can be no doubt but that they are fully cured by the parties appearing in the first instance, and, by their consent, agreeing to a continuance. The object of service and notice was, to apprise the party of the nature of the pro-

ceedings against him. The fact of his agreeing to the continuance, is evidence of his having made himself a party to the record; and by such appearance, any defect that might exist, as to the service of the writ or notice, was waived. The judgment was entered by default against Rogers, the plaintiff having first continued as to Ford. This judgment is manifestly irregular, but its informality is cured by our statute of amendments. The proper judgment should have been by *nil dicit*.

Judgment affirmed.

Pelham *vs.* Oakey.

Held, as in *Clary & Webb* vs. *Morehouse*, 3 *Ark.* 261, that where a note is sued on which bears interest at a rate greater than six per cent. per annum, non-payment of the interest must be alleged in the breach.

Stone *vs.* Bennett et al.

Variance between the writ and declaration in the names of the plaintiffs; or between the writ and declaration in the capacity in which the plaintiffs sue; or between the writ and declaration in the names of the assignees, are no bar to the action; and if available for any purpose, can only be in abatement of the suit.

Anciently, after oyer of the original writ, advantage might be taken, either by plea in abatement, demurrer, motion in arrest of judgment, or writ of error.

Nothing which was ground of only special demurrer at common law, can now be specially assigned as cause of demurrer.

When oyer of the assignments is neither prayed nor granted, though copied into the transcript, they are no part of the record.

It is not necessary to allege, in the declaration, that the defendant had notice of the assignment.

That there is no venue distinctly laid to every material allegation in the declaration, cannot be taken advantage of on general demurrer.

This was an action of debt, instituted by Bennett and others, and determined in Jackson Circuit Court, in May, A. D. 1841, before the Hon. Thomas Johnson, one of the Circuit Judges. The defendants in error sued on a note, as assignees of Ferdinand C. Fletcher and Asa M. Carpenter, assignees of Jesse Dougherty. The declaration sets forth the note and assignments, and contains a breach negativing the payment of the money mentioned in the note, or any part thereof,

by either of the makers, to the payee or either of the assignees. The writ was quashed, on motion of Stone, and leave granted to amend it, and the case continued, with leave to plead on or before the first day of the next Term.

At the succeeding Term, Stone filed a demurrer to the writ and declaration, the writ not having been amended under the leave for that purpose granted; and the plaintiffs asked and obtained leave to amend it, according to the leave previously granted; and it was so amended. Stone, by leave of the Court, withdrew his demurrer, and craved oyer of the writing sued on, which was granted by filing the writing in Court; and he filed another demurrer to the writ and declaration, which the plaintiffs moved the Court to strike out; but this motion being overruled, they joined in the demurrer, which, after argument, was overruled by the Court, and judgment by *nil dicit* given in favor of the plaintiffs, for the sum mentioned in the declaration, and damages for its detention. The grounds of demurrer will be found stated in the opinion of the Court. Stone sued his writ of error.

Pope and *Byers*, for the plaintiff.

The Court below erred in overruling the demurrer to the declaration and writ, because the writ was void, and did not correspond with the declaration in stating the names of the parties; the writ describing the plaintiffs as Joseph Bennett, L. C. Morrill, David Bennett, and Moses Greenwood; the declaration describing them as Joseph Bennett, Luther C. Morrill, David Bennett, and Moses Greenwood.

Defects in the writ, apparent upon its face, can be taken advantage of on demurrer. 1 *Chitty Pl.* 439.

The Court erred in rendering judgment against the plaintiff in error for all the costs; having, at a previous term, ordered that the defendants in error pay the costs of the continuance.

Fowler, contra.

By the Court, Ringo, C. J.

The three first causes of demurrer specially assigned, are: 1st, That there is a variance between the writ and declaration in the names of

the plaintiffs; 2d, There is a variance between the writ and declaration, in the capacity in which the plaintiffs sue; 3d, There is a variance between the writ and declaration, in the names of the assignees. These objections, if true, are no bar to the action; and if they are available for any purpose, it can only be in abatement of the suit. And notwithstanding, anciently, after oyer of the original writ, advantage thereof could be taken, either by plea in abatement, demurrer, motion in arrest of judgment, or writ of error, they would always, as we apprehend, have been waived by the interposition of a defence in bar of the action. Such is the effect of inverting, or failing to observe, the established order of pleading, as has been repeatedly ruled by this Court. See *Dyer vs. Hatch*, 1 *Ark. Rep.* 339. *Clark vs. Gibson*, 2 *ib.* 109. *Webb vs. Jones & Prescott*, *ib.* 330. It is also well settled, that a general demurrer constitutes in law such defence; and, therefore, as no special demurrer can be filed, and nothing which is only ground of special demurrer at common law can now be specially assigned as cause of demurrer, we entertain no doubt that the Court below, as to these causes, decided correctly.

The fourth and fifth causes are: 1st, That there is a variance between the note given on oyer and that described in the declaration; 2d, There is a variance between the assignments on the note given on oyer, and the assignments as stated in the declaration. Upon comparing the note and assignments copied in the transcript of the record before us, with the allegations in the declaration, no substantial variance between them is perceived. Besides, it may be proper to remark, that oyer of the assignments was neither prayed nor granted; and, therefore, although they are copied in the transcript, they cannot be regarded as comprising a part of the record.

The sixth cause of demurrer specially assigned, is, that there is no averment in the declaration, that the defendant, Stone, had notice of the assignments of the note mentioned in the declaration. It is very clear, that notice of the assignment is not essential to the legal right of the assignees to maintain their action against the maker of the instrument; and, therefore, it is unnecessary to allege such notice in the declaration. *Rev. St. Ark.* 107.

The seventh and eighth objections are: 1st, That no legal cause of action is set forth in the declaration; 2d, That the breach assigned is not as broad as the contract stated in the declaration, and that there is no venue to all the material allegations.

The note and assignments are not only substantially, but specially and correctly, set forth, so as to show in the defendants in error an undoubted legal title to the instrument sued on, and also a right of action in their own names, by virtue of the provisions contained in the 11th chapter Revised Statutes, above cited. The breach negatives the payment of the debt demanded to the original payee or either of the assignees, and there is a proper venue distinctly laid to every material allegation in the declaration; yet, if there was not, such objection could not be taken advantage of on general demurrer; and, therefore, we are of the opinion that there is no error in the judgment of the Circuit Court, in overruling said demurrer.

The remaining objection, that the judgment is given for too much damages, is not sustained by the record.

Judgment affirmed.

Pitcher & Walters vs. Morrison & Morrison.

That the writ does not set out the Christian names of the plaintiffs; and that there is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue; are neither objections to the writs, or in bar of the action; and cannot be taken advantage of, on general demurrer.

When, in a declaration on a note drawing ten per cent. interest per annum, the breach negatives the payment of the debt, but is silent as to the interest, on general demurrer, the Court will disregard or amend the defect, unless it is specially stated as ground of demurrer.

This was an action of debt, instituted by Pitcher & Walters, and determined in Van Buren Circuit Court, in May, A. D. 1841, before the Hon. Thomas Johnson, one of the Circuit Judges. It was founded on a promissory note for $169 28, payable ten days after date, with interest at the rate of ten per cent. per annum. The breach assigned in the declaration, negatives the payment of the debt, but is wholly

silent as to the interest. The defendants moved the Court to quash the writ, but the Court overruled their motion. They thereupon appeared, and demurred to the writ and declaration; the appellants joined; and the Court gave judgment, "that said demurrer be sustained, and that the writ be abated, and that the defendants have and recover of the plaintiffs all the costs in this case." The causes of demurrer are stated in the opinion of the Court. The plaintiffs appealed.

Fowler, for the appellants.

By the Court, Ringo, C. J.

The causes of demurrer, specially assigned, are: 1st, That the writ does not set out the Christian names of the plaintiffs; and, 2d, There is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue.

These are unquestionably not objections to the merits, or in bar of the action; and, therefore, according to the principles acted upon by this Court, in the case of *Stone vs. Bennett et al.*, just decided, could not be taken advantage of by general demurrer.

The breach assigned is not commensurate with the contract as stated in the declaration, and is therefore defective; but as no objection to the breach is specially assigned in the demurrer, we are bound to disregard or amend it. And inasmuch as the declaration shows a legal right in the appellants to demand and recover of the appellees the debt, without the conventional interest mentioned in the contract, the demurrer, according to the principles adjudged by this Court, in the case of *Davies vs. Gibson*, 2 *Ark. Rep.* 115, ought to have been overruled. We are therefore of the opinion that the Circuit Court did err in sustaining the demurrer, and thereupon abating the writ.

Judgment reversed.

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LANE *vs.* LEVILLIAN, ADM'R.

The common law rule on demurrer, is, that where there are good and bad counts in the same declaration, and a general demurrer, the plaintiff has judgment on the demurrer.

Where a person gives a continuing guaranty, or one relating to future transactions, he has a right to know whether his guaranty has been accepted, or to what extent he may be liable; and demand of the principal, and notice to the guarantor, are necessary, to charge him.

When the debt has become due and absolute when the guaranty is given, the guarantor's obligation is not considered secondary or collateral, but primary and positive, and no demand or notice is necessary.

Nor when the guaranty is, that the debt shall be paid by a particular day.

All the later cases seem to tend to dispense with demand and notice, unless the guarantor's liability is shown, either by his express contract, or by its necessary implication, to be a collateral agreement; provided the creditor's delay be unaccompanied by fraud, or an agreement not to prosecute the principal, made without the guarantor's assent.

By the laws of Louisiana, which govern in all cases of contracts made there, upon a guaranty made after a note has become due, no demand or notice is necessary.

The case of *Ringgold* vs. *Newkirk & Olden*, explained and restricted.

THIS was an action of assumpsit, determined in the Union Circuit Court, in November, A. D. 1835, before the Hon. EDWARD CROSS, one of the Territorial Judges. William and Ebenezer Lane sued Thomas Franklin, in assumpsit. The declaration contained three counts. The first stated that one Thomas B. Franklin had, on the 27th of January, 1829, made a note, at New-Orleans, to the plaintiffs, due the 1st of May, 1829, for $809 61, with interest at ten per cent. after due; that Thomas B. Franklin was dead; that the note never had been paid, in whole or part, and the whole sum and interest still remained due; that the defendant, Thomas Franklin, on the 17th of June, 1829, at New-Orleans, endorsed on the note his guaranty, under his signature, and thereby, in consideration of one dollar to him in hand paid, guaranteed the payment of the note.

The second count is upon a promise by the defendant to pay the plaintiffs the amount of a bill of exchange for $100, accepted by the plaintiffs for his accommodation, and by them paid.

The third is a common money count.

The general breach alleges the non-performance of the guaranty, and the non-payment of the moneys mentioned in the two last counts.

A general demurrer to the declaration was sustained; and the plaintiffs appealed to the Superior Court of the Territory. Franklin having died, the suit was revived against his administrator.

Pike, for the appellants.

On general demurrer to the whole declaration, there being two good counts, it should of course be overruled. *Duppa vs. Mayo*, 1 *Saund. R.* 286. *Pinckney vs. Inhabitants of East Hundred*, 2 *Saund. R.* 379. *Bressy vs. Humphreys*, *Cro. Jac.* 557. *Com. Dig. Pleader Q.* 3. *Amory vs. Brodrick*, 5 *B. & A.* 715.

But the most important question to the parties is, as to the liability of the defendant on the guaranty stated in the first count. It was made in New-Orleans, and endorsed upon a promissory note; and, consequently, the laws of Louisiana determine its effect, and the obligations created by it. This has already been argued by us, and decided by the Court, in *Ringgold, Adm'r, vs. Newkirk & Olden*, 2 *Ark.* Sureties, endorsers, and guarantors, are liable everywhere, only according to the law of the place of their contract. *Story on Cons. of Laws*, 2*d ed.* 223.

In Louisiana, if a person endorses his name on a note not negotiable, he becomes a surety for the principal; and, when sued, he cannot set up, as a defence, that the note was not protested, or notice of non-payment given to him. The negligence of the creditor, in not suing the principal, will not avail the surety, unless the negligence can be considered as amounting to an act whereby he can no longer subrogate the surety to his own rights against the principal. The question is, is the surety entitled to the benefit of the action *cedendarum actionum?* But the exception *cedendarum actionum* cannot be opposed to the creditor, unless, by a *positive* act on his part, he has rendered himself incapable of ceding his action against the debtor, by *discharging his person or property*, or unless, by allowing a demand, which he has instituted, to be dismissed, he has laid himself open to the suspicion of collusion. *Cooly vs. Lawrence*, 4 *Martin*, 639.

By the common law, a promise to pay a debt already incurred by a third person, is a *nudum pactum*, and not available, if there be no new consideration, as forbearance, &c., and credit was not given at

the promissor's request; and this is equally the rule where the guaranty is in writing. *Elliot vs. Giese*, 7 *Har. & John.* 457. *Wood vs. Benson*, 2 *Cromp. & Serv.* 94. *Elder vs. Warfield*, 7 *Har. & John.* 391.

But even by common law principles, there is a distinction, as to the responsibility assumed by the guarantor, and the steps necessary to be taken to charge him, growing out of different kinds of guaranties. Thus, where a mercantile guaranty is given, by which A. guarantees to B. the payment of all sums for which he shall credit C., or the payment of a certain sum to be credited on advance to C. *in futuro*, a demand of payment should be made of the original debtor; and, in case of non-payment, notice of such demand and non-payment must be given in a reasonable time to the guarantor, in order to charge him. So it was held in *Douglass et al. vs. Reynolds et al.* 7 *Peters*, 126. See *Van Wart vs. Woolley*, 5 *D. & R.* 374; *S. C.* 3 *B. & C.* 439.

At first sight, there would seem to be much conflict of decision in the common law courts, on this question of demand and notice. Thus, in *Warrington vs. Furber*, 8 *East.* 242; *Phillips vs. Astling*, 2 *Taunt.* 206; *Cannon vs. Gibbs*, 3 *Serg. & Rawle*, 202; *Sage vs. Wilcox*, 6 *Conn.* 81; *Oxford Bank vs. Haynes*, 8 *Pick.* 423, and some others, demand and notice have been held necessary, except where the principal debtor is insolvent. In *Redhead vs. Carter*, 1 *Stark. R.* 14; *Goring vs. Edwards*, 6 *Bing.* 94; *Allen vs. Rightmere*, 20 *J. R.* 365; *Williams vs. Grainger*, 4 *Day*, 444; *Cobb vs. Little*, 2 *Greenl.* 261, and others, to which we shall hereafter refer, such demand and notice has been held not to be necessary.

The essence of the engagement of a guarantor who guarantees the payment of a pre-existing debt, is said to be, that the debt shall be paid, if the creditor shall take the usual and legal steps to secure it, or render the principal's liability absolute. *Reed vs. Cutts.* 7 *Greenl.* 190.

It is now well established, by the recent and better authorities, that a guaranty endorsed on a note *past due*, imports and expresses a sufficient consideration, as required by the statute of frauds; for the presumption that it was made in consideration of forbearance to sue,

arises from the fact of its having been made after the note fell due; and, further, a statement that it is made "in consideration of one dollar in hand paid," is a sufficient expression of consideration, as are the words "value received."

No demand on the principal debtor, or notice to the guarantor, is necessary, when the guaranty is endorsed on a note past due. This is clearly settled. *Allen vs. Rightmere*, 20 *J. R.* 365. *Reed vs. Cutts*, 7 *Greenl.* 190. *Cobb vs. Little*, 2 *Greenl.* 261. *Reed vs. Hillhouse*, 7 *Conn.* 523. *Morton vs. Eastman*, 4 *Greenl.* 526. *Boyd vs. Cleaveland*, 4 *Pick.* 525. *Seymour vs. Van Slyck*, 8 *Wend.* 421. *Oakley vs. Boorman*, 21 *Wend.* 590. *Josselin vs. Ames*, 3 *Mass.* 274. *Watson vs. McLaren*, 19 *Wend.* 557. *Lee vs. Dick*, 10 *Peters*, 496.

And the great weight of authority now is, that even on a guaranty endorsed on a note *before* it is due, no demand or notice is necessary. It is an absolute undertaking, and the guarantor should see whether the debtor pays, and if not, pay himself. The promise of the guarantor is made upon one solitary contingency, and that is, the non-payment of the money by the principal debtor. The rule that reconciles all the cases is, that demand and notice is only necessary as regards the guarantor, where it is necessary to fix the liability of the principal. *Theobald on Principal and Surety.* And these principles are directly decided in *Reed vs. Cutts*, 7 *Greenl.* 191; *Cobb vs. Little; Morton vs. Eastman; Boyd vs. Cleaveland; Seymour vs. Van Slyck; Mann vs. Eckford's Ex'rs*, 15 *Wend.* 508; *Hough vs. Gray*, 19 *Wend.* 202; *Watson vs. McLaren*, 19 *Wend.* 551; *Lee vs. Dick*, 10 *Peters*, 496.*

*NOTE.—The cases which hold that, under a contract guaranteeing a debt yet to be made by another, the guarantor is not liable to a suit, without notice that the guaranty is accepted and acted on, *have* (it is said) *no foundation in English jurisprudence.* All the cases requiring guarantors to be treated as mere endorsers, rest on the dicta of two distinguished American Judges—MARSHALL, Ch. J., in *Russell vs. Clark's Ex'rs*, 7 *Cranch*, 69–92; STORY, J., in *Cremer vs. Higginson*, 1 *Mason*, 323, 340, and *Russell vs. Perkins*, *ib.* 368, 371. Upon these dicta, says COWEN, J., in *Douglass vs. Howland*, 24 *Wend.* 35, are based *Babcock vs. Bryant*, 12 *Pick.* 133; *Rapelye vs. Bailey*, 3 *Conn.* 438; *Green vs. Dodge*, 2 *Ham.* 430; *Norton vs. Eastman*, 4 *Greenl.* 521; *Douglass vs. Reynolds*, 7 *Peters*, 113; *Edmondstone vs. Drake*, 5 *Peters*, 624. And he remarks, that *no* English case sustains these principles. Though not bearing particularly on the case above decided, an examination of this question may be interesting to the learned reader.

It is also held, that no demand or notice is necessary, where the guaranty is an express promise to pay if the principal do not, in *Ketchell vs. Burns*, 24 *Wend.* 456.

The New-York Court has gone still further, in a very late case, and held that one who guarantees the payment of a negotiable note, absolutely, by an endorsement on it

It is also perfectly well settled, that where a man puts his name on a note not negotiable, with intent to guarantee its payment, you may write a guaranty, indeed, a promissory note, over the name, and express a valuable consideration. *Oakley vs. Boorman*, 21 *Wend.* 590. *Josselin vs. Ames*, 3 *Mass.* 274. *White vs. Howland*, 9 *Mass.* 315. *Hunt vs. Adams*, 5 *Mass.* 358. *Palmer vs. Grant*, 4 *Conn.* 389. *Beckwith vs. Angell*, 6 *Conn.* 315.

Even where *demand* is necessary, the creditor is never required to *sue* the debtor, before he can proceed against the guarantor. *Reed vs. Cutts*, 7 *Greenl.* 198. *Lock vs. United States*, 3 *Mason*, 446. *Hunt vs. Bridgham*, 2 *Pick.* 583. *U. States vs. Kirkpatrick*, 9 *Wheat.* 724. *Kennebec Bank vs. Tuckerman*, 5 *Greenl.* 130. *Douglass vs. Reynolds*, 7 *Peters*, 126.

But, as this contract was made in Louisiana, all the obligations resulting from it are created by the laws of Louisiana. By them it is to be ascertained whether it is a valid guaranty; whether it is absolute or conditional; and whether, by the laws of that State, the guarantor, in making it, agreed to pay with or without demand and notice. Those laws determine his liability. If he could be sued there without demand and notice, he can be sued here in the same manner.

It is a valid guaranty by those laws, and for sufficient consideration. *Flood vs. Thomas*, 5 *Mar. N. S.* 560. *Barrow vs. Caseaux*, 5 *Louis. R.* 78. The surety has the right of suing the principal debtor for indemnification, when the debt is due by the expiration of the term for which it had been contracted. *Civil Code of Lou.*, 430, *Art.* 18. And the surety, having this right of action, cannot claim an exoneration from his obligation, except under certain circumstances. *Cooly vs. Lawrence*, 4 *Mart.* 639. The creditor is only subjected to the cession of his actions by a mere principle of equity, not having contracted any precise obligation to the other debtors and sureties, to preserve them. It is sufficient that he act with good faith; that is, that he do nothing contrary to his obligation; and he ought not to be answerable for mere negligence. 2 *Pothier on Obligations*, *n.* 520,

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to that effect, made at or prior to its delivery to the payee, becomes, in legal effect, a joint and several maker, and may be sued as such by any subsequent holder; and that his liability is the same as if he had signed a joint and several note. *Lequeer et al. vs. Prosser*, 1 *N. Hill*, 256.

in finem. From which authority, it is evident that mere negligence on the part of the creditor will not exonerate the surety, although thereby some privilege be lost to the latter. *Cooly vs. Lawrence*, 4 *Mart.* 311.

And if a surety, when sued, would avail himself of the plea of discussion, he must tender a specific sum, to meet the expenses of the discussion, and specifically point out the property of his principal to be discussed. 1 *Ev. Pothier*, 235. A person may engage as surety for any obligation whatever. *ib.* 225. A person may become surety, not only for an engagement already contracted, but for one to be contracted in future. *ib.* 227.

According to the law which was in force before the *Novel* 4 of Justinian, the creditor could demand of the surety the payment of what was due to him, before applying to the principal debtor. That novel allowed to sureties the exception of discussion, or of order, by which they could compel the creditor who demanded from them the payment of the debt, to discuss in the first place the goods of the principal debtor. *ib.* 232. The creditor is only obliged to discuss the principal debtor, before proceeding further against the surety, when the surety demands it, and opposes the exception of discussion. Therefore, *although the creditor has not discussed the principal debtor*, his demand and suit against the surety are regular, until the surety opposes the exception of discussion. The Judge cannot, *ex officio*, ordain this discussion. This exception of discussion is merely dilatory, as it tends merely to suspend and delay the action against the surety until after the discussion, and not to exclude it entirely. It must therefore be opposed before the contestation of the cause; as, by contesting the principal demand without opposing the exception, he is held to have renounced the exception. *ib.* 234, 235. The creditor could not, in France, be compelled to discuss property out of the kingdom, or in litigation, or hypothecated. *ib.* 235. The discussion is to be made at the risk and cost of the surety; and the creditor may require him to furnish him with money therefor. *Curtis vs. Martin*, 5 *M. R.* 674. *Delazeny vs. Blanque's Syndics*, 6 *M. R.* 562. *Thibodeau vs. Patin*, 1 *Mart. N. S.* 478. *Baldwin vs. Gordon*, 12 *M. R.* 378. *Herries*

vs. Canfield, 9 *M. R.* 385. *Robecha vs. Folse et al.* 11 *L. R.* 136. *Banks vs. Brander et al.* 13 *L. R.* 276.

This guaranty created the obligation of surety; (1 *Ev. Pothier*, 262); and it is a simple accessary to the obligation of the principal debtor. It is a pure accession to the original obligation, and has *propriam causam*, as is said: that is, the surety becomes bound in the same manner with the principal, and is responsible, as though he were himself the principal. 1 *Ev. Pothier*, 263.

Apart from all these considerations, it is certain that, on *demurrer*, the first count in the declaration was good.

It is not necessary, in a declaration against a person, on his undertaking to be answerable for, or to pay, the debt of another, to state an agreement, note, or memorandum, or the terms of any such, or the parties thereto, or that it was in writing, or signed by the defendant; nor is it necessary to do so in the replication to a plea, averring that no agreement, or note, or memorandum, stating the consideration in writing, signed by the defendant, was stated and shown; and that such a plea was bad on special demurrer.

It is not matter of objection to such a declaration, that the consideration for such collateral undertaking, as set out, is inadequate; for it is not necessary to state a full and adequate consideration, to maintain assumpsit on the promise and undertaking. A good and valuable consideration in law, whether full and adequate or not, is all that is necessary to state for that purpose. And further, it is not necessary, in such a declaration, to aver a request made to the party himself, in the first instance, to pay the debt, before the guaranty was resorted to: at least, an averment that he had neglected and refused to repay the money, is sufficient for the purpose of maintaining the action against the guarantor.

All these are matters of *evidence*, unnecessary to be stated in the pleadings. "Evidence is not set out in pleading on the record." *Lilly et al. vs. Hewitt*, 11 *Price*, 494.

Trapnall & Cocke, contra.

Where a guaranty contains express stipulations, by which a guarantor binds himself to a direct payment of the money, his undertaking

is absolute, and no demand or notice is necessary. So where the guaranty or promise, though collateral to the principal contract, is made at the same time with it, and becomes an essential ground of the credit given to the principal debtor, the whole is one original and entire transaction, and no notice is necessary. But in case of a general guaranty, forming no inducement to the credit given to the principal debtor, and containing no stipulations binding the guarantor to the direct payment of the money, the promise is collateral and conditional, and demand and notice are necessary. *Ringgold, Adm'r, vs. Newkirk & Olden*, 3 *Ark. Douglass et al. vs. Reynolds*, 7 *Peters*, 113. *Sage vs. Wilcox*, 1 *Conn.* 81.

If the contract is merely *collateral*, it cannot be changed into an absolute engagement, by the mere fact that the note was over due at the time when the guaranty was made.

The weight of authority is in favor of this position. *Lee vs. Dick*, 10 *Peters*, 496, so far as it conflicts with this view, contains but *obiter dicta*, the point not being directly presented.

Where the guaranty is *general*, containing no express stipulations which make it *absolute* in the first instance, whether it be of a special demand by note or other evidence of debt, or not, the authorities hold demand and notice indispensable. See cases above cited, and *Phillips vs. Astling*, 2 *Taunt.* 206. *Cannon vs. Gibbs*, 9 *Serg. & R.* 202. *Oxford Bank vs. Haynes*, 8 *Pick.* 423.

By the Court, Lacy, J.

There can, we think, be no question but that the demurrer in this case was improperly sustained. It was a general demurrer to the whole declaration, which contained three counts: two of them are unquestionably good, and the demurrer as to them should have been overruled. The action was commenced and determined under our Territorial statutes; and, of course, the common law rule upon the subject stood then in full force. And the doctrine upon the point is well settled, that where there are good and bad counts in the same declaration, and there is a general demurrer filed, judgment shall be taken upon the good counts, without regard to the bad. *Duppa vs.*

Nayo, 1 *Saund. Rep.* 226. *Bressey vs. Humphries*, *Cro. Jac.* 557. *Com. Dig. Pleader*, 2, 3.

The most important question in this cause arises upon the first count, which charges the defendant below upon a guaranty, in which no demand or notice is alleged to have been given. On the 27th January, 1829, Thomas B. Franklin executed his note to B. Lane & Co. for $809 61, payable upon the 1st of May following. And the declaration alleges, that the defendant, upon the 17th of June, 1829, by his endorsement upon the back of the note, in consideration of one dollar, guaranteed the payment of said note. The guaranty was entered into in the city of New-Orleans. It is well settled, that the law of the forum where the contract was made, must govern its obligations. Upon this state of facts, the point to be decided is, could the plaintiff charge the defendant, without averring demand upon the original debtor, or showing some legal excuse for failing to make such demand, and notifying the guarantor of the non-payment of the debt? or, in other words, is this a conditional or absolute guaranty?

In the authorities on the subject of guaranties, there is a good deal of seeming, and some irreconcilable, contradiction in the cases. The difficulty does not seem to lie so much in the principles as stated, as in their application to the facts in controversy. By the general principles of law, the guarantor is only collaterally liable, upon the failure of the principal debtor to pay the obligation. A demand upon him, and a failure upon his part to perform his engagements, are indispensable in such cases, to constitute a cause of action; and the authorities upon this point are full, and can admit of no question. In such cases, the guaranty is held to be a collateral or conditional contract, arising out of the original obligation. *Douglass et al. vs. Reynolds et al.* 7 *Peters*, 113. *Hunt vs. Adams*, 5 *Mass.* 358. *Oxford Bank vs. Hayne*, 8 *Pick.* 423. *Phillips vs. Astling*, 2 *Taunt.* 206.

The engagement of a guarantor is generally founded on some new or independent consideration, growing out of the original obligation, except in those cases where it is given at the time of the contracting of the principal debt, and is necessarily connected with it. *Seward vs. Vrederburg*, 8 *John.* 29. *Dewolver vs. Debaurd*, 1 *Peters*, 476. 3 *Kent's Com.* 86.

Where a party gives a continuing guaranty, or where it relates to future transactions, the general rule upon the subject is, that the guarantor has a right to know whether his guaranty has been accepted, or to what extent he may be liable; and, in such cases, demand and notice are necessary, to charge him. The reason is, that his agreement is collateral or conditional, and so both parties understand it to be; and his liability does not accrue, unless he who receives the benefit from it, fixes it by demand and notice. The guarantor is liable upon the expressed or implied condition, that due and proper diligence would be used to promote payment from the original obligor. *Warrington vs. Furlur*, 8 *East.* 340; *Phillips vs. Astling*, 2 *Taunt.* 206; *Oxford Bank vs. Hayne; Bank of New-York vs. Livingston*, 2 *J. R.* 409; and *Cumston vs. McNair*, 1 *Wend.* 457—all establish this principle, and turned upon guaranties on bills of exchange or promissory notes *not then payable*, but which would be duly honored and paid thereafter. In these cases, demand and notice were held necessary, upon the principle that certain legal steps were to be taken and pursued by the creditor, (cases of insolvency excepted), to give effect to his guaranty. The rule, however, is changed, when the debt which is the subject of the guaranty, has become due and absolute before the guaranty is given. The creditor is not required then to take any legal steps to perfect his claim on the principal debtor. It was made perfect before the guaranty given, and the law holds the guarantor cognizant of that fact. His undertaking is not treated or considered as a secondary or collateral liability, but as a primary and positive agreement, by which he binds himself to see that the principal debt is paid. This dispenses with the necessity of demand and notice. It is upon this principle, that when a guaranty is entered into that the original debt shall be paid upon a particular day, it is the duty of the guarantor to see that it is paid upon that day; and, in such cases, he is chargeable, without demand and notice. And so it was held in *Breed vs. Hillhouse*, 7 *Col. Rep.* 523, where the guaranty was held for the payment of the note within four years from its date; and in *Lee vs. Dicks*, 10 *Peters*, 496, the Supreme Court of the United States says: "There are many cases where the guaranty is of a specific existing demand, by a promissory note or other evidence of debt; and

in such cases, the guaranty is given upon the note itself, or with reference to it, or recognition of it, where no notice would be necessary. The guarantor, in such cases, knows positively what he guarantees, and the extent of his responsibility; and any further notice to him would be useless." The whole doctrine upon this subject will be found reviewed in *Reed vs. Cutts*, 2 *Green.* 189; in which most of the leading cases are collated and commented upon; and the rule there established is in accordance with the one we have before stated. Indeed, all the later cases seem to tend to dispense with demand and notice, unless the guarantor's liability is shown, either by his express contract or by its necessary implication, to be a collateral agreement: provided, the creditor's delay be unaccompanied by fraud, or an agreement not to prosecute the principal debtor without the assent of the security. This is the doctrine of the common law upon the subject; and the civil law certainly does not hold a party, we think, to greater strictness as to demand or notice.

According to the Louisiana code, suretyship is an accessary promise, by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. *Hayne vs. Manfield*, 9 *Mar.* 385. *Astor vs. Morgan*, 2 *Mar.* 353.

The obligation of a security towards a creditor, is, to pay in case the debtor does not satisfy the debt; and the property of such debtor is to be previously discussed and seized, unless the security should have renounced the plea of discussion, or should be bound *in solido*. *Lou. Code, Art.* 3014. That the creditor is not bound to discuss the principal debtor's property, unless he should be required to do so by the surety, on the institution of proceedings against the latter. *ib.* 3015.

From these provisions of the civil code of Louisiana, and the principles applicable to them, as settled by the Supreme Court of that State, we entertain little or no doubt that, upon a guaranty after the note has become due, and the right of action being perfect against the original debtor, the surety's obligation is an absolute agreement to pay the debt, in case the original debtor does not; and, in such case, he will be held liable, without demand or notice. The principle here stated, we think, is clearly distinguishable from the rule laid down in the case of *Ringgold vs. Newkirk & Oldem*, decided at the July term

of this Court, 1840. 3 *Ark. Rep.* 107. That case must be construed, like all others, in reference to the particular facts before the court; and any general or unqualified expressions found in the opinion, must be restricted and limited to the sense in which they were intended to be used by the court, in relation to the subject matter before it. The court, in that case, considered the guaranty given, as looking to a future transaction, in securing the payment of a bill of goods delivered, but which was to be paid at some future period; and, therefore, they held demand and notice necessary to charge the guarantors. Whether or not the two cases are reconcilable with each other, is a matter of but little moment, in comparison with our desire to find out and establish the true rule upon the subject. We feel ourselves constrained, by the weight of authority, to affirm the principle before laid down, that where a party guarantees a note already due, and the creditor has committed no act either of fraud or culpable negligence, whereby he discharges the guarantor, that, in such a case, both common and civil law hold demand and notice to be unnecessary. This rule unquestionably proves that the court below erred in sustaining the demurrer to the first court.

Judgment reversed.

Burks et al. *vs.* Dickson.

Held, that a writ of error, tested and signed by H. Haralson, who had, previous to its date, ceased to be clerk of this court, was void; and case dismissed, for want of jurisdiction.

Waller et al. *vs.* The State.

A motion for a new trial waives all exceptions taken at the trial, unless they are specifically put upon the record by the objections to the overruling of the motion for a new trial.

In a criminal case, the presumption of law is in favor of the verdict. Unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong has been done in the premises.

The evidence in this case not sufficient to warrant the disturbing of the verdict.

THIS was an indictment for larceny, tried in the Franklin Circuit Court, in September, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. *Alfred Waller*, *Henderson Waller*, and *Roberson Waller*, were tried and convicted, and appealed to this Court. The facts of the case will be found in the opinion of the Court.

D. Walker, for the appellants.

R. W. Johnson, *Atto. Gen.*, for the State.

By the Court, DICKINSON, J.

The appellants were indicted, below, for larceny of a horse: during the progress of the trial, took several objections to the opinion of the Court: 1st, in regard to the challenge of a juror in behalf of the State. They then moved to exclude the evidence from the jury; which motion was overruled; and they thereupon moved several instructions, one of which was given, and the rest refused. The opinion of the Court was excepted to upon this point, and the instructions were set out in the bill of exceptions. The counsel for the appellants then moved for a new trial, which motion was overruled. They thereupon filed a bill of exceptions to the opinion of the Court, setting out the evidence in the cause, but failing to set out the instructions that were either given or refused. It has been so repeatedly held in this Court, that a motion for a new trial waives the exceptions taken at the trial, unless they are specifically put upon the record by the objections to the overruling of the motion for a new trial, that it is deemed unnecessary to say any thing further in support of such opinion. The motion for a new trial operates as a withdrawing of all exceptions previously put in; and the party having waived his right in regard to them, must stand upon his motion for a new trial; and, if that is adjudged against him, he cannot resort back to his exceptions, having voluntarily abandoned them. The verdict, and judgment of the Court below, are then left standing in full force, and the inquiry now is, were they

warranted by the facts proved upon the trial, or is there such a preponderance of evidence against the finding, that this Court is bound to award a new trial?

The presumption is in favor of the verdict. Unless the record affirmatively overthrows this presumption, we cannot disturb it; and it must do this in such manner as to show that manifest injustice and wrong have been done in the premises. The evidence is vague and disconnected, but still we can gather, from the whole tenor of it, and the connecting links that bind it together, these facts: that one Cornelius, who was indicted, but not taken, told Manus, the witness, in the presence of Alfred Waller, that it was a good time to steal the horse; that Alfred assented to it; and, that the other two Wallers, Henderson and Roberson, afterwards, went to look for a mare, and, on returning, told the witness that it was a fit time, not only to steal the horse, but, also, to steal the mare. They engaged him to run the horse; the witness got provisions from Henderson Waller, and a gun from Roberson Waller, to bear expenses; and Roberson left his saddle at the back of the field, and gave him a clean shirt to wear; and Henderson Waller also gave him a counterfeit dollar; that they then appointed a particular place to meet witness; that Henderson Waller and Cornelius came, a short time afterwards, Cornelius having with him the horse; that witness took him, and, two days afterwards, with the saddle that Roberson furnished, swapped the horse to Ranes, for a grey mare; and, subsequently, passed the mare to Alfred Waller, for thirty dollars in the store. Alfred Waller told another witness, that Manus had stolen the horse, and swapped him for a grey mare; that he must say nothing about it; that, if he did, he would not live an hour; and that Manus had plenty of friends to assist him. The proof does not show at what precise time the horse was taken, but the larceny seems to have occurred shortly after the conversation with regard to stealing and running the horse, when all the parties were present; and, from the subsequent fact of his being delivered to Manus that night, and the agency that each had in the transactions, leaves it a matter of inference, for the jury to presume that all the Wallers, who stand convicted, were actually present at the taking and the stealing of the horse. It is clear, they all advised it, and that each one played

his part. Henderson furnished the provisions, and came with Cornelius, bringing the horse, and delivered him to Manus. The saddle he rode seems to be Roberson's, and left at the back of the field, for the purpose of running the horse with. Alfred got the mare for which the horse was swapped, and said that Manus had plenty of friends to assist him. When these facts are taken in connection with each other, and that the horse was stolen presently after the conversation, it was but rational and proper for the jury to presume, that the parties were all then present and assisting, or near enough to aid, assist, and abet; and that being the case, they were all principals in the offence, and the jury were warranted in finding them guilty. Be that, however, as it may, there is, certainly, not a sufficiency of proof, in the record, to warrant us in setting aside the verdict.

Judgment affirmed.

Billings, Administratrix, *vs.* Billings.

Where a paper, purporting to be a will, was produced for probate, and rejected, and letters of administration granted to a third person, if the executor removes the matter into the Circuit Court, without giving the administratrix notice, and the Circuit Court refuses to permit the administratrix to be made a party on the record, and orders an issue to be made up, *ex parte*, as to the validity of the will, which is tried, and the will decided to be valid, the proceeding has no color of law, or shadow of justice to support it.

The administratrix was entitled to notice, and to be made a party to the record.

This was an issue as to the validity of a will, tried in the Jackson Circuit Court, in May, 1841, before the Hon. Thomas Johnson, one of the Circuit Judges. The facts are sufficiently stated in the opinion.

Fowler, for the appellant.

Linton, contra.

By the Court, Lacy, J.

It is perfectly apparent, that the proceedings in the case, by the Court below, have been exceedingly irregular, and wholly unauthor-

ized. A paper, purporting to be the last will and testament of Noah P. Billings, was produced before the County Court, for probate. It was there rejected; and letters of administration were then sued out, by Narcissa Billings, on the estate of her deceased husband. Upon this state of case, William Billings, who claimed to be appointed executor by the paper purporting to be the last will and testament of Noah P. Billings, filed his petition, and removed the cause to the Circuit Court. The Court below refused to admit her to be made a party to the proceeding, or to continue the case. An issue was then made up as to the validity of the will, *ex parte*, as it is termed in the record. A jury was thereupon impannelled, to pass upon it, who pronounced the paper, produced upon the trial, to be the last will and testament of Noah P. Billings, deceased; and the Court gave judgment acccordingly, and directed its opinion to be certified to the Probate Court, for further proceedings to be therein had, agreeably to the decision of the Circuit Court. A motion was then made for a new trial, which was overruled. The reason assigned was, that Narcissa Billings being no party to the suit, of course she had no right to be heard. The bill of exceptions filed, has placed these facts upon the record, and the case is now brought here, by appeal, to correct the judgment of the Circuit Court.

We are at a loss to conceive upon what rule of practice, or principle of justice, the Court below proceeded to make up an issue, and try the validity of a will, without proper parties, or without even affording an opportunity to those who were interested in the matter, to come in and defend. It is a principle of natural justice, as well as of municipal law, that no one, having an interest in any judicial proceeding, can be bound by it, unless he appears, or an opportunity is afforded him of coming in and defending the action. The proceeding, in this instance, is not only carried on without the proper parties, or without notice to the appellant, but in violation of her rights, and in opposition to her petition; and that, too, in a case where, at least for the time being, she was the properly constituted administratrix of her deceased husband, and, as such, had a direct and immediate interest against the paper, purporting to be his last will and testament, being established. To deny her the privilege of contesting its validity, or being

heard in opposition to it, is to deprive her of an important legal right, without notice, and against her consent. This cannot be done. The effect of such a proceeding does not stop here, but it indirectly annuls the acts of a Court of competent jurisdiction, without properly investigating and considering the grounds of its decision. Such a proceeding, on the part of the Circuit Court, has no color of law or shadow of justice to support it; and its judgment must, therefore, be reversed, with costs, and this case be remanded to the said Circuit Court, with instructions that Narcissa Billings, if she desires it, be made a party to the suit, and leave given to the appellee, within a reasonable time, to amend his petition, and make all others, (if any there be), who are legally interested in the matter, parties to the proceeding; and that the cause then progress, and be heard and determined according to law.

Brittin *vs.* Mitchell.

A bond, executed to A. B., administrator, *or* C. D., administratrix, of E. F., is a good bond, and negotiable, so that, if assigned by both A. B. and C. D., suit may be brought on it by the assignee.

The word *or* must be taken to mean *and*, in such a case.

Debt, upon a bond executed by *Brittin* and others, to *Samuel Gray*, administrator, *or Lucy Gray*, administratrix, of *Matthew Gray*, deceased; determined in the Hempstead Circuit Court, in October, A. D. 1841, before the Hon. William Conway B., one of the Circuit Judges. The defendant, Brittin, demurred to the declaration; and his demurrer being overruled, judgment went against him, and he sued his writ of error.

Pike, for the plaintiff.

A contingency or uncertainty, by or to whom a bill or note is payable, is fatal to its validity. *Ch. on Bills*, 159, *a*.

Every contract must show in whose favor it is to be performed, or it will be void for uncertainty in an essential particular. If it be really,

uncertain by or to whom payment is to be made, the instrument cannot operate as a bill or note. Thus, a note to be paid "by A. *or else* B.," is bad. So a note whereby the maker promises to pay to A. B., or to plaintiffs, or to his or their order. *Plankentragen vs. Blundell*, 2 *B. & A.* 417. 1 *Leigh, N. P.* 367. *Walrad vs. Petrie*, 4 *Wend.* 575.

The word *or* can never be construed to mean *and*, except where it is clearly necessary to give effect to some clause in a will, or some legislative provision. In such cases, it has been forced out of its proper meaning, to effect these purposes, *but never to change a contract at pleasure. Douglass vs. Eyre, Gilpin*, 147.

Trimble, contra.

By the *law merchant*, a contingency, as to person, destroyed the character of the instrument as a bill or note, and it was no longer assignable, or a negotiable instrument. *Chitty on Bills*, 159.

It is not pretended that this instrument is a bill or note, but it is a bond, or a written agreement, under seal; and the payees could have maintained an action of debt on it as a bond, agreement, or contract, to pay a liquidated sum. 4 *Wend.* 575, 6, 7.

Suppose a note, payable to A. or B., under the statute 3 *and* 4 *Ann*, was not assignable, (technically), as a note, so that the assignee could maintain an action in his name; yet, if for value received, a suit could be maintained on it, as a contract, by the obligee. And the reason is, that such a note was not assignable, under the statute above; for that statute was made to give to promissory notes the character of commercial paper: that is, "shall have the same effect as inland bills of exchange." *Chitty on Bills*, 540, *note*. And the statute declares, that the endorsee or assignee "shall and may maintain his, her, or their action, in like manner as in cases of inland bills of exchange."

The count describing the bond was good, and the plaintiff is entitled to recover. 4 *Wend.* 575.

The instrument of writing, as described in the declaration, is a writing obligatory, and, therefore, imports a consideration. The obligees could recover on it, in debt, as a bond or contract for the payment of a sum certain. 4 *Wend.* 575, 6, 7. And, by our statute,

the assignee may sue for the same, in his own name, as assignee thereof, in the same manner that the original obligee or payee might or could do. *Rev. St. p.* 107, *title Asssignment, sec.* 2. The first section makes "all bonds, bills, notes, agreements, and contracts, in writing, for the payment of money or property, or for both money and property, assignable. *Sec.* 1. Anote pay able to A. or B., is not, technically, a negotiable instrument, under the statute of 3 *and* 4 *Ann;* but this does not affect the question. In this case, there is a bond for the payment of a sum certain, and for value received, on which the payees might recover; and, by our statute, above recited, the assignees may sue in the same manner as the original obligee or payee might or could do.

By the Court, Dickinson, J.

That the Court properly overruled the demurrer, and gave judgment for the plaintiff below, we have no doubt.

There is, certainly, no variance; and we do not think the objection of the bond being payable to Samuel *or* Lucy Gray, tenable. The party, unquestionably, owed the money to the estate of Matthew Gray, deceased; and he executed the bond to the administrator and the administratrix; and because the writing describes it as payable to either one or the other, that cannot vitiate it. The word "or," used in the instrument, must be taken to mean "and."

Under our statute, "all bonds, bills, notes, agreements, and contracts, in writing, for the payment of money or property," are assignable. This is, certainly, one of that description, and therefore assignable.

Judgment affirmed.

Robinson *vs.* Calloway.

Under our statute, replevin may be maintained either for an unlawful taking, or a wrongful detention.

The plaintiff, to support the action, must show title.

When a defendant pleads property in himself, or in a stranger, he must conclude with a *traverse* of the plaintiff's title; and the point on which the issue is joined, and upon which the jury must pass, is whether or not the plaintiff has such a title as will enable him to maintain the action.

The allegation of property in the defendant, or in a stranger, is merely inducement to the traverse of the plaintiff's title, and no issue can be formed upon it. The plaintiff cannot waive the issue as to his own title, and tender a traverse of the defendant's title.

Consequently, the plaintiff cannot recover, unless he shows title in himself; and the defendant can defeat the action, by showing title in a third person, without connecting himself with that third person. The affirmative is with the plaintiff.

Evidence that a slave belonged to a person deceased, and that the plaintiff, who is his widow, administered jointly with another person still living; that there are several heirs, and has been no distribution of the estate; that, after the death of the intestate, the plaintiff obtained possession of the negro, who has been called her own, and she has had possession of him until shortly before suit commenced, clearly shows that she has no such title as will maintain replevin.

THIS case was tried in the Pulaski Circuit Court, in March, 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. It was an action of replevin, in the *detinet*, brought by Amy Calloway, against Hardy Robinson, for a negro boy named Mordecai, who was replevied and delivered to the plaintiff below. At March term, 1841, the defendant filed seven pleas: 1st, non-detinet; 2d, property in the defendant; 3d, property in James M. Trigg; 4th, property in John S. T. Calloway; 5th, property in the heirs at law of John Calloway, deceased; 6th, property in the executors of John Calloway, deceased; and, 7th, property in the administrators of John Calloway, deceased; each of which six last pleas contained a traverse of property in the plaintiff, and concluded with a verification.

The plaintiff moved the Court to strike from the files the six last pleas; which motion was overruled; and he then joined issue to the first plea, and replied in short to each of the others, to each of which replications the defendant joined issue.

Upon the trial on these issues, the following evidence was introduced. The plaintiff proved, by her first witness, a son of the plaintiff, that she had had possession of the boy called Mordecai, ever since the death of his father, John Calloway; that she lived in Clark county; that the boy was taken away from that county in August, 1839; but witness did not know how or by whom; that the boy was about fifteen or sixteen years of age; that, for some time after his father's decease, the plaintiff and John S. T. Calloway, her son, lived together; and, when she moved away, she took the boy and several

other negroes along with her; that Mordecai was born during the lifetime of John Calloway, and while he and the plaintiff were living together in the married state, as husband and wife; and that he was the only slave of the same name or description ever in possession of his father, since his recollection; that he was born of a woman slave in possession of his father, but was understood to be, and was called, the plaintiff's slave; that John Calloway died six or seven years ago, and left fourteen children, of whom eight or nine were still living; that the plaintiff had hired the boy out, and lent him to John S. T. Calloway, to go to mill; and that he was worth six or seven hundred dollars.

Green B. Davis stated, that he had lived in Clark county, three or four miles from the plaintiff, whom he had known for twenty years. Has seen the boy at the plaintiff's. Witness' brother hired him awhile of the plaintiff; once and-awhile, Peter, a son of the plaintiff, now deceased, claimed him as his property; that John Callaway died seven or eight years ago, and plaintiff has exercised ownership over him since her husband's death: he did not know whether the title was in the plaintiff or not, nor of his being in possession of any other person; that plaintiff and John S. T. Calloway lived together for some time after John Calloway's death; before whose death, the boy was in his possession, and he (John Calloway) exercised ownership over him.

The Sheriff of Pulaski county then identified the boy, and proved that he would hire for ten dollars a month. Upon this testimony the plaintiff rested.

The defendant's evidence is not necessary to be stated.

The plaintiff then read in evidence a copy of letters of administration granted to her and John S. T. Calloway on the 6th day of January, 1835, by the Clerk of Clark county. She then offered to read a paper commencing as follows: "Appraised bill of property of the estate of John Calloway, deceased. We, Adam Stroud, Archibald Huddleston, and David Mosby, appraisers of the estate of John Calloway, deceased, do appraise the property as follows, to wit:" Then follows a list of eleven negroes, with the price of each, among which was, "1 boy, named Mord., $300." No affidavit or certificate

was appended to the list, nor was it signed by any person; but following it was the certificate of the Clerk of Clark Probate Court, that it was a true and complete transcript of the original appraisement bill, on file in his office.

The plaintiff then recalled the plaintiff, Davis, and he was permitted to state that the boy was sometimes called Mordecai, and sometimes Mord.

Upon the evidence, the Court, on motion of the plaintiff, instructed the jury, among other things, that if the defendant has shown title to the boy in question, to be in any person or persons other than the said plaintiff, unless they believe from the evidence that the defendant, Robinson, derives title from that other person or persons, they must find for the plaintiff.

To which the defendant excepted, and moved the Court to instruct the jury.

1st. That if the defendant has pleaded property in a third person or persons, and proved it, he is by law entitled to a verdict and judgment for the return of the property; and,

2d. That if the legal title to the slave remains in the estate of John Calloway, deceased, and not in John S. T. Calloway or his assigns, still they could not find for the plaintiff, because she has commenced suit alone.

The jury found for the plaintiff, and assessed damages in the sum of one hundred dollars, for which judgment was rendered, and Robinson sued his writ of error.

In this Court several questions were argued, which are not necessary to be noticed.

Pike, for the plaintiff.

The plaintiff was bound under the issues to prove property in herself. Where a plea concludes with a traverse, the plaintiff must reply to and take issue on the *traverse*, and not on the inducement.

If there is a traverse in the defendant's plea, of a point material to the plaintiff's title, the replication must re-assert the fact, and conclude to the country. For, as there is a complete issue formed by the

negative and affirmative, the plaintiff cannot decline the defendant's traverse, and offer another traverse to some other point in the defendant's plea. And hence results the general rule, that there can be no traverse upon a traverse, where the first traverse is material; since, if this were allowed, there might be many successive traverses, and thus the parties might never come to an issue. However, if the plea concludes with a special traverse of the *time* and *place* in the declaration, the plaintiff may either join in the traverse, or traverse the inducement. This is an exception. *Story on Pl.* 57. *Digby vs. Fitzharbert, Hob.* 104.

So it is laid down, that where a plea confesses and avoids the material facts in the declaration, there must not also be a traverse, *because it shall not be in the power of the party, by adding a traverse, to prevent the other party from denying the facts which avoid his title.* 1 *Saund. R.* 22, *n.* 2; *ib.* 209, *n.* 8; *Oystead vs. Shed,* 13 *Mass.* 522; *Stephen,* 227. *Anon.* 3 *Salk.* 353; *Gould* 400.

The issue on each of the six last mentioned pleas in this case, having been made up in short, each "replication in short," was necessarily a replication to the traverse; and the issue on each of the six pleas was precisely the same. The affirmative in each was with the plaintiff, and her allegation was, "property in herself." This she was bound to prove.

It was a proper issue. Our statute has made certain provisions as to the pleadings in replevin. Among them are, that the defendant shall be entitled to the same pleas in abatement and in bar, as heretofore, and with like effect; and may plead as many several matters as he may think necessary for his defence. *Rev. St.* 664, *sec.* 32. And it also provided that the general issue in replevin in the detinet shall put in issue not only the wrongful detention, *but also the property of the plaintiff therein. ib. sec.* 34.

A defendant may either deny the title of the plaintiff, and conclude to the country, or state his own title, and conclude with a traverse. And a plea of property in a stranger is good in bar or in abatement, and entitles the party to a return without an avowry. *Harrison vs. McIntosh,* 1 *J. R.* 380.

The general issue of non-cepit, in the case of a wrongful taking, puts

in issue not only the *taking*, but the *place*, if material; and in case of a wrongful detention, the general issue of *non-detinet* puts in issue not only the *detention* of the goods, but the *property* of the plaintiff—and the distinction so made between the effect and operation of the general issue, in the cases of *non-cepit* and *non-detinet*, is in analogy to that existing in the actions of trespass and trover. The defendant in replevin may plead property in himself or in a stranger, in bar of the action, or property in himself and the plaintiff, or in a stranger and the plaintiff; and all these different pleas are obviously founded upon the principle, that the plaintiff, as in trover, must recover upon the strength of his title to, or property in, the goods in question. It is obvious that the material fact in dispute, and substantial issue, raised on all pleas of property in replevin, is, *property in the plaintiff*. They all tend to deny and disprove this, and are valid defences for that reason. From this, it is said, results the rule, that "in pleas of property in the defendant or third person, as the case may be, such fact must not only be alleged, but the defendant must also traverse property in the plaintiff." The title to the property stated by the plea, is only by way of inducement to the traverse. *Rogers vs. Arnold*, 12 *Wend.* 30.

The question is not as to the *absolute ownership*. Right to the possession, and dominion of the goods for the time, are all that is essential. As the possession of a chattel is *prima facie* evidence of right, a mere stranger cannot deprive the party of that possession, without showing some authority or right derived from the true owner, to justify the taking. Upon the issues, it is not material that the defendant should prove title to the property as set forth in any one plea, as that is only inducement to the traverse of the plaintiff's title, and need not be, and was not, denied in the replication. Upon the issues, the plaintiff was bound to prove and maintain an *exclusive* right to the possession and control of the property. *Rogers vs. Arnold, ut sup. Bemus vs. Beekman*, 3 *Wend.* 667. *Lady Chichesly vs. Thompson, Cro. Car.* 104.

The substance of the issue thus joined, is, whether the plaintiff has such a property as will maintain replevin, or whether the person named in the plea has such a property as will defeat it. The inquiry is, where was the right of possession? The pleas are good, *and would*

entitle the defendant to a return, without connecting himself in title with the persons in whom he alleges an outstanding title to be. Prosser & Petrie vs. Woodward, 21 *Wend.* 205. *Simpson vs. McFarland*, 18 *Pick.* 430. *Salkold vs. Skelton, Cro. Jac.* 519; *Presgrave vs. Saunders*, 2 *Ld. Raym.* 984.

Where there are several executors or administrators, they must all be joined, though some be under seventeen, or have not proved the will, or have even refused. *Webster vs. Spencer*, 3 *B. & A.* 363, 96. Executors or administrators hold property as trustees; and where there are more than one, it is a *joint* trust. It is not necessary to produce authority, to show that neither of them can have the *exclusive* right to the possession and control of the property. The fact that the plaintiff had been in the possession of the negro after the death of her husband, proves nothing as to the right of exclusive possession. Without the letters of administration, she showed that she had had possession; but she destroyed her case when she produced those letters.

An executor or administrator could not maintain replevin at common law. They are allowed to do so, by the statute; but we apprehend that they must sue in that capacity. Here the plaintiff sued in her individual right, and then proceeded herself to show that she and a third person, as administrators, alone were entitled to sue.

Ashley & Watkins, contra.

By the Court, Lacy, J.

It is perfectly clear, under our revised statutes, page 659, that this action may be maintained for an unlawful taking, or a wrongful detention of a personal chattel. The plaintiff, to support the action, must show title: he has no right to a recovery unless he has been injured, either by an invasion of his right of property or his right of possession. The pleadings in the action are peculiar, but they are nevertheless founded in justice and policy. In this case, the defendant pleaded "non-detinet," and "property in himself and other persons." Issues were formed upon these pleas: the inquiry now is, what are the parties respectively bound to prove?

The declaration alleges title in the plaintiff. This is a mate-

rial fact; and when the issue is joined upon it, must necessarily decide the cause. When the defendant pleads any matter inconsistent with this averment, as property in himself or in a stranger, of course he is compelled to conclude with a traverse of the plaintiff's title.

The point upon which the issue is joined, and upon which the jury must pass, is, whether or not the plaintiff has such a title to the property as will enable him to maintain the action.

The allegation of the defendant, of property in himself, or in a third person, is merely inducement to the traverse of the plaintiff's title, and, therefore, no issue is formed upon that fact. The plaintiff is not at liberty to waive the issue of his own title, and tender a traverse of the defendant's title. To admit him to do this, would be to establish a rule in pleading that would run contrary to all established precedents, and produce endless prolixity.

In replevin, as in all other actions, it must appear by the declaration, that the plaintiff is the injured person. It would be idle to charge the defendant with unlawfully taking or detaining the plaintiff's property, unless he had title. The possession of a chattel interest carries with it the presumption of ownership or right of possession; and neither of these can be interrupted or disturbed, unless the party claiming it shows that he has a superior, paramount title. The authorities are full and conclusive upon this point. 1 *Saund.* 22, *n.* 2; 1 *Chitty*, 592; *Com. Dig. Plead. S.* 14; *Lady Chichesly vs. Thompson, Cro. Car.* 4; *Rogers vs. Arnold*, 12 *Wend.* 33. In *Prosser & Petrie vs. Woodward*, 21 *Wend.* 207, the whole doctrine will be found fully examined and decided in exact conformity with the principle here stated.

These principles clearly show that the plaintiff was not entitled to recover, unless she showed title in herself, and that the defendant could defeat the action by establishing it in another. The plaintiff was bound to recover by the strength of her own title, and not by the weakness of her adversary's. She held the affirmative of the issue; and, unless she proved her own title, she had no right to recover. These principles are perfectly obvious, and their application to the instructions given to the jury by the Judge who tried the cause, proves he was mistaken in regard to the law governing the case be-

fore him. The facts contained in the record, so far from proving title in the plaintiff, expressly disprove the claim.

The Court instructed the jury, that, "under the issues joined, if the defendant proved property in a third person, other than himself, he was bound to show that he derived a valid title from that third person, in order to defeat the plaintiff's right of action." This instruction was evidently erroneous, and expressly contradicts all the established rules of pleading upon the subject, and also our own statute. *Rev. St. sec.* 34, *p.* 664. The Court refused to instruct the jury that "if they believed, from the evidence, that the title to the slave in dispute, was in the estate of John Calloway, deceased, the plaintiff had no right to recover." In refusing to give this instruction, the Court also erred. It is perfectly manifest, that if the administrators, or the heirs of John Calloway, deceased, had title to the property, an action could not be maintained alone in the name of the widow. The plaintiff's right to recover, depended upon her title; and if the proof showed the title out of herself, and vested it in others, she certainly could not maintain the action. The whole proof in the cause, in our opinion, clearly established these facts: The slave mentioned in the declaration, is shown to be the property of John Calloway, in his lifetime, and that the plaintiff in the action, is his widow; that, upon his death, he left a number of children, several of whom are now living; and that Amy Calloway, with John S. T. Calloway, administered upon the estate of her deceased husband; that there was no legal distribution of the assets of the estate among the heirs or representatives; that, after the death of John Calloway, the plaintiff retained possession of the slave; that he was considered and called her property; and that she exercised acts of ownership over him, until a short time before the commencement of this suit, when he passed into the possession of the defendant. This evidence, so far from establishing title in the plaintiff, clearly negatives any such idea. As the wife of John Calloway, she held no property separate and apart from her husband, during her coverture. That, upon his death, she was only entitled to her distributive share of his estate; and the fact of her claiming the boy as her own property, and its being so regarded by others, could not vest in her either a legal or equitable title. She brings this suit in her own

name, and rests her claim upon her own title and interest. By her own showing, she has no title or pretext of title. If the property belonged to the estate of John Calloway, at the time of his death, then it must either have vested in his administrators, or in his legal heirs and representatives. If the administrators had title, they of course should have both joined in the action. If their right to the property, or to the possession of it, had been divested by distribution, or otherwise, then the action would only lie in the names of the heirs or legal representatives, or in the names of those in whom the legal interest was vested. Here, Amy Calloway's title rests upon the mere assertion of a naked right, without title, accompanied with possession; which is not shown to be adverse to the other heirs or legal representatives: and, of course, having established no separate right or claim in herself, she is not entitled to a recovery.

This view of the case supersedes the necessity of our examining or deciding the other points raised upon the record, with regard to the defendant's proof. Amy Calloway, having shown no title, according to the doctrine well settlled in actions of replevin, she is not then authorized to disturb the possession of the defendant.

Judgment reversed.

Cummins, *Ex Parte.*

Where, after a delivery bond has been taken and forfeited, the plaintiff sues out an alias execution on his *original* judgment, and does not follow up his remedy against the property seized, this writ is a legal justification to the officer to whom it is directed, and imposes on him the duty of executing it.

If the officer fails to sell, upon such alias execution, whether on account of the interference of the plaintiff, or otherwise, he cannot proceed to sell the property on five days' notice: and if the Court below refuses an order to compel him to sell, this Court will, certainly, not compel the Court below, by mandamus, to issue a *venditioni exponas*, commanding the sheriff to sell, on five days' notice.

Motion for a mandamus, to the Chicot Circuit Court, to compel that tribunal to order the sheriff of Chicot county to sell, upon five days'

notice, certain property of *Albert W. Webb*, on which he had levied an execution in favor of William Cummins, the relator.

From the petition and exhibits, it appeared that Cummins obtained judgment, in Chicot Circuit Court, in May, 1839, against Webb, for a debt of $150, with interest from the 1st day of December, 1837, until paid, with costs, the execution of which, by an agreement of the parties, entered of record, was to be stayed for six months; that, on the 11th day of January, A. D. 1840, Cummins sued out a writ of execution on the judgment, directed to the sheriff of Chicot county, and returnable on the 19th day of May, A. D. 1840, which came to the hands of the sheriff on the 15th January, who, on the 23d April, levied it on certain slaves of Webb, and took from Webb a bond, with security, for the forthcoming and delivery of the slaves to him, on a certain day; that the sheriff, on the return day of the execution, returned the same, together with the bond, and certified thereon that the slaves had not been delivered, nor had the debt and costs, or either of them, been paid to him, and that the bond was forfeited. The appraisement returned, fixed the value of the slaves at $3,400; that Cummins, on the 21st day of May, 1840, caused an alias writ of execution to issue on the said judgment, directed, also, to the sheriff of Chicot county, returnable on the 17th day of November, then next, which was placed in the hands of the sheriff, on the 22d day of May, and by him, on the 26th day of October, 1840, levied on certain slaves, as the property of Webb, to be sold on the 16th day of November, 1840; at which time, (according to the return of the sheriff thereon endorsed, on the 12th day of May, 1841), an arrangement was made, between the plaintiff and defendant, and the sheriff ordered, by the plaintiff, not to proceed with the sale; and, therefore, he returned the execution, with the facts thereon stated; that the following entry was made on the margin of the record of the judgment, to wit: "January term, 1841, 5th day: This day appeared, in open Court, the plaintiff in this case, and acknowledged full satisfaction of this judgment."

It also appeared, that Cummins, on the 12th day of May, 1841, moved the Circuit Court for an order to the sheriff of Chicot county, to sell the property levied on, under the alias execution, after giving five days' notice, according to the statute; and that, on the day following,

he filed his own affidavit, stating that the entry of satisfaction, appearing on the record, was not his act and deed, and that the same was made without his authority, consent, or knowledge; and that the judgment had not been paid off and satisfied, and that the parties had so admitted, since the entry on the record was made; and that he believed, and did not doubt, but that the entry was made through mistake; and, thereupon, moved the Court to order the entry to be erased from the record, as not being his deed: That the following proceedings were had, and entered on the record of the Court, on the 14th day of May, 1841, to wit: "This day came the said plaintiff, and the motion heretofore filed here, for an order to the sheriff of the county of Chicot, to proceed to sell the property levied on by virtue of the above execution in this case, upon five days' notice, having been fully heard and understood by the Court, it is the opinion of the Court, that said motion be overruled, and that said defendant recover against said plaintiff, his costs by him in and about said motion expended."

Wm. & E. Cummins, for the relator.

Trapnall & Cocke, contra.

By the Court, Ringo, C. J.

Upon the facts presented on this application, the petitioner insists that he is entitled to an order or writ of *venditioni exponas*, to coerce the sheriff to expose to sale the property seized by him, on and by virtue of his executions aforesaid, to satisfy said judgment against Webb; that the law regards a judgment, obtained in a Court of competent jurisdiction, as a security and obligation of the highest grade, upon which final process of execution may be obtained of right, and cannot legally be refused, so long as it does not, by testimony of equal grade, appear to have been suspended, reversed, annulled, or satisfied; that there is no other legal means of enforcing satisfaction of a judgment at law; and, therefore, as there is no legal or record evidence that the judgment in question is either suspended, reversed, annulled, or satisfied, he has a legal right to the order, or writ of execution, demanded, and is without any other adequate legal remedy to enforce the payment or satisfaction of his judgment; and, inasmuch as the Circuit

Court has denied to him such remedy, he is entitled to this writ, to compel that Court to grant it.

That the law considers the judgment of a Court of competent jurisdiction, as creating a security and obligation of the highest grade, must, in our opinion, be admitted; and it is equally clear, that the law has provided, that, in most, if not all cases, where judgment is obtained in the course of a common law proceeding, such obligation shall be enforced by means of some writ of execution. But this remedy, like most remedies designed to coerce the observance or performance of any legal obligation or duty, is the mere creature of law, and must, in its operation and effects, be governed by such regulations as are prescribed by law. And whenever a party resorts to it, he takes it, subject to all such legal regulations, restrictions, and limitations, as are provided for its government. Thus, such acts only as the law prescribes, can be legally done or justified under its authority; and, in every stage of the proceeding, such legal prescriptions must be observed, whether they inure to the benefit of the one party or the other, provided they neither destroy any vested right, nor impair the obligation of any contract.

In the case before us, the judgment ascertained, beyond all controversy, the fact, that Cummins was legally entitled to a certain sum of money, and that Webb was legally obliged to pay it to him; but its payment could only be coerced by means of such writ of execution as was authorized by law to issue on such judgment; and the officer, charged with the execution thereof, was bound, in the discharge of his duty, to observe, in every essential part, the provisions of law in relation thereto, and could not legally forbear the doing of any act thereby enjoined upon him, nor do any act not authorized by it; and hence, it is manifest, that this, as well as every other legal remedy, must be prosecuted in the manner and form prescribed by law. Upon such judgment, Cummins had, unquestionably, a legal right to demand, and cause to be issued, a writ of execution, against the goods and chattels, lands and tenements, of Webb, according to the provisions of the 5th, 6th, and 7th sections of the 60th chapter of the Revised Statutes of this State, so soon as the time had expired during which the execution thereof was to be stayed by the express agreement between

himself and Webb, entered of record when the judgment was obtained; and of this right he availed himself, by suing out such writ, which was placed in the hands of the proper officer, to be by him executed according to law. But other provisions of the same law secured to Webb the right of retaining in his own possession, until the day of sale, such personal property as should be seized by the officer by virtue of such writ, by giving bond in favor of Cummins, with sufficient security, to be approved by the officer, in double the value of such property, conditioned for the delivery of the property to the officer, at the time and place of sale named in such condition; and, for the purpose of ascertaining the value of such property, made it the duty of the officer to call to his assistance, at the time of making such levy, two respectable householders, to inventory and value such property, under oath, and required such inventory to be attached to, and returned with, the execution. By virtue of the execution so issued in this case, the sheriff seized certain slaves, the property of Webb, caused them to be valued, and an inventory made, as required by law, whereby the property so seized was ascertained to be of the value of $3,400, and, thereupon, Webb gave bond to Cummins, with security, approved by the sheriff, in double the amount of the value of said property, conditioned according to law, and then, availing himself of his legal right, retained the property in his own possession until the day of sale, when the same not being produced or delivered to the sheriff, according to the condition of the bond so taken therefor by him, the bond was forfeited, and the execution, together with the inventory, appraisement, and bond aforesaid, returned, with a statement of all the facts endorsed thereon by the sheriff.

What was the legal effect or consequences of these proceedings? Did they satisfy the debt to Cummins, or discharge the obligation of Webb to pay it? In our opinion they did neither. What remedy, then, was provided by law, to enforce the obligation, and coerce the payment of the debt? According to the well-established principles of the common law, the seizure, in execution, of the property of the defendant, of sufficient value to pay the demand, discharged the judgment, and extinguished the obligation of the defendant, and constituted a bar to any subsequent action or execution founded upon it;

and the plaintiff was forced to seek his remedy either against the property so seized, or the officer charged with the execution of the writ. But such, it is contended, is not the effect of a levy, under our law, where a delivery bond is given, and the possession of the property retained by the defendant. And it is urged that, in such case, the judgment creditor may, at his election, either proceed against the property seized, pursue his remedy on the bond, or have an alias execution on his judgment, without regard to the proceedings upon the first execution, or the property thereupon seized, the remedies provided by the statute being cumulative. Be this as it may, we do not consider any determination, in regard to it, necessary to a correct legal disposition of the present application, as Cummins has neither thought proper to follow up his remedy against the property seized upon the original execution, nor to resort to the delivery bond, to coerce payment of the money adjudged to him, but has voluntarily sued out an alias execution upon the judgment, as though nothing had been taken upon the original, by virtue of which, property of Webb appears to have heen taken, which, as nothing appears to the contrary, must be presumed to be of sufficient value to satisfy the demand. Now, suppose it is conceded that the alias writ irregularly or illegally issued, or both, still it would, as we apprehend, not only furnish a legal justification to the officer executing it, but would also impose that duty upon him. It was not void, and the officer could not justify any dereliction of duty, in omitting to execute its mandate according to law, by showing that it was so irregularly or illegally issued; and, thererefore, it is unnecessary to decide whether it issued regularly or irregularly, legally or illegally, as that could make no difference in regard to the question of sale; because, so long as the writ was neither superseded, nor otherwise legally avoided, the seizure under it could not, in either case, be regarded as a nullity; and, therefore, the officer, if he had not been arrested in the discharge of his duty, by the order of Cummins not to proceed with the sale, would have been bound to expose the property, so seized, to sale, in the manner prescribed by law, to satisfy said execution. But, as no delivery bond had been given and forfeited, subsequent to the last levy, he could not, upon or after a failure to sell, at the time prescribed by law, whether such failure was oc-

casioned by the interference of the plaintiff, or any other cause, proceed to sell the property on five days' notice, because it was not a case within the provisions of the statute authorizing a sale upon such notice, which only embrace cases where a delivery bond has been taken, and the condition thereof not complied with. Besides, the thirty-ninth section of the 60th chapter of the Revised Statutes, by virtue of which a sale on such notice was authorized, though in force when Cummins forbid the officer's proceeding with the sale, and ordered him to desist therefrom, had been repealed prior to the time when his motion was made to the Court for an order to the sheriff to sell the property levied on under the alias execution, after giving five days' notice; consequently, there existed no legal authority whatever, to sell the property on such notice, and the motion for such order was properly overruled. The motion was not, as it has been urged, for a *venditioni exponas,* simply commanding the officer to sell the property seized on the alias execution, and remaining in his hands unsold, and to have the money before the Court at the return thereof, to satisfy Cummins' debt, according to the legal order of the proceeding in such such case, but for an order wholly unknown to the law, and requiring him to sell the property at a time, and under circumstances, not authorized by it. Such was the motion made by the party himself; and, if he was either mistaken as to his legal rights or his remedy to enforce them, it surely was not the province of the Court, to mould his application into a different form, and grant him, thereupon, a remedy authorized by law, but which he did not seek. The duty of the Court was, to decide upon the case in the form in which it was presented by the parties themselves, and grant or refuse the remedy sought, as the law adjudged the right upon the case as presented. In this case, as before remarked, Cummins had no right to such order as, by his motion, he required the Court to make; and, of course, this Court would not be justified in compelling the inferior Court to make it.

Motion denied.

OBAUGH *vs.* FINN.

The distinction between *verbal* and *written* slander, by which an action may be maintained for written or printed words, which, if only spoken, would not support an action, has been uniformly maintained for ages in England and the United States, and is too well established to be now departed from.

The rule is well established, that any words, written and published, throwing contumely on the party, or prejudicing him in his employment, are actionable, without any allegation of special damage.

Therefore, a publication in a newspaper, whereby one person cautions the public against another, stating him to be a plasterer by trade, who absconded on a certain day, without paying any of his numerous debts, and swindling him out of fifty-five dollars, which he had advanced him, on his promise to do a certain piece of work; that he was from Baltimore, and was said to have left that place in a similar manner; and concluding, "It is not for the small amount of money, out of which he has swindled me, that I now publicly advertise him, but to put others on their guard against his villany," is a *libel*, and actionable, without allegation of special damage.

And, in an action thereon, a demurrer to evidence being put in, admitting the publication, and that the plaintiff was a plasterer, doing business, as such, in Little Rock, these facts were sufficient to maintain the action; and the demurrer was properly overruled.

Upon the filing of a demurrer to evidence, the usual course of proceeding is, either to take a verdict for the plaintiff, conditionally, and then discharge the jury; or, to discharge the jury before any verdict is rendered, and then dispose of the demurrer: in which case, if the demurrer is overruled, and the damages are unliquidated, a new jury is summoned to assess the damages.

And though it is, in some respects, a matter of practice, yet it is error for the Court to retain the jury after the demurrer is filed, and, after overruling it, to have the damages assessed by the same jury.

It is a course of proceeding wholly unauthorized by any rule or precedent, and in derogation of the defendant's legal rights.

THIS was an action on the case, for a libel, tried in the Pulaski Circuit Court, in March, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. Finn sued Obaugh for the publication of a notice in the Arkansas State Gazette, of the 28th August, 1839, in the following words: "CAUTION.—The public are hereby cautioned against one *John Finn*, a plasterer by trade, who absconded from this city, on the 11th instant, without paying any of his numerous debts, and swindling me out of fifty-five dollars, which I had advanced him, on his promise to do a certain piece of work. Said Finn was formerly from Baltimore; and is said to have left that place in a similar manner. It is not for the small amount of money, out of which he has swindled me, that I now publicly advertise him, but to put others on their guard against his villany.

JAMES H. OBAUGH."

The declaration charged the plaintiff in error with having falsely,

wickedly, and maliciously published, and caused to be published, the libel, of and concerning the defendant, and his conduct in his trade and business, as plasterer; respecting his employment and hiring, by the defendant, without showing any special damages resulting from the libel.

The plaintiff in error pleaded the general issue, and the truth of the matter contained in the publication. To the former, the defendant joined issue, and replied to the latter, denying the truth of the matters so published, to which the plaintiff joined issue; and a jury was sworn to try the issue joined. On the trial, Finn proved the publication of the notice, as alleged, by the order of Obaugh; and then proved that he was a plasterer by trade, had served an apprenticeship at the plastering business, and followed it ever since he left school, and still follows it in the county of Pulaski and city of Little Rock; and rested his case. Obaugh thereupon presented a demurrer to the evidence, which was admitted, and the defendant joined therein. Whereupon, Obaugh, before the argument of the demurrer, moved the Court to discharge the jury; but the Court overruled his motion, and he excepted. The demurrer was then argued and overruled by the Court, and the opinion of the Court again excepted to. But no judgment was entered of record by the Court, upon the demurrer. While the case was in this situation, and during the trial, Obaugh offered to introduce testimony to the jury originally sworn in the case, and which had not been discharged, as upon an inquiry of damages consequent upon the overruling of his demurrer to the evidence; but the Court refused him leave to offer any evidence whatever, and he again excepted. And, after the case was argued by counsel, as to the inquiry of damages, and before the jury retired from the bar, he moved the Court to instruct the jury, that no recovery could be had, unless the jury were satisfied that the injury resulted to the plaintiff in his occupation or trade of plasterer; which instruction the Court refused to give, and he excepted. The jury returned into Court their verdict, finding Obaugh guilty, and that he committed the wrongs, &c., of his own wrong, and not for the causes by him pleaded, and assessing the plaintiff's damages to the sum of two hundred dollars,

upon which the Court gave final judgment for the damages so assessed, with all costs; and Obaugh sued his writ of error.

Trapnall & Cocke, and *Ashley & Watkins*, for the plaintiff.

The statutes of this State contain no provision in relation to demurrers to evidence. For the proceedings, and practice under them, we are indebted to the common law.

The object and effect of a demurrer to evidence, are to take from the jury, and refer to the Court, the application of the law to the testimony. 1 *Starkie*, 434-5. *Stephens' Pl.* 122. *Story's Pl.* 364, *and note*. There are only two modes of proceeding: one, to discharge the jury, and, if judgment upon the demurrer is given for the plaintiff, to issue a writ of inquiry, for the assessment of damages; and the other, to instruct the jury to render a verdict, conditionally, and subject to the judgment of the Court upon the demurrer. 6 *Comyn*, 209; *Cro. Car.* 143; *Cort vs. Birkbeck*, *Douglass*, 222; *Scolastica's case*, *Plowden*, 410; *Archbold's Practice*, *vol.* 1, 185; *Tidd*, 2*d vol.* 914; *Gibson vs. Hunter*, 2 *Hen. Blackstone*, 187.

If the jury render a conditional verdict, the proceedings of the trial and verdict are entered on the record, and, afterwards, the questions of law arising on the facts as found, are argued before the Court, and determined, and a final judgment rendered. *Stephen Pl.* 123.

If the jury are dismissed, and judgment upon the demurrer is given for the plaintiff, it is interlocutory; upon which the writ of inquiry issues, if the damages are unliquidated; otherwise, the judgment of the Court is final.

These are the only modes of proceeding known to the common law; and the same practice is followed in New-York, Virginia, Kentucky, Maryland, and in the Circuit Courts of the United States.

The Circuit Court has no right to change the mode of proceeding; that right, by statute, belongs exclusively to the Supreme Court; and, conceding that it has the power, by law, to do so, it certainly has no authority to make such a change as will not only vary the *modus operandi*, but essentially alter the nature, and, to some extent, defeat the object, of the proceeding.

The Court erred in refusing to dismiss the jury, on the motion of the defendant, after issue was joined upon the demurrer. *White vs. Fox*, 1 *Bibb*, 374.

The Court erred in failing to render judgment for the plaintiff, upon the demurrer.

By demurring, the defendant makes a final submission of the case, and says that he will proceed no further; the progress of the case is arrested, until the demurrer is disposed of, and, upon its decision, hangs the determination of the cause. If sustained, a final judgment is rendered for the defendant; if overruled, a judgment is rendered for the plaintiff, which is final as to his right of recovery. The judgment of the Court is, that the evidence is sufficient to sustain the allegations in the plaintiff's declaration; and that the demurrer be overruled; and that the plaintiff have and recover of the defendant all the damages by him sustained, by reason of the premises in the declaration contained; but, because these damages are unknown, that a jury come, &c. &c.

Without a judgment, there is no ultimate action on the demurrer; and it must stand undetermined, or be disregarded altogether.

If the Court are bound by law to render judgment on the demurrer, and that judgment should be as before stated, all that remains to be done, is to ascertain the extent of the recovery, by an inquiry of damages; and this assessment cannot be made by the original jury, but must be done by a jury brought up upon the writ of inquiry; and, therefore, we contend that it was erroneous in the Court, to permit the original jury to assess the damages, without a writ of inquiry having issued.

And having, without judgment upon the demurrer or instruction, submitted the whole case on the part of the plaintiff, we contend that it was inconsistent and unjust, to reject the evidence of the defendant, and exclude it from the consideration of the jury.

Pike, contra.

When a party wishes to withdraw from the jury the consideration of the law, and its application to the fact, he may demur to the evidence. 1 *Saund. Pl. & Ev.* 495. 1 *Phil. Ev.* 297. *Gibson vs. Hunter*, 2 *H. Bla.* 206.

By this proceeding, the issue in fact closed to the jury, is exchanged for an issue in law; and, on the determination of the latter issue, either way, judgment follows, as it would have done on a verdict found for the same party, on the issue in fact. *Gould*, 479. 1 *Swift's Dig.* 771. 1 *Arch. Prac.* 174, 185, 186.

A demurrer to evidence is analogous to a demurrer to pleading; the party, from it, comes and declares that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue. *Stephen*, 90.

A demurrer to evidence admits, not only those facts of which positive proof is made, but also those inferences and conclusions which are, by fair presumption, deducible from the facts so proved. 1 *Saund. Pl. & Ev.* 495. The party demurring must distinctly admit, upon the record, *every fact* and *every conclusion* in favor of the opposite party, which the evidence conduces to prove: in other words, every fact which the party *might* have inferred from it, in his favor. *Gould*, 487.

And when the parol evidence is certain and direct, the adverse party may demur, by entering the evidence on the record, and admitting it to be true. Where the evidence is circumstantial, and from the facts given in evidence, other facts, on which the plaintiff's right of action depends, are to be inferred, not by legal inference or presumption of law, but by reasoning or deduction, the *principal* facts or conclusions must be expressly admitted, or the Court cannot decide on the demurrer. Thus, where a number of facts and circumstances have been given in evidence, for the purpose of raising the presumption, and deducing the conclusion, that the defendant knew the payee of a note to be fictitious, and then urging, as matter of law, that, by reason of this knowledge, the defendant was bound by his acceptance, it is not enough to set out in the demurrer, and admit to be true, the facts and circumstances proved, but the fact of the *knowledge*, which the jury might reasonably infer, must be distinctly admitted. *Gould*, 488. *Gibson vs. Hunter*, 2 *H. Bla.* 187. *Cocksedge vs. Fanshaw*, *Doug.* 129. *Dickey vs. Adm. of Putnam*, 3 *Serg. & R.* 416. *Mans vs. Montgomery*, 11 *Serg. & R.* 328.

If the evidence offered is loose and indeterminate, the party de-

murring must state it on the record as *certain* and *determinate*, and admit it in that form to be *true*. As, if a witness states a fact to the best of his belief, or according to his impression, the demurrer must state the fact as certain, and absolutely true. *Feay vs. Decamp.*, 15 *Serg. & R.* 227. *Duerhagen vs. U. S. Ins. Co.* 2 *Serg. & R.* 187. *Ross vs. Eason*, 4 *Yeates*, 54. *Eastland vs. Caldwell*, 2 *Bibb*, 26. *Morrison vs. Berkey*, 7 *Serg. & R.* 245. *Thornton vs. Bank of Washington*, 3 *Pet.* 40, 42. *Chinoweth vs. Haskell*, 3 *Pet.* 96. *Hart vs. Calloway*, *ib.* 460.

A demurrer to evidence cannot come in after the demurrant has introduced testimony. *Hart vs. Caldwell*, *ub. sup.*

There are, commonly, three stages in the process under which facts are ascertained: First, the judge is called on to decide whether the evidence offered conduces to prove the fact to be ascertained: that is, whether it is or is not relevant. In deciding these questions, the Court gives no judgment as to the *weight* of the testimony. If it *conduces* to prove or disprove any fact in issue, or material to the issue, if the jury may legitimately infer any thing favorable to either party, the judge decides it to be relevant. To this opinion, a bill of exceptions lies.

In the second stage, the admissibility of the evidence being established, the question of *weight*, that is, *how far* it conduces to prove the fact to be ascertained, is not for the judge to decide, but for the jury, exclusively.

In the third stage, the judge declares to the jury what is the law upon the particular state of facts, in case they ascertain those facts; and the jury there compound their verdict of the law and fact so combined; or, as in case of a special verdict, the jury first ascertain the facts, and then the Court decides whether the facts, thus ascertained, maintain the issue.

Now, when the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he demurs to the evidence. In this case, he puts himself in exactly the same position as though the jury had already returned a special verdict, and found every fact which they might find or infer from the evidence adduced. *Jacob vs. U. States*, 1 *Breck.* 527.

Consequently, the demurrant, being in the same situation as though the jury *had* found all that they *might* find, without deciding grossly against evidence, can raise no question on the demurrer, as to the *weight* of evidence. Whether the testimony is relevant—that is, whether it *conduces, in any degree,* to sustain the issue, is the only point of which the Court can judge on the demurrer; and if the testimony clearly conduces, *in any degree,* to prove the whole affirmative side of the issue, the demurrer must be overruled. *Gould,* 480. *Gibson vs. Hunter,* 2 *H. Bla.* 205. *Fowle vs. Com. Council of Alexandria,* 11 *Wheaton,* 320. *McKinley vs. McGregor,* 3 *Whart.* 369.

When the Court decides the demurrer either way, all the questions in the case are finally determined, except as to the amount of damages. No further evidence can be afterwards introduced.

How the damages are to be assessed, is a question merely of practice, as to which there was no positive rule in England. They were sometimes assessed provisionally, by the principal jury, before they were discharged, and before the demurrer was decided; and sometimes they were discharged on the filing of the demurrer, and the damages assessed by another jury, on a writ of inquiry. *Saunders,* in his treatise on *Pl. & Ev.,* says, that the latter was the most usual course. 1 *Saund.* 496. *Buller's N. P.* 313. *Tidd,* 916. In *Scholastica's case, Plowd.* 410, the damages were assessed conditionally. In *Cort vs. Birkbeck, Doug.* 222; *Darrale vs. Newbott, Cro. Car.* 143, on a writ of inquiry, upon the authority of "*Old Book of Entries, fol.* 551, *Trespass in Arson,* 1." That either method might be adopted, see *Arch. Pr.* 175. *Gould,* 491. *Stephen,* 90.

In Connecticut, the practice has been for the Court to assess the damages when the judgment on the demurrer was given for the plaintiff. 1 *Swift's Dig.* 771. In Virginia, it has been held no error, that the jury gave an unconditional verdict before the demurrer was determined. *Bigger's Adm. vs. Alderson,* 1 *Hen. & Mun.* 54.

Unquestionably, the Circuit Court has the power to frame its own rules of practice, keeping within the limits of positive enactment, and not running contrary to them.

Moreover, decisions on matters of practice cannot be assigned for error. Amendments and matters of practice are things of discretion;

and it has been often held, that they cannot be noticed in a court of errors, though brought up on certiorari. *Hart vs. Seixas*, 21 *Wend.* 40.

The proper object of a writ of error is, to remove the final judgment, with its premises, which are, the pleadings between the parties; the proper continuance of the suit and process; the finding of the jury upon an issue of fact, if any such has been joined; and, lastly, the judgment of the inferior court. These, the parties below have a right *ex debito justitiæ* to have upon the record.

The practice of the Courts below is a matter which belongs, by law, to the exclusive jurisdiction of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to, or revision by, a superior court. *Mellish vs. Richardson*, 9 *Bing.* 125. *Ex parte Bacon & Lyon*, 6 *Cowen*, 392. *Ex parte Benson*, 7 *Cowen*, 362. *Davis vs. Braden*, 10 *Peters*, 286. *Rowley vs. Van Benthuysen*, 16 *Wend.* 377. *The People vs. Superior Court of New-York*, 5 *Wend.* 125. *Ex parte Morgan*, 2 *Chitty R.* 250.

The general distinction of law, as to the necessity of showing special damage, is, that where the natural consequence of the words is a damage, as if they import a charge of having been guilty of a crime, or having a contagious distemper; or, if they are prejudicial to a person in office, or to a person of a profession or trade, they are actionable; as where the imputation affects the person in his office, profession, or business, and where the slander is propagated by printing, writing, or signs. *Stark. on Slander*, 12. And see 6 *Bac. Abr.* 205. 2 *Dallas R.* 60.

The general rule is sufficiently simple and unembarrassed, to wit: that words are actionable that directly tend to the prejudice of any one in his office, profession, trade, or business; and they are actionable, whether the office be merely confidential and honorary, or productive of emolument. *Stark.* 100.

So any words tending to injure a merchant or *tradesman*, are actionable, whether they reflect upon the *honesty* of his dealings, his credit, or the excellence of the subject matter in which he deals. And the action extends to words spoken of a person *in any lawful em-*

ployment by which he may gain his livelihood. *Stark.* 108. 1 *Vent.* 275.

The humility of the employment or occupation is no objection to the action, either in law or reason; and the action will lie for malicious misrepresentations of the characters of menial servants. *Stark.* 109. *Seaman vs. Bigg*, *Cro. Car.* 480. *Terry vs. Hooper*, 1 *Lev.* 115.

The question in all such cases is, do the words, *in any degree*, prejudice the party in his employment. If they do, they are actionable. The question of damages is a question for the jury. *Stark.* 110. The words, in such cases, are actionable, if they relate to the plaintiff's *integrity*, *knowledge*, *skill*, *diligence*, *credit*, or the subject matter in which he deals. *ib.*

Where the words are spoken of a merchant, they must be spoken with direct reference to his trade. It is actionable to call a tradesman a rogue or cheat, in reference to his trade. *Stark*, 113. *Burr*, 1,688.

But words implying a want of credit are actionable, whether spoken in direct reference to the trade or business or not; and are actionable when applied to a person carrying on a business purely mechanical. *Squire vs. Johns*, *Cro. Jac.* 585. And any words which, in common acceptation, imply want of credit, are sufficient. *Davis vs. Lewis*, 7 *T. R.* 17. *Sebly vs. Carrier*, *Cro. Jac.* 345. *Morris vs. Langsdale*, 2 *Bos. & Pul.* 84. *Lewis vs. Hawley*, 2 *Day*, 495. *Hall vs. Smith*, 1 *M. & S.* 287. *Chapman vs. Lamphire*, 3 *Mod.* 155. *Dobson vs. Thorstone*, 3 *Mod.* 112. 3 *Salk.* 326. *Holt on Libel*, 217, 218, 219.

This is equally the law in the United States. *Ostrom vs. Colkins*, 5 *Wend.* 263. *Tobias vs. Harland*, 4 *Wend.* 537. *Sewall vs. Catlin*, 3 *Wend.* 291. *Mott vs. Comstock*, 7 *Cowen*, 654. *Demorest vs. Haring*, 6 *Cowen*, 76. *Burtch vs. Nicholson*, 17 *J. R.* 217.

We do not intend to discuss the whole doctrine as to libel. The difference between the two has been constantly and uniformly declared with approbation in England and America. For this distinction, and the reasons, see *Holt*, 221, 222, 223. *Stark.* 126, 127, 128, 129, 130, and onward, and the thousand authorities quoted. *Skinn.* 123. 2 *Wils.* 204. 12 *Co.* 35. 2 *Brownl.* 151. *Hard.* 470. 2 *Show.* 314. 3 *Salk.* 226. 2 *Wils.* 403. 1 *T. R.* 748. 6

T. R. 162. 1 *Bos. & Pul.* 331. 19 *J. R.* 367. 5 *Binn.* 340. 5 *Binn.* 218.

The rule is now unalterably settled, that any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage: in short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse. *Stark.* 140.

Every thing written of another, which holds him up to scorn and ridicule, that might reasonably be considered as provoking him to a breach of the peace, is a libel; and all such written abuse as may be fairly intended to impair him in the enjoyment of society, or to throw a contempt on him which might affect his general fortune and comfort. *Holt*, 223, 224.

Scandalous matter is not necessary to make a libel. If an ill opinion is induced to be had of the person libelled, or the writing tends to make him contemptible or ridiculous, an action lies. *Cross vs. Tilney*, 3 *Salk.* 226. *Skinner*, 124. *Zenobio vs. Axtell*, 6 *T. R.* 162. *Bell vs. Stone*, 1 *Bos. & Pul.* 331. *Janson vs. Stuart*, 1 *T. R.* 748. *Villars vs. Mousley*, 2 *Wils.* 403. *Lyle vs. Clason*, 1 *Caine's R.* 581. *Austin vs. Culpepper*, 2 *Show.* 313. *Holt on Libel*, 229 *n.* *Thornley vs. Lord Kerry*, 4 *Taunt.* 355. *Genet vs. Mitchell*, 7 *J. R.* 120. *McCorkle vs. Binns*, 5 *Binn.* 340. *Steele vs. Southwick*, 9 *J. R.* 214. *Coleman vs. Southwick*, 9 *J. R.* 45. *Southwick vs. Stevens*, 10 *J. R.* 443. *King vs. Root*, 4 *Wend.* 136. *Hillhouse vs. Dunning*, 6 *Conn. R.* 391. *The State vs. Avery*, 7 *Conn. R.* 268.

Hempstead & Johnson, in response.

The Court manifestly erred in refusing evidence to be adduced in mitigation of damages.

On a demurrer to evidence, where it is manifest the merits of the cause have not been tried, this Court is not compelled to render final judgment, but may, in its discretion, remand the cause, that a

venire facias de novo may issue. *Gazzam, Heard, and Wragg vs. The Bank of Mobile*, 1 *Ala. Rep., new series*, 268.

When a judgment, rendered on demurrer to evidence, special verdict, or case agreed, is reversed, the proper practice is to remand, in order that the primary tribunal may, in the exercise of its discretion, award a new trial, or place the parties in such a condition as will advance the justice of the case. *Edmonds vs. Edmonds, ib.* 401.

The office of a demurrer to evidence is, to withdraw from the jury the consideration of the facts offered in evidence to maintain the issue which the jury were impanneled to try, and to offer them to the Court. It is, in effect, the substitution of the Court for the jury. *Curry vs. the Bank of Mobile*, 8 *Porter*, 360.

In case of a demurrer to evidence, it seems to be the most correct practice, on account of its despatch, to direct the jury to assess the damages at the time the demurrer is taken, to be imposed in the event the demurrer is overruled. *A new jury, however, may be impanneled to assess the damages;* and either mode is legal. 7 *Porter*, 420.

Evidence spread on the record, in a case in which a demurrer is offered to evidence, cannot be allowed to go to a second jury impanneled to assess damages, after the demurrer to evidence is overruled. *ib.* 420.

[Mr. Hempstead also argued, at considerable length and with great research, that the question as to the distinction between verbal and written slander, was, in this State, an open question; and that, in reason and justice, no such distinction ought to be sustained.]

By the Court, Ringo, C. J.

Several questions are presented by the record and assignment of errors; one of which is, that the Court erred in overruling the demurrer to evidence. The argument in support of this objection rests upon the assumption, that the publication charged in the declaration is not in itself libellous, and will not support an action at law, unless special damages be alleged and proved. And a great number of adjudged cases have been cited to show that the language contained

in the publication, if uttered verbally, would not, in law, be deemed slanderous, or support an action; and we are urged to disregard the well-known distinctions between libels and slander, and to hold, that no action can be maintained for the publication of language which, if only verbally spoken, would not support an action. We have carefully examined the cases cited, and, upon deliberate consideration, come to the conclusion, that the law, in this respect, is too well established to be now questioned or departed from. The distinction has been uniformly maintained for ages, in the courts of England, and has been recognized in most, if not all, of the United States. And language, though not actionable, if merely spoken, has, in many cases, been adjudged libellous, when written and published. And the rule appears to be well established, that any words, written and published, throwing contumely on the party, or prejudicing him in his employment, are actionable.

That the language used in the publication, upon which this action is founded, is such as to bring the individual, of whom it was published, into contempt, ridicule, and disgrace, and injure him in his employment or trade, there can, in our opinion, be no doubt. It is, therefore, within the rule above stated, and is actionable, without any allegation of special damages arising therefrom. The testimony proved the publication, by the order of Obaugh, as stated in the declaration, and that Finn was a plasterer by trade, doing business as such, in the city of Little Rock and county of Pulaski. The demurrer admitted the truth of these facts, and they were unquestionably sufficient in law to maintain the action. And, therefore, there was no error in the judgment of the Court overruling said demurrer.

But it is insisted, that the Court erred in refusing to discharge the jury, on the motion of the plaintiff in error, upon his demurrer to the evidence being filed and received by the Court, and in retaining it until the demurrer was adjudicated and disposed of by the Court, and then suffering them to pass upon or try the issue joined, notwithstanding his interposition of the demurrer to the evidence.

The authorities cited in the briefs, clearly show, that the object and effect of a demurrer to evidence are, to take from the jury, and refer to the Court, the application of the law to the testimony; and,

where the testimony is, upon such demurrer, adjudged insufficient in law to maintain the action, it is equally certain, that a final judgment must be pronounced thereupon in favor of the defendant; and the like judgment must be given for the plaintiff, if the demurrer be overruled, in all cases where the subject-matter of the controversy is such as not to require the intervention of a jury, for the purpose of ascertaining or assessing unliquidated damages. These rules appear to be well settled, and are not questioned by either party in this case.

It is also admitted, that the usual course of proceeding, upon a demurrer to the evidence being filed, is either to take a verdict for the plaintiff, conditionally, and then discharge the jury; or, to discharge the jury before any verdict is rendered, and then dispose of the demurrer; and if, in the latter case, the demurrer should be decided in favor of the plaintiff, and the damages to which he is entitled be unliquidated, a writ of inquiry is awarded, and another jury impanneled thereupon, to inquire of and assess them. And the latter course of proceeding, upon a reference to the books and cases cited in the briefs, appears to be the most usual; but it is said that either would be regular; and cases are cited, by the defendant in error, to prove that, in some of the American States, a course of proceeding, different from either, has been indulged, and such departure therefrom held to be no error. Besides, he insists that it is a mere matter of practice, which may be modified or changed by the Circuit Court at will, and so be regulated according to its sense of propriety or convenience. This argument is plausible; and we have experienced some difficulty in coming to a satisfactory conclusion upon the question. Our deliberations, however, have resulted in the opinion, that, notwithstanding it is in some respects a matter of practice, yet, it is a practice so interwoven with the law, that it can neither be disregarded nor changed at the discretion of the Court. Nor do we consider it any more a matter of mere practice than the filing of the demurrer itself; which the Court, under some circumstances, in the exercise of a sound legal discretion, may certainly refuse to receive; yet, when the testimony is in every respect certain, or in writing, the defendant would, as we apprehend, have a legal right to demur, if he desired to withdraw it from the consideration of the jury. And, in such case, the Court, in

the exercise of any discretion with which it is vested, would not be justified in refusing to receive it, or compel the plaintiff to join therein.

It may be regarded as in many respects similar to the right of filing or amending the pleadings in a cause, the admission or rejection of which anciently depended upon the practice of the courts, and was regulated by nothing but their discretion. But many of the rules of practice, so established, have long since become incorporated with the common law, so as to constitute a part thereof—thus forming not merely rules of practice, but constituting principles of law, binding upon the courts as well as the parties, and establishing legal remedies, prescribing their form and order, as well as the manner of conducting them. Take the order of pleading as an illustration; and inquire by what authority the courts, wherever the common law has been adopted, refuse to receive or regard pleas to the jurisdiction of the Court, or in abatement of the suit, after a plea in bar of the action has been filed. The answer, we apprehend, must be, that the law forbids such defence, after a defence has been interposed in bar of the action; yet, the order of pleading was originally nothing but the practice adopted by the courts themselves, for convenience and the better administration of justice, which, in the course of time, became parcel of the common law. And, therefore, a party failing to observe the order so established, often loses the advantage of a defence, of which he could have availed himself, if he had interposed it at a proper time and in legal form; and so it has been uniformly ruled by this Court. And cases may be found, where judgments have been set aside, because the established order of pleading had not been observed; the judgment having been given upon some defence, which, according to that order, had been waived, or superseded by the interposition of some defence posterior to it in the legal order of pleading. Yet, this could not be, if the order of pleading depended upon the simple discretion or mere practice of the Court, as contradistinguished from the rules of practice and order of proceeding prescribed by law. Such, also, is the character of the rule which prescribes the order of proceeding upon the filing of a demurrer to evidence; it is a rule of practice established by law, which the Court and parties are bound to observe. In the present case, the rules of proceeding established in such case,

have been entirely departed from, and a course of proceeding, wholly unauthorized by any rule or precedent, has been adopted, with the sanction of the Circuit Court, without the assent of the plaintiff in error, and in derogation of his legal rights; and, therefore, there is error in the proceeding and judgment against him, of which he may well complain, although it is impossible to know what would have been the result, if the proceeding had been conducted according to law. He had a legal right to require that it should be so conducted; or, in other words, he was entitled to a legal trial, which was refused him by the Court.

And, therefore, it is unnecessary to determine such other questions as are presented by the record and assignment of errors, as they will probably never arise upon another trial of the case.

Judgment reversed.

Beebe et al. *vs.* The Real Estate Bank.

Under our statute, profert is necessary of a promissory note, as well as of a bond, and its omission is ground of general demurrer.

The Real Estate Bank, in suits upon notes executed to it, is entitled to recover interest at the rate of ten per centum per annum, from maturity, by way of damages.

Debt, tried in Pulaski Circuit Court, in March, 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. The Real Estate Bank sued Roswell Beebe and others, on a note executed by them, and made no *profert* of the note. The defendants demurred, for want of profert, and the demurrer being overruled, judgment went for the debt, and interest at ten per centum per annum, from the maturity of the note until it should be paid. The defendants sued their writ of error.

Ashley & Watkins, for the plaintiffs.

By the Revised Statutes, page 627, sec. 60, 61, all demurrers are required to be special. The omission of profert was cause of general

demurrer, at common law, and, consequently, is so now, in this State, by virtue of the adoption of the common law and statutes of England, prior to 4th James I. *Dr. Lyfield's case*, 10 *Coke*. 5 *Com. Dig.*, *title* "*Pleader*," 10, 171. *Rev. St. Ark.* 182.

At common law, profert of a promissory note was not necessary, but this rule is changed by the statutes of this State; which place promissory notes on the same footing and equal dignity with instruments under seal. *Rev. St. Ark. p.* 633, *secs.* 102, 103, 104. And see *sec.* 65, *title* "*Practice at Law*," *Rev. St. Ark.*

By the act of the 3d March, 1838, the right to recover ten per cent. interest dates from the protest of the note, on suit being brought. The note, in this case, does not appear to have been protested.

Section 6, of the same act, as printed and certified by the Secretary of State, only extends the provision of the "preceding *section*," which relates to the liability of endorsers to the Real Estate Bank, and does not include the previous *sections*, which authorize the State Bank to charge such interest. See, also, *Rev. St. Ark. title* "*Interest*," *sec.* 5; and the decision of this Court, at this term, in the case of *McFarland et al. vs. The State Bank.*

Pike, contra.

Profert, at common law, was only necessary of *deeds*. It was not necessary of any written agreement or instrument not under seal, nor of any instrument which, though under seal, did not fall within the technical definition of a *deed;* as, for example, a sealed will or award. *Stephen*, 436. 2 *Saund. Pl. & Ev.* 739. *Com. Dig. Pleader*, 0, 3. *Aylesbusy vs. Harvey*, 3 *Lev.* 205. 2 *Saund.* 62, *b. n.* (5.) *Stephen*, 69.

Profert was, originally, a mode of offering a particular kind of proof. All affirmative kind of pleadings were, formerly, required to be supported by an offer of some mode of proof; as, by a jury, by the record, or by a deed; and, where the proof was to be made by merely exhibiting the deed to the Court, in which case no jury was intervened, there was, at the conclusion of the declaration, a profert *in curiam* of the deed. When questions concerning the genuineness or validity of a deed came to be submitted to a jury, profert became unnecessary. *Stephen*, 439, *app. n.* 80.

Profert of a note never was necessary, and the defendant could always obtain an order for the inspection of any instrument of which no profert was required to be made. *Stephen*, 440. See, also, 8 *T. R.* 573. *Gray vs. Fielder*, *Cro. Car.* 209.

It is a mistake to suppose that, before the statute of 4 *and* 5 *Anne, chap.* 16, the omission of profert, when necessary, was fully settled to be matter of substance. It was sometimes held to be matter of form, and sometimes matter of substance.

The statute has done nothing more than to change the character of notes as instruments of evidence. The execution of a note cannot be denied, except by plea, under oath; nor can the execution of a bill of exchange; but a note may, and a bill must, be sued on, in assumpsit.

The statute has made no change in the common law as to profert. Section 65, of the chapter on practice at law, provides, that "an action at law may be maintained on any instrument of writing, whether under seal or not, notwithstanding it may be lost or destroyed; and, in every such action, no profert of such instrument shall be required, but the party shall allege the loss or destruction as an excuse for the want of profert; and every such allegation shall be considered a material averment in the cause."

Certain rules of construction may be profitably applied to this section.

The rules by which the sages of the law, according to Plowden, (*Plowd. Rep.* 205), have ever been guided, in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation, of ages. The resolutions of the barons of the exchequer, in *Heyden's case*, 3 *Co.* 7, were the following:

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the common law, four things are to be discerned and considered:

"1. What was the common law before the making of the act?

"2. What was the mischief and defect against which the common law did not provide?

"3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

"And, 4th, by the true reason of the remedy."

It was doubtful, at common law, whether a party could sue at all, at law, on a lost bond. Profert of a deed was, generally, held indispensable; of an unsealed instrument, it was never necessary. Later cases, in England, have settled, that the loss or destruction of a deed might be alleged as an excuse for profert. *Read vs. Brookman*, 3 *T. R.* 151. *Thoresby vs. Sparrow*, 2 *Str.* 1186. *S. C.* 1 *Wils.* 16. *Ex parte Greenway*, 6 *Ves.* 812. *E. Lud. Co. vs. Boddam*, 9 *Ves.* 466. *Smith et al. vs. Woodward*, 4 *T. R.* 586.

The mischief and defect, then, was the doubt whether, on a lost deed or bond, an action at law could be maintained. The remedy appointed to cure this "disease of the commonwealth," was a section adopting the principle of these later decisions:

"To know what the common law was before the making of a statute, whereby it may be seen whether the statute be introductory of a new law, or only affirmative of the common law, is the very lock and key to set open the windows of the statute." 2 *Suet.* 301. 3 *Co.* 13. *Hob.* 83.

Statutes are to be construed with reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers, that the act did *not* intend to make any alteration *other* than what is specified, and *besides* what has been plainly pronounced; for if the Parliament had had that design, it is naturally said they would have expressed it. *Dwarris*, 695.

Section 6 of the act of March 3d, 1838, is misprinted. The word *section* should be *sections*. See *original rolls*.

By the Court, Dickinson, J.

At common law, a party never was required to make profert of a promissory note: the reason was, that it did not constitute the foundation of the action. It was only evidence of the debt, and its execution was required to be proved upon the trial. Profert was given upon sealed instruments, because they constituted the gist of the action, and it was required to enable the defendant to plead knowingly. Oyer was granted upon profert being made; and, upon the making of profert,

the party could then plead a special or general plea of *non est factum*, or set up any other defence which might defeat the cause of action. It was the grade of evidence that determined the character of the pleadings. A sealed instrument proved itself. Its execution might be denied, but its consideration could not be impeached. Under our statute, the consideration of sealed and unsealed instruments may both be inquired into, and therefore there is a perfect equality in their grade of evidence. The production of each proves itself, and the consideration for which it was given. This consideration, in both instruments, is liable to be impeached in the same way, but he who impeaches them must do it by plea, supported by affidavit.

It certainly cannot be pretended, that it is not necessary to make profert of a sealed instrument under our statute. Promissory notes carry with them the same evidence of indebtedness that sealed instruments do; and the consideration of both being disproved in the same way, then it necessarily follows, that promissory notes, as well as sealed instruments, under our statute, should be made profert of. This view of the case is strengthened by the words of the act itself, (*Rev. St., chap.* 116, *sec.* 65), which declares that, when any such instrument is lost or destroyed, an allegation to that effect shall excuse the *want of profert*. This positive provision, making profert unnecessary under such circumstances, certainly implies that, in all other cases, except where the instrument is lost or destroyed, profert should be alleged of promissory notes as well as of sealed instruments.

The second point presents no difficulty. The language of the act is clear and distinct, allowing ten per cent. interest per annum, after the note, bond, or bill, comes to maturity. Interest is given by way of damages, to compensate for the failure of the debtor to pay at maturity. Having failed, of course he is liable, at the rate as charged in the judgment.

Judgment reversed.

WILLIAMS *vs.* BRUMMEL.

Reading a notice to take depositions, is not a sufficient service, under a statute requiring *notice in writing* to be served on the party. A *copy* must be delivered.

Parol evidence cannot be admitted to establish the contents of notes, which are not produced, or their absence accounted for; especially when the notes have been prosecuted to judgment in another State, and a judicial record of that fact exists.

A judicial record can only be proven by itself, or a duly certified copy from the rolls.

A. B. and C. D., being in partnership, executed their notes to a third person for goods furnished the firm, and E. F. became their security on the notes. E. F., having been compelled to pay the notes, sued C. D. to recover the amount paid. A. B. is not a competent witness for E. F. in such suit, to establish the fact of the partnership, or the liability of C. D.

THIS was an action of assumpsit, instituted by *Josiah Brummel*, against *Daniel E. Williams*, and tried in the Hempstead Circuit Court, in October, A. D. 1841, before the Hon. WILLIAM CONWAY B., one of the Circuit Judges. The declaration contained several counts; but the liability was claimed to exist on account of the payment, by Brummel, of certain notes executed by one Parskill Motley and Williams, to Wm. Buckner, jr., on which Brummel was security, and which he had been compelled to pay, and of the payment, by him, of certain judgments on which he became liable in the same way. The defendant pleaded the general issue, and two pleas of payment by Motley, and filed his petition for discovery, alleging that Brummel had been paid and indemnified, by selling certain negroes, mortgaged to him by Motley, to secure him. Issues were made on these pleadings, and the petition answered.

On the trial, the plaintiff produced certain depositions, taken in Kentucky. The defendant objected to the reading, because he had received no sufficient notice of taking them. The plaintiff produced a notice, which had been served on the defendant, by reading; and the Court held it sufficient. To the decision the defendant excepted. The depositions were then offered. The defendant moved to strike out so much of each as spoke of the notes executed by Motley, Williams, and Brummel, of suits upon them, and of a certain replevin bond, sued on and paid by Brummel, insisting that they were matters which could not be proved by parol, but the original notes must be produced, or copies, or their absence accounted for; and that records could only be proved by copies authenticated. The Court struck

out a portion of each, and allowed the *residue* to be read. The defendant excepted. The deposition of Buckner, *as read*, was in the following words: "I sold a stock of goods, amounting to about $1827, to Daniel E. Williams and Parskill Motley, for which they executed to me three notes, for about $609 20 cents each; and Josiah Brummel entered as the security of said Motley and Williams, on each of the three notes aforesaid, all which three notes were by said Brummel paid to me and to my agent. Motley and Williams also executed another note to me, for two hundred dollars, on which I instituted suit, and the said Josiah Brummel became their security in a replevin bond for the same; and, on the 14th day of June, 1832, the said Brummel paid to me two hundred and twenty-three dollars and sixty-eight cents, being the full amount of said replevin bond. The principal, interest, and costs, in all the cases, were paid by said Brummel, who was security as aforesaid."

In this deposition, the Court below had struck out, after the words "$609 20 cents each," the words "payable in five, ten, and fifteen months from the date, and dated the 17th day of March, 1831. The note that fell due first, was credited by two hundred dollars;" and, after the words "replevin bond," the words "suits were brought upon all the notes above alluded to, in the Green Circuit Court of Kentucky."

The deposition of Parskill Motley, (which was objected to on the ground that he was interested and incompetent: objection overruled, and exception taken), *as read*, was in these words: "In the year 1831, in the month of March, Daniel E. Williams and myself entered into co-partnership. We purchased, about that time, a stock of goods of Wm. Buckner, jr., for which we executed our notes, payable in five, ten, and fifteen months, for the sum of $609 20 each, or thereabouts. We also executed another note to said Buckner, for two hundred dollars. We were sued on said $200 note, and it was replevied by Josiah Brummel, who has since paid the same, together with interest and costs. The three notes for $609 20 each, J. Brummel entered our security; and the said Josiah Brummel has paid the same to the said Buckner, together with interest, principal, and costs; making in the whole the sum of $1827 60, together with the interest and costs upon

four suits. To secure the said Josiah Brummel, I mortgaged to him seven negroes, six of which were sold for the sum of ten hundred and fifty dollars, and the other, making the seventh, is dead. This amount is all I have paid to the said Brummel, or know of his having been paid, either by myself or Daniel E. Williams, in discharge of the before-mentioned notes. When suit was brought against us for the before-mentioned debts, I gave up to said Brummel the negroes mortgaged to him. I was present when the most of them were sold, and they were sold at fair prices, at that time, and by my consent."

In this deposition, the Court had struck out, after the words "into co-partnership," the words, "and we handed over to Archibald C. Cox, of Greensburg, Ky., the articles drawn between us, for safe-keeping;" after the words "two hundred dollars," the words, "which was credited on the first note that fell due;" after the words "interest and cost," the words, "the said $200 note was given in part consideration of the goods we purchased of the said Buckner;" after the words "our security," the words, "and suit was brought on said note;" and, after the words "principal and costs," the words, "with the exception of the credit of the $200 entered on the first note, which amount he had also paid, as before stated."

The deposition of Archibald C. Cox was also read, which proved that Williams and Motley bought the goods of Buckner; that they handed him a paper purporting to be their articles of partnership; that Williams and Motley boxed up and took away the goods; that Brummel entered their security for the goods, and, after a time, paid the whole amount; but without stating the amount.

The plaintiff then read the defendant's petition for discovery, which stated that the only true cause of action against him was, that, on the 17th March, 1831, Motley and himself executed two notes, with Brummel as security, to Buckner, each of that date, each for $609 20, one due at five, the other at ten months, both alleged by Brummel to have been paid by him. That, when they were executed, Motley and himself had entered into partnership, in Greensburg, Kentucky, the terms of which partnership were, that Motley was to furnish the goods, and Williams to attend to the business; the profits and losses to be equally divided; that the goods in question were purchased by

Motley individually, and Williams only executed the notes as security; negroes were mortgaged by Motley, to Brummel, to secure him, and had been sold for a price sufficient to satisfy both notes and interest, and that Brummel attempted to appropriate the proceeds, to pay individual liabilities of Motley to himself.

The plaintiff then read a letter from Williams to him, in which he stated, that he supposed, from accounts, there was still an unsettled matter between them; that they had been unfortunate in business; that he bad been a good while of opinion that the Buckner debt was settled, as Motley had informed him that his negroes were mortgaged to Brummel to secure him, and finally to pay the debt. He requested Brummel to write, and let him know how the matter stood, and how he could be released from it; that he did not wish any one to suffer on his account; and inquired how he would like to own some good land on Red river.

The plaintiff's counsel then testified that, about two years before, he spoke to Williams about the claim; that he refused to pay it, and said he supposed the notes had been paid by mortgage on Motley's negroes.

Upon this evidence, the jury found for the plaintiff $1237 14 damages, and the defendant sued out a writ of error.

Pike & Baldwin, for the plaintiff.

By the statute concerning depositions, *Rev. St.*, 325, the party intending to take depositions, "shall cause notice in writing, of the time and place of taking such depositions, to be served on the adverse party, if he reside in the county in which the suit is pending, and if not, then on his attorney of record in the cause." If neither the party nor his attorney reside in the county, "the putting of such notice in the office of the clerk," is to be sufficient.

The notice must be a notice in writing. The officer must leave with the party a written notice, an original from the clerk, or at least a certified copy in writing thereof. *In no just sense can a notice by reading be deemed a notice by writing.* No instance can be produced, where a notice, required to be served and given in writing, has been

valid, unless the service has been by the delivery of the paper itself, or a copy in writing. *Hart vs. Gray*, 3 *Sumn.* 339.

The 21st and 22d sections of the chapter on "Practice at law," *Rev. St.*, 622, which provide that, whenever, in the commencement or progress of any suit, it shall be necessary to serve any notice on either party to such suit, it may be served in like manner as a writ of summons, cannot be brought in to sustain the decision below. It would be difficult to find one solitary general maxim as to the construction of statutes, which will warrant the decision below. *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei: Verba ita sunt intelligenda ut res magis valeat quam pereat:* that is, that one part of a statute must be so construed by another, as that the whole may, if possible, stand. *Ea est accipienda interpretatio quæ vitio caret.* Without relying on these maxims, there is a rule which applies directly to this question. It is expressed in the uncouth maxim: "*Generalis clausula non porrigitur ad ea, quæ specialiter sunt comprehensa;*" or in the more eloquent language of the digests of the civil law: "*In toto jure, generi per speciem derogatur; et illud potissimum habetur, quod ad speciem directum est.*" The meaning of which maxim is, that when the law descends to particulars, such more special provisions must be understood as exceptions to any general rules laid down to the contrary; and the general rules must not be alleged in confutation of the special provisions. More pithily, "A thing given in particular, shall not be told by general words." *Churchill vs. Crease*, 5 *Bing.* 180; *Dwains on Stat.* 765.

The Court permitted parol evidence to be given of the contents of notes, which were not produced, nor their absence accounted for; and of judicial records and judicial proceedings of a court in Kentucky, without any excuse rendered for the non-production of a transcript of that record. It is common learning, found in every law book, and matter of universal knowledge, that the best attainable evidence must be adduced. The law on this subject is reduced to certain axioms. No evidence of an inferior class can be substituted for that of a superior degree. The contents of a writing cannot be proved by a copy, still less by mere oral evidence, if the writing be in existence and attainable. 1 *Starkie*, 437; *Bullock vs. Korn*, *Cowen*, 30; as a letter.

Taunton Bank vs. Richardson, 5 *Pick.* 436; *Blade vs. Noland*, 12 *Wend.* 173.

That Motley was incompetent, there is no question. The rule is well settled, although there are some authorities to the contrary, that a person who is *prima facie* liable to the plaintiff for the debt in question, cannot testify with a view to throw even a part of the debt, *a fortiori* the whole of it, off himself and on to another. *Brown vs. Brown & Subb*, 4 *Taunt.* 752. *Ripley vs. Thompson*, 12 *Moore*, 55. *McBrain vs. Fortune*, 3 *Camp.* 317. *Marguand vs. Webb & Webb*, 16 *J. R.* 89. *Gregory vs. Dodge*, 14 *Wend.* 603. *Benedict vs. Hecox*, 18 *Wend.* 490. *Purviance vs. Dryden*, 3 *Serg. and R.* 402. *McVorough vs. Goods*, 1 *Dal.* 62; 2 *Dal.* 50.

A judgment will be reversed, if improper and illegal evidence was admitted, although there was other and sufficient evidence to the same point. *Osgood vs. Manhattan Co.*, 3 *Cowen* 612. *Anthoine & Marais vs. Coit*, 2 *Hall*, 40.

Trimble, contra.

A notice to take depositions is a notice "in the progress of the suit," and may be served in the same manner as *writs of summons*, which is "by reading it to the party, and in his presence and hearing." *Rev. St.*, *title Practice at Law*, *sec.* 13, 21, 22.

The rule requiring the best evidence, does not apply either, 1st, where no presumption of fraud arises from the substitution of secondary evidence; 2d, in case of admission; and, 3d, where a writing is produced as collateral evidence, and not as the foundation of the action. 1 *Stark. Ev.* 3*d Part*, *marg. pp.* 392, 393, 394, 395. 2 *Stark. Ev.* 4*th Part*, *marg. pp.* 99, 100, 101, 102. The sheriff's return upon an execution on judgment against several, is evidence to show upon which the levy was made. *ib.*

The acts of ministerial officers are merely *prima facie* evidence, and never conclusive, except between the same parties. The rule laid down in 1 *Stark. Ev.* 292, 293, 294, 295, applies in this case. In principle, the evidence of a record is no way different in such a case as this. 2 *Stark. Ev.*, *Part* 4, *pp.* 99, 100.

The judgment itself is the best evidence; and the existence, only,

of a note, bond, or even judgment, need be proved, as it shows merely the liability of the security, and is collateral evidence only, and not proof of a contract *inter partes*. If the money be made, by execution, out of the security, then strict legal proof of the judgment, and all proceedings under it, might be necessary; otherwise, the authority of the sheriff to collect and receive the money, would not appear. 3 *Stark. Ev., 4th Part, marg. pp.* 1357, 1358, 1359. 4 *Cow. Rep.* 80, 424. 7 *Serg. & R.* 369. 7 *Cow. Rep.* 310. As to the liability of the principals, or either of them, to refund or repay money paid by their security. *Peak's Ev., Amer. ed.* 390, 391, 392, *note* 1. *Ford vs. Keith*, 1 *Mass. R.* 139. *Showe et al. vs. Laud.*, 12 *Mass. R.* 447. *Bunce vs. Bunce, Kirkby's Rep.* 137. *Sluby vs. Champlin*, 4 *J. R.* 461. *Clason et al. vs. Morris*, 10 *J. R.* 525. *Miller et al. vs. Ord*, 2 *Bin. Rep.* 382. *Duncan et al. vs. Keiffer*, 3 *Bin. Rep.* 126. 1 *Col. Rep.* 443. *Murrell vs. Johnson, Hen. & Mun. Rep., Amer. ed.* 449.

Was Motley's interest such as to disqualify him from testifying in favor of the defendant in error? As to equipoise of interest, see 2 *Stark. Ev. 4th Part*, 751, 752. 2 *Mass. Rep.* 108. 1 *Bibb*, 298. *Ad. Rep.* 144. 2 *Serg. & R.* 119. 3 *Martin's Rep. N. S.* 166. Interest must be direct and certain, not contingent or doubtful. 2 *Stark. Ev., 4th Part, marg. pp.* 744, 745, 746, *note C.* 3 *T. R.* 33. *H. Bla.* 308. 1 *T. R.* 163. 2 *Esp. Ca.* 705. 3 *Stark. Ev., 4th Part, marg. pp.* 1357, 1358. 2 *Stark. Ev., 4th Part, marg. p.* 758, *note* 1. 14 *J. R.* 387. Where a witness is neutral, or stands indifferent between the parties, he is competent; much more so, when his interest is against the party calling him. If the defendant in error recovers, then the plaintiff would have recourse against the witness for contribution; he is therefore giving evidence against himself; or at least, his testimony relieves him of no responsibility.

An endorser is a competent witness in an action between the drawer and acceptor of a bill. See 1 *T. R.* 163. 2 *Esp. Ca.* 705. 3 *Stark. Ev., 4th Part, marg. p.* 1358. As to the competency of a witness, when his interest is against the party calling him to testify, 1 *J. R.* 159. *Trustees of Lansingbury vs. Willard*, 8 *J. R.* 334.

As to notice, and the service thereof at common law, *vide* 1 *Stark.*

Ev., marg. p. 359. 3 *Caine's Rep.* 174. 2 *J. R.* 136. 2 *Stark. Ev.* 976.

By the Court, DICKINSON, J.

The first question which arises is, whether the reading to a party the notice to take depositions, is a sufficient service under our statute regulating the practice in such cases. The act declares, that the party intending to take depositions shall cause notice, in writing, of the time and place of taking, to be served upon the adverse party, if he resides in the county in which the suit is pending; and, if not, then on his attorney of record in the cause. *Rev. St. sec.* 6, 325. It is contended that this section is regulated and restrained by the 21st and 22d sections of an act regulating the practice at law, (*Rev. St.* 622), which declares, that any notice, in the commencement or progress of a suit, may be served by any officer authorized to serve process, or by any other person who may be a competent witness upon the trial; and that the notice shall be served in like manner as writs of summons; and that, by the 13th section of the same act, writs of summons may be served by reading or delivering a copy thereof. By inspecting these several provisions, it will be perceived that they relate to different subjects, and that the two acts are not at all contradictory or inconsistent with each other. They are not *in pari materia*, and of course should not be taken together. The first act relates to notice being given to take depositions; the latter respects the regulation of notice of other orders, either in the commencement or progress of a suit. In such cases, the notice can be served by reading or giving a copy; and the general words of the act do not extend to the service of notice for the taking of depositions. The question, then, has to be determined upon the act itself, in regard to the service of notice. What is the true meaning of that act? Does the statute mean a notice by reading the same, or leaving a copy? It unquestionably must be a notice in writing. A notice in writing, according to the sense of the statute, surely means, that an officer, or some competent person, must leave with the party a written notice of the time and place of taking the depositions.

"In no instance," says Justice STORY, in *Hart vs. Gray*, 3 *Sumn.*

339, which is plainly similar to the one now before us, "can any case be produced where a notice, required to be served in writing, has been held valid, unless the service has been by the delivery of the paper itself, or a copy in writing." The reason of the rule is most obvious and just. The purpose of the notice is to apprize the adverse party of the time and place, so that he can attend, and cross-examine the witnesses, or make whatever other defence the law allows. To read a notice, instead of giving the original or leaving a copy, would be, in effect, to take away from him the advantages of a notice altogether. It would be substituting his frail and imperfect memory, as to time, and place, and names, instead of leaving him the written evidence of these facts. The reading would be of no avail, if that was sufficient: the officer certainly would not be bound to give the party an opportunity of copying it, or taking a memorandum of its contents. If there should be different times and places, it would be wholly impossible for a party to remember, with accuracy, these facts, which might be every way material for his defence. The Court, therefore, erred in receiving the depositions.

We might here close our inquiries; for, if the depositions were improperly admitted, there is no sufficient evidence left to warrant the recovery. We deem it proper, however, to remark, that the Court erred in admitting parol evidence to establish the contents of notes, which were not produced, nor their absence accounted for, on the trial. These notes had been prosecuted to judgment in the courts of Kentucky, and a judicial record existed of that fact. This Court has decided that a judicial record is incapable of being proved in any other way except by itself, or a regularly certified copy from the rolls. This principle is too plain and familiar to require further remark. There being no ground laid for the non-production of the notes, or that of the judicial records, of course it was error to permit any testimony to go, either in regard to the amounts or dates of the notes or judicial records, or any thing else connected with them.

There is another question still remaining to be decided.

Motley is shown to be the partner of Williams, the defendant in the action, at the time the debt was contracted for which the suit was brought. There is some conflict in regard to the competency of testi-

mony thus situated. The better opinion, however, seems to be, that the witness is incompetent. It is certainly true, that a contingent interest does not affect the competency of a witness. That principle, we apprehend, has no application in the present instance. If the party here is disqualified, it is upon the ground that he has an interest in the event of the suit, which, although it may never be asserted against him, nevertheless operates; and that he is, in fact, deposing in his own favor, and charging the whole debt upon his partner, when he is equally bound for his proportion. Were his interest equal, then his evidence would be admissible. He would, in truth, have no interest, for the law would consider him as standing indifferent with regard to the parties; but where his interest must vary with the verdict, the witness is exposed to a different responsibility. He ought not, then, to be permitted to give evidence for the party whose success would leave him with a diminished responsibility. It is no answer to this argument, that the witness may not be called to make contribution. He is under a legal liability to contribute; and the law supposes a party will claim what is legally and equitably due him. His competency can only be restored upon the ground of a release, or that he has a general or specific lien for an indemnity, which is certain and fully adequate to remunerate him, and which cannot be affected by the verdict. In *Connor vs. Kesee*, 5 *Serg. & R.* 371, the Court, after laying down the rule upon the subject, remark, that "where the verdict *may* create a new responsibility, in favor of or against the witness, or increase or decrease an existing one, he ought to be rejected." Such an interest is not deemed contingent. It is merely uncertain when it will become operative. In the case of *Buckland vs. Tankard*, 5 *T. R.* 578, the action was by the endorsee of a bill of exchange against the acceptor. The bill was drawn upon the defendant, and by him accepted to pay Grexon, or his order, and endorsed in blank. Grexon was called as a witness for the defendant, to prove that the plaintiff had no property in the bill, and that it was left with him to raise money from the defendant. He was objected to, as an interested witness; and Lord KENYON, *Chief Justice*, said: "The whole question turns upon this, whether the witness' situation would or would not be bettered by the event of the verdict;" and he decided that the

witness was properly rejected. This case goes, perhaps, further than any others in exclusion of a witness, upon the ground of interest, but we do not find that it has ever been overruled. In *Marquand vs. Webb*, 16 *J. R.*, SPENCER, *Justice*, who delivered the opinion of the Court, said, that "the witness called was undoubtedly interested to render the burden upon himself as light as possible, and to throw it on the defendant. The witness being, by his own confession, a part owner, would be answerable in contribution, and he would thereby mitigate his own loss."

The principle seems to be this, that wherever a fact is to be proved by a witness, and such fact be favorable to the party who calls him, and the witness would derive a certain advantage from establishing it in the way proposed, he cannot be heard. The rule here laid down, which will be found fully supported by all the authorities, especially in *Hudson vs. Robinson*, 4 *Maule & Selwyn*, 475, and in *Benedict vs. Hecox*, 18 *Wend.* 510, and the cases there cited, demonstrate that Motley was an incompetent witness. In the case now under consideration, he was called as a witness, to prove that Williams was his partner, which fact he establishes, and that both he and Williams were jointly liable to Brummel for money paid by him, as their security, upon certain notes, which were afterwards sued for and recovered by Buckner, and that Brummel paid them. The payment of these notes constitutes the foundation of Brummel's claim, and, upon them, Motley, as well as Williams, is liable, and he is called in favor of Brummel, to charge Williams with the whole debt. He is, therefore, evidently interested, being liable for the whole debt to Brummel, unless he can charge Williams, by his testimony, with one-half. He is then giving evidence to diminish his own responsibility, and has, of course, a direct interest in favor of the party for whom he is testifying. Therefore there was manifest error in the Court in admitting Motley's deposition.

Judgment reversed.

BURNETT *vs.* MENIFEE.

Upon quashing the original writ, it is error to enter final judgment againt the plaintiff. Where the defendants reside in different counties, the plaintiff may either issue separate writs to the different counties, each against the defendants only who reside in each, or he may issue one writ to the county where the suit is brought, against *all* of the defendants, and, upon its being returned *non est* as to some, may discontinue as to them, and take judgment against the others.

DEBT, determined in Conway Circuit Court, in September, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Burnett sued Nimrod Menifee and James Menifee, alleging, in his declaration, that the former resided in the county of Conway, and the latter in the county of Pope, and issued a summons, to the sheriff of Conway, against both, which was executed on Nimrod Menifee, and returned, as to James Menifee, *non est*. On motion of Nimrod Menifee, the Court quashed the writ, and thereupon entered final judgment against the plaintiff. Burnett sued his writ of error.

Gilchrist & Evans, and *Ashley & Watkins*, for the plaintiff.

Linton, contra.

By the Court, DICKINSON, J.

It was error for the Court below to give final judgment against the plaintiff, as was decided in the case of *Hartley vs. Tunstall et. al.*, 3 *Ark. Rep.* 125. This judgment, both in form and substance, as the Court remarked in that case, is in bar of the action, and wholly unauthorized.

Besides, there is error in quashing the writ, because it was joint, and only executed upon one. The statute regulating the proceedings in such cases, gives to the plaintiff the right of issuing separate writs, where the defendants reside in different counties; but it certainly does not abridge the right of issuing a joint writ, in the same county in which the suit was commenced. He may take his writ against both; and, if not executed in time, or not executed at all, he may either discontinue as to the defendant upon whom there has been no service,

and proceed to judgment against him upon whom there was service; or he may continue the case to the next term, for service. In this instance, he chose to pursue the first remedy, which he was fully authorized to do.

Judgment reversed.

Pelham et al. *vs.* Grigg et al.

The *obligation* required to be filed for the payment of costs, in certain cases, must be a *bond*.

A *bond* must arise upon a good and valid consideration, between persons capable of contracting, and be executed in the manner required by law.

An instrument under seal, without any *obligee* named, by which a person acknowledges himself bound to pay all costs which may accrue, is not sufficient under the statute.

Debt, tried in the Benton Circuit Court, in May, A. D. 1841, before the Hon. Joseph M. Hoge, one of the Circuit Judges. Grigg & Elliott sued Pelham & Shepperd, and a writing under seal, signed by *Williamson S. Oldham*, was filed with the declaration, in these words: "The plaintiffs in this suit being non-residents of the State of Arkansas, I acknowledge myself bound to pay all costs which may accrue in such action." The defendants moved to dismiss the suit, for want of a bond for costs, it being admitted that the plaintiffs were non-residents. The motion was overruled, and final judgment entered for the plaintiffs. The defendants sued a writ of error.

Walker, for the plaintiffs.

The statute requires the non-resident plaintiff, or some responsible person for him, to "file an *obligation*, by which he shall acknowledge himself bound to pay all the costs which may accrue in such action." *Rev. St. p.* 201.

An obligation is "a bond of right, binding us to another to give or do or refrain from doing something." *Pothier on Obligation*, 2. "It is the essence of all obligations, that there be, 1st, a cause from

which the obligation arises; 2d, persons between whom it is contracted; 3d, something which is the object of it." *ib. p.* 4. In order to make a contract, there must be a *person* capable to contract, a *person* capable to be contracted with, a *thing* to be contracted for, and a *consideration*. 1 *Comyn on Con.* 3. The word *obligation* is a legal term, and has a fixed and definite meaning, and, in that sense, succeeding legislatures are presumed to have used it, when courts of law are called upon to give it a construction. *Coke Lit.* 172. The common-law meaning of an obligation is, "a bond with a penalty." *ib.* 172. This Court, at the July term, 1840, in the case of *Sabin vs. Hambleton*, said: "A *covenant* is defined to be an agreement between two or more persons, under seal," &c.

In Kentucky, upon a statute nearly similar, it has been decided, that the bond must be made payable to the defendant. *Hard. Rep.* 172. It is essential that it contain an accurate description of the cause of action, and of the parties; and that it be filed before the commencement of the suit.

Coke defines an obligation to be a bond with a penalty; and, in *Bac. Abr. title Obligation*, it is said that a "penal bond is an obligation, with a certain penalty mentioned in the bond, and debt is the only remedy." Debt would not lie on this instrument, and there is no penalty mentioned in it.

Oldham, contra.

It would be improper to name any particular person as obligee, because the statute contains no such provision; and we are not authorized to go beyond the law. The obligation cannot be made to the defendant, because, in no event is he responsible for the plaintiff's cost, until judgment is rendered against him, in favor of the plaintiff; it cannot be made to the officers of court, by name, because there may be witnesses and others equally interested, and who ought, by the same reasoning, to be made obligees.

The statute did not contemplate a common-law obligation; if it had, the person to whom the obligation should be made payable, would have been designated. It merely designed "an acknowledgment of some responsible person," &c.

Although there is no person named as obligee, is not every person interested in the costs an implied obligee, and can he not institute suit thereon, in his own name, and recover from the obligor whatever costs may be due him? This view of the case will be confirmed by reference to the 33d section of the same statute, which provides that, in all cases where there is security for costs, in which the plaintiff shall be adjudged to pay the costs, judgment may be rendered against such security, on *motion of the party* entitled to such costs, notice of such motion being first given.

The obligation in this case is in conformity with the form prescribed by the rules of the U. S. Circuit Court for the District of Arkansas.

By the Court, Dickinson, J.

The Court unquestionably erred, in not dismissing the plaintiffs' suit for want of a proper bond for costs. The plaintiffs in the action, being non-residents, were required to file, in the office of the Clerk of the Circuit Court in which suit was brought, the obligation of some responsible person, a resident of the State, who shall acknowledge himself bound to pay all costs which may accrue. *Rev. St.* 202. An obligation is a bond, and it must arise upon a good and valid consideration, between persons capable of contracting, and must be executed in the manner required by law. In this case, the party merely acknowledges himself bound to pay all costs which may accrue. Such an instrument is certainly not the kind of obligation contemplated by the statute. It contains no one requisite of a bond; at least, is fatally defective, as there is no obligee; and the instrument purporting to be an obligation, cannot be binding.

The judgment reversed; and the Circuit Court instructed to dismiss the cause, for want of sufficient security for costs.

PHILLIPS *vs.* LEMOYNE.

Where the return term of a writ was by law to be held on the second Monday after the fourth Monday of September, a writ commanding the party to appear "on the first day of our next October term," is good.

A fortiori, it is good, if it also states that the Court is to be held on the eleventh day of October, that being the second Monday after the fourth Monday of September.

DEBT, by Phillips, for the use of McFarland, against Lemoyne, determined in Conway Circuit Court, in October, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. The term of the Court to which the writ was returnable, was by law to be holden on the "second Monday after the fourth Monday of September," being the eleventh day of October. The writ commanded the defendant to be summoned to appear "on the first day of our next October term, at a Court to be holden on the 11th day of October next." The Court, on defendant's motion, quashed the writ, and entered judgment for the defendant, who sued his writ of error. The case was argued here, by

Fowler & Watkins, for the plaintiff.

Gilchrist & Evans, contra.

By the Court, DICKINSON, J.

The object of process is to give the party reasonable notice of the time and place at which he is to appear, and to apprize him of the cause of action, and to whom he is bound to answer. In this instance, the summons clearly shows the time and place specifically; and we should have held it to be good, if it had merely stated "upon the first day of our next October term." The law fixes that time, and the party is presumed to know it; but here the summons has gone further, and stated with accuracy the very day on which the Court was to be held. The notice being good, no objection lies to it.

Judgment reversed.

MITCHELL *vs.* WALKER.

The proceeding by petition and summons, under the statute, will only lie in cases where debt lay at common law. It will not lie on a note executed solely for property, or an agreement for unliquidated damages.
It will not lie on a note payable in Arkansas State Bank paper.

THIS was a suit by petition in debt, under the statute, brought by David Walker against James Mitchell, on a note "to be paid in Arkansas State Bank paper," tried in Washington Circuit Court, in May, A. D. 1841, before the Hon. JOSEPH M. HOGE, one of the Circuit Judges. Judgment went by default for the sum mentioned in the note, as debt, and the interest accrued, as damages and costs. Mitchell sued his writ of error.

Oldham, for the plaintiff.

No principle is better settled, than that, in an action upon such an instrument as the one sued upon by the plaintiff below, the judgment must be for damages; and that the true measure of damages is the value of that number of dollars in bank paper when the same became due; and that the common-law action of debt will not lie upon an instrument payable in bank notes. *Janny vs. Henry*, 3 *Mon. Rep.* 8. *Watson vs. McCall & McNair*, 1 *Bibb*, 356. *Bruno vs. Kelso*, *ib.* 487. *Mattox vs. Craig*, 2 *Bibb*, 584. *Monk vs. Roberts*, 4 *Mon.* 89. *Kennedy & Woods vs. Van Winkle*, 6 *Mon.* 398. *Owens vs. Holliday*, 7 *Mon.* 296. *Jeffery vs. Underwood*, 1 *Ark.* 108.

Our statute was not designed to change the form and nature of the judgment to be rendered; for it expressly provides that every suit, commenced in accordance with the form therein prescribed, shall be prosecuted to final judgment and execution, in the same manner as if the same had been commenced in the ordinary form. *Rev. St.*, *chap.* 21, *sec.* 7.

Linton, contra.

By the Court, LACY, J.

The statute regulating the proceedings, enacts, that "any person

being the legal owner or holder of any bond, bill, or note, for the payment of money or property, may sue thereon, in any circuit court having jurisdiction thereof, by petition in debt." *Rev. St., p.* 152. It is clear that the object of the act is to give to the party, by petition and summons, a summary mode of recovery in debt. Indeed, the proceeding under the statute is a new and more simple manner of suing in that form of action, and will only lie in such cases where, by the common law, debt could be maintained: it is by petition, and not by declaration. The party is required to show that he is the legal holder of the bill, bond, or note; and in this it resembles debt; for, in that case, the plaintiff must show that the legal interest is in him, and the instrument declared on must be substantially set out. By petition and summons, a copy of the instrument is required to be inserted. The breaches, in both cases, are precisely similar, in averring that the debt remains unpaid for which the plaintiff demands judgment, and damages for detention. The form prescribed constantly speaks of the debt, and keeps up that idea throughout; thus showing, conclusively, that the suit contemplated by the Legislature, had reference alone to such cases for which debt would lie at common law. It gives a new remedy, which is cumulative of a pre-existing right, and restricts the form of action to the particular class of cases by which that right could be asserted. Upon a note executed alone for property, or an agreement for unliquidated damages, debt will not lie, neither will a suit by petition and summons. The party, in both cases, could not make the necessary averments, or assign proper breaches: he could not allege that the debt was unpaid, or that he demanded judgment for the same, and damages for its detention. The term "debt" has a legal definite signification, and means a sum certain, or that which may be reduced to a certainty. When the intervention of a jury is required to assess unliquidated damages, debt will not lie. In such cases, neither can petition and summons be brought, because there would be no certainty in the debt demanded.

Upon a statute similar to our own, the Supreme Court of Kentucky, in the case of *Janny vs. Henry*, 2 *Mon.* 95, held that petition and summons can only be maintained, for the direct payment of money, by evidence in writing. The suit must be prosecuted to final judgment

and execution, in the same manner as if commenced in the ordinary form. The statute makes no provision for taking and executing judgment for property. This principle proves that, in the case now before the Court, the party has mistaken his form of action. An agreement to pay so much money, in Arkansas paper, or bank notes, is certainly not a direct contract to pay that amount in lawful currency. The party suing is only entitled to recover the value of the paper or bank notes at the time the same became due, and that value can only be ascertained by witnesses to establish the fact; and, upon proof thus given, the amount of the verdict should be entered up, fixing the sum at the intrinsic and real value of the paper in lawful money.

Judgment reversed.

McLain *vs.* Taylor.

The Constitution of this State expressly takes from Justices of the Peace all original jurisdiction, in all actions which are not matters of contract, and in which the sum in controversy does not exceed one hundred dollars, and even in matters of contract, where the action is covenant.

An action of forcible entry and detainer is, in no sense of the word, a matter of contract.

The law, therefore, giving Justices of the Peace jurisdiction in actions of forcible entry and detainer, is unconstitutional and void.

Appeal from Justices of the Peace, determined in the Jefferson Circuit Court, in October, A. D. 1841, before the Hon. Isaac Baker, one of the Circuit Judges. Creed Taylor brought an action of forcible entry and detainer, under the statute, against John McLain, in Desha county, before two Justices of the Peace, and obtained judgment of restitution, from which McLain appealed to Desha Circuit Court. After a trial there, before the Hon. E. L. Johnson, then Circuit Judge, the jury not agreeing, Taylor removed the case to Jefferson Circuit Court, where a jury was impanneled, and the case proceeded to trial. In the progress of the case, the Court discharged the jury, and dismissed the case, for want of jurisdiction. McLain appealed to this Court.

The case was argued here by

Fowler, for the appellant, who insisted that all other objections to the jurisdiction were waived, if the Justices had jurisdiction of the subject matter.

Trapnall & Cocke, contra.

The constitution confines the jurisdiction of Justices of the Peace to "all matters of contract, (except in actions of covenant), where the sum in controversy is of one hundred dollars and under." "A forcible entry is where a man enters into the lands and tenements *manu forte*." *Co. Lit.* 257, *b.* The force with which the entry is made, is the only inquiry. 3 *Blackstone*, 170; *Smith vs. Dedman*, 4 *Bibb*, 192. This is an injury, not only of a civil, but, if the force amounts to a breach of the peace, of a criminal nature, and the subject of indictment at common law. 3 *T. R.* 295. *King vs. Wilson*, 8 *T. R.* 364. 4 *Bl.* 104; and, by statute *Richard* 2, *st.* 1, *ch.* 8, punished with imprisonment and ransom, at the king's will.

The obvious intention of the constitution was, to confine the jurisdiction of Justices of the Peace to cases of contract, and to refer the redress of all injuries to person or property, to the Circuit Court; and, therefore, the act of forcible entry and detainer, in attempting to confer upon Justices of the Peace a jurisdiction denied to them by the constitution, is unconstitutional and void.

By the Court, Lacy, J.

This is an action of forcible entry and detainer, commenced before a Justice of the Peace. The proceedings have been exceedingly informal and irregular; those questions, however, we do not deem it necessary to examine or determine. The view we shall take, necessarily cuts them off.

We hold the act of the Legislature, giving to Justices of the Peace jurisdiction in cases of forcible entry and detainer, and regulating its proceedings, to be repugnant to the constitution of this State, and, therefore, of no effect. The grants of that instrument, distributing the judicial power of the State among the several tribunals of justice,

gave the jurisdiction in such cases expressly to the Circuit Courts, and excluded it directly from Justices of the Peace.

The constitution declares, that two or more Justices of the Peace shall, individually or jointly, have exclusive jurisdiction in all matters of contract, except in actions of covenant, where the sum in controversy does not exceed one hundred dollars. And, in no case, shall they have jurisdiction to try or determine any penal offence, except when sitting as examining courts, to commit, discharge, or hold to bail. The Circuit Courts are invested with original jurisdiction in all civil cases not cognizable before Justices of the Peace. These clauses are plain and obvious; and they certainly take from Justices of the Peace all original jurisdiction in all actions which are not matters of contract, where the sum in controversy does not exceed one hundred dollars; and, even in matters of contract, in actions of covenant. The object and design of the constitution were, evidently, to give jurisdiction in subject matters of contract, and not to extend that jurisdiction to any other class of cases.

In any other class of cases, the jurisdiction in such actions was expressly given to the Circuit Court. An action of forcible entry and detainer, in no sense of the term, can be said to be a matter of contract. The idea of a contract, so far from entering into, or forming any part of, the action, is expressly excluded by the form and substance of the action. The party's right to recover is based upon the ground of wrong and injury done or accompanied with violence or force. It is an unlawful seizure, on the part of the defendant, of the possession of the freehold, or a wrongful detention of that possession. In both cases, the defendant is guilty of violence and force, and, according to the principles of the common law, could be made answerable, as for a penal offence. These positions are incontrovertible; and, as the defendant in the action is not answerable in any contract, of course the Justice of the Peace had no jurisdiction.

Judgment affirmed.

HENRY *vs.* WARD.

It is not necessary for a Sheriff to state, in his return, that he executed the process in his own county. The law requires him to state *how*, but not *where*, he executed it. If he states that he executed it, the presumption is, that he executed it within his own county.

Under the provisions of the Revised Statutes, upon judgment on a contract bearing more than six per cent. interest, interest at the rate specified in the contract, accrues on the *whole* judgment, (including the debt and the interest to the date of the judgment, as damages), from the date of the judgment.

DEBT, determined in Crawford Circuit Court, in February, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Ward sued Henry on a note for $641 44 cents, bearing ten per cent. interest, due Jan. 14, 1840. The Sheriff executed the summons on Henry; but did not state that he executed it in Crawford county. Judgment was rendered by default, for $499 43 cents, residue of debt, $70 38 cents, damages, with interest on the judgment, at the rate of ten per cent. per annum, till paid. Henry sued his writ of error.

Linton, for the plaintiff in error, to the point that the return was insufficient, cited *Gilbreath vs. Kuykendall*, 1 *Ark.* 50. *Rose vs. Ford et al.* 2 *Ark.* 26. That too much interest was adjudged. *Wooster vs. Clark*, 2 *Ark.* 101.

The case was further argued by

Pike, for the defendant in error; and *W. & E. Cummins*, in response.

By the Court, RINGO, C. J.

The plaintiff in error recites and relies upon the cases of *Gilbreath vs. Kuykendall*, 1 *Ark. R.* 50; and *Rose vs. Ford et al.* 2 *Ark. R.* 26, as establishing the proposition, that the return to process, to justify a judgment by default, must expressly state, that it was executed in the county within which the officer to whom it is addressed is authorized by law to execute it. We have examined the opinions expressed in

the cases cited, and find that this point has not been expressly decided in either. The Court, in these cases, says, in effect, that it must appear, from the return of the officer, that the process was executed in such county, and must state expressly how it was executed. This opinion we still entertain; but the statute does not require the officer to state expressly, in his return, where the process was served; and, therefore, the legal presumption that he acted within the sphere of his power, and according to the obligations of his official duty, must be so far indulged as to warrant the conclusion that the act was done within the limits of the county in which he was legally authorized to act. The return before us shows every fact essential to a legal execution of the writ, and is signed "Eli Bell, Sh'ff of Crawford county, Ark." And, although it does not expressly state that it was executed in said county, the legal presumption is, that it was executed there; and, therefore, it is, in our opinion, sufficient to warrant the judgment by default.

The second question depends upon the construction to be given to the provisions contained in chapter 80 of the Revised Statutes of this State; the 2d section of which provides that parties may agree, in writing, for the payment of interest, not exceeding ten per centum per annum; the third gives interest on all moneys due on judgments at law, or decrees in equity, from the day of the rendition thereof, until satisfaction be made, by payment, or sale of property; and the fourth declares expressly, "that judgments or decrees upon contracts bearing more than six per cent. interest, shall bear the same interest as may be specified in such contracts, and the rate of interest shall be expressed in all such judgments and decrees." These provisions unquestionably allow parties to contract in writing for the payment of interest, at any rate not exceeding ten per centum per annum, and expressly give the same interest specified in such contracts, upon judgments and decrees founded thereupon, when the interest so stipulated in such contract is more than six per cent. per annum, from the date of the judgment and decree, and imperatively require the rate of interest so given upon such judgments or decrees, to be expressed therein. But it is insisted, that judgments bear no interest at common law; and, therefore, all statutory provisions giving it, must be

construed strictly. This, we think, might be conceded, and yet judgment be given for interest, at the rate specified in the contract, upon the whole sum adjudged or decreed, including both principal debt and damages, according to the express letter, as well as the obvious design, of the law; and this appears to us to be the only mode in which these plain and express provisions of the statute could be literally or strictly enforced. And the argument, that they are designed to enforce a specific execution of the contract, cannot be maintained; because, a judgment or decree, so framed as to enforce only a specific performance of the contract, would necessarily give interest upon the contract, according to the stipulation therein contained, instead of giving it upon the judgment or decree, as the statute expressly requires it to be given; and, in this respect, they would not only not be in conformity to the provisions of the statute, but be directly opposed to them. We are, therefore, clearly of the opinion, that the statute contemplated that the whole sum, both principal and damages, adjudged or decreed to be recovered or paid on such contracts, should bear interest from the date of the judgment or decree, at the rate specified in the contract, and that the same should be so expressed in the judgment or decree.

Judgment affirmed.

Carter, Ex'r of Ellis, vs. Menifee.

Where oyer is craved of the letters testamentary of an executor, who sues, if he exhibits letters, granted by the clerk of probate, in vacation, and duly authenticated, the plaintiff's legal right to the debt sued for cannot be impeached, without showing a legal revocation of the letters, or such facts as are sufficient to prove that the grant of them was void.

Debt, determined in Conway Circuit Court, in October, A. D. 1841, before the Hon. Richard C. S. Brown, one of the Circuit Judges. William Carter, as executor of the last will of Jane Ellis, sued Nimrod Menifee.

The declaration was in every respect sufficient, and contained a profert of the letters testamentary, granted to the plaintiff as executor of the last will and testament of Jane Ellis, deceased. The defendant appeared, and prayed oyer of the letters testamentary, which being granted by filing them with a copy of the will, he demurred to the declaration, and set forth specially, as causes of demurrer, 1st, that, by the plaintiff's own showing, he had no right to maintain this action; 2d, by the showing of the plaintiff, the last will and testament of Jane Ellis had never been duly proven, and probate thereof taken; and, 3d, the letters testamentary were altogether insufficient, in law, to authorize the plaintiff to maintain his action. The plaintiff joined in the demurrer, and the Court sustained it, and entered up a final judgment against the plaintiff.

Ashley & Watkins, for the plaintiff.

By the Court, Ringo, C. J.

We are at a loss to conceive upon what ground the demurrer was sustained; because, not only the letters testamentary, granted and issued, in proper form, to the plaintiff, by the clerk of the Probate Court of the county of Perry, in this State, but also a duly authenticated transcript of the will of the testatrix, was given and filed on oyer, and the former set out in the demurrer of the defendant; thus making the letters, if not the copy of the will, parcel of the plaintiff's pleading, and showing in him a legal right to maintain the action. The letters thus shown were duly authenticated, and appear to have been granted by competent authority; and they contain intrinsic evidence that the will had been proven and admitted to record in the county of Perry. These facts show in the plaintiffs a legal right to the debt mentioned in the declaration, which cannot be impeached without showing a legal revocation of the letters testamentary granted to him, or such facts as are sufficient in law to prove that the original grant thereof was void. No such thing was ever attempted to be shown, and therefore we entertain no doubt that the Court erred in sustaining the demurrer to the declaration.

Judgment reversed.

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FEATHERSTON *vs.* WILSON.

In an action by an assignee of a note, the note cannot be excluded from going in evidence, because the plaintiff does not state, in the commencement of his declaration, that he sues as assignee.

It is not necessary to say that he sues "*as assignee*," if he sets out the assignment, or shows, by proper averments, that he is assignee.

In an action on a note, parol evidence is not admissible, to prove that, at the time the note was made, there was an agreement that the value of certain peltries should be credited on the note, when the amount should be ascertained.

THIS was a suit determined in the Crawford Circuit Court, in February, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges.

Featherston and Wilson, in the Court below, by declaration, commencing, "William G. Featherston, the plaintiff in this suit, by attorney, complains of Robert Wilson, defendant in this suit, in an action of assumpsit." It then stated that Wilson, on a day and at a place certain, made a note to Wm. W. Fleming, at eight months, for $200, and that Fleming, on the 30th of October, 1840, assigned it to the plaintiff, "whereby, and by force of the statute in such cases made and provided, the said Robert became liable to pay to the said plaintiff the contents of said note, according to the tenor and effect thereof;" and concludes: "Nevertheless, the said promissory note to pay," &c., being the common breach.

A writ of attachment issued, and was executed. The defendant appeared and pleaded four pleas, *nil debet*, and three pleas of payment *post diem*. The plaintiff joined issue to the first, and filed a general replication to each of the other pleas, to each of which replications the defendant joined issue: *all*, in short, on the record, except the pleas.

The plaintiff gave in evidence the note. It does not appear, by the record, to have been endorsed; or, if it was, that the endorsement was offered in evidence. He also read an instrument, signed by Fleming and Wilson, of the same date as the note, stating that they had made a settlement, and found Wilson indebted to Fleming $200, for which he had given his note at eight months.

The defendant then offered to prove, by oral evidence, that, at the time of making the note, there was a conversation between Wilson and Fleming, about certain peltries, which were to be credited on the note, when the amount should be ascertained. This evidence was excluded. The defendant then moved to exclude the note from the jury, on the ground of variance, because the plaintiff should have declared "as assignee." The Court sustained the motion, and excluded the note. The jury found, that the defendant did not undertake and promise, in manner, &c., and the defendant had judgment.

The bill of exceptions sets out the note without any endorsement, and says that the note was offered in evidence. The clerk had copied into his transcript a note of the same tenor and date, assigned to Featherston, but it was no part of the record. Featherston sued his writ of error.

Paschal & Cocke, for the plaintiff, cited *Kittlewell et al. vs. Scull*, 3 *Ark.* 474, to the point that the declaration was good.

Pike & Baldwin, contra, admitted that the case was stuffed with errors, *ab ovo usque ad mala;* that the declaration set at defiance all the rules of pleading; the first plea was no response to it; there was no issue on which the verdict could be based; the Court erred in excluding the oral evidence; and the reason given for excluding the note was erroneous. But they contended, that the note was properly excluded, because the note was not shown to have been endorsed or assigned to the plaintiff, and, if it was, the endorsement was not read in evidence.

They insisted that the plea of not guilty, or *nil debet*, in assumpsit, was good after *verdict*, though not after judgment by default. *Brennan vs. Egan*, 4 *Taunt.* 164. *Baily vs. Edwards*, *Cas. Temp. Hard.* 179. *Robinson vs. Green*, 1 *Str.* 574. *Corbyn vs. Brown*, *Cro. Eliz.* 470. *Elvington vs. Doshant*, 1 *Lev.* 142. *Marshan vs. Gibbs*, 2 *Str.* 1022. *Cas. Temp. Hard.* 173. *Coggs vs. Bernard*, *Salk.* 26, 735. *Pigot vs. Pigot*, *Cro. Jac.* 44. *Jouce vs. Parker*, *Cro. Jac.* 575.

Non infregit conventionem is a good plea after verdict. 1 *Sid.* 289. So if *nil debet* is pleaded for *nil detinet*. 2 *Saund.* 319, *a.*

As to the finding upon different issues, one rule is, that, though the

verdict be imperfect, and does not, in terms, find the issue joined by the parties, yet, if the Court can collect the point in issue out of the verdict, it is sufficient. *Stearns vs. Barrett*, 1 *Mason*, 153.

A general rule is, that, although the verdict may not conclude formally, or punctually in the words of the issue, yet, if the point in issue can be concluded out of the finding, the Court shall work the verdict into form, and make it serve according to the justice of the case. *Hob.* 54. *Hawks vs. Crofton*, 2 *Burr.* 698. *Porter vs. Rummery*, 10 *Mass.* 64. *Hanna vs. Mills et al.*, 21 *Wend.* 90. *Law vs. Merrills*, 6 *Wend.* 268.

By the Court, Dickinson, J.

The proceedings in this case are exceedingly irregular, and the plea is every way informal, if not insufficient. The view we shall take of the case, however, supersedes the necessity of determining their validity. The Court certainly erred in excluding the note sued on from being received as evidence, upon the ground of variance from the instrument set out in the declaration.

The declaration correctly describes the note, and sets out the assignment; and the instrument offered upon the trial corresponds precisely, in every particular, with it. It is true, the declaration does not, in its commencement, declare that the plaintiff in error sues as assignee, but, in the body of it, he makes a substantive averment of that fact, and sets out, *in hæc verba*, the assignment of the note. It is clear that the terms of the note, or its legal tenor and effect, cannot be varied or explained away by the parol testimony offered. There is no ambiguity or uncertainty upon the face of the note, and therefore it is not allowed to be explained or qualified by oral evidence.

Judgment reversed.

TROWBRIDGE & JENNINGS *vs.* PITCHER, WEAVER & CO.

Under our statute, in an action on a note, the production of the note is full evidence of its execution, and the consideration, unless questioned by the plea of *nil debet*, *non assumpsit*, *non est factum*, or the like, supported by affidavit.

And, in a suit against a firm, on a note executed by the partnership name, it is not necessary, under our statute, upon the plea of *nil debet*, not sworn to, to prove the partnership.

THIS was an action of debt, tried in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. Pitcher, Weaver & Co., sued Samuel G. Trowbridge & Richard T. Jennings, as partners, on a note executed by their firm name. The defendants pleaded *nil debet*, without swearing to the plea. Upon the issue, no other evidence being produced than the note, the plaintiff had judgment. The defendants moved for a new trial, and their motion being overruled, they sued their writ of error.

Hempstead & Johnson, for the plaintiffs, insisted that it was necessary, under the issue, to prove the partnership of Trowbridge & Jennings; and cited *Rev. St.*, *sec.* 102, *p.* 633. 2 *Saund. on Pl. & Ev.* 710. *Tuttle vs. Cooper*, 5 *Pick.* 414. *Collyer on Part.* 449. *Rochester vs. Trotter*, 1 *Marsh.* 54. *Mason vs. Rumsey*, 1 *Camp.* 384.

Trapnall & Cocke, contra, cited *Rev. St.*, *title Abatement*, *sec.* 5.

By the Court, DICKINSON, J.

Under our statute, the production of the note is evidence of its execution, and the consideration for which it was given, and is full proof of these facts, unless questioned by pleas of *nil debet*, *non est factum*, *non assumpsit*, and the like, supported by affidavit. In this case, the plea is unsupported by affidavit; consequently, the production of the note itself proves the indebtedness of the defendants, in the manner charged in the declaration.

Judgment affirmed.

WILLSON *vs.* LIGHT.

In the Circuit Court, on appeal from a justice of the peace, each party is entitled to a trial by jury; and if the record does not show that a party *demanded* a jury, and the case was tried by the Court, the presumption is that he waived his right.

In a suit by an assignee upon a lost note, a plea of set-off, alone, admits the existence of the note, its assignment and loss; and if the record fails to show that the defendant offered to set off, the presumption is in favor of the Court below.

THIS was a case determined in Pope Circuit Court, in March, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. John Willson was summoned to appear before a justice of the peace, to answer the complaint of Wm. R. Light, assignee of E. D. Watson. Before the summons issued, the affidavit of Watson was filed, that he had lost the note sued on. At the trial before the justice, Willson offered a set-off, which was not allowed; and, he making no other defence, judgment was rendered against him for the amount of the note, and interest; and he appealed. In the Circuit Court, he moved to quash the proceedings, which motion was overruled, and he went to trial. At the trial, (which was before the Court, the record saying nothing as to the parties requiring or dispensing with a jury), the appellant objected to Watson's affidavit being read in evidence, which was overruled. He made no other defence, and judgment went against him and his security. Willson sued his writ of error.

Fowler, for the plaintiff.

Gilchrist & Evans, contra.

By the Court, DICKINSON, J.

It is certainly true, as contended, that each party, under the constitution of the United States, and of our own State, is entitled to the benefit of a trial by jury. But then this is a personal right or benefit, which either or both of the parties may waive. And as the record shows that neither party demanded a jury, according to the provisions of our statute regulating the practice in such cases, it is an express waiver of the right. *Rev. St.*, *p.* 633, *sec.* 98.

The judgment was given upon a lost note, as appears from the affidavit filed before the justice of the peace. The issue in the Circuit Court was the same as before the justice of the peace. *Rev. St., sec.* 186, *p.* 517. The question, then, to be tried, was, Is the defendant entitled to a set-off? This plea certainly admits the existence of the note, its assignment and loss. The record fails to show what the defendant below offered to set off. Of course, the presumption is, that the Court decided correctly. If the defendant intended to question the execution of the note, or its assignment, he had the right to do so before the justice of the peace, or before the Circuit Court. The instrument set out is certainly assignable, under our statute, and the Court below decided correctly in refusing to dismiss the case from the docket.

Judgment affirmed.

Brooks et al. *vs.* Palmer.

In an action on a note bearing ten per cent. interest, where the declaration does not negative the payment of the interest, a general demurrer, not stating this objection specially as cause of demurrer, must be overruled.

But, upon the overruling of the demurrer, judgment can only be given for the *debt*, as the breach does not notice the interest.

Debt, on a bond for $595, with interest at ten per cent., determined in Jefferson Circuit Court, in October, A. D. 1841, before the Hon. Isaac Baker, one of the Circuit Judges. John Palmer sued Brooks and others, upon a declaration with a single count, the breach of which alleged the non-payment of the principal alone. The defendant demurred to the declaration, *in short*, on the record. Demurrer overruled, and judgment for plaintiff for $595 debt, $89 85 damages, and interest on the judgment at ten per cent., with costs. The defendants sued their writ of error.

Yell, for the plaintiff, cited 1 *Ch. Pl.* 326. *Gould*, 182.

Hempstead & Johnson, contra.

By the Court, DICKINSON, J.

The only question presented for our consideration, is, as to the effect of the demurrer, no defect or imperfection in the pleadings being set out. The plaintiff below certainly does set out facts sufficient to entitle him to a recovery upon the writing obligatory for $595. Therefore, as the defendants omitted to specify in their demurrer in what respect the declaration is defective or insufficient, the Circuit Court rightly overruled it. *Davis vs. Gibson,* 2 *Ark. R.* 115. The plaintiffs in error, however, relied upon their demurrer, and the Circuit Court was only authorized to give judgment in accordance with the breach in the declaration, which is confined exclusively to the debt demanded in the declaration, and contains no averment of the non-payment of the interest; consequently, as there was a special contract to pay at a certain rate of interest, the allegation in the breach must be governed by the nature of the stipulation, and be co-extensive with it.

There being an entire omission of any breach as to the interest, the judgment of the Circuit Court is clearly erroneous, having been given for more than the pleadings warranted.

Judgment reversed.

BRENT *vs.* FENNER ET AL.

Payment, *ante diem,* is a good plea in bar, in debt on bond.
Tender, before the day, is good, and with interest from that time, and costs.

DEBT on bond, determined in Pope Circuit Court, in October, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Plea, payment *ante diem.* Demurrer to plea sustained, and judgment for plaintiffs.

Gilchrist & Evans, for the plaintiff.

Linton, contra.

By the Court, LACY, J.

We hold the plea to be good, upon this ground, that, when a note is payable on or before a particular day, the obligor, by the terms of the contract, reserves to himself the right to discharge the debt at any time before the day named. He is not compelled to pay it, until it falls due, and suit cannot be instituted upon it before that time; but he has the privilege of paying the note before it falls due, and it is at his option whether or not he will do so. He has a right to tender the money immediately after the execution; and a lawful tender would bar interest and costs after that time. The case is still stronger where the defendant has actually paid the money, and the plaintiff has accepted it. Having received one satisfaction for his debt, he cannot demand another; consequently, the Court erred in sustaining the demurrer.

Judgment reversed.

HICKEY ET AL. *vs.* SMITH, HUBBARD & CO.

An obligation for costs must be under seal.

DEBT, by Smith, Hubbard & Co., against Hickey and others, determined in Pope Circuit Court, in October, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges.

An instrument, stating the plaintiffs to be non-residents, was filed, before suing out the writ, in the form of a bond for costs in every way, except that it was not *sealed*. At the return term, the defendants moved to dismiss the case, for want of a bond for costs, and offered to prove, by a witness, that the plaintiffs were non-residents; but the Court overruled the motion, because it was not reduced to writing, and sworn to, or proven, like a plea in abatement, before it was submitted. They then filed a motion, sworn to; but the Court held that it came too late, and refused to receive it. The defendants made no fur-

ther defence; and judgment went against them, from which they appealed.

Linton, for the appellant.

Gilchrist & Evans, contra.

By the Court, LACY, J.

The statute requires that a non-resident plaintiff shall, before he institutes his suit, cause an obligation to be filed; and it surely requires no argument, to show that an obligation must be sealed. The instrument filed in this case, is not sealed, and, therefore, deficient in one of its most important requisites. The term obligation, as here used, must be taken in its common-law definition. The statutes of this State make no difference between sealed and unsealed instruments, as regards their evidence and consideration. The only material difference that we are aware of, arises upon the statute of limitations; unsealed instruments being barred in three years from the time the cause of action arises; sealed instruments, in five years.

The motion to dismiss ought to have been sustained.

Judgment reversed.

FRAZIER & TUNSTALL *vs.* FORTENBERRY.

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After a change granted in a case, the case is no longer within the jurisdiction of the Court awarding the change. It belongs exclusively to the Court to which the order is directed.

The Court to which the case is transferred, has a right to remit the papers, for the purpose of having them properly made out and authenticated. Such an order cannot re-invest the former Court with jurisdiction; and, if it proceeds to hear and determine the case, the proceedings are *coram non judice*.

ASSUMPSIT, by Fortenberry, against Frazier & Tunstall, determined in Independence Circuit Court, in June, A. D. 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. The suit was instituted in Independence county. There was a change of

venue, according to the provisions of the statute in such cases, ordering the cause to be removed to Van Buren county. That Court directed the papers to be remitted to the Independence Court, for the purpose of having a perfect transcript made out, and properly certified, for the change of venue. When the papers came back, the Judge of the Independence Circuit Court assumed jurisdiction of the cause, and overruled the motion to dismiss it; the cause then proceeded to trial, and judgment was rendered for the plaintiff, and the defendants sued their writ of error.

Fowler, for the plaintiff.

D. Walker and *Linton*, contra.

By the Court, LACY, J.

The whole proceedings in the cause, are certainly irregular and illegal. After a change of venue granted, the case is no longer within the jurisdiction of the Court awarding the change. It appertains and belongs exclusively to the Court to which the order is directed. That Court, by virtue of the change of venue, is invested with complete control and authority over the subject matter in dispute, and its jurisdiction and power cannot be ousted or destroyed by the improper interference of any other tribunal. It is its right and duty to have the transcript and papers properly made out and authenticated. Certainly, such an order cannot re-invest jurisdiction in the Court in which the suit was originally brought, or in any manner authorize it to hear and determine the same. By the change of venue, it lost that jurisdiction. This being the case, the act of the parties, in appearing and contesting the matter before the Independence Circuit Court, cannot confer jurisdiction upon that Court; consequently, the judgment of that Court in the premises, was *coram non judice*.

Judgment reversed.

McLain & Badgett *vs.* Carson's Ex'r.

In England, upon the death of one partner, a joint creditor could not proceed against his separate estate; the joint debt was extinguished; and the creditor's right of action is against the survivor. At law, this is well settled; but, in equity, there is a conflict of authority.

In equity, the creditor is permitted to have satisfaction of his debt out of the estate of the deceased partner, through the medium of subsisting equities between the parties themselves.

The general rule is, that if, upon the decease of a partner, the creditor's contract is to be treated as several as well as joint, in respect to the firm, then he will be entitled to receive satisfaction in equity, immediately out of the estate of the deceased partner, and to take his portion, by the same gradation with separate creditors.

Under our laws, a joint contract, as understood in England, has no existence.

Here, a partnership debt is a several as well as joint contract; and a partnership creditor may proceed immediately, at law, against the estate of a deceased partner, and be paid at the same time with separate creditors.

The old debt against the firm, is separate, as well as joint; the death of one partner cannot extinguish the separate demand against his estate.

That contingency leaves this right in full operation; the estate of the deceased partner, is separately bound for the debt.

This was an appeal from the Probate Court of Lafayette county, tried in September, 1841, in the Lafayette Circuit Court, before the Hon. William Conway B., one of the Circuit Judges. The firm of Sarah Percifull & Co., composed of Samuel P. Carson and Sarah Percifull, purchased a quantity of articles of McLain & Badgett. Some time afterwards, Carson died, and McLain & Badgett exhibited their account against Sarah Percifull, duly authenticated, to his executor, Robert Hamilton, for allowance. He having refused to allow the account, McLain & Badgett presented it to the Probate Court of Lafayette county, where it was allowed, and directed to be paid in "Class four." The executor appealed to the Circuit Court of Lafayette, and that Court having reversed the judgment of the Probate Court, McLain & Badgett brought up the case by appeal to this Court.

There was no controversy as to the facts; and the appellants' right to an allowance was made, by express agreement, on the record, to depend upon the decision of the legal question, whether payment could be coerced from the estate of Carson, in the hands of the executor, without resort first being had, and proceedings taken, against

the partnership funds, if any, in the hands of the surviving partner, Sarah Percifull.

Trapnall & Cocke, for the appellants.

In England, a partnership contract, at law, is regarded as a joint contract. Upon the death of a partner, the joint creditor cannot proceed against his separate estate, because the principle applicable to all such contracts is, that, by the death of the joint contractor, the joint contract, as to him, becomes extinguished, and the creditor can maintain an action against the surviving joint contractors only. 1 *Chitty's Pl. Collyer on Part.* 337.

But, although all the authorities concur in regarding a partnership contract as joint at law, yet, in equity, there are conflicting decisions. Some eminent Chancellors have maintained, that the form of the legal contract is the same in law and in equity, and that the consequences would be the same in both courts, were it not for another principle, of which a court of equity sometimes avails itself, which is, "that, with certain limitations, a creditor will be permitted to receive satisfaction of his debt, out of the estate of his deceased partner, through the medium of the equities subsisting between the partners themselves."

The leading cases on this side are, *Gray vs. Chiswell*, 9 *Ves.* 118. *Ex Parte Kendall*, 17 *Ves.* 519. *Jacomb vs. Hartwood*, 2 *Ves.* 265. By other learned Judges, the partnership contract is treated in equity as joint and several; and this is the view of it taken by Sir WILLIAM GRANT, in *Devaynes vs. Noble*, 1 *Mer.* 529; afterwards, upon appeal, affirmed by Lord BROUGHAM. See *Sumner vs. Powell*, 2 *Mer.* 37. *Collyer on Part.* 338.

Under our Revised Code, there can exist in this State no such thing as a joint contract, in the sense in which it is used in the English law. "All joint debts or obligations shall survive against the heirs, executors, and administrators of such joint debtor or obligor as may die before the discharge of any such joint debt or obligation." *Rev. St. sec.* 1, *ch.* 82, *p.* 475. See also sections 23 and 24.

By the Court, LACY, J.

The doctrine of partnership, in these cases, is well settled in Eng-

land. At law, the contract was always treated as a joint agreement; and, upon the death of one partner, a joint creditor could not proceed against his separate estate. The reason is, that, by the death of the joint partner, the joint contract, as to him, becomes extinguished. The creditor may have his action against the survivor or joint contractor. 1 *Ch. Pl.* 57. *Collier on Part.* 337. In equity, there is some conflict between the authorities. The creditor, in equity, will be permitted to receive satisfaction of his debt out of the estate of the deceased partner, under certain restrictions, through the medium of subsisting equities between the parties themselves; and Lord ELDON has pithily remarked, "that separate creditors must take the separate estate, and the joint creditors the surplus." *Greer vs. Chiswell*, 9 *Vesey*, 118. *Jacomb vs. Hartwood*, 2 *Vesey*, 265. And Lord BROUGHAM said, in *Sumner vs. Powell*, 1 *Mer.* 73, "that a partnership debt has been treated, in equity, as the several debt of each, though, in law, it is only the joint debt of all."

The general rule upon the subject is, that if, upon the decease of a partner, the creditor's contract is to be treated as several, as well as joint, in respect to the firm, then he will of course be entitled to receive satisfaction in equity, immediately out of the estate of the deceased partner, and to take his portion *pari passu* with separate creditors.

Under our laws, no such thing as a joint contract, in the sense in which it is used in England, can be allowed. Our statute regulating proceedings upon such subjects, enacts, "that all joint debts or obligations shall survive against the heirs, executors, and administrators of such joint debtor or obligor, as may die before the discharge of such joint debt or obligation." *Rev. St., sec.* 1 *to* 24, *p.* 475. This act makes a partnership debt a several, as well as a joint contract; and the partnership creditor is, consequently, invested with a legal right to proceed immediately against the estate of the deceased partner, and to be paid at the same time with separate creditors. The debt against the firm being separate as well as joint, the death of the one partner cannot extinguish the separate demand against his estate. That contingency leaves his right in full operation, and the deceased partner's estate bound separately for the debt.

Judgment reversed.

HAWKINS *vs.* HENSLEY.

Under the Revised Statutes, chap. 91, sec. 6, which provides that certain actions shall be commenced within three years after the passage of that act; or, when the cause of action shall not have accrued at the taking effect of that act, then within three years after the cause of action shall have accrued; the right of action is not barred by the statute, where suit is brought within three years after the law took effect, though the right of action might have accrued more than three years before action brought.

THIS was a suit determined in Crawford Circuit Court, in February, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Hawkins sued Hensley in debt, upon a note executed in 1836, by Hensley, to Owen Webb, and assigned by Webb to the plaintiff. The defendant demurred, on the ground that the plaintiff had mistaken his action, and that there was no immediate liability shown, moving from defendant to plaintiff. The demurrer being overruled, he pleaded *nil debet*, and *actio non accrevit infra tres annos*. To the first plea, the plaintiff took issue: to the second, he demurred. The demurrer was overruled, he declined moving further in the case, judgment went against him, and he sued his writ of error.

Turner and *Pike*, for the plaintiff.

The plea of the statute of limitations was bad. It was filed on the 6th of March, 1841, in a suit upon a note executed in September, 1836. The limitation on such a note, when it was executed, was, by the territorial statutes, five years. *Ter. Dig.* 381.

By the Revised Statutes, which went into operation on the 20th March, 1839, it was provided that such an action, among others, should be commenced within three years after the passage of this act; or, "when the cause of action shall not have accrued at the taking effect of this act, within three years after the cause of action shall accrue." *Rev. St.* 527. It is abundantly manifest, that this statute cannot be pleaded, in any case, until after the 20th of March, 1842. If there should then be a cause of action existing, not barred by the old statute, but to which the new one applies, the defendant could plead it. This

is clear, from the very words of the law itself, and equally clear upon reason and authority. The principle was fully settled in *Dash vs. Van Kleek*, 7 *J. R.* 477, and in *Sayre vs. Wisner*, 8 *Wend.* 661.

Debt will not lie, in England, in favor of the assignee of a note against the maker, because the statutes of Anne only gave the endorsee the right to maintain an action in like manner as in cases of inland bills of exchange. *Bishop vs. Young*, 2 *B. & P.* 78. *Stratton vs. Hill*, 3 *Price*, 253.

But this doctrine has been entirely overturned in the United States. *Raborg et al. vs. Peyton*, 2 *Wheat.* 385. *U. S. vs. Colt*, 1 *Peters, C. C. R.* 145. *Kirkman vs. Hamilton et al.*, 6 *Peters*, 20.

Paschal, and *Gilchrist & Evans*, contra.

Statutes have legal relation to the first day of the session at which they are passed. The existing law of limitations is deemed, in law, to have been in force from the sixth day of November, A. D. 1837, when the session commenced. *Com. Dig., title Parliament*, 1 *and* 295. *Lutler vs. Holmes*, 4 *T. R.* 660. *Rev. St.* 677.

Debt will not lie in favor of an assignee against the *maker of a note.* The English rule is still in force in this country. The cases in 2 *Wheat.* and 1 *Peters*, 56, are not in point. *Kirkman vs. Hamilton*, 6 *Peters*, 20, is decided under the laws of North Carolina. See *Oliver vs. Napier*, 1 *Cook.* 11. *Anderson vs. Crockett*, 6 *Yerg.* 330.

By the Court, Ringo, C. J.

The only question presented by the record and assignment of errors, for the decision of this Court, is, whether the judgment given upon the demurrer to the plea of the statute of limitations, was authorized by law? The solution of this question depends upon the construction to be given to the statute of limitations, *Rev. St., chap.* 91, the 6th section of which, among other things, provides, that "the following actions shall be commenced within three years after the passage of this act; or, when the cause of action shall not have accrued at the taking effect of this act, within three years after the cause of action shall accrue: First, all actions of debt, founded upon any contract, obligation, or liability, (not under seal), excepting such as are brought upon

the judgment or decree of some court of record of the United States, of this, or some other State." These provisions absolutely embrace causes of action of two distinct classes: First, all actions of debt, founded upon any contract, obligation, or liability, not under seal, except such as are founded upon the judgment or decree of some court of record in the United States, where the right of action had accrued prior to the taking effect of said statute, in which cases, the right to sue, at any time within three years next after the taking effect of said act, is expressly given; but the right to sue in such cases is, by the terms of the enactment, expressly limited to that period. Second, all actions of debt upon such contracts, obligations, or liabilities, not under seal, except judgments or decrees of courts of record, as aforesaid, where the right of action should accrue after the taking effect of said statute; in which class of cases, suit must be commenced within three years next after the cause of action accrues. Such we understand to be the express and positive injunctions of the statute, the effect of which, in respect to cases of the first class, is to exclude the plea, where the suit is brought within three years after the act went into operation, notwithstanding the right of action may have accrued more than three years before the institution of the suit. In the present case, a right of action accrued on the contract set forth in the declaration, on the 22d day of September, 1836; and, according to the law then in force, the party invested with such right was at liberty to commence an action at law thereupon, at any time within five years thereafter. *Ark. Dig.* 381. And therefore the right of action on said contract was not barred by either statute, when this suit was commenced. Consequently, the plea of the defendant, setting forth "that the said cause of action has not accrued within three years next preceding the commencement of said action," is wholly insufficient to bar the action; and the declaration being in every respect sufficient, and the action in the name of the plaintiff well conceived, the demurrer of the plaintiff to said plea of the defendant, ought to have been sustained, and the plea adjudged insufficient.

Judgment reversed.

DICKINSON ET AL. *vs.* TUNSTALL.

If a note, payable at a particular place, is described in the declaration as payable generally, it is a variance, and fatal on demurrer.

A note for $500, payable at 12 months, "with ten per cent. interest until paid," bears interest from date.

But, if the breach does not negative the payment of the interest, it is bad on demurrer, and no judgment can legally be given for interest.

DEBT, on a bond for $500, due at 12 months, and payable at the Branch of the State Bank at Batesville, with ten per cent. interest till paid, tried in Independence Circuit Court, in June, A. D. 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. Tunstall's declaration stated the bond as payable *generally*, and the breach was silent as to the interest. The defendants obtained oyer, and demurred for variance, and because the bond was not set out according to its legal effect, and also pleaded *non est factum*, without affidavit, which was stricken out. Demurrer overruled, judgment by *nil dicit* for debt and interest at ten per cent., and writ of error.

Pike & Baldwin, for the plaintiffs.

Fowler, contra.

DICKINSON, J., being related to one of the parties, gave no opinion.

By the Court, RINGO, C. J.

There is, manifestly, a variance between the obligation described in the declaration and the one given on oyer, in this, viz: that the former is described as being payable generally, and not at any particular place, while the latter is expressly made payable in the Branch of the State Bank of Arkansas, at Batesville, which, according to the judgment of this Court, in the case of *Sumner vs. Ford et al.*, 3 *Ark.* 389, is fatal to the pleading. The demurrer was, therefore, well taken, and ought to have been sustained. The breach is also insufficient to warrant the judgment, as given, for interest, as has been repeatedly ruled by this Court.

The obligation would, in our opinion, bear interest from its date, by virtue of the express stipulation in the contract to pay interest; but as no breach of this part of the contract is alleged, no judgment could legally be given for it. The plea of *non est factum* was properly stricken out, for it could have been entirely disregarded, as has been often ruled.

Judgment reversed.

WHITFIELD *vs.* THE STATE.

The condition of a recognizance was, to appear and answer an indictment for *gaming*. The condition, as stated in the *scire facias* upon the recognizance, was, to appear and answer an indictment for *keeping a gaming-table*. HELD, no variance.

SCI. FA. on recognizance, tried in Pulaski Circuit Court, in March, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. William B. Greenlow, and Arthur Whitfield as his security, entered into recognizance for the appearance of Greenlow in that Court, "to answer an indictment preferred against him for *gaming*." Greenlow failing to appear, a *scire facias* issued, stating the condition of the recognizance to have been, that Greenlow would appear and answer an indictment "for keeping a gaming-table." The *scire facias* being served on Whitfield alone, the suit was discontinued as to Greenlow, and Whitfield pleaded *nul tiel record*, on which the State took issue, and judgment was rendered for the State. Whitfield sued his writ of error.

Trapnall & Cocke, for the plaintiff.

A recognizance to appear and answer an indictment for gaming, is void. *West vs. the Commonwealth*, 3 *J. J. Marshall*, 642.

Accurate description of records, in pleading, is rigorously exacted by all courts; and this Court has evinced a most unrelenting devotion to the principle, in the case of *Caldwell vs. Bell*, 3 *Ark.* 419; but no reasonable relaxation of the rule could confound the charges of

"*gaming*," and "*keeping and exhibiting a faro table*," and admit proof of the one under an allegation of the other. Gaming is a generic term, and embraces a great many kinds of hazard, but could not comprehend the keeping and exhibiting of a faro table; because, although a game may be, and is proven to have been, played on the table, yet the game itself is not the offence charged in the statute, but merely the evidence of it; the playing of the game on the table being evidence against the dealer of "*the keeping and exhibiting a faro table*."

R. W. Johnson, Atto. Gen., contra, insisted that the general term gaming *included* the special offence of keeping a gaming-table, and cited 3 *Leon.* 243; *Hob.* 209; *Felter vs. Mulliner*, 2 *J. R.* 181; *Stoddart vs. Palmer*, 10 *Eng. Com. Law Rep.* 4; 7 *Mass.* 68; 2 *J. R.* 96, 127; 2 *Conn.* 194.

By the Court, Dickinson, J.

The object of the act of the Legislature, passed upon the subject of gaming, was to suppress and punish every species of vice of that kind that was known to exist, or that might afterwards arise.

The mischief being highly prejudicial to the best interests of society, and in every way demoralizing in its consequences, and destructive of the prosperity and good order of the State, hence the Legislature used very general and comprehensive terms to suppress the evil of gaming, and advance the remedy, to put a stop to all such practices.

The party bound himself in the recognizance, that the individual charged should appear and answer to the indictment for gaming. He was liable for his appearance for keeping or exhibiting a gaming-table, for that is certainly one species of gaming, and is included in the general words of description. The *scire facias*, in setting out the recognizance, truly describes the bond, when it states, it was for keeping and exhibiting a gaming-table; for we hold that to be gaming, within the meaning of the recognizance and the act of the Legislature. The production of the record then proved the charge, and there is no substantial variance between the recognizance set out in the *scire facias*, and that produced upon the trial.

Judgment affirmed.

EUBANKS *vs.* DOBBS, ADM'R.

An executor or administrator may maintain trover, for the property of the testator or intestate, wrongfully converted in his lifetime.

Where such action is brought against the son of the intestate, who relies upon a receipt of his father, given by way of acknowledgment of satisfaction for the property converted, the administrator cannot avoid the effect of this receipt, by proving that it was given in fraud of creditors; but may prove that the intestate was *insane* when he gave it.

THIS was a case tried in Pope Circuit Court, in October, A. D. 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Mephy Dobbs, as administrator of the estate of Lewis Eubanks, deceased, sued John Eubanks, son of the itestate, in trover, for the conversion by him, in the lifetime of the intestate, of sundry articles of property, and *choses in action*, belonging to the intestate. The defendant pleaded the general issue, and that he had paid the intestate, in his lifetime, two hundred and fifty dollars, in full satisfaction and discharge of the grievances in the declaration mentioned. At the trial, divers exceptions were taken, which it is not necessary to notice. To support the special plea, the defendant offered his father's receipt, in the following words: "Received of John Eubanks, two hundred and fifty dollars, in full of all debts, dues, or demands, up to this date." To avoid the effect of this instrument, the Court, against the objections of the defendant, admitted evidence to show that the intestate executed it to defraud his creditors, and when he was insane; and also instructed the jury, that, if they believed that the receipt was executed to defraud creditors, they ought to find for the plaintiff. The jury found for the plaintiff $248 and costs, for which judgment was rendered, and the defendant sued his writ of error.

Gilchrist & Evans, for the plaintiff.

Linton, contra.

By the Court, DICKINSON, J.

There are several bills of exception taken during the progress of

the trial, which we deem it unnecessary to discuss, as the main points in the cause arise upon the instructions. The record is encumbered with much useless matter; there are but few principles of law applicable to the case, and those are simple, and every way familiar.

The plaintiff sought to charge the defendant, upon the ground that he had received the notes and other property sued for, during the life of the intestate, who was proved to be his father; and that he had converted the same to his own use and benefit. Will the action lie? Upon this point, there can be no doubt. The executor or administrator might bring trover for the wrongful conversion of the property of his testator or decedent. The defendant, in the present instance, endeavors to discharge himself, by producing an acknowledgment of satisfaction, in the receipt of his father for the value of the property. The plaintiff attempts to avoid this conclusion, 1st, upon the ground of insanity; and, 2d, upon that of fraud. The Judge who tried the cause has expressly decided, that the administrators would have a right to recover, although the proof established the fact that the receipt was given in fraud of the rights of creditors. In this there is certainly manifest error; and the instruction being every way material and important, for the direction and government of the verdict, of course we are authorized to presume, that it must have had considerable weight and influence in determining the cause. It is perfectly clear, that, if the proof showed that if it was executed in fraud of the rights of creditors, then neither the party executing it, nor his administrators, nor any claiming under him, could take advantage of that fraud. To allow them to do so, would be to encourage fraud instead of suppressing it, and hold out the strongest temptation for its perpetration. The maxim is, that no one shall take advantage of his own wrong: much less, of his own fraud. While the fraud violates and destroys the contract, as respects the rights of third persons, or creditors, still the argument is rightly held to be binding between the parties themselves. And, unless this was the rule, the rights of creditors, or third persons, could not be protected or secured against fraudulent devices. The universality of the rule is only equalled by its importance; and, therefore, when the Court below instructed the jury, that the fraud of the deceased could be made to benefit his estate, he certainly contra-

vened a principle of natural and municipal justice, which is recognized by all the authorities, and enforced by courts, with the most rigid exaction.

It is certainly true, that if the deceased, at the time of executing the receipt, was disqualified, from insanity or imbecility of mind, of course neither he in his lifetime, nor those who succeeded him, are bound by any such pretended contract. Insanity or imbecility of mind destroys the will of the contract, and takes from it its binding efficacy and force. There can be no volition where there is neither judgment nor consent; and him who expects to take advantage of this weakness or aberration of mind, the law wisely restrains from doing so, and holds the contract a mere nullity, or no contract at all. No two things can be more widely separate than fraud and insanity. They cannot exist together; the one deserves the punishment of the law; the other, its sympathy and protection; and so they have ever been treated. If the receipt was given, and the party executing it knew not what he did, the law holds it a nullity *ab initio*. On the other hand, if it was executed in fraud, it is binding between the parties themselves and all who claim under them; and it is absolutely void and of no effect, as to creditors. This principle the defendant has been denied the advantage of.

Judgment reversed, and new trial awarded.

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Dillard *vs.* Evans.

Words and terms used in argument between individuals, must be taken in a general sense, and not in a technical signification.

In March, 1840, bank paper continued the common medium of exchange, or ordinary circulation, in Arkansas; and of this fact, the Court is bound judicially to take notice.

Therefore, a note of that date, payable in "*common currency of Arkansas*," is a note payable in Arkansas bank paper, and not in specie.

This was an action of debt, tried in Washington Circuit Court, in November, A. D. 1841, before the Hon. Joseph M. Hoge, one of the

Circuit Judges. John Dillard sued Lewis Evans, in debt, on a note, executed March 17, 1840, and payable in "*common currency of Arkansas.*". The defendant demurred, on the ground that the plaintiff had mistaken his remedy, and the demurrer was sustained, and judgment entered against the plaintiff, who appealed to this Court.

Paschal and *Evans*, for the appellant.

The instrument declared on, is a money contract; and, therefore, the action is well brought, in debt. According to the intention of the parties, the payment of the money was to be made in the common currency, and that currency, as specified and intended in the contract, was gold and silver.

Chambers vs. George, 5 *Littel's Reps.* 335, was decided at a time when bank paper was the general and almost exclusive currency and circulating medium of the State of Kentucky; and the contract was construed according to the popular acceptation of the terms used, of which the Court held it was bound to take notice. 3 *Mon. Rep.* 157.

But, at the time the contract declared on in this case, was entered into, bank paper was not the *general* currency in this State. There was much of specie in circulation, and the contract is to pay in dollars; and their value must be ascertained by the only standard known to the constitution.

But, admitting that bank notes were intended, still the third count of the declaration is well brought, and was sufficient.

The promise in this case being for dollars, which means the specie, the inquiry should be, not what was the value of Arkansas paper at the time the cause of action accrued, but how many of the representatives of money would have to be applied to the payment.

If foreign money is to be paid, it may be sued for in debt, or in debt in the *debet and detinet*, demanding the foreign money, and leaving the jury to assess the damages. 2 *Bac. Abr.* 287, and cases there cited. Debt is the proper remedy to recover money on all contracts, whether simple or under seal. 1 *Ch. Pl., title Debt*, 123, 124. Debt is not now merely applied to the recovery of sums certain, but likewise to every contract, whether the same be certain or merely capable of being reduced to certainty. 1 *Ch. Pl., title Debt*, 123. *Morris*

vs. Edwards, 1 *Ohio Rep.* 189. *Edwards vs. Morris*, 1 *Ohio Rep.* 520. *Smith vs. Goddard. ib.* 178.

Walker, contra.

Debt is the appropriate form of action for the recovery of a sum of money. There is a clear distinction between the words money and currency. Nothing is money but gold and silver. Currency may be money or bank notes; and will be so considered according to the facts existing at the date of the contract. *McCord vs. Ford*, 3 *Mon.* 166. The Court is bound judicially to take notice of the currency at any given period. *Sampton vs. Haggard*, 3 *Mon.* 149. The contract should be construed according to the popular acceptation of the language used. A note payable in the currency of the State, is not a contract for the payment of money. *Chambers vs. George*, 5 *Lit.* 335. Debt will not lie on a note payable in Tennessee currency. 2 *Yer. Rep.* 448.

A bond for the payment of $500 in horses, is a bond for the payment of property, not for money. The expression $500 is used as the measure of the quantum of property to be paid. Damages must be assessed by a jury, and the measure of damages should be the value of the property. *Henderson vs. Staunton*, *Hardin*, 118. 1 *Bibb*, 356.

Debt only lies for a sum of money due by certain and express agreement, where the quantity is fixed and specific, and not dependent on any subsequent valuation to settle it. *Black. Com.* 153. Debt lies upon every express contract to pay a sum certain. 2 *Com Dig.* 137. The great essentials in debt, are, 1st, that the contract be for money; 2d, a sum certain; 3d, specifically recoverable. *Esp. N. P.* 172.

By the Court, Lacy, J.

The instrument bears date on the 11th day of March, A. D. 1840, and, at that period of time, bank paper constituted the common medium of exchange or ordinary circulation for money. Bank issues are not, in the constitutional sense of the term, lawful money or legal coin. Gold and silver alone are a legal tender in payment of debts; and

the only true constitutional currency known to the laws. And, had specie or current coin been the common circulating medium at the date of the note sued on, then the terms of the contract would have been restricted exclusively to that circulation. Such was not the fact; and this Court is bound judicially to take notice of the kind of circulating medium that was then in general use in the State. And the bond sued on should be construed in reference to the existing state of things at the date of its execution. The parties contracting must be supposed to use the terms in their agreement, in their ordinary and popular acceptation, and not in their strict constitutional sense. Words and terms, when used in agreements between individuals, must be taken in a general sense, and not in a technical signification. This is a rule of sound legal construction, founded alike in justice and in public policy; and its application to the case now before the Court, will readily test and determine the case before us. The terms "common currency in Arkansas," at the date of the bond sued on, unquestionably meant bank notes or paper issues, which were then the general and universal currency of the State. Gold and silver, or lawful coin, had, at that time, ceased to circulate as money, and their place was supplied by bank issues or paper money; and, consequently, the parties to the suit are presumed to have contracted, with a full knowledge and understanding of this state of things; and, therefore, it is both right and just, that their contract should be governed by the true import and meaning of the terms that they themselves have thought proper to attach to them. This point has been expressly decided, in a number of cases, by the Court of Appeals in Kentucky. *McCord vs. Ford*, 3 *Mon.* 166; *Stricker, as adm'r, vs. Miller*, 5 *Lit.* 235. In the case of *Chambers vs. George*, 5 *Lit.* 335, which was an action of petition and summons on a note, "payable in the currency," Chief Justice Boyle held the terms of the agreement to mean bank notes or paper issues at the date of the contract; paper money then constituting the ordinary circulation in that State. In this opinion we fully concur; and, consequently, the Court below decided correctly in sustaining the demurrer. The note sued on not being an obligation for the direct payment of money, of course an action of debt will not lie upon it.

Judgment affirmed.

TROWBRIDGE & JENNINGS *vs.* SANGER.

A writ of error lies to the refusal of the Court below to grant a new trial.

It is an inflexible rule of law, that written evidence is of a higher grade than oral testimony; and, when a writing contains no ambiguity, oral testimony is not admissible to explain or prove it.

If the instrument be ambiguous, its defects may be supplied, or its uncertainty explained. It is competent to prove the date of a receipt by oral testimony, or show it by circumstances connected with the transaction.

Dates, and amounts of receipts, are capable of being proved orally. They are mere defects or omissions, which may properly be supplied by other proof than the instrument itself. The admission of such testimony comports with the rule of written evidence, and goes far to uphold it.

In an action against *partners*, on an account, the partnership of the defendants must be proved.

THIS was an action of assumpsit, tried in Pulaski Circuit Court, in September, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges.

Sanger sued Trowbridge & Jennings, as partners, in assumpsit, on an account for furniture, &c., sold and delivered. The case was tried on the pleas of non-assumpsit, and set-off, and Sanger obtained a verdict for $519 12.

The defendants then moved for a new trial, on affidavits and certain papers, and their motion being overruled, they excepted. The bill of exceptions sets out the evidence, in substance, as follows: The plaintiff's only witness proved the presentation by him to Trowbridge of a bill, precisely like the bill of partnership filed. Trowbridge cast up the bill, and said that if Sanger would deduct $100, he would pay it. He claimed no other credits than those allowed in the bill, but a deduction of $100 for mattresses which were too short. The bill was in the hand-writing of Sanger. Witness presented two bills, but did not recollect their respective amounts. They were presented at different times. The bill filed in the case was presented last; was positive there was no credit for $234 in the last bill; and did not remember as to there being such a credit on the first. Trowbridge said nothing about rather paying than having a law-suit. Witness delivered two loads of mattresses, but did not say to whom, and one dozen chairs.

The mattresses had each a small hole in the end, which it might have required two minutes to sew up. Such a hole is generally left in mattresses. The account so proven was for $644, with a credit of $140.

The defendants then offered a receipt, signed by Sanger, and attached, by a wafer, to an account of Trowbridge & Jennings, against Sanger. The receipt bore no date, and was in these words: "Received, of R. Jennings, the sum of five hundred dollars, to apply on account of Trowbridge & Jennings." The above amount is in full for the said five hundred dollars. The Court refused to permit the receipt to be read in evidence, and the defendants saved the point, but took no bill of exceptions until after the motion for a new trial was overruled. No other evidence was given.

The Court instructed the jury, that it was necessary for the plaintiff to have proved that Trowbridge & Jennings were partners, and that positive proof was not required to establish that fact, but it might be inferred by the jury from circumstances. No exception was taken to these instructions.

The defendants moved for a new trial, because the verdict was against law, evidence, and the instructions of the Court, the discovery of new evidence, and the error of the Court in excluding the receipt from the jury.

Trowbridge's affidavit, presented with this motion, stated that, since the trial, he had discovered that Wm. Caldwell was a material witness for him, and could give testimony material to the issue; and that, before the trial, he did not know that Caldwell knew any thing about it; that he had told him, since the trial, that Sanger had told him, in 1840, that Trowbridge & Jennings did not owe him much; that Jennings had paid him five hundred dollars for Trowbridge & Jennings, which payment he considered better than Arkansas money; that he intended to take Caldwell's testimony, but he left on a steam-boat before he did so; believes he can procure it, &c. He further stated, that, since the trial, he had discovered, among the papers of a suit before commenced in the same Court, by Sanger, against Trowbridge & Jennings, and dismissed, a bill against them, in Sanger's handwriting, in which he claimed a balance of only $204 50, which bill he believes to be the same one spoken of by the witness in the case,

as presented by him to Trowbridge; and in it is an item, as follows: "Balance due on Mr. Jennings' account, $234, and a credit for $500; that he made vigilant search for the bill, and was unable to find or discover it until after the trial; that, in the dismissed suit, Sanger had made an affidavit that only $220 was due him from Trowbridge & Jennings, which affidavit was made February 16, 1841.

The account, which Trowbridge *could not find* before the trial, was attached to, and made part of, a deposition taken by him and Jennings, in the dismissed suit, and on file in that suit. The deponent stated that he procured mattresses of Sanger for them; that one Devinney was owing them $107, of which Sanger agreed to pay them $100, (credited on the bill of particulars); that the mattresses were open at one end, and Sanger said he would send a person to sew them up, which he did not do. That England (the witness in the case) presented him a bill of Sanger's, against Trowbridge & Jennings, showing a balance due Sanger of $204 50. The bill, so referred to, was filed, and is the same one mentioned in Trowbridge's affidavit. The defendants sued their writ of error.

Hempstead & Johnson, for the plaintiffs.

Pike & Baldwin, *Trapnall & Cocke*, contra.

A writ of error for the refusal of a court to grant a new trial, did not lie, at common law; the granting of such new trial, in any case, being a matter of discretion. *Henderson vs. Moore*, 5 *Cranch*, 11. *Marine Ins. Co. vs. Young*, 5 *Cranch*, 187. *Weich vs. Mandeville*, 7 *Cranch*, 152. *Barr vs. Gratz*, 4 *Wheat.* 220. *U. S. vs. Daniel*, 6 *Wheat.* 542. *McLanahan vs. Un. Ins. Co.*, 1 *Peters*, 183. *U. S. vs. Buford*, 3 *Peters*, 31. *U. S. vs. Gibert*, 2 *Sumn.* 52. *Whiteside vs. Jackson*, 1 *Wend.* 423. *Reynard vs. Brecknell*, 4 *Pick.* 303. *The People vs. Haynes*, 14 *Wend.* 554. *The People vs. Dalton*, 15 *Wend.* 583. *Anderson vs. The State*, 5 *Har. & John.* 174. *McCourry vs. Doremus & Suydam*, 5 *Hals.* 245. *Carpenter vs. Gookin*, 2 *Verm.* 295. *Chase vs. Davis*, 7 *Verm.* 479. *Lewis vs. Hawley*, 1 *Day*, 50. *Bloss vs. Kittredge*, 5 *Verm.* 30. *Magill vs. Lyman*, 6 *Conn.* 60. *Phleming vs. The State*, 1 *Ala.* 42. *Law vs. Merrils*, 6 *Wend.* 278. *Burke vs.*

Young, 2 *Serg. & R.* 383. *Burd vs. Landsdale*, 2 *Binn.* 80. *Wright vs. Small*, *ib.* 93. *Granger vs. Bissel*, 2 *Day*, 364. *Lewis vs. Hawley*, 1 *Conn.* 49. *White vs. Trinity Church*, 5 *Conn.* 187. *Gamer et al. vs. Crenshaw*, 1 *Scam.* 143. *Sawyer vs. Stephenson*, *Breese*, 6. *Cornelius vs. Boucher*, *ib.* 12. *Clemson vs. Kamper*, *ib.* 162. *Collins vs. Claypole*, *ib.* 164. *Street vs. Blue*, *ib.* 201. *Adams vs. Smith*, *ib.* 221. *Vernon vs. May*, *ib.* 229. *Littletons vs. Moses*, *Breese's App.* 9. The rule, in Illinois, was changed, in 1837, by *statute*. All which cases are *express* upon the point, and treat it as a matter about which there can be no controversy.

The proper office of a writ of error is, to remove the final judgment, with the premises, which are, "the pleadings between the parties, the proper concurrence of the writ and process, the finding of the jury upon an issue of fact, if any such has been joined, and, lastly, the judgment of the inferior court." *By all the Judges of England*, in *Mellish vs. Richardson*, 9 *Bing.* 125.

Again, upon a writ of error, the decisions of a court or jury, *on questions of fact*, cannot be reviewed where there has been no erroneous decision on matters of law. The testimony, as well as the law, cannot be submitted to the revision of this Court, upon error. A motion for a new trial *is not a part of the proceedings in a cause*. It is addressed to the discretion of the Court below. A court of error cannot weigh evidence. *Cases cited above, and Graham vs. Cammann*, 2 *Caine's R.* 168; *Carver vs. Jackson*, 4 *Pet.* 80; *Parsons vs. Armor & Oakley*, 3 *Pet.* 425; *People vs. Superior Court of New-York*, 20 *Wend.* 664; *U. S. vs. Duval*, 6 *Wheat.* 542.

By moving for a new trial, the defendants waived all exceptions taken on the trial.

The bill of exceptions is irregular. A bill of exceptions is never allowed to detail *the evidence*, but its office is to state *the facts proved*, not the *evidence* which proved them. *The People vs. Dalton*, 15 *Wend.* 581.

By the Court, Lacy, J.

The rejection of the receipt constitutes the principal ground in support of the motion for a new trial. It is certainly an inflexible rule

of law, that written evidence is a higher grade of proof than oral testimony; and that, where the writing itself contains no ambiguity, in such cases, oral testimony is not admissible to explain or prove it. This rule, however, is not contravened, but expressly recognized by the principle that, if there is ambiguity in the instrument, then it is admissible to explain its uncertainty, or to supply its deficiency. In this case, it was certainly competent to have proved the date of the receipt by oral testimony, or to have shown it by circumstantial evidence connected with the transaction.

The receipt was given in payment of Trowbridge & Jennings' account, the signature of Sanger was proved, and, if there had been satisfactory evidence given as to its date, (for aught that we can know), it might have established the discharge of Sanger's account, or at least so much of it as it purported to pay. Dates, and amounts of receipts, are capable of being proved orally, and it is the daily practice of courts of justice to permit it. They are merely defects or omissions, which may be properly supplied by other proof than the instrument itself; and the admission of such testimony comports with the rule of written evidence, and goes far to uphold it. The Court, then, certainly erred in rejecting the receipt as evidence; and, as the party's rights may have been materially prejudiced by this error, a new trial should have been awarded, upon that ground alone.

Besides, we have looked into the evidence as presented by the record, and there is certainly no very satisfactory proof showing the partnership of Trowbridge & Jennings. Their liability depended upon their copartnership. This fact the declaration charged, and the plaintiff was bound to prove it by competent testimony. It was a substantial fact, capable of being established either by the partnership agreement itself, or by other acts and circumstances of a clear and explicit character, which would remove all difficulty upon the subject. We deem it unnecessary to analyze the testimony given upon this point, because we have already shown that the party was entitled to a new trial on other grounds.

Reversed, and a new trial awarded.

LAWSON *vs.* MAIN.

The official return of a sheriff, upon process executed by him, cannot, in a proceeding against him, be contradicted or disproved by evidence introduced by himself.

When a sheriff returns, upon execution, that he levied it upon property of the defendant in execution, sufficient to satisfy it, and that he exposed the property to sale, and the bid was sufficient to cover the amount of the execution, these facts fix his liability.

The levy being sufficient to satisfy the execution, it was, in contemplation of law, satisfied, unless the return shows, on its face, some matter sufficient to avoid this legal consequence.

The sheriff cannot discharge himself, by showing, by parol, that the property levied on was that of another, or that he has applied the fund to some other execution. He should have made a proper return in the first instance.

MOTION in Pulaski Circuit Court, against James Lawson, jun., sheriff of Pulaski county, determined in November, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. On the 8th of June, 1841, William Main sued out of Pulaski Circuit Court an alias fi. fa., against Jefferson Smith, on a judgment for $101, damages and costs, on which Lawson, the sheriff, returned that he levied it on two negroes, which were appraised at $300, and certain lots, valued at $2000, and also on 20 promissory notes, signed by three other persons, for $81 25 each; that the property and notes were duly advertised and offered for sale, at the time and place fixed by law, when William Field, being the highest and last bidder, bought Smith's interest of one-fifth in the negroes, for $51; his interest of one-fifth in the land, for $266 67; and his one-fifth interest in the notes, for $280. This sale took place on the first Monday of September, A. D. 1841.

On the 23d of September, 1841, Main gave notice to the sheriff, that he would move against him, on the 25th September, 1841, for judgment for the amount of his execution, and lawful interest, and damages at the rate of 10 per cent. per month, from the 7th of September, A. D. 1841. Main filed his motion, accordingly, on the 23d of September, and the Court took it under advisement, and gave the sheriff leave to amend his return, which he did, by adding to it, that, on calling on Field, the purchaser at the sale, he refused to pay the amount bid by him *for the notes;* and that he thereupon again exposed the notes to sale, and they were not sold, for want of bidders.

The sheriff produced in evidence, on the hearing of the motion, an execution in favor of Rutherford and Ashley, against Smith, upon a judgment of Pulaski Circuit Court, of older date than Main's, levied upon the same property, the amount of which, after it was levied, was assigned, on the 31st of August, 1841, by Rutherford and Ashley, to Field, the purchaser at the sale. He also read a mortgage, with power of sale, executed by Smith, to Field and Rutherford, in 1840, before either judgment was rendered, of and upon all the property levied on, to secure to them the repayment of $1,093 73 cents, in thirty days from its date. The notes levied on were admitted to be payable to Smith, as administrator of Bernard Smith, deceased.

Main moved to strike out the amendment to the sheriff's return, but the motion was overruled, and the Court rendered judgment against the sheriff, for the amount prayed in the motion. Lawson sued his writ of error.

Ashley & Watkins, for the plaintiff.

Hempstead & Johnson, contra.

By the Court, LACY, J.

The question presented by the record is an important one, and we have maturely considered it. It resolves itself simply into this inquiry: Can the return of the sheriff be contradicted or disproved by extraneous evidence, introduced by himself? No proposition, to our minds, can be clearer than that it cannot. This rule is fully supported by authority; and the reason, justice, and necessity of it can, in no case whatever, be questioned. The return of the sheriff is an official, ministerial act, and forms a part of the record of the Court, which can neither be impeached nor questioned *aliunde* by him. It proves itself, for it has the sanction and seal of judicial truth attached to it; and to permit its verity and sacredness to be called in question by other evidence, would be virtually to abolish and destroy the records of public justice, and to produce the utmost uncertainty and incalculable mischief into the whole proceeding. The execution is but the mandate of the judgment of the Court, moulded into form and shape by the authority of law, and speaking at once its will and command,

both of which are entrusted to the officer for its due service and return, he being but the organ and the instrument of the law, for carrying into effect its judgment and decrees. The levy and return of the execution constitute part of the judicial proceedings in the case, and are so intimately interwoven with them, as to become a constituent and important part of the public documents of the country. It is true, that the Court will allow him, upon application, to amend his return; but then this privilege is given to him upon the principle that the truth of the facts ought to appear of record, and the sheriff, having been mistaken in regard to them, is permitted to alter the return. It is for this reason, as well as for others of a more important character, that the return of a sheriff must prove itself, and that he must be bound by it; and in no instance will he ever be permitted to contradict or explain it away. If that were the case, the law, speaking through the officer, would be contradicted and disproved by the acts of the individual himself, in his private capacity. The sheriff is then concluded by his return; and his liability, so far as he is concerned himself, is fixed by his own act. That being the case, it only remains for us to see whether the return, in the present instance, will charge him, or whether he is exonerated by it.

His return, in substance, states, that he levied upon certain real and personal estate, and choses in action, of the defendant in the execution, sufficient to satisfy the debt of the plaintiff below, and that he exposed the same to sale, and that the bid was sufficient to cover the amount of the execution. These facts appear upon the return of the execution, and beyond all doubt fix his liability. The levy was sufficient to satisfy the execution; and, in contemplation of law, it was satisfied that moment, unless the return on its face shows some matter sufficient to change this legal consequence. The sheriff made the seizure: he cannot discharge himself by contradicting his own return, nor by showing that the property levied upon was that of another, or that he has applied the fund to some other execution. He has no right to make the levy, unless it is lawful. An unlawful seizure subjects him to damages, and authorizes the party who has been injured by the unwarrantable levy, to treat him as a trespasser.

In this case, the sheriff endeavors to show the appropriation of the

fund to the payment of prior executions. This may be, and probably is, true; but, if it be so, he should have returned the execution properly, in the first instance, by showing that he had levied in favor of the prior executions, and that he had exhausted the property of the debtor to pay them. These facts should appear upon the return of the executions themselves. This he has not thought proper to do. He has made the levy on the defendant in error's execution; the property seized on was sufficient to discharge it; the sale was made for that purpose; and the facts returned on the execution itself, show that he had in his hands, or ought to have had, a sufficient fund to have satisfied the execution, exclusive of the choses in action that were levied upon. A motion is given against the sheriff for an improper or unwarrantable return, by our statute regulating the proceedings in such cases. The remedy afforded by the act has been substantially complied with; and he being bound by the truth of his return, the Court below properly sustained the motion.

Judgment affirmed.

Bertrand *vs.* Byrd.

In a count against the acceptor of a bill, which is accepted "payable in a settlement between himself and the plaintiff," if there is no averment that there had been a settlement, the count is bad.

A count on a contract with the defendant alone, may be joined, in assumpsit, with a count for goods sold to him and others jointly, and work and labor done for him and others jointly.

This was an action of assumpsit, by Bertrand against Byrd, determined in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. The first count charged Byrd as acceptor of a bill, drawn on him by William Marlow, and accepted, payable "in a settlement between himself and Bertrand," without alleging that there had been any settlement. The second was a good count on a note; the third a good *indebitatus* count;

the fourth a count for goods sold, work and labor done, moneys advanced, &c., to and for Byrd and two other persons; and the fifth an account stated with Byrd. A joint and several demurrer to the declaration and each count, was sustained. The plaintiff asked leave to strike out his first count, which was refused, and he declined amending. Judgment went against him, and he sued his writ of error.

Fowler, for the plaintiff.

Trapnall and *Pike*, contra.

By the Court, Dickinson, J.

The first count charges the defendant upon a bill of exchange. The acceptance was conditional; the defendant's liability depended upon a settlement between himself and the plaintiff; and as that settlement is never averred to have taken place, of course his liability has not accrued. The demurrer was, therefore, properly sustained as to this count. The second count charges the defendant's indebtedness upon a promissory note, and is every way formal and valid. The third is an indebitatus count, and equally as good. And the fourth is also an indebitatus count, charging, among other things, that the defendant and two other persons, (who are not sued in the action), were indebted for "goods and merchandize sold and delivered," "money paid, laid out, and expended," &c. We can discover no objection to this count. The defendant was jointly and severally liable for the purchase and delivery of the goods, with the other two persons not sued; and his liability, in that capacity cannot be deemed a misjoinder of actions with the other counts. By the purchase of the goods, if separately answerable to the plaintiff, we can see no sufficient reason why this responsibility may not be coupled with other distinct charges against him. The demurrer was, therefore, improperly sustained as to each of these counts.

Judgment reversed.

THE REAL ESTATE BANK *vs.* BIZZELL.

If, upon a motion to affirm a judgment appealed from, because the transcript was not filed in time, the appellant shows that his counsel made timely application for a transcript, and used due exertion to obtain it, and that it was not obtained because the Clerk of the Court below was not able to prepare it, owing to the great number of transcripts required for the Supreme Court, the affirmance will be denied.

The certificate of a Notary who protested the bill, that he forwarded due notice of protest, though under his notarial seal, is no evidence of that fact.

THIS was an action of assumpsit, against William H. Bizzell, as endorser of a bill of exchange, payable in New-Orleans, tried in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The case was tried on the general issue. On the trial, after giving in evidence the bill sued on, and the notarial protest, and the certificate of the Notary appended to the protest, that he forwarded notices of protest, by mail, on the day of protest, to the different parties to the bill, directed to the places of their respective residences, endorsed on the bill; the Court instructed the jury, that, to charge the defendant, notice must have been sent by the next mail after the protest, to the post-office nearest defendant's residence; and, that the Notary's certificate was no evidence that the notice was sent. Judgment went for the defendant, and the plaintiff appealed.

Upon the case coming into this Court, the appellee moved to affirm the judgment, (upon certificate of Clerk, required by law), because the transcript had not been filed ten days before the commencement of the term. A rule was accordingly entered, that the appellant show cause. Cause was shown, at a subsequent day, by the affidavit of the appellant's attorney, A. Fowler, Esq.

By the Court, RINGO, C. J.

It appears, from the affidavit filed in response to the rule, that the appellant had retained an attorney at law, specially to attend to the prosecution and management of this case; that he superintended its prosecution in the Circuit Court; that the appeal was taken and

granted on the last day of the last term of said Circuit Court; that, within a day or two after the appeal was taken, said attorney was compelled, by special agreement, to leave Little Rock, to attend the Circuit Court of Batesville; that, before he started, he called upon the Clerk of said Circuit Court, and particularly requested him to attend to making out and filing with the Clerk of the Supreme Court, in due time, the transcript in this and other cases on appeal and on error, in which he was interested as counsel, and which had to be made out by the Clerk of said Circuit Court; that the Clerk told him said transcripts should be attended to by him; that said attorney, after his return from Batesville, about the commencement of the present term of this Court, when he had discovered that said transcripts were not filed, applied to the Clerk to know why they had not been filed, and said Clerk responded each time to such inquiry, that he had not had time; that he had been working diligently day and night, but the mass of transcripts which he had to make from the record books was so great, that he found it impossible to get them ready; that others were in the same condition; but he would complete and file them as soon as he could. And that some short time after said last application, on the same day, he was informed by the Clerk of this Court, that this and several other transcripts had been on that day filed by the Clerk of said Circuit Court. The provisions of the 23d and 24th sections of the statute above cited, require the appellant, in all cases of appeal from the Circuit Court, to cause a transcript of the record to be filed with the Clerk of this Court, at least ten days prior to the commencement of the term to which the appeal is returnable; and, in case of a failure to do so, provide that the judgment appealed from shall be affirmed, upon the production, by the appellee, of a certificate of the Clerk of the Circuit Court, that an appeal has been prayed and recognizance entered into according to law, unless good cause to the contrary be shown. These provisions were evidently only designed to prevent unnecessary delay in the prosecution of such appeals to this Court as suspend the judgment of the inferior Court, and to enable the appellee to determine the controversy in a summary manner, if the appellant should fail or neglect to use reasonable diligence, in bringing the case properly before this Court for adjudica-

tion. In this case, the truth of the facts, as shown in response to the rule, has not been controverted; and from them it appears, not only that the appellant designed to prosecute the appeal, without delay, but, also, that due diligence has been used, as well as reasonable efforts made, to have the transcript of the record filed with the Clerk of this Court, within the time prescribed by law. Rule discharged.

The case was thereupon argued in chief.

Fowler, for the plaintiff, to the point that the certificate was evidence, cited *Rev. St. p.* 151, *sec.* 11. *Holliday vs. McDougal*, 20 *Wend.* 85. 1 *Hill's (N. C.) Rep.* 45. 8 *Wheat.* 326, 331. *Peck's Rep.* 268. 5 *Cond. Rep.* 451. 6 *Cowen*, 164. That this was a foreign bill, 2 *Peters*, 586, 590. 4 *Wash. C. C. R.* 148. 2 *Peters*, 668, 170. 15 *Wend.* 530. 8 *Dana*, 134.

That it was not necessary to send the notice to the nearest post-office; but it is sufficient if the holder believed it to be the nearest; *Washam vs. Goar*, 4 *Porter*, 445. 1 *J. R.* 294.

That testimony given in a cause, without objection, must be considered competent; and the other party cannot move to instruct that it is not so. 22 *Wend.* 273, 275. 14 *J. R.* 215. 3 *Monroe*, 56. 5 *Cond. Rep.* 227. 7 *Wheat.* 453.

Wm. & E. Cummins, contra.

No evidence was given to show that Bizzell resided at or near Murfreesborough, whither the notice is alleged to have been sent. The notice must be sent to the nearest post-office to the residence of the party entitled to such notice. *Ireland vs. Kip*, 11 *J. R.* 231. *Freeman vs. Boynter*, 7 *Mass. Rep.* 483. The party must use reasonable diligence to ascertain the residence of the party to be affected by notice; and it is not sufficient to look for a party at the place where the bill is dated, if his residence be elsewhere. *Fisher vs. Evans*, 5 *Bin.* 541.

The memorandum of the Notary, as to notice, though officially signed and sealed, is no part of the protest, but is entirely separate from it, and can have no higher character, and no higher degree of

credit should be given to it, than if the same facts had been stated in a private letter of the Notary.

Section 11, of Chapter 20, Revised Statutes, is in these words: "The protest made by the Notary Public, under his hand and seal of office, shall be allowed as evidence of the facts therein contained." The word "protest," in this section, means nothing more than the official declaration of the Notary, of the dishonor of the bill. To this extent, his acts are entitled to full faith and credit. Beyond this, he has no authority; and his acts are entitled to no higher regard than those of a private person. The Notary has nothing to do with giving notice to the parties concerned. This does not fall within the scope of his official duties.

By the Court, Dickinson, J.

We can see no objection to the instructions. It is true, that our statute makes the certificate of the Notary evidence of the non-payment of the bill, and his notarial act of this fact cannot be questioned; but this provision certainly does not dispense with proof that notice of protest was duly forwarded to the defendant. That proof the holder of the bill is bound to make, and unless he establishes it upon the trial, the defendant is exonerated. It is true, that the Notary certifies that he forwarded notice of protest, by the first mail after the bill fell due, to Murfreesborough; but this is no proof that notice of protest was sent, or that Murfreesborough is the nearest post-office to the residence of the defendant. The certificate of these facts is not a notarial act, and of course they should have been established by proof *aliunde;* and, failing to do this, the plaintiff has not made out a cause of action against the defendant, and must, therefore, fail in her suit.

Judgment affirmed.

THE GOVERNOR, FOR USE, &c., *vs.* PLEASANTS ET AL.

In debt, on sheriff's bond, a breach, charging him with collecting money on execution and failing to pay it over, must allege a demand and refusal.
In such action, a breach that he has not returned the execution, is good.

THIS was an action of debt, determined in Washington Circuit Court, in December, 1841, before the Hon. JOSEPH M. HOGE, one of the Circuit Judges. Suit was brought in the name of "ARCHIBALD YELL, Governor of Arkansas," successor of James S. Conway, Governor, for the use of James Littlefield and others, against Lucius C. Pleasants and others, his securities, on his bond to JAMES S. CONWAY, Governor, as sheriff of Washington county. The declaration recited the issuing of an execution, directed to him, in favor of Littlefield & Co., against William Dugan, and alleged two breaches: First, that he collected the money on the execution, and did not pay it over, without averring any demand and refusal to pay over; and, second, that he did not return the execution. After a motion to quash the writ was overruled, the defendants demurred, assigning *eight* causes of demurrer. The causes assigned were, briefly, that the suit was improperly brought in the name of Gov. YELL, and not in the name of the obligee; that the bond was not executed as required by law; that there was no averment that JAMES S. CONWAY was Governor; that it was a personal suit by Archibald Yell; that there was no averment that he was successor of Gov. CONWAY; and that the declaration did not specify which of the defendants was principal, and which security. The Court sustained the demurrer, and gave final judgment for the defendants. The case came up by writ of error.

Walker, for the plaintiff.

The principal ground relied on by the defendants, and in which they were sustained by the Court below, is, that the bond was executed on the 8th January, 1839, under the act of 1836; the Revised Statutes were declared in force 20th March, 1839; and, therefore, the breaches

were not covered by the bond: in other words, that the act, declared in force the 20th March, annulled and destroyed its obligatory force. Such never was the intention of the Legislature; nor is such the legal effect of the repeal of the act of 1836. 1 *Cranch*, 103. 2 *Cranch*, 358. 2 *Gallis. C. C. R.* 204.

Oldham, *Paschal*, and *Evans*, contra.

On the 26th day of October, 1836, the Legislature passed a law, entitled "An act to regulate the office of sheriff," which required the sheriffs to give bond to the Governor of the State of Arkansas, and his successors in office. See *pamphlet acts of* 1836, *pp.* 112, 113. The bond, in this case, was executed in January, 1839. After its execution, and before the breaches complained of by the plaintiff, the statute, passed December 18th, 1837, took effect on the 20th March, 1839. This statute required the sheriffs' bonds to be given to the State of Arkansas, and has express reference to the election of 1838, at which time Pleasants was elected sheriff of Washington county. *Rev. St.*, *Chap.* 140, *title* "*Sheriffs.*" The statute of 1836 was repealed by express words, by the 129th *Chap.*, *sec.* 28, *Rev. St.*, *title* "*Revised Statutes*," without continuing the sheriffs' bonds in force, or providing that they shall remain liable on the bonds given under the law then repealed, for any future acts. The sheriff, then, is not responsible, on his bond, for any acts done, or penalties or forfeitures incurred, subsequent to the repeal of the act of 1836, under which the bond was executed, as there is no provision or exception, in the act by which it was repealed, continuing in force such bonds. *Miller's case*, 1 *Black. Rep.* 451. *United States vs. Passmore*, 4 *Dall. Rep.* 372. *Hatfield Township Road case*, 4 *Yates' Rep.* 392. 1 *Kent's Com.* 465, *note a.* 11 *Pick.* 450. 21 *Pick.* 350. *Commonwealth vs. Duane*, 1 *Binn.* 608. 1 *H. P. C.*, *Chap.* 40, *sec.* 6. *Rex vs. Morgan*, 1 *Str.* 1066. *Bac. Abr.* "*Statute*," *D.*

Whence does the Governor derive his authority to sue, after the act by which he was made trustee, was repealed? The bond was executed to the Governor, as a sole corporation. 1 *Black. Com.* 469. 2 *Bac. Abr. title* "*Corporation.*" 3 *Kent's Com.* "*Corporation*," 273. 1 *Kyd on Corporations*, 76, 77. When a corporation is dissolved by

act of Parliament, the debts due to or from it are extinguished. 4 *Black. Com.* 484. 3 *Kent's Com.* 305.

It does not appear that Archibald Yell sues in his representative character. *Brown vs. Hicks*, 1 *Ark. Rep.* 232.

By the Court, LACY, J.

The questions raised upon the assignments of the demurrer are most, if not all of them, frivolous; but, whether good or bad, are merely matters in abatement, and therefore could not be taken advantage of upon demurrer. The declaration contains two breaches. The first charges the sheriff for collecting the money and failing to pay it over, upon the execution. This breach contains no demand and refusal, and of course would be held to be bad. There is no cause of action accruing against the sheriff, in this form of action, for his collecting of money and failing to pay it over, unless the plaintiff avers a demand and refusal.

The second breach charges the sheriff with a failure to return the execution according to law. We hold this breach to be good. The words of our statute expressly make him liable, if he fails to return the execution, or makes a false return. The act declares, that, "if any officer shall not return any execution that comes to his hands, on or before the return day therein specified, or shall make a false return thereof, he shall be held liable, and bound to pay the whole amount of money in such execution." Language cannot be more explicit or peremptory than this. The second breach is, therefore, properly assigned.

Judgment reversed.

BERTRAND *vs.* BYRD.

"Due C. P. Bertrand, for cash lent, three hundred dollars," signed R. C. Byrd, and having the word "*seal*" written at the end of the name, with a scrawl around it, is a *sealed* instrument, within the meaning of the Revised Statutes.

That provision of law which enacts, that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed," is merely declaratory of what the law was before.

DEBT, determined in the Pulaski Circuit Court, in November, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit

Judges. Bertrand sued Byrd, on an instrument signed by Byrd, in the following words: "Due C. P. Bertrand, for cash lent, three hundred dollars. May 10, 1840. R. C. Byrd;" with the word "*seal*" at the end of Byrd's name, and a scrawl around it. The declaration described the instrument as a *writing obligatory*. Oyer and demurrer sustained, and final judgment for defendant. The case came up by writ of error.

Fowler, for the plaintiff.

Trapnall and *Pike*, contra.

By the Court, RINGO, C. J.

The only question presented for the decision and judgment of this Court, is this: Does the law regard the instrument given on oyer as the foundation of the suit, as being unsealed? If it is sealed, the declaration describes it truly, and the judgment upon the demurrer is wrong; but, if it be not sealed, the judgment is right.

It is precisely such an instrument as was adjudged by this Court, in the case of *Jeffery vs. Underwood*, 1 *Ark. Rep.* 108, to be sealed, and of course a writing obligatory, and is admitted by the defendant; but he insists that the law respecting such instruments has been since changed by the 3*d sec. of Chap.* 30, *Rev. St. Ark.*, which enacts, that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl, by way of seal, shall be deemed and adjudged to be sealed." The language of this statute is affirmative, and merely declaratory of the law as it existed before. It neither establishes a new rule nor abrogates an old one, but makes the rule certain, which was previously controverted, that an instrument in writing, containing on its face any expression that it is sealed, and having a scrawl affixed to it by the obligor or maker, by way of seal, shall be deemed and adjudged to be sealed. This we conceive to be the true meaning and construction of this statutory provision, and such is the effect, literally, of the language used. The common law, as is well known, anciently admitted as a seal nothing but an impression made upon some tenacious substance, but this practice has long since been measurably, if not en-

tirely, disused and supplanted, or superseded, by the practice of affixing a scrawl, by way of seal, to the instrument, after or opposite the signature of the obligor. Now, suppose an instrument in writing was duly sealed in the ancient mode, with an impression made upon some tenacious substance, instead of scrawl, either with or without an expression on the face of the instrument, or in the body of the writing, that it is sealed, would the law consider such instrument as sealed, and attach to it the same consequences and force as if it was executed, in every respect, in strict conformity with the provisions of this statute? We apprehend it would, because such would be their effect under the previous law; and the statute under consideration contains no negative words; and, therefore, according to the rules laid down by the most learned judges and authors for the construction of statutes, the old law, so far as it is not in conflict with the statute, is not thereby abrogated or repealed; and, for these reasons, the Court, in our opinion, erred in adjudging the instrument of which oyer was given, unsealed, and thereupon sustaining the demurrer to the declaration. The instrument has upon its face a scrawl, purporting, and substantially averred, in the declaration, to have been affixed there by Byrd, by way of seal, containing within it the word "seal," distinctly written and expressed; and this, we conceive, places it within the provisions of the statute: but, whether within its provisions or not, it must be regarded as a sealed instrument: and if, in fact, the scrawl was not so affixed by the defendant, it is not binding upon him, and he may well put that fact in issue by an appropriate plea; but, until he does so, it must be adjudged his deed.

Judgment reversed.

Richmond *vs.* Duncan & Preston.

Service of a writ of attachment by merely summoning a *garnishee*, gives the Court no jurisdiction.
Manner of serving such writ prescribed.

This case was determined in Clark Circuit Court, in October, A. D. 1841, before the Hon. William Conway B., one of the Circuit

Judges. Duncan & Preston filed their declaration in debt, with the proper affidavit and bond, and sued out a writ of attachment against Barton Richmond. The writ was returned served, by summoning John Wilson, as garnishee, and no property found. After publication made, judgment by default. The case came up by writ of error.

Pike & Baldwin, for the plaintiff, referred to *Desha vs. Baker et al.*, 3 *Ark.* 509, as settling this case; and contended further, that suing this writ of error ought not to be held to be such an appearance as subjected the plaintiff to the jurisdiction of our courts, and would compel him to appear and defend. They insisted that it would be only to relieve him against one wrong done him, by subjecting him to another equally as great. Shall it be said that a foreigner cannot avoid an unjust judgment, void of itself, because *coram non judice*, without being compelled to permit the jurisdiction ultimately to attach? *Story, Conf. of Laws*, 461, 462. *Bissell vs. Briggs*, 9 *Mass.* 468. *Hall vs. Williams*, 6 *Pick.* 232.

Hanagin, contra.

By the Court, Ringo, C. J.

This Court held, in *Desha vs. Baker et al.*, 3 *Ark.* 509, that a writ of attachment of this character, under our statutory provisions prescribing the manner in which such process shall be served, could not be executed so as to bind either the property, effects, or credits of the debtor, without the officer charged with the execution thereof, going to the place where the property upon which it is levied may be found, or to the place where the debtor to the defendant may be found, or, if he cannot be found, to his usual place of abode, and then and there, in the presence of one or more citizens of the county, declaring, according to the truth of the fact, that he attaches, as the property of the defendant, certain lands or tenements, goods or chattels, then present, giving, at the time, such description of the property so attached as will identify and distinguish it from other property not attached; and, where it is designed to bind either property, effects, or credits of defendant, in the hands of any garnishee or third person, the same course must be pursued: that is, the officer must declare, in the pre-

sence of such garnishee or third person, one or more citizens of the county being also present, that he attaches all the property, credits, and effects of the defendant, in the hands or possession of such garnishee or third person; or, if it be not necessary to attach the whole, he must designate and specify what portion or particular part thereof he attaches; and the like declaration and specification must be made at the usual place of abode of such garnishee or third person, when service of such writ shall be made by leaving a copy. And unless this be done, the property, effects, or credits of the defendant, are not bound, or legally subjected to the demand of the plaintiff, by virtue of the attachment, notwithstanding the writ may, in every other respect, have been executed in the manner prescribed by law.

The proceeding by attachment is, in its character, essentially a proceeding *in rem*, although the defendant may be personally served with the writ, if he be found in the county; in which event it assumes also, in some respects, the character of a proceeding *in personam;* and, upon such service, the defendant is bound to appear and answer, as in ordinary actions: but, to warrant a judgment against him by default, the writ must be executed by either a personal service upon him, or a service legally binding either upon his lands, tenements, goods, chattels, moneys, credits, or effects. The return to the writ, in this case, shows no such execution of it upon either. Consequently, the judgment against the plaintiff, by default, was wholly unauthorized, and the Court erred in pronouncing it.

Reversed, and defendant ruled to appear below.

Inglish et al. *vs.* Watkins, Adm'r.

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Judgment against one defendant, after the suit is regularly discontinued as to him, without any subsequent appearance on his part, will reverse the judgment as to all the defendants.

The objection of repugnancy between different parts of the declaration, was only cause of special demurrer at common law, and cannot be assigned as cause of demurrer under our law.

A contract to pay a specified sum of money, 12 months after date, to bear interest at 10 per cent., and interest to be paid quarterly, carries interest from the date.

Such a contract must, according to the well established rules of construction, be construed most strongly against the obligors.

The allegation as to where the instrument was made, is a substantive averment of that fact, but forms no part of the description of the contract.

There is no difference between the right to sue and recover upon a contract stipulating to pay interest quarter-yearly, and one stipulating to pay interest at the end of the year.

Where a demand certain is payable by instalments, debt can be maintained after all the instalments are due.

A party not served with process, and against whom a discontinuance is entered, becomes a party, by prosecuting a writ of error to this Court, and must be considered, thereafter, as having been duly served with process.

This was an action of debt, determined in Pulaski Circuit Court, in June, A. D. 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. Robert A. Watkins, as administrator of Ann L. B. Byrd, sued Inglish, Galloway, and Johnston, on a bond, which is set forth in the declaration as follows: "$500 dolls. Twelve months after date, we, William K. Inglish, as principal, and David W. Galloway and John W. Johnston, as his securities, promise to pay Ann L. B. Byrd, or order, five hundred dolls. for value received of her, to bear interest at 10 pr. ct., and int. to be paid quarterly. Witness our hands and seals. March 15th, 1839." The breach negatived, expressly, the payment of the debt and interest, or either, or any part of either, to the intestate, or to Watkins, as administrator. There was also a profert of his letters of administration. The original process in the cause, issued against all of the plaintiffs in error, being returned not executed as to Galloway, and the suit as to him being regularly discontinued, oyer was prayed and granted, and a demurrer filed by Inglish and Johnston, which was overruled, and final judgment given against all the plaintiffs in error.

Fowler, for the plaintiffs.

Ashley & Watkins, contra.

By the Court, Ringo, C. J.

In giving judgment against Galloway, after the suit had been regularly discontinued as to him, without any subsequent appearance to the action, on his part, the Court unquestionably erred; and for this error, the judgment must be reversed.

But, in our opinion, there is no error in the judgment overruling the demurrer to the declaration. The objection as to repugnancy could not be assigned, under our statute, as a ground of demurrer at common law; besides, the supposed repugnancy does not, as we think, exist; for, although it is true that the pleader has introduced some unnecessary allegations as to the design and meaning of the instrument sued on, they are perfectly consistent with what we understand, from the instrument itself, to be the true legal interpretation thereof. There can be no doubt that the instrument bears interest from its date. The contract is to pay a specified sum of money, twelve months thereafter, to bear interest, &c. The legal presumption is, that the parties to the contract contemplated its performance, according to the terms stipulated: that is, that the principal debt would be paid at the expiration of twelve months, and the interest accruing thereon at the end of every three months from the date of the contract; and there is nothing in it to warrant the conclusion that either party contemplated its non-performance, and provided specially for such contingency; besides, it is such contract as, according to the well established rules of construction, must be construed most favorably to the obligee, and most strongly against the obligors; and this is the effect which the pleader has, by unnecessary averments, after setting out the instrument *in hæc verba*, attempted to give it. The allegation as to where the instrument was made, is a substantive averment of that fact, but forms no part of the description of the contract, which is literally set out in the declaration. The breach as to the interest, as well as the whole contract, is well assigned, and there can be no doubt that the action is well conceived. The contract is for the payment of a certain sum of money, with interest at a specified rate, and at specified periods of time; but the times were past when the suit was brought, and we can perceive no difference whatever between the right to sue and recover, upon a contract where the interest is stipulated to be paid quarter-yearly, and one containing a stipulation to pay the same per annum, or at the end of the year: in either case, as where a demand certain is payable by instalments, debt can be maintained after all the instalments are due.

Reversed, and Galloway ruled to appear.

PELHAM *vs.* THE STATE BANK.

Exceptions not reserved at the trial, but signed afterwards, form no part of the record.
After demurrer to declaration sustained, and no objection made to an amendment of the declaration at the time, irregularity, in that respect, cannot be taken advantage of on error.
Where oyer is craved of the writing only, and not of the assignment upon it, the assignment becomes no part of the record by being copied into the transcript.
Final judgment for costs, against the defendant, must be considered as given only for the costs expended by the plaintiff.
Terms used in a judgment, which are vague and uncertain, but do not directly contradict a statute, will be presumed to conform to it.

DEBT, on bond, by the Bank, assignee of Henry R. and William L. Hynson, against Pelham, determined in the Independence Circuit Court, in August, A. D. 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. Oyer was craved and granted, of the bond sued on, and the defendant demurred to the declaration, assigning, as causes of demurrer, that the plaintiff stated that it sued as assignee of the Hynsons, *but not that they were partners;* that the assignment was made by them as partners; that, if the bond was thus made to them as individuals, the assignment of one would not carry the interest of the other; variance between the bond and declaration; variance as to the assignment; that no protest of the bond was alleged; no demand stated at the Bank where the bond was payable; breach insufficient; declaration showed no authority in the plaintiff to sue; and that it did not state that the bond had become due and payable. The demurrer was sustained; and the plaintiff, by leave, *amended*, by filling up the blank assignment, and was ordered to pay the costs of the demurrer and amendment. The defendant saying nothing further in bar, judgment went for the plaintiff, for debt and damages, *and all the costs* in the suit. On the day after the trial, the defendant excepted to the allowance of the amendment, without having reserved the point at the trial. The case came up on error.

W. Byers, for the plaintiff.

Hempstead & Johnson, contra.

By the Court, Dickinson, J.

The exceptions of the plaintiff in error came too late to be considered. As they were not reserved at the trial, they form no part of the record. There was no objection made to the amendment of the declaration, after the demurrer was sustained, nor any further steps taken by the defendant below; consequently, it is too late now to avail himself of any irregularity in this respect. The breaches in the declaration are well laid; and whether the assignment of the writing obligatory was set out with sufficient certainty, is immaterial; for oyer was craven only of the writing, and not of the assignment; and the fact of the clerk's copying it into the transcript does not necessarily make it form a part of the record, or entitle it to the consideration of this Court. The plaintiff below was ordered, by the Circuit Court, to pay the costs of the demurrer and amendment; and the final judgment for costs against the defendant, in that Court, must be considered for all the costs in the suit expended by the plaintiff, and cannot, as we conceive, be made to extend any further. The terms used are certainly vague and uncertain, but, as they are not in direct contradiction to the statute, we will presume them to be in conformity with it.

Judgment affirmed.

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Crary *vs.* Ashley & Beebe.

In an action of debt, by two obligees, upon a bond executed by the defendant alone to them jointly, it is not a good plea in bar, by way of accord and satisfaction, that the defendant, by an executory verbal contract, agreed to do certain work, and furnish certain materials for *one* of the obligees, which agreement that obligee accepted in full satisfaction of the bond; and that, though the defendant was ready, and offered to perform his contract, that obligee failed to perform certain precedent conditions.

An accord must be executed in all its parts, before it can produce satisfaction. An accord executory constitutes no bar.

Unliquidated damages claimed upon mutual verbal agreements with an obligee, are no bar to an action by both obligees, upon a writing under seal.

Such pleas are dilatory and frivolous, tender no natural issue, nor are they adapted to the form of the action, and the plainliffs might disregard them, and sign judgment.

The rule is, that, if the pleas are informal, and go to the merits, the plaintiffs should demur, because then the defendant might obtain leave to amend; but, if they are without color of truth to support them, or are intended as instruments of delay, they should be stricken out.

These pleas being so palpably erroneous, the plaintiffs might have signed judgment as for want of a plea.

At common law, if the pleas were unnecessary and improper, they were stricken out on motion: the motion is addressed to the sound discretion of the Court.

DEBT, on bond executed by Crary, to Ashley & Beebe, for one thousand dollars, with interest from date at ten per cent., determined in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The defendant pleaded, that, in consideration of his indebtedness on the bond, and on other bonds, amounting to two thousand dollars, all executed to Ashley & Beebe, he agreed with Ashley, to furnish the materials and do the work of two brick houses, about to be put up by Ashley, and to furnish other materials, and do other brick-work, for which Ashley agreed to give the highest prices paid for similar work at the time, until the amount due by him on the bonds should be extinguished; and that Ashley agreed to give him notice when he should be ready for him to commence the work; in consideration of which undertaking, contract, and agreement of defendant, Ashley discharged, exonerated, released, and acquitted him from all obligation on the bonds, and accepted his undertaking, promise, and agreement, in full satisfaction and discharge of the bond sued on, principal and interest, averring readiness and offer to perform; and that Ashley never gave him notice to do the work, and has always prevented him from doing it. This was the tenor of three pleas filed by him, except that the second alleged Ashley & Beebe to be partners in the debt secured by the bond, and that each had authority to release and settle; and the third undertakes to *offset* the damages alleged to have accrued by Ashley's failure to perform his agreements. The Court, on motion, struck out the pleas; and the defendant making no further defence, judgment went against him. The case came up on error.

W. & E. Cummins, for the plaintiff.

Where the pleas go to the substance of the action, as *nil debet* in debt on bond, they cannot be treated as nullities. *Chitty Pl.* 508,

509. *Fall vs. Stickney*, 3 *J. R.* 541. There is no intermediate course. The party must either demur, or treat the plea as a nullity, and sign judgment. See *Platt vs. Robbins et al.*, *Coleman's Rep.* 81. If pleas are not manifestly void and bad, the party must demur. *Brooks vs. Patterson*, 1 *John. Cases*, 328. *Jackson vs. Webstar*, 6 *Mun.* 462. *Anon.* 2 *Ch.* 239. *Drake vs. Mitchell*, *Woodf. L. & T.* 527, 528. *Anon.* 1 *Ch.* 355. *Thomas vs. Smithies*, 4 *Taunt.* 668. These rules ought more especially to prevail, under our statute, where an unlimited power of amendment is given our courts. *Rev. St. Ark.*, *title Pr. at Law*, *sec.* 112, *et seq.*

Although the release and discharge are not averred to have been in writing, and under seal, still that is not absolutely necessary, especially under our statutes, whereby sealed and unsealed instruments are placed upon the some footing. 14 *J. R.* 330. The new contract stated in the pleas, was made on sufficient consideration. *Fleming vs. Gilbert*, 3 *J. R.* 528. 1 *Roll. Abr.* 453, *pl.* 5. *Year Book*, 2 *Hen. VI.* 73. 1 *Esp. Cas.* 35. A tender or offer to perform a contract, and a waiver and refusal, which must always be by parol, are equivalent to a performance. 1 *Str.* 535. *Doug.* 691. *Keating vs. Price*, 1 *John. Cas.* 22. *Coit & Woolsey vs. Houston*, 3 *J. Cas.* 243. A sealed or written contract may be waived or relinquished by parol. 1 *J. Cases*, 32 *to* 36. 7 *Cowen*, 48. 3 *J. Cases*, 60. 1 *Cowen*, 250. 13 *J. R.* 359. *Ketchum & Sweet vs. Evertson*. *Langton vs. Stokes*, *Cro. Car.* 383. 8 *Taunt.* 596. 2 *Mod.* 660.

Where there is a contract under seal, and, on some new consideration, the obligor promises to do the thing contracted to be done by the sealed instrument, or any thing else, the obligee has a right to accept such new contract, and to enforce the same, notwithstanding he still retains the sealed contract. Thus, where there was a new contract to pay the debt due by bond, or new consideration, assumpsit will lie. 12 *East.* 578. See also, as to same principle, 1 *Saund. Rep.* 210, *note a. and note* 1; *Hard.* 71; 1 *East.* 104; 1 *Lev.* 188; 8 *T. R.* 595; 2 *Saund. R.* 137, *h.*; *Sir T. Ray.* 118; 1 *Vent.* 159; *Cro. Car.* 343; *Cro. Eliz.* 68; 12 *Mod.* 511; 1 *Vin. Abr.* 272; 1 *Roll. Abr.* 8 *pl.* 6; 1 *East.* 630; 3 *T. R.* 479. But viewing the pleas as pleas of *accord and satisfaction*, they were not nullities. *Coit & Woolsey vs. Houston*,

3 *J. Cases*, 243. The defendants prevented the performance of the new contract, and have no right to take advantage of their own wrong. 1 *Str.* 545. *Doug.* 691. 1 *Esp. Cases*, 35. 1 *Roll. Abr.* 453, *pl.* 5.

Watkins, contra.

On a motion to strike out pleas, the Court will look into the body and substance of the pleas, and consider their sufficiency as an answer to the action; and, if they are not issuable, and otherwise insufficient, will strike them out, and not compel the opposite party to demur or plead. Such was the practice of this Court, in regard to the amended pleas offered by the defendant, in the case of *The State vs. Harris*, 3 *Ark.* 570. *Pope vs. Tunstall et al.*, 2 *Ark.* 290.

A plea that attempts to set up a parol, unexecuted release, or accord and satisfaction, without consideration, between the defendant and one of his obligees, of an instrument under seal, and before the obligation fell due, is bad. *Pope vs. Tunstall et al.*, 2 *Ark. Rep.* 223, *et seq.* 1 *Leigh's Nisi Prius*, 132, 699. *Daniels vs. Hollenback*, 19 *Wend.* 308. *Bursell vs. Lytle*, 6 *Wend.* 399. *Hawley vs. Foote*, 19 *Wend.* 516. *Watkinson vs. Inglesley*, 5 *J. R.* 386. *Coit vs. Houston*, 3 *John. Cases*, 243. *Anderson vs. Highland Turnpike Co.*, 19 *J. R.* 86. *Graham vs. Grant*, 3 *Mon.* 302. *Payne vs. Barnett*, 3 *Marshall*, 314. *Haggin vs. Williamson*, 5 *Monroe*, 13. *Cave's Ex'r. vs. Calms*, 3 *Marshall*, 38. *Davis vs. Noaks*, 3 *J. J. Marshall*, 497.

So is a plea that attempts to set up an offset of unliquidated damages, on an alleged assumpsit between one of the obligees and the defendant below, in an action of debt, on an instrument under seal. 1 *Leigh's Nisi Prius*, 154, 157. *Fletcher vs. Dyke*, 2 *T. R.* 32. *Butts vs. Collins*, 13 *Wend.* 583. *Gram vs. Caldwell*, 5 *Cowen*, 589. *Hogg's Ex'r. vs. Ashe*, 1 *Hay.* 471. 2 *Bibb*, 86. *Hardin*, 150. 3 *Bibb*, 49.

The pleas were liable to be stricken out, because they were vague, uncertain, mixed up with extraneous matter, and not issuable; and set up the same matters, with immaterial variations as to form.

By the Court, Dickinson, J.

That the pleas are wholly defective, is abundantly proven by all the authorities; and so this Court has ruled the question, in the case of

Pope vs. Tunstall and another, 2 *Ark. Rep.* 223. An accord must be executed in all its parts, before it can produce satisfaction. An accord executory constitutes no bar. In the present instance, these pleas can be neither termed an accord with satisfaction executed, nor accord in satisfaction executory. They certainly do not fall under the denomination of either of these classes of pleas. They endeavor to set up unliquidated damages, claimed upon mutual verbal covenants of the plaintiff in error, with one only of the obligees, in discharge of a joint contract with them both, under seal; and that, too, in a case where the plaintiff in error does not allege that he has performed any part of his agreement. He endeavors to excuse himself for his non-performance, upon the ground that the obligee, with whom he contracted, failed to execute his part of the agreement, which was a condition precedent. These facts certainly show that the pleas were dilatory and frivolous. They tender no material issue, nor are they adapted to the form of action. They stand upon no higher ground than *nil debet* or *non-assumpsit*, in debt. These latter pleas have been held, in such cases, mere nullities, and the party might sign judgment without noticing them. The rule upon the subject we take to be this, that, if the pleas are informal, but still go to the substance of the action, then the party will not be allowed to sign judgment, but must demur; and the reason given for the demurrer is, that the defendant might obtain leave to amend; but, if they are without color of truth to support them, or where they are intended as mere instruments of delay, they ought to be stricken out. 12 *Wend.* 196, 223. 10 *Wend.* 624. 10 *Wend.* 672. The pleas we are considering, certainly could not be amended, because they are wholly defective in both form and substance, there being nothing to amend by, and the pleas being so palpably and manifetsly erroneous, that the law will permit the plaintiff to sign judgment as for want of a plea. Although, in these cases, it is prudent to obtain the sanction of the Court, yet the plaintiff may, in general, sign judgment without such authority.

In *Gardiner vs. Webb*, 17 *Pick.* 411, upon a promissory note, by the the endorsee against the maker, the defendant pleaded that the note was given as an indemnity against certain endorsements, made, or to be made, by the promisee, for the accommodation of the maker. The

plaintiff objected, and the pleas were ordered to be stricken from the rolls. It was the old rule of the common law, if the pleas appeared to be unnecessary and improper, to strike them out, upon motion. The motion is addressed to the sound discretion of the Court, and the rejection is not made to depend merely because the facts which are set forth in the declaration would not constitute a sufficient defence, but because it is unnecessary to encumber the record with a long statement of facts, which, under no state of things, can be moulded or shaped into form so as to bar the action. The reason here given we deem satisfactory; and we think it shows that the Court committed no error in sustaining the motion of the plaintiff below.

Judgment affirmed.

Fowler *vs.* Thorn & Wilson.

When a party obtains judgment in the Circuit Court, his adversary is, of right, entitled to a writ of error, but not to stay of execution, unless he enters into recognizance, under the statute, conditioned that he will prosecute such writ with effect, and pay the money adjudged against him by the Supreme Court, or otherwise abide its judgment.

The recognizance is to secure the debts, damages, and costs, in both courts.

The words "prosecute his writ with effect" mean, that, if he fails, the recognizance will pay the money for his failure. It binds them to pay the money adjudged against him in the Supreme Court, or otherwise abide its decision. It is the same thing, whether this Court adjudges the money against him, or orders the Circuit Court to adjudge it. He is bound to abide its judgment, and, of course, the legal consequences of that judgment.

Debt, on recognizance, determined in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. Fowler alleged, in his declaration, that Wilson, with Thorn as his security, entered into recognizance to him, in the Supreme Court, in the sum of fifteen hundred dollars, in a case in error there pending, upon a judgment obtained by Fowler, against Wilson, in Pulaski Circuit Court, conditioned that Wilson would prosecute his writ of error with effect, and pay the money that might be therein adjudged against him by the Supreme Court, or otherwise abide the

judgment of the Supreme Court; that Wilson did not prosecute his writ of error with effect, but, on the contrary, the judgment was *affirmed*, with costs, amounting to $17 46¼ cents; that the original judgment was for damages $1000, and costs $21 53 cents. The breach alleged was, that Wilson and Thorn had not paid the damages, or any of the costs, on the penalty of the recognizance.

The defendants demurred, for insufficiency of the breach, and because the declaration did not aver that the Supreme Court awarded any damages. Demurrer sustained, and judgment for defendant. The case came up on error.

Fowler, in pro. per.

Hempstead & Johnson, contra.

By the Court, LACY, J.

The recognizance is taken in compliance with the statute, and the declaration properly negatives its condition. The inquiry now is, what is the obligation of the parties entering into such recognizance?

The meaning and objects of the act, as well as its express words, are clear and explicit. Whenever a party has obtained a judgment in the Circuit Court, his adversary is entitled, as a matter of right, to a writ of errror; but he will not be permitted to stay the execution, unless, in accordance with the provisions of the statute, he secures the payment of such judgment by entering into a recognizance, "conditioned that the plaintiff in error will prosecute such writ with effect, and pay the money adjudged against him by the Supreme Court, or otherwise abide its judgment." These are its express words. That the recognizance is to secure the debt, damages, and costs, that have been recovered by the judgment complained of, both in the Circuit and Supreme Courts, cannot be doubted. Its language could not be more explicit; for, if it does not mean that he is bound to pay the debt, damages, and costs, in both courts, then we are at a loss to conceive the object and intention of the act. Again, it is declared that the condition of the recognizance is, that the plaintiff in error shall prosecute his writ with effect. What is the meaning of the term "prosecute his writ with effect?"

It certainly denotes and expresses, that he will succeed in the action, and that, if he does not, they will pay the money for his failure. The latter clause of the sentence binds them to pay the money that may be adjudged against him in the Supreme Court, or otherwise abide its decision. If there could be any doubt before, as to what is the true meaning of the terms, then these latter expressions wholly free the subject from all doubt and uncertainty.

The defendants in error expressly stipulate to pay the money that the Supreme Court may adjudge against the principal in the recognizance, or that he shall abide its judgment. Now, it is the same thing whether this Court adjudges the money against him directly, or orders the Circuit Court to adjudge it. Besides, he is bound to abide its judgment, and of course the legal consequences that follow the judgment. Whether the Supreme Court enters the judgment itself, or directs its judgment to be entered up by the Circuit Court, is a matter of no moment.

Judgment reversed.

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Pullen *vs.* Chase.

The omission of a venue is aided at common law by a judgment by default.

By our own law, it is immaterial, in transitory actions founded on contract, to state the venue in the body of the declaration. The statement in the margin, of the county in which the action is brought, is sufficient.

To support an action upon a contract for the payment of money on demand, no previous demand is necessary.

In an action upon a promissory note, payable on demand, *non assumpsit infra sex annos*, is a good plea; but, if the promissory note was to do a collateral thing, which would create no debt until demand made, it would be otherwise.

The distinction is, that a debt, arising from a positive existing promise to pay on demand, is due at the date of the contract, and the right of action is then perfect; but, if the promise is to do a collateral thing, on request, nothing is due until request made. Until then, no right of action accrues, and hence, in such case, the demand must be specially avowed and proved.

Under our statute giving interest, a promissory note, payable on demand, draws interest from date.

Decided on demurrer, in the Circuit Court of Arkansas county, in October, A. D. 1841, before the Hon. Isaac Baker, one of the Cir-

cuit Judges. Debt, on a note payable on demand, by Chase, against Pullen. Declaration entitled, "*Arkansas, sct.* In the Arkansas Circuit Court, to the October term thereof, A. D. 1841." The declaration stated no venue, but was otherwise every way formal. Defendant craved oyer, and, without setting out the note, demurred, on three grounds: First, want of venue; second, failure to describe the instrument; third, for want of an allegation that payment was ever demanded. Demurrer overruled, and judgment for plaintiff for the debt, and interest from the date of the note. The case came up by writ of error. There being a plain excess of ten dollars in the judgment, it was remitted here.

J. Yell, for the plaintiff.

A venue should not only be stated positively, and without ambiguity in every declaration, but it should be laid to every material, traversable fact, and that omission will be fatal, though issue be taken upon another point. 1 *Chitty's Pl.* 282. 1 *Saund. on Pl. & Ev.* 413. *Gould's Pl.*, *p.* 111, *sec.* 102, 103. It is essential to the declaration, that a place be alleged, where every fact, material and traversable, occurred. *Rex vs. Holland*, 5 *T. R.* 620. 1 *Chitty's Pl.* 260. Where a wrong county is stated in the margin, and the right county in the body of the declaration, it is cured; but, where the right county is stated in the margin, and a wrong county in the declaration, it is only aided. *Saund. on Pl. & Ev.* 413. 1 *Chitty's Pl.* 282, 284.

Pike & Baldwin, contra.

The omission of venue was never ground of any thing more than special demurrer, in a transitory action; at least, not since the statute of Elizabeth, *Mellor vs. Barber*, 3 *T. R.*, where there was a venue in the margin, the want of it in the body of the declaration was no objection, even on special demurrer. *ib.* *Briggs vs. Nantucket Bank*, 5 *Mass.* 94. *Gilbert vs. Nantucket Bank*, 5 *Mass.* 97. *Alder vs. Griner*, 13 *J. R.* 449.

The instrument not having been set out on oyer, the plaintiff in error does not show that there was any variance.

The breach contains the allegation, "although often requested," and no other allegation of demand was necessary.

The following opinion was delivered by RINGO, C. J.

If the omission of a venue be a defect in substance, at common law, or by the statutes of England adopted in this State, it is not cured by our statute of jeofails, which only extends to judgments by confession, or upon verdict, but not to judgments upon demurrer, where the cause of demurrer is specially stated, as required by the statute. The question, therefore, whether it is such a defect in the pleading as may be taken advantage of by general demurrer, must be determined by the application to it of such rules and principles of the common law and statutes of England, in aid, or to supply the defects thereof, made prior to the fourth year of James the First, as are applicable to it, and of a general nature, and also applicable to our form of government, and not repugnant to the constitution and laws of the United States, or of this State. By the common law, transitory actions might have been brought in any county, but, by the statute, 6 *R.* 2, *Chap.* 2, it was enacted, that if, by the declaration, it appears that the contract was in another county than where the writ is brought, the writ shall abate. 1 *Com. Dig.* 250, (*n.* 6), 271, (*n.* 18), 114, (*n.* 17). The effect of this statute was to require such actions to be instituted in the county where the contract was made, if founded in contract; and, if brought in a different county, although the fact did not appear in the declaration, the court, upon affidavit being made, showing that the cause of action arose in another county, and not in the county where the action was laid, nor elsewhere out of the other county, would change the venue, unless the plaintiff would undertake to give evidence of some matter in issue in the county where the action was brought, when, if he failed to do so on the trial, he was non-suited, which had the same effect as abating the writ according to the statute. 1 *Saund. Rep.* 74, (2), (*h.*) And since the statute 4 *Ann*, *Chap.* 16, *sec.* 6, which directs the jury, in civil cases, to be taken from the body of the county, it is held sufficient, in civil cases, to state the county in the declaration, without any place at all. *Ware vs. Boydell*, 3 *M. & S.* 108. And even before, it was held sufficient to name the place

only in the declaration, because the place is always construed to refer to the county in the margin. 1 *Saund. Rep.* 308, (1). The authorities cited indicate, that the principal object of stating a venue, or place where the cause of action arose, was to show where the trial should be had, or from whence the jury should come, and that, by the ancient common law, no particular place where the cause of action arose need be stated, in transitory actions; and, it has been ruled, that, in such actions, the omission of a venue is aided at common law by a judgment by default, because the defendant thereby admits that there is nothing to try, and that an objection merely to the mode in which the venue is stated, can be taken only by special demurrer. 1 *Chitty's Pl.* 311. *Briggs vs. Nantucket Bank*, 5 *Mass. R.* 94. *Gilbert et al. vs. same, ib.* 97. *Alder vs. Griner*, 13 *J. R.* 449. Now, by the laws of this State, it is wholly immaterial in transitory actions, founded on contract, where the cause of action arose, because, in such cases, the action may be prosecuted in any county, without regard to the place where the contract was made, or the cause of action arose; and the jury must come from the body of the county in which the suit is brought, notwithstanding the contract was made, or the cause of action arose, in a different county; consequently, as no legal right depends upon that fact, the statement of it in the declaration appears to be unnecessary, and the law which required it to be shown, may well be regarded as inapplicable to our form of government, as at present organized; yet, admitting it to be applicable, still it would, as we conceive, be only matter in abatement, or cause of special demurrer, which, under our statute, could not now be taken advantage of by demurrer. But, besides this, the county in which the action was brought, is stated in the margin of the declaration; and this, according to some of the authorities cited, would have been a sufficient venue in such case, notwithstanding the statute of 6 *R.* 2, above cited. The demurrer as to the first ground specially assigned was, therefore, in our opinion, properly overruled.

As to the second ground, it is deemed sufficient to remark, that the instrument exhibited upon oyer is not copied in the transcript before us, and of course we cannot say whether it is truly set out and described in the declaration or not. It is, however, described as paya-

ble on demand, and there is no averment of any special demand or request made of the plaintiff in error to pay it, before the commencement of this suit, which omission constitutes the third objection stated in the demurrer.

This objection cannot, in our opinion, be maintained, because the contract, as set out in the declaration, shows a direct and positive obligation or promise to pay, in consideration of a pre-existing debt or duty; and, in such case, it has been uniformly held, both in England and the United States, that no demand or request is necessary to create a legal right of action on the contract. *Birks vs. Trippet*, 1 *Saund. R.* 32. 2 *Bibb*, 101. *Cotton vs. Beaville et al.*, 3 *Mon.* 224. *Haxton & Brace vs. Bishop*, 3 *Wend.* 13. And it has been adjudged that, in an action on a promissory note, payable on demand, *non assumpsit infra sex annos* is a good plea, for it is payable immediately on the making of the promise; also, if indebitatus assumpsit be brought on a promise to pay on demand, the plea of *non assumpsit infra sex annos* has been held to be good, because it shows a debt due at the time of the promise; but, if the promise was to do a collateral thing, on demand or request, nothing is due until a demand or request is made, and, until then, no right of action accrues; and, therefore, in such cases, the demand or request must be specially averred and proved. The contract, as set forth in the declaration, is clearly of the first description, and the demurrer was correctly overruled.

In respect to the time from which interest on such contract shall be computed, there has been some diversity of decision in the courts of the different States, and even in England; but we are not aware of any case in which it was ever decided that the right of action did not accrue at the date of the contract, which could not be the case upon any legal principle, if the money was not then due, the rule being inflexible, that no legal right of action arises upon any contract, without some breach of the stipulations contained in it, either expressed or implied; and, therefore, as our statute expressly gives interest "for all moneys, after they are become due by any instrument of the debtor, in writing," the interest was correctly allowed to be computed from the date of the note.

Affirmed with costs, deducting $10, *remitted.*

Mr. *Justice* LACY concurred.

Mr. *Justice* DICKINSON dissented, and delivered the following opinion:

Interest is deemed to be a compensation for not paying money when due. On a note, payable at a particular day, with interest, it is payable from the date. 5 *Vesey*, 803. *Coop.* 29. 2 *Mass.* 568. 8 *Mass.* 221. If interest is not mentioned, then it runs only after the day of payment. 2 *Burr.* 1081. Any instrument of writing, by which money is to be paid on a day certain, bears interest thereafter, not as damages, but as part of the contract. 3 *B. & C.* 490. 2 *Vesey*, 133, 134. It will be computed on all notes, bills, contracts, or debts, which, on their face, or in the nature of the contract, carry interest from the day when payable. 2 *Vesey*, 306. *Dick.* 307, 308. *Burr.* 119. But, if there is *no* time of payment, or, if payable *on demand*, then, after demand made. 1 *Vesey*, 64. These are the rules which prevail at law, as well as in equity. Interest is given as an incident to the debt, and under rules which preclude all discretion on the part of the courts. Lord ELLENBOROUGH, in delivering the opinion of the court in the case of *Cotton vs. Brag*, 15 *East.* 226, said, "Lord Mansfield sat here upwards of thirty years; Lord Kenyon, for above thirteen years; I have now sat here for more than nine years, (a period of 52 years), and, during this long course of time, no case has occurred where, upon a simple contract of lending, without an agreement for the principal, at a *certain time*, or for interest to run *immediately*, or under special circumstances, from whence a contract for interest was to be inferred, has interest ever been allowed." Most of the cases in this country recognize the same principle. It is one of common sense, easily applied. In *Jacob vs. Adams*, 1 *Dall.*, Chief Justice McKEAN said, "Interest, upon a note payable on demand, is never allowed but from the time of demand made, by suit or otherwise." The same principle is sustained in *Mountford vs. Wills*, 2 *B. & P.* 337, and in *Robinson vs. Bland*, 2 *Burr.* 1085. So in New-York, in *Clark vs. Brown*, 4 *J. R.* 133; 5 *Cow.* 611; 15 *J. R.* 12. Also in Kentucky, in *Gore vs. Buck*, 1 *Mon.* 207; and *Bartlett vs. Marshall*, 2 *Bibb*, 471; and in most of the American courts. 1 *Baldwin's Rep.* 539. All concur, that it is only where a default of payment is made, that inte-

rest attaches. To allow interest upon a note on demand from its date, without an averment of demand, is, *I conceive*, a departure from the spirit of the law of interest, and from the reason of all its rules in other cases, neither recognized by the common law, nor authorized by statute. The objection raised to the judgment of the Circuit Court, in allowing interest in this case, from the date of the note, without an averment of demand on that day, is, in my opinion, *well taken*, and the judgment ought, for that reason, to be reversed.

Crary *vs.* Carradine & Newman.

Where the verdict is sustained by two unimpeachable witnesses, though their testimony is contradicted by one other witness, a new trial will not be granted.

When an account for goods, with interest charged at 8 per cent., has been presented to the defendant, and he has admitted it to be correct, and promised to pay it, a verdict and judgment for the *whole* account, principal and interest, with legal interest on both from the promise, is just, and will not be disturbed.

If a verdict is by mistake, and endorsed by the jury on a wrong paper, it may be transferred to the proper paper, and signed by the foreman, after the jury is discharged, and when they are not all present.

Exhibits and papers referred to in a deposition, cannot be read, unless they are attached to the deposition, and inclosed in it.

This was an action of assumpsit, tried in Pulaski Circuit Court, in November, A. D. 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. Carradine & Newman sued John W. Crary, on an account for goods, &c., sold, amounting to $111 44 cents, with interest calculated at eight per centum per annum, up to the 15th of June, 1841, amounting, together, to $132 70, contracted in Natchez, Mississippi. There was also a suit pending in the same court, in assumpsit, by the same plaintiffs, against Oliver B. Crary, brother of John W. Crary, on an account for goods sold, for $227 96, and interest a 8 per cent. to June 15, 1841, amounting, together, to $297 03 cents, also contracted in Natchez.

The defendant pleaded the general issue, and that, on the 15th day of June, 1841, he accounted with the plaintiffs, and was found in-

debted in the sum of $143 70, and for that sum, and $297 03, together, executed the following bond: "For value received, Little Rock, Arkansas, 15th June, 1841, we, John W. Crary, as principal, and Oliver B. Crary, as security, promise to pay to Carradine & Newman, or order, six months after date, four hundred and thirty-three dollars and seventy-three cents, with interest from date until paid: as witness our hands and seals;" signed by J. W. Crary alone, which was accepted in satisfaction. On these pleas, issues were formed. The jury found for the plaintiffs $146 39, for which judgment was entered.

It was proven conclusively, by two witnesses, one of them the plaintiffs' attorney, that the two accounts were admitted to be correct, by both the Crarys, on the 15th of June, 1841; and it was agreed that, for the amount of the two, the bond above recited should be executed by *both* the Crarys, but that, after John W. Crary had signed the bond, Oliver B. Crary refused to do it, and so it was never accepted in satisfaction. Oliver B. Crary's testimony, which was taken and read, conflicted with this evidence. Certain exhibits were referred to, in Oliver B. Crary's deposition, but were not annexed to, or enclosed with, it, and were not allowed to be read. The bond was produced, and cancelled, on the trial. When the jury returned their verdict into Court, it was endorsed on the declaration against Oliver B. Crary, and was transferred to the proper declaration, and signed by the foreman, after the jury were discharged, and when they were not all present, it being notorious to which case it belonged.

The defendant moved in arrest of judgment, and for a new trial, for the transferring of the verdict, excess on interest allowed, the refusal to permit the exhibits to be read, and because the verdict was contrary to the evidence. Motions overruled, and writ of error. The bill of exceptions, taken after the motions in arrest and for a new trial were overruled, and which set out the evidence, states, that the exceptions were taken when the motions were overruled, (the bill of exceptions being signed on a subsequent day), but the *record* is silent as to this.

W. & E. Cummins, for the plaintiffs.

The exhibits were not closed up with the deposition, but the de-

fendant offered to prove, by competent testimony, their identity and safe custody since they had been shown to the witness, when the deposition was taken. Without the exhibits, the deposition did not appear to have any connection with the cause. The defendant lost the benefit of the whole, by the exclusion of the exhibits. This was clearly erroneous.

The plaintiffs showed no joint right to sue. The verdict was for too much. The legal rate of interest is the true measure of damage for the detention or non-payment of money. See *Chap.* 80, *Rev. St.*; *Newall vs. Griswold*, 6 *J. R.* 45; *Kane & Kane vs. Smith et al.*, 12 *J. R.* 156; *Coffin vs. Coffin*, 4 *Mass. Rep.* 1; *Boyden vs. More*, 5 *Mass. Rep.* 315.

The Court cannot regard any verdict but one publicly delivered before the Court, by the whole jury. *Root vs. Sherwood*, 6 *J. R.* 68. *Blackly vs. Sheldon*, 7 *J. R.* 22. 3 *J. R.* 255. Where the name of either party is mistaken in the venire, although the jury find a verdict in the proper cause, the verdict will be set aside. 2 *Tidd's Practice*, 837. In this case, the Court gave judgment on the verdict of only part of the jury.

The witnesses on the part of the plaintiffs below, were interested in the event of the suit, and should have been excluded. *Turner vs. Pearte*, 1 *T. R.* 717. *Longworth vs. Fox*, 2 *Bay.* 521.

The admissions of the defendant were made to an ineffecual treaty for compromise, and were not sufficient to charge him. *Waldridge vs. Kennison*, 1 *Esp. Rep.* 143. *Gregory vs. Howard*, 3 *Esp. Rep.* 113. *B. N. P.* 236. *Hartford B. Com. vs. Granger*, 4 *Con. Rep.* 148. *Fuller vs. Hampton*, 5 *Con. Rep.* 417. 2 *Pick. Rep.* 290. *Gerrish vs. Sweetzer*, 4 *Pick. Rep.* 374. *Detogny vs. Rentone*, 2 *Martin's Rep.* 175.

Ashley & Watkins, contra.

We remark, that a motion for a new trial is addressed to the sound legal discretion of the Court, and the authorities are contradictory, whether the overruling of such a motion is ground of error. A motion for a new trial is a waiver of all exceptions, in matters of law, at the trial, and which might be available in arrest of judgment, or on writ

of error; and the Supreme Court will not reverse a judgment in a case where a new trial has been refused, unless the party has excepted to the opinion of the Court overruling his motion for a new trial, and, by spreading out the whole evidence and instructions in his bill of exceptions, shows a case of injustice, and that the Court, in overruling his motion for a new trial, did not exercise a sound legal discretion. *Danley vs. Robbins' heirs*, 3 *Ark.* 141.

It does not appear, from the record, that the defendant ever excepted to the opinion of the Court overruling his motion for a new trial, or that he ever filed any bill of exceptions. Such a paper could not have been filed in vacation; and, if filed in term time, it forms no part of the record, unless an entry of the filing be made on the minutes. *Rev. St., p.* 627, *sec.* 51. *McDonald vs. Faulkner*, 2 *Ark.* 472.

The debt was contracted in Mississippi, where the legal rate of interest is 8 per cent. The account was stated at 8 per cent., which the defendant acknowledged to be correct, and was to have given his note for that amount, with interest as stated, up to the 15th June, 1841, including the account against Oliver B. Crary, with security. All the jury did was to find the amount of the account as so stated and acknowledged to be due on the 15th June, 1841, with interest from that time to the finding of the verdict. This they had a right to do, by law; and, under the circumstances of the case, they could not have done less. 2 *Tidd's Practice*, 807. 1 *Caines' Rep.* 391, *note a. Stafford vs. Green*, 1 *J. R.* 505. 11 *J. R.* 98. 15 *J. R.* 318. 2 *John. Cases*, 17. See also *Rev. St. Ark.*, *title Practice at Law*, *sec.* 118, 119.

There is no provision of law which requires that a general verdict should be delivered in writing, so it be pronounced in court, and recorded, or which requires a verdict to be written on the declaration, or any other paper belonging to the cause. If the plaintiff in error wished to avail himself of this ground, in his motion for a new trial, he should have fortified with an affidavit that the jury were mistaken in their verdict, or that he had been prejudiced by the act.

The Court properly refused to permit certain papers to be read as exhibits, referred to in the defendant's deposition, because the exhibits, referred to by the witness, had not been sealed up with his deposition.

See *Rev. St. Ark.* 327, *sec.* 18. In this respect, the utmost strictness is required. *Beall vs. Thompson et al.*, 8 *Cranch*, 70.

By the Court, DICKINSON, J.

We see no error in the proceedings of the Court below. The new trial was properly refused; the finding of the jury was warranted by the evidence; the Court acted regularly and properly in directing that the verdict be changed from the declaration upon which it was entered, through mistake, to that where it properly and rightfully belonged. The fact that some of the jury had retired before this was done, is wholly immaterial. It is the duty and right of the Court, to see that the records are properly kept, and to direct its clerk to take the necessary steps for this purpose. The remaining point, which seems to be most relied on, is, that the Court below excluded the exhibits that were not attached to the depositions. The act of the Legislature is imperative upon the subject. It requires all depositions and exhibits, together with the commission and interrogatories, to be closed, sealed up, and directed to the Court where the action is pending. From some cause or other, the exhibits became detached from the depositions; and, as the act only made them evidence in the cause upon the performance of the foregoing pre-requisite, the Court properly excluded them upon the trial. *Rev. St.*, *Chap.* 48, *sec.* 18.

Judgment affirmed.

L. B. TULLY, *Ex Parte.*

The act of the General Assembly providing that, if any judge of the Circuit Court of this State shall fail to hold court, in any of his counties, at the times required by law, he shall forfeit and pay to the State the sum of one hundred and fifty dollars, is contrary to the constitution, and void.

The Legislature has no power to diminish the salary of a judge, during the time for which he shall have been elected. They cannot effect, indirectly, what they are directly forbidden to do.

But, if there has been no appropriation to pay the salary so withheld, the Auditor of Public Accounts cannot be compelled, by mandamus, to pay it.

UPON application for a *mandamus*, by LEWIS B. TULLY, late one of the Circuit Judges, for a mandamus.

Hempstead, for the relator.

R. W. Johnson, Atto. Gen., contra.

By the Court, DICKINSON, J.

This is an application in behalf of one of the Circuit Judges of the State, to this Court, for a writ of mandamus upon the Auditor of Public Accounts, requiring him to issue his warrant upon the Treasurer for the amount claimed to be due the applicant, as a part of the salary of his office. The Auditor has responded to the rule entered; and the facts he states, show conclusively, that, at the time the salary is claimed to have been due from the State to the Judge, for his services in office, there was in the treasury a sufficient amount of money appropriated by law to pay the circuit judges, but that the money then in the treasury has been since expended for other purposes, and that there is not now any appropriation by law, unexpended, for the payment of salaries due the former judges of the Circuit Court.

Upon this state of fact, the question arises, whether the act of the Legislature, approved March 3d, 1838, is repugnant to the 8th section of the 6th article of the constitution. The words of the act are, "that, if any judge of the Circuit Court shall fail to hold his court in any of his counties, at such time as is required by law, such judge shall forfeit and pay to the State, the sum of one hundred and fifty dollars." The act further makes it the duty of the clerk of the Circuit Court of the county in which such failure may have happened, to certify the same to the Auditor of Public Accounts: and if the judge cannot satisfy the Auditor, by conclusive testimony, that it was impossible for him to hold such court, then it is made the duty of the Auditor to deduct the penalty from the salary of the judge. *Chap.* 42, *sec.* 1, *Rev. St.* The clause of the constitution before referred to, declares, that "the judges of the Supreme and Circuit Courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be diminished during the time for which they are elected. They

shall not be allowed any fees or perquisites of office, nor hold any other office of trust or profit under this State or the United States."

A comparison of the act with the constitution, conclusively settles this question, which, to our minds, is of easy solution. The object and design of the constitution are, to place the judicial department above all unwarrantable interference on the part of the Legislature, except in the mode and manner pointed out in the instrument, and to separate these two departments from each other, except so far as their action was deemed necessary and proper: and this remark holds equally good as to the executive department. This Court has so repeatedly said, that the three political departments were each and all supreme, within their peculiar and constitutional jurisdictions, that we deem it unnecessary to add any thing more upon that branch of the subject. To question or deny this great conservative principle of constitutional liberty, is to impeach the right of self-government itself, and to destroy the only means given, under our political system, by which that invaluable blessing can be secured and maintained. The constitution has wisely guarded against the encroachment of any of the departments upon its co-ordinate branches; and it has treated their unwarrantable invasions as an infraction of the sovereign will of the people, as expressed in the instrument, and, consequently, has adjudged them to be utterly void.

Each and all of the departments of government are directly responsible to the people, and amenable to them in the mode and manner pointed out by the constitution and the laws; and they are amenable in that way alone. The Legislative, through the agency of the elective franchise, and the rules prescribed by itself for the government of its proceedings; the Executive, by the right of suffrage, and by impeachment for gross misconduct and corruption, for mal-administration in office; the Judiciary, by the election of the Legislature, for a term of years, and by address or impeachment for gross misconduct and corruption in office. In order to render the judiciary independent of the other two departments, the convention has declared, that they shall, at stated times, receive a compensation for their services, to be fixed by law, and which shall not be diminished during the time for which they are elected. They are not allowed to take any other fees or

perquisites, or to hold any other office of trust or profit. For the term they are elected, the compensation for their services cannot be diminished by the Legislature, for such are the express words of the constitution, and its injunction must be respected and obeyed. This negative declaration leaves the Legislature, however, full power to increase their salaries, but, when they are once fixed by law, they cannot again be diminished, either directly or indirectly, so far as respects the officer, for the period of his election. Before or after his election, the Legislature may fix the amount of his compensation; but, as soon as it becomes fixed, at that moment the compensation becomes a vested and constitutional right, appertaining and belonging to the office, and it cannot be divested, or in any manner weakened or destroyed, during the term for which the judge holds his commission. The true object and design of this clause in the constitution were, to make the judicial department independent of the Legislature, so far as the compensation or salary of the judges was concerned, after they had prescribed the amount to be paid them for their services. The convention well knew that the judiciary was the weakest of all the departments of government, and most liable to attacks from the other departments. They, therefore, guarded it with watchfulness and wisdom, so far at least as the independence of their salary was concerned, from all unwarrantable interference whatever. If the power were given to the Legislature over the salaries of the judges, then they were fully aware that the popular branch of the government, in times of political commotion and high excitement, could readily bend the judiciary into mere instruments of its will, and thus completely destroy its independence, or drive or degrade the judges from the bench, by leaving them merely a nominal compensation.

The judiciary would then prove no safeguard or barrier for the defence of public liberty, nor would it be a shield or asylum to protect and uphold the rights and franchises of the people. So far from answering these great and invaluable purposes, if their salaries were exclusively under the control of legislation, the will of the Legislature would then, in effect, be supreme. Under our system, the Executive is clothed with but little authority; and, if the Courts could be disgraced, and rendered imbecile by the reduction of their salaries, or

moulded to suit their wishes and designs, then the judiciary would have no higher office or duties to perform than simply to register the mandates and edicts of the Legislature. How, then, could the judges declare the will of the Legislature, or rightly interpret the laws, so as to make their decrees and judgments living monuments of truth and justice to their own age, and bequeath them, as a rich and invaluable legacy, to posterity, around which the friends of liberty could rally, and to which they might cling, with hope and confidence, in the worst of times, and find shelter and protection against the encroachments of ambition and tyranny. Hence, the convention has thought proper to place the salary of the judges out of the reach of the Legislature, and to take away all temptation to assail their independence through the means of their subsistence.

All experience proves, that power over a man's subsistence amounts but too frequently to a power over his will. If the judges fail to do their duty, they are liable to removal by address or impeachment. The constitution forbids their salary being taken from them, or reduced in its amount. The Legislature cannot effect, indirectly, what it is forbid to do, directly. It is certainly a clear proposition, that the Legislature cannot declare that the salary of the judges, upon a failure to discharge their duties, shall be forfeited to the State. To allow them to do that, necessarily makes them the judges of what should constitute a forfeiture; and that would indirectly place in their hands the power to lessen, or entirely take away, their salary, during the term for which they are elected, which is clearly and pointedly inhibited by the constitution. The salaries of the judges of the Supreme and Circuit Courts stand upon the same ground, and the Legislature can no more touch the salary of the one than of the other. They are both fixed, so far as their diminution is concerned, by the constitution, and are inviolate, and excepted out of the powers of the Legislature. The act in question declares, in express terms, a penalty against the circuit judges for a failure to hold a court, in each circuit, of a hundred and fifty dollars, and makes the Auditor a judge of the sufficiency of the excuse, upon the certificate of the clerk of the county, and makes it his duty, if the judge was not prevented from attending his courts by causes unavoidable, rendering his attendance impossible, to withhold

from him his salary for that amount. We can regard this law in no other light than as an act of forfeiture in favor of the State, for the non-performance of a judicial duty, and, for that failure, it decrees a certain amount of the judge's compensation forfeited to the State.

If this does not expressly diminish the salary of the judge, during the time he is in office, by indirect, yet effectual means, then we are sure language cannot give the power. To our minds, the act is a clear and palpable violation of the constitution. It is a direct and dangerous attack upon the independence of the judiciary, and upon the freedom and happiness of the people, and in contravention of their supreme will, as expressed in the constitution. We therefore hold the act as void, so far as it interferes with the salary of the circuit judges. But as, from the return of the Auditor, it appears that there is no appropriation to meet the amount claimed; and, as the constitution prohibits any money to be drawn from the treasury but in consequence of an appropriation by law, *Const.*, *sec.* 4, *Art.* 6;

Rule discharged.

Crary *vs.* Carradine & Newman.

Where a witness, sworn on his *voir dire*, stated, that he considered himself bound to pay the account sued on, and thought he would pay the judgment, if obtained; that he had promised to settle the account for the defendant; that no particular consideration has passed between them, but he promised merely out of good feeling for defendant, who was his brother. Held, that he was a competent witness for the defendant.

His evidence having been excluded, although it might not have been sufficient to overthrow the other evidence, yet it was erroneous to refuse a new trial.

This is the suit referred to in the preceding case of *Crary vs. Carradine & Newman.* The cases were parallel, in every respect, except that, in the present case, John W. Crary was offered as a witness, by the defendant, and, being sworn on his *voir dire*, stated, that he considered himself bound to pay the account sued on, and thought he would pay the judgment, if obtained; that he promised to settle the

account of the defendant, but on no other consideration than for good feeling. The Court held him incompetent, and refused to allow him to be sworn in chief.

Cummins, for the plaintiff.

If the witness was interested at all, he was interested to testify against the defendant, who called him. At all events, if the witness was under any obligation to indemnify the defendant, it was merely honorary, and he was still competent. 2 *Stark. Ev.* 746. *Gilpin vs. Vincent*, 9 *J. R.* 219. A contrary doctrine was laid down in 1 *St. Rep.* 129, and 1 *Con. Rep.* (1 *Day's Rep.*) 147. These latter cases have not been followed, and the rule laid down by Starkie is now well settled. *Dod's Adm. R.* 20. *Pederson vs. Stoffles*, 1 *Camp.* 145. *Union Bank vs. Knapp*, 3 *Pick. Rep.* 108. *Williams vs. Matthews*, 3 *Cowen*, 252. *State vs. Clark*, 2 *Tyler*, 277. *Long vs. Bailie*, 4 *Serg. & R.* 226. *Ferusler vs. Carlin*, 3 *Serg. & R.* 130. *Carman vs. Foster*, 1 *Ashmead*, 133. *Smith vs. Down*, 6 *Con. Rep.* 365. *Moore vs. Hitchcock*, 4 *Wend.* 292. *Phillips' Ev.* 34. *Pick.* 156.

Even if the witness had been interested in the suit, yet he was so interested that he was reduced to a state of neutrality, and was competent. 2 *Stark.* 750. *Wright vs. Mitchell*, 1 *Bibb*, 298. *Cushman vs. Laker*, 2 *Mass. Rep.* 108. *Nesby vs. Swearingen*, *Addison's Rep.* 144. *Ilderton vs. Atkinson*, 7 *L. R.* 480. Still further, if interested at all, he was interested against the defendant, who had a right to waive the objection, and have his testimony go to the jury. *Hamlin vs. Fitch*, *Kirly's Rep.* 174. *Storrs vs. Wetmore*, *Kirly's Rep.* 203. *Jackson vs. Vredenbergh*, 1 *J. R.* 159. *Jacobson vs. Fountain et al.*, 2 *J. R.* 170.

The courts always look to the points a witness is called to prove; and, if he is competent to establish any facts, he will not be excluded. *Jacobson vs. Fountain et al.*, 2 *J. R.* 170. 4 *Cranch*, 62. *Bent vs. Baker and another*, 3 *Dur. & East*, *Rep.* 27.

Ashley & Watkins, contra.

If a witness supposes he is under an honorary though not a legal engagement, as to indemnify bail, he is still competent. 1 *Stark. Ev.*

103. *Pederson vs. Stoffles*, 1 *Camp.* 145. *Union Bank vs. Knapp*, 3 *Pick.* 108. A witness who conceives himself under a legal engagement, is incompetent, although he is mistaken. *Fotheringham vs. Greenwood, Strange*, 129. *Rex vs. Walker*, 1 *Ford*, 145. *Trelawney vs. Thomas*, 1 *H. Black.* 3117. *Rudd's Case, Leach C. C. J.* 154. *Skillinger vs. Bolt*, 1 *Con. Rep.* 147. *Richardson's Ex'r. vs. Hunt*, 2 *Munf.* 148. 4 *Bibb*, 445. *Freeman vs. Luckett*, 2 *J. J. Marsh*, 391. *Trustees of Lansingburgh vs. Willard*, 8 *John.* 428. *Plumb vs. Whiting*, 4 *Mass. Rep.* 518.

The only authorities adverse to this doctrine appear to be 2 *Tyler*, 273; 4 *Serg. & R.* 226. A witness, when not a party to the record, may be called to testify against his interest, if the party calling him is willing to run the risk. *Long vs. Baillie*, 4 *Serg. & R.* 226. *Swift Ev.* 77. 1 *Stark. Ev.* 165. 1 *Bibb*, 154. 1 *Little's Rep.* 108. *Same*, 221. *Hurd vs. West*, 7 *Cowen*, 752.

The testimony, if admitted, would not have sustained the plea of accord and satisfaction. Upon a settlement of claims against two persons, the obligation of one of them, with extension of time, without security, is, in law, no accord and satisfaction. *Cro. Eliz.* 727. 1 *Esp. Ni. Pri. 2d Part*, 67. *Clow vs. Borst*, 6 *J. R.* 47. *Bird vs. Cavitat*, 2 *J. R.* 342. *Kellogg vs. Richards*, 14 *Wend.* 116.

By the Court, LACY, J.

There is considerable conflict in the authorities, with regard to the kind of interest disqualifying the witness from testifying. We have looked into the different cases with some attention, and, although the rule varies, still we think the later and better authority is, that the interest to disqualify a witness must be legal and certain in the event of the suit, or in the record as an instrument of evidence. However, minute the interest may be, it will still disqualify. The legal interest in the event of a suit, is contradistinguished from mere prejudice or bias, or any other of the numerous motives by which a witness is supposed to be governed. If the witness is really interested in the event of the suit, although he may presume he has no interest, he is disqualified. The reason given is, that it would be dangerous to violate a general rule because the witness mistakes his responsibility. If the

witness supposes that he is under an honorary, though not a legal, engagement, he is still competent. The objection, in such a case, would go to his credit, and not to his competency. The reason why a person is incompetent from interest, is the supposed temptation to perjury. This, it is presumed, will create a bias on his mind, which may induce him to testify incorrectly, to benefit himself. In *Vaness vs. Verhue*, 3 *J. Cases*, 82, it is said, "that, if a witness will not gain or lose by the event of a cause, or if the verdict cannot be given in evidence for or against him, in another suit, the objection goes to his credit only, and not to his competency. There are a great number and variety of cases which make the witness's incompetency depend upon his fixed legal interest. 1 *Stark. Ev.* 102, and cases there cited. *Long vs. Bayley*, 4 *Serg. & R.* 327. *Union Bank vs. Knapp*, 3 *Pick.* 108. *Pederson vs. Stoffles*, 1 *Camp.* 145. 1 *Str.* 129. *Doug.* 134. 1 *T. R.* 163. *Stewart vs. Hipp*, 5 *J. R.* 256.

Where a witness thinks himself interested, there is the same reason to suspect a bias on his mind, as if his interest was real. *Skillinger vs. Bolt*, 6 *Con. Rep.* 147. *Steneny vs. Overton*, 4 *Bibb*, 445. *Plum vs. Whiting*, 5 *Mass.* 518. *Peter vs. Ball*, 4 *Har. & McHen.* 314. And in the case of *The Trustees of Lansingburgh vs. Willard*, 8 *J. R.* 428, the court take this distinction. If the witness declares himself interested on the side of the party who calls him, and his interest is so situated that he cannot be released, in such case he ought not to be sworn, though, in strictness of law, he is not interested; but, if his interest be against the party calling him, and he will run the risk of a bias upon his mind, then he should be permitted to testify. But, in *Gilpin vs. Vincent*, 9 *J. R.* 220, where a witness had, in fact, no fixed legal interest in the event of the suit, but merely felt himself obligated, in honor, to share the loss or pay the debt, then he was considered competent, and permitted to be sworn. And so it is ruled in *Moore vs. Hitchcord*, 2 *Wend.* 292.

The principle here stated clearly shows, that the interest of the witness called is merely honorary; that his testimony, so far from lessening his responsibility, would increase it. He had no direct, fixed interest in the suit. The Court therefore erred in excluding his testimony, as his interest was merely honorary; and, although his testimo-

ny may not be sufficient to overthrow the other evidence, as appears of record, still we are unable to say what influence it might have had upon the minds of the jury, if received; and therefore the motion of the plaintiff in error for a new trial, ought to have been granted.

Reversed, and new trial awarded.

Cummins vs. Webb.

Where the return of the officer upon an execution shows no legal disposition of the property levied upon under its authority, the law presumes the property to be in his custody, and of sufficient value to satisfy the execution; and so long as the execution and levy remain, and are not suspended, or otherwise legally avoided, the plaintiff can only look to the officer and the property for satisfaction, though the execution be irregular, but not void.

When an officer omits, neglects, or refuses to sell property levied upon, according to law, the creditor may have a *venditioni exponas*, to compel him to sell, or forfeit issues to the amount of the demand.

An entry made in the margin of a record of a judgment, by a clerk, at a term subsequent to the entry of the judgment, stating that the plaintiff appeared in open court, and acknowledged satisfaction of the judgment, but not signed or attested by the clerk, or any other person, is no valid entry of satisfaction, under the statute.

The property in the officer's hands, under the levy, may be sold to satisfy the execution, though the plaintiff may have another adequate legal remedy. The law will not compel him to abandon his execution because the levy under it is inoperative, and to commence a new action to attain the same end.

The law affords defendants ample redress against a plaintiff who makes any unlawful use of its process of execution.

On application for mandamus.

On a petition and exhibits then filed, Cummins, at the last term of this Court, moved the Court for a writ of mandamus to the Clerk of the Circuit Court of Chicot county, commanding him to issue a writ of *venditioni exponas*, directed to the sheriff of said county, requiring him to sell certain slaves, seized by him to satisfy an execution in favor of the petitioner, against Albert W. Webb, which remain in his hands unsold. The petition, which was sworn to, and the exhibits referred to in, and filed with, it, show the same facts exhibited by the petitioner, on his application for a mandamus to the Chicot Circuit Court, previ-

ously presented, and disposed of at the present term of this Court, (*ante p.* 103), together with the additional fact, that the petitioner had applied to the Clerk to issue such execution, and he had positively refused to do it, because, as he stated, there appeared on the margin of the record of the judgment, the following entry: "January term, 1841, 6th day, January 9th, 1841. This day appeared, in open Court, the plaintiff in this cause, and acknowledged full satisfaction of this judgment;" which entry was made in open Court, in the Clerk's hand-writing, by the direction of A. Pike, Esq.; and that, by it, the judgment appears to have been fully satisfied; and, so long as it remains upon the record, he must refuse to issue any execution in the case: and also, because the Circuit Court, at the last term thereof, refused, after an investigation into the case, to order execution to issue, or to make any order to the sheriff to sell the property levied on under the alias execution, issued prior to January term, 1841.

W. & E. Cummins, for the relator.

Trapnall and *Cocke*, contra.

The entry of satisfaction shows enough to justify the Clerk in his refusal to issue execution; and, until it is set aside by the Chicot Circuit Court, in a proceeding impeaching, not its form, but its substance, it must ever bar the plaintiff from proceeding upon the judgment by execution.

The plaintiff's motion to set aside the entry was overruled; upon what ground, does not appear. We claim the ordinary presumption indulged invariably in favor of the correctness of all judgments rendered by a court of competent jurisdiction, in support of this judgment of the Court.

Execution issued upon the original judgment, and was levied, and a delivery bond taken, and returned forfeited. By law, the sheriff is directed to levy the execution upon an amount of property sufficient to satisfy the judgment; and, when levy is made, it will be presumed to have been made upon property of sufficient value to pay the debt and costs; and, therefore, after an execution has been levied upon property, no new execution can issue upon the original judgment, until

the levy has been disposed of. *Hopkins vs. Chambers*, 7 *Monroe*, 262. *Mariney vs. Andrews*, *Cro. Eliz.* 237. *Morrow vs. Hart's Adm.*, 1 *Marshall*, 292.

It is not for this Court to determine upon the correctness of the entry of satisfaction, but that is a question exclusively belonging to the cognizance and decision of the Circuit Court. So long as the record remains unchanged, it must be conclusive in this Court, as to its own verity and decision against the petition.

Admitting the right, has the petitioner shown that entire want of an adequate legal remedy that, according to the general principles and authorities, authorizes the emission of this writ? He has had a levy made by his execution, and a delivery bond taken, with competent personal security. This levy and bond are in satisfaction of the judgment, and upon the bond he is to proceed for the recovery of his money, either by motion, according to the 40th and 41st sections of the statute of execution, at the return term of the execution, or upon the bond, by an ordinary action at law. The right to the motion is barred by lapse of time, but the right of action upon the bond is in full force, and such action would, unquestionably, bring in question the correctness of this record as to the satisfaction of the judgment, and enable the plaintiff to set it aside, if incorrectly or fraudulently made. This is a plain and ample remedy, and expressly given by law, and therefore there does not exist any legal necessity for resorting to so unusual and imperative a proceeding as a writ of mandamus. *Smith vs. Carr*, *Hardin* 303. *Payne vs. Mattox*, 1 *Bibb*, 164. *Chitty & McClain vs. Glenn*, 3 *Monroe*, 424.

By the Court, Ringo, C. J.

The return of the officer to the alias execution, shows conclusively, so far at least as it concerns himself or the parties to the execution, that he had seized thereon certain slaves, the property of the defendant, Webb, which were not sold prior to the return day of said writ, by order of said plaintiff; and, as he has not shown any legal disposition of said property, nor its value, the law presumes it to be still in his custody, and of sufficient value to satisfy the execution; and, so long as the execution and levy thereon remain, and are neither suspended nor

set aside, nor otherwise legally suspended, stayed, or avoided, the judgment upon which the execution issued, must be considered as satisfied, and the plaintiff can only look to the officer and the property seized, to satisfy or pay him the money to which he is entitled, by virtue of the judgment, however irregularly the execution may have issued, provided it be not void; because neither the plaintiff nor the officer can avoid it for that cause; and the officer may well justify any act legally done by him by virtue of its authority; and therefore his duty is the same, so long as the process is not avoided by the defendant. Now, this alias execution cannot, in our opinion, be regarded as a void process, and therefore the plaintiff's right to have the property, taken by virtue of its authority, sold to satisfy it, cannot be questioned, if it is not concluded by some other fact appearing in the case. The property was not sold when, by law, the sheriff was bound to expose it to sale, because, as the sheriff states in his return, the plaintiff ordered him not to sell it; but his order extended no further; and, therefore, as nothing appears to the contrary, we are bound to presume that the property still remains in the custody of the sheriff, to satisfy the execution; and, as no conflicting claim to it is shown, we consider the law as holding it to satisfy this particular debt, and his legal right to have satisfaction thereof, from the sale of it, as complete, if the debt has not been otherwise satisfied to the plaintiff, nor the judgment legally discharged.

But it is urged, in opposition to the present application, that the entry of satisfaction on the margin of the record of the judgment, although not made in conformity with the statutory provisions on the subject, is, nevertheless, sufficient to justify the clerk in his refusal to issue the execution on the demand of the petitioner, and must constitute a bar to his right to any execution in the case, until it is set aside by the Circuit Court: and it is said, also, that the Circuit Court overruled the motion of the petitioner to vacate the entry, or set it aside, upon a full hearing and consideration of the facts, and that his right to any execution is barred thereby, so long as that decision stands unreversed, and that this Court has no power to annul the latter nor vacate the former upon this application. To the last proposition we readily accede; but it appears, from the transcript of the record exhibited

with the petition, that the motion to vacate or set aside said entry on the margin of the record, purporting to be an entry of satisfaction of said judgment, has never been adjudicated by the Court, but remains upon the record, in nowise overruled or finally disposed of. And it has already been decided in this Court, upon the application of the petitioner for a mandamus to the Circuit Court, that the motion of the petitioner, in that Court, was not for a writ of execution of any character whatever, but simply for an order to the sheriff to sell the property levied on under said alias execution, on five days' notice; and, although that motion was correctly overruled, the decision upon it surely cannot affect his right to a writ of execution to coerce a sale of the property seized to satisfy the execution, at the time, in the manner, and upon the notice required by law; for, although the property could not legally be sold by him, on five days' notice, he could lawfully sell it on the first day of the succeeding or any subsequent term of the Circuit Court, upon twenty days' previous notice thereof, legally given; and this the law binds him to do, if the execution be not otherwise satisfied, or he, in some other manner, legally discharged from the performance of such duty. And where an officer, whose duty it is to sell property seized to satisfy an execution, either omits, neglects, or refuses to make sale thereof, according to law, the rule is understood to be well settled, that the creditor, whose debt or demand the property was seized to satisfy, may have a writ of *venditioni exponas*, to compel the officer to discharge his duty, and coerce him to sell the property, or forfeit issues to the amount of the demand. That such is the general rule upon the subject, and such the regular legal course and order of proceeding in such cases, we think there can be no question; nor do we consider the right of the petitioner to proceed in this manner, in the least affected by the entry on the margin of the record of the judgment, because it is not an entry of such a character as to have in itself any legal operation whatever. It cannot be regarded as a matter of record, or parcel of the record of the Court in the case, because it appears affirmatively to have been made at a time long subsequent to the term in which the judgment was given, and, although made in open Court, is not entered with the proceedings of the Court at the term when it was entered, and therefore is destitute of the judicial sanction

of the Court, and entirely divested of the sanctity and verity which the law, from considerations of public policy, attaches to judicial acts and judicial records. Nor can it be regarded as legal evidence of a satisfaction of the judgment; but it does not, in some respects most essential to its validity as the legal evidence of a satisfaction, as prescribed by the statute, conform to the provisions of the statute. Thus, it is especially variant from the statutory provisions on the subject, in not being signed by the plaintiff in the judgment, nor by the person by whom the acknowledgment was made, nor attested by the Clerk, and it is therefore legally inoperative; at least it cannot, in itself, have the effect of discharging the judgment. *Rev. St., Chap.* 84, *sec.* 22, 24.

It is also urged against the present application, that the petitioner has another adequate legal remedy, by which he may obtain satisfaction of his demand: that is, by proceeding on the delivery bond taken after the levy made upon the original execution; and therefore he is not entitled to the writ now applied for. Whether he has now any remedy upon that delivery bond, or not, is a question which we do not consider ourselves called upon to determine, because its decision, either way, could not, as we apprehend, in any manner affect his legal right to have the property, seized upon the alias execution, and remaining in the officer's custody by virtue of the levy made under it, sold to satisfy said execution, which, from the facts shown, appears to remain unsatisfied; for the law surely would not, while this execution, and the judgment under it, are operative, compel him to relinquish and abandon his remedy, already so nearly prosecuted to a satisfaction, not only of the judgment, as it regards the defendant, but also of the execution and demand itself, to the plaintiff, by his actually receiving the amount thereof, and, at this stage of the proceeding, commence and prosecute a new action, for the purpose of accomplishing the same object.

The law, in our opinion, imposes no such hardship and injustice upon judgment creditors; but, in cases situated as this is, invests them with a legal right to complete the execution by coercing a sale of the property seized, and thereby obtaining a satisfaction of the execution, and, ultimately, payment of the demand. By this course of proceeding, a multiplicity of suits, which the law is said to abhor, is avoided, and the

rights of each party preserved: besides, the law affords to defendants ample remedy and redress against any plaintiff who shall make, or attempt to make, any unlawful use of its process of execution.

We have, therefore, after a careful and attentive consideration of the whole subject, come to the conclusion that the petitioner has a legal right, under the circumstances of the case, as shown by his petition and exhibits, to a writ of *venditioni exponas*, to coerce a sale of the property, seized as the property of the defendant, by virtue of his alias execution, which appears to remain in the custody of the sheriff of Chicot county, unsold, and that he has no other adequate legal remedy to enforce the sale, or obtain satisfaction of his said judgment, execution, and demand. And, although the propriety of resorting to this Court to compel the ministerial officers of courts of inferior jurisdiction to perform their duties, may well be questioned, yet, as this Court is expressly invested with jurisdiction over such cases, when they are properly presented, we do not consider ourselves at liberty to decline its exercise.

Peremptory mandamus awarded.

Johnson's Ex'r *vs.* Clark.

Held, that, according to the act of the General Assembly regulating the practice of the Circuit Courts in cases in Chancery, a party is not entitled to an appeal, unless upon a final decision, order, or decree.

And that, where the drecree affirms that the conveyance of certain slaves is a mortgage, and that the complainant has a right to redeem under it, and directs the Master in Chancery to take an account, and make report to the next term of the Court; these facts clearly show that the decree is merely interlocutory, and not final or conclusive between the parties; and the appeal will be dismissed for want of jurisdiction.

CLARK *vs.* OAKLEY'S ADM'R & CLARK.

The statute which provides that a judgment shall be affirmed, where the transcript is not filed in this Court, at least ten days before the term to which the appeal is taken, applies only to cases where a recognizance is given, and the judgment suspended.

The appellee cannot wait until the appellant has filed his transcript, and then move upon that, to affirm. He must procure the certificate of the Clerk below.

Under the territorial statutes, a party could not, at law, impeach the consideration of a sealed instrument. If entitled to relief, he was compelled to resort to a court of equity.

If the material allegations in the bill are denied in the answer, they must be established by competent and direct evidence.

Where a record is appealed to in the bill for proof of a fact, that fact cannot be established by oral testimony; and, if the complainant fails to produce the record, the presumption is, that it would have disproved the allegations in the bill.

IN Chancery, tried in April, 1840, in Hempstead Circuit Court, before the Hon. WILLIAM CONWAY B., one of the Circuit Judges.

On the 13th of June, 1834, John Clark and Allen M. Oakley filed their bill. They alleged that, in 1826, they borrowed of Jesse Shelton $1500, for which they gave their note or obligation, which, in the spring of 1827, came into possession of Benjamin Clark, the defendant, by assignment or otherwise, and was, by them, about the 8th of March, 1827, paid off to B. Clark, by their assigning to him three bonds, dated September 19, 1826, executed by M. W. Edwards and Thomas Carr, payable to Clark & Oakley, amounting, together, to $730, besides interest, which were received by B. Clark in payment of so much of their note to Shelton, no more being then due on it, they having before paid to B. Clark all the note, except that amount: that their note was given up to them by B. Clark, at the time, and cancelled.

That Clark kept the obligations of Edwards and Carr, until September 22, 1828, when he falsely and fraudulently represented to them that Edwards and Carr were insolvent, and unable to pay, and had not paid, their obligations, or any part of them; and complainants, on his request, then cancelled the assignment of, and received back, the obligations, then amounting, with principal and interest, to $826 86 cents. Deducting from this $52 10, due them by Clark, they

gave him their joint and several bond, for the residue, $774 56, of that date, payable on demand.

That, after this, they brought three suits against Edwards and Carr, on the obligations so returned, in Hempstead Circuit Court, to December term, 1828, which three suits were consolidated at September term, 1829. That Carr then pleaded payment to B. Clark, of all the obligations and interest, which he held then by assignment, to which plea they joined issue. That this issue was tried by a jury, who found for Carr, and judgment rendered in his favor, whereby they were barred of their whole action. The proceedings were referred to as part of the bill.

That Clark had sued them on their obligation given to him, and obtained judgment at May term, 1834, in the same Court, for $774 56, debt, and interest at 10 per cent. per annum, from September 22, 1828, till paid.

The bill made full charges of fraud, and prayed a decree of $52 10 cents, with interest from Sept. 22, 1828, a perpetual and temporary injunction as to the judgment, and general relief.

The injunction was granted. Clark answered, at May term, 1835, admitting that complainants borrowed of Shelton, and gave their note or obligation, as stated. He denied ever having the note or obligation, by assignment or otherwise, or that they paid it off to him, as stated in the bill. He averred that, about the 8th of March, 1827, Clark & Oakley and himself accounted, and they were found in his debt $1030, or thereabouts, and, as collateral security, delivered to him four notes or bonds; one executed by Carr, with Edwards as his security, for $300, or thereabouts, and the three mentioned in the bill. That afterwards, and while he held the notes, Carr and Edwards, by Edward Johnson, paid off the $300 note, and it was delivered up to Carr. That he never secured any thing on the obligations.

That, about Sept. 22, 1828, Clark & Oakley requested him to deliver them the three obligations, and told him that they had been executed in consideration of a tract of land sold by them to Edwards and Carr. That they had given Edwards and Carr a bond to make title, and were unable to do it. That he gave up the obligations;

they accounted; Clark & Oakley fell in his debt $774 56, for which they gave him their obligation, mentioned in the bill. That the assignment of Carr and Edwards' note formed no part of the consideration. That he never represented to Clark & Oakley that Edwards and Carr were insolvent, and never requested them to take back the notes or obligations.

Admits that Clark & Oakley sued Edwards and Carr on the obligations, as stated; that the suits were consolidated; that Carr pleaded, as alleged; and that, on the trial, Carr had a verdict and judgment against the complainants; but alleged, that there were other pleas of payment to Clark & Oakley themselves, filed by Carr in the suit, on which issues were formed. That the case was tried on all the issues; and, as he is informed and believes, the verdict was not founded on the plea stated in the bill, or on evidence establishing these facts, but on evidence satisfying the jury that Clark & Oakley had failed to perform their contract with Edwards and Carr, and had cancelled the whole contract on which the obligations were founded. That he is unable to state, positively, on what premises the jury found, but expressly denies that Edwards and Carr ever paid him any thing on the obligations, and denies that he is bound by the verdict.

He admitted that he had sued and obtained judgment, and stated that, about April, 1830, and after the result of the suit against Edwards and Carr, Clark & Oakley agreed to confess a judgment on their obligation to him, and part of the papers were prepared for that purpose; but, before it was done, they agreed to pay him in time for him to pay a debt to Jesse Shelton, for which he had confessed, or was about to confess, judgment, and that he should delay paying Shelton until he should be coerced by law, and they would indemnify him; that they have, in part, indemnified him, but refuse to pay their debt to him.

He then continued with a demurrer to the bill, *first*, because he was not bound by the judgment in favor of Carr, and, *second*, for want of equity; and denied fraud.

Upon filing this answer, he moved to dissolve the injunction; the complainants filed their replication; and, the judge being interested, the case was continued.

Nothing further was done until the June term, 1838, when the motion to dissolve was overruled. At October term, 1839, the death of Oakley was shown, and his administrator, Finley, substituted as complainant.

At April term, 1840, the case was heard, on bill, answer, replication, and depositions. The whole evidence was, the depositions of Thomas Carr, Ephraim Myrick, and William McDonald.

Carr deposed that, about the 19th of December, 1826, he and Edwards executed three notes or obligations, to Clark & Oakley, one for $230, due Jan. 22, 1827, with interest from due, at 10 per centum per annum; one for $250, due October 15, 1827; and the other for $250, due May 1, 1827, each with like interest. That, some time afterwards, he learned that they had been assigned to B. Clark, and sent his agent, Wm. McDonald, to inquire of B. Clark if they had been assigned to him, and was informed by McDonald that they had been assigned by Clark & Oakley to Clark. That he afterwards sent Francis Holmes, as his agent, to make the like inquiry of B. Clark, and was informed by Holmes that they had been assigned, as he had before been informed.

That he was informed, and believes it to be true, that Edwards paid B. Clark, through the hands of Edward Johnson, jun., the whole amount of said obligations, except a trifle, after they had been assigned to B. Clark, but at what precise time, the witness could not state, from length of time and forgetfulness. He was so informed by B. Clark, through McDonald and Holmes. Never saw the obligations in Clark's possession, or conversed with him, personally, about them: never executed any note or obligation to Clark & Oakley than the three aforesaid. He stated that the same obligations had then been shown him, from the files of Hempstead Circuit Court. That he and Edwards were sued on them by Clark & Oakley, and he filed his plea of payment, and judgment was given in his favor, upon his separate plea of payment to B. Clark.

Myrick stated, that, on the 23d of September, 1828, B. Clark placed in his hads three obligations, (describing them particularly, as in Carr's deposition), all endorsed in blank by Clark & Oakley, and requested him to make a statement of the principal and interest then

due on them. That he made out and gave B. Clark such statement, (which statement was produced to him by Oakley, while giving his deposition, recognized, and annexed). That Oakley also produced, while he was giving his deposition, three obligations, from the files, which he identified and recognized as the same, the endorsement of Clark & Oakley being crossed with a pen. The statement referred to, is:

Edwards and Carr's note, due 22d day Jan., 1827, for	$230 00
Interest at 10 per cent. to 22d Sept., 1828,	38 33
	$268 33
Edwards and Carr's note, due 1st May, 1827, for	250 00
Interest at 10 per cent. to 22d Sept., 1828,	35 00
	$285 00
Edwards and Carr's note, due 15th Oct., 1827, for	$250 00
Interest at 10 per cent. to 22d Sept., 1828,	23 33
	$273 33
	285 00
	268 33
Total, - - - - - -	$826 66
Deduct for amount due John Clark, from Ben. Clark,	52 10
Endorsed "Edwards and Carr's notes, (*a*)."	$774 56

McDonald stated, that late in 1837, or early in 1838, he went as the agent of Carr to B. Clark, and inquired of him in what amount Carr was security for Edwards, on notes which Clark had got from Clark & Oakley. B. Clark showed him three notes, in which he, said Carr, was security for Edwards. The notes were endorsed in the hand-writing of Oakley; and were for such sums, that the aggregate, as marked in their books, amounted to $730. Clark told him that he had purchased them from Clark & Oakley; and, also, that Edwards had purchased for him (B. Clark) in New Orleans, groceries to the amount of $500, for which he (B. Clark) had become

endorser for Edwards, whichsum was then unpaid; and that, if Edwards paid for the groceries, it was to be credited on the notes, and he had no doubt but Edwards would be able to pay it. He inspected the notes on file in the case of Clark & Oakley vs. Carr & Edwards, and identified them as the same.

Upon this state of the case, the Court made the injunction perpetual as to $500, part of the judgment, and as to all interest which would have accrued thereon as part of the judgment; and dissolved it as to the residue of $274 56, and all interest thereon; and also decreed the defendant $37 15 damages, and adjudged the costs against him. The defendant appealed.

After the transcript was filed in this Court, the appellees moved the Court to affirm the decree, because the transcript was not filed at least ten days before the term to which the appeal was taken. This motion was made on the transcript; no certificate of the Clerk below being produced.

By the Court, Dickinson, J.

The statute (*see p.* 644, *sec.* 24,) which requires the transcript to be filed at least ten days before the first day of the Court to which the appeal was taken, in default of which, (unless upon cause shown), the appellee may, by producing the certificate of the Clerk of the Circuit Court that an appeal has been entered, have the judgment affirmed, has reference alone to cases where a recognizance has been given for the prosecution of the appeal, whereby the further proceeding in the Circuit Court is suspended.

In the case before us, no such recognizance was entered into; consequently, there is no reason why the judgment or decree should not be carried into effect. Besides, a party has no right to wait until the appellant shall file his transcript, and then, upon that transcript, move for an affirmation. If he desires an affirmation, he should procure the certificate of the Clerk below, that an appeal has been taken, and upon that evidence this Court is authorized to affirm, if no good cause to the contrary be shown.

Fowler and Trimble, for the appellant.

Pike, Trapnall & Cocke, contra.

By the Court, LACY, J.

The complainants seek to be relieved on the ground of fraud. All the material allegations of the bill are expressly denied by the answer, and the proof by no means supports the charge of fraud. The answer denies that the obligation sued on was given in consideration of the assigned notes of Edwards and Carr, or that the respondent ever received any payment upon them. The bill does not state in express and positive terms that these notes constituted the consideration of their obligation to the respondent, but it leaves a strong and almost unavoidable inference of that fact. There is no evidence whatever proving that the several notes of Carr and Edwards constituted the consideration of the complainants' bond to the defendant. This fact then is disproved by the answer. The other allegation upon which the respondent is sought to be charged is, that while he had Carr and Edwards' note in his possession by assignment, he received upon them the full amount of payment, which he failed to credit; and therefore, by his fraudulent representations, he induced John Clark and Oakley to take back these notes, and execute their own obligation in lieu of them; that the assignments were cancelled, and that they afterwards brought suit upon the notes; that upon the trial of the cause, Carr pleaded payment by Edwards to Benjamin Clark, and defeated their cause of action. The record in this suit is made part of the bill, but it was not produced, or offered to be read as evidence upon the hearing. This allegation is certainly not supported by the proof. The answer expressly and positively contradicts the whole of it. It states that the obligations of Carr and Edwards were delivered as collateral security, to secure the payment of John Clark and Oakley's obligation; that Carr and Edwards were not represented as insolvent; that he never received any thing from them except $300 upon Carr's individual note, upon which Edwards was security, and which was given up; and that he accounted to the complainants for that amount. He insists that the suit of Clark and Oakley against Carr and Edwards was tried upon several pleas joined—a plea of payment to Clark and Oakley themselves, and a failure upon their

part to execute their agreement with Carr and Edwards; and that upon the pleas and evidence adduced in support of them, a verdict and judgment were had, and not upon the plea of payment to himself. The testimony by no means establishes that the respondent, while he held the notes of Carr and Edwards in his hands, ever received payment upon them. Carr himself fails to prove that he ever paid any thing to B. Clark. He merely states that he believes Edwards paid all the obligations except a small balance. But how or in what manner Edwards made the payment, or at what time, is left wholly to conjecture. This loose statement of Carr's, then, establishes nothing. The statements of the other witnesses are equally vague and uncertain. McDonald only saw the notes in B. Clark's hands, and calculated the interest on them, and examined the assignments, which were in Oakley's hand-writing. These facts certainly do not show that the respondent received payment of or upon the notes; nor do they explain the nature or terms of the contract between the parties. Myrick states that Edwards had purchased $500 worth of groceries for Benjamin Clark, and Clark admitted that, should Edwards pay for them, he was to credit Carr and Edwards' notes, then in his possession, with that amount. There is no evidence that he paid for the groceries, or that Clark credited the $500 upon the note. This statement of the witness is a mere conversation with Benjamin Clark, which, from its indefiniteness, establishes nothing material as to the fact of payment. Again, it is made to depend upon a contingency, which is never proved to have happened. The answer then stands in full force, and it expressly disproves the allegations of the bill. Besides, the complainants have made the record in the case of John Clark and Oakley against Carr and Edwards a part of their bill; and although relying upon it to show payment to Benjamin Clark, while he held the notes of Carr and Edwards in his possession, they have failed to produce it, or read it in evidence upon the hearing. Whether or not, under any state of facts, it would be competent evidence to charge Benjamin Clark, we do not feel ourselves called on to determine. One thing, however, is certain, that having appealed to the record for proof of payment to Benjamin Clark, they cannot be permitted to establish it by

oral testimony; and in failing to produce it, the law raises the presumption that the production would have disproved the allegations of the bill. If it were possible that there could be any doubt upon the subject before, the non-production of the record not only disproves the allegation of payment stated in the bill, but it expressly affirms its denial in the answer, and overthrows the complainants' only ground of equitable relief.

Reversed, injunction dissolved, and bill dismissed.

McLain & Badgett *vs.* Smith.

Proceedings for the foreclosure of mortgages, under *chap.* 101 of the Revised Statutes, are within the jurisdiction of a court of equity, and must be governed by the principles and rules of practice in courts of equity.

And in proceedings under this chapter, the actual occupant of the land, if there be one, is a necessary party, and must be made a party by the petition, or it must be shown in the petition that there is no occupant, or that the mortgagor or mortgagee is the occupant. The omission to make the actual occupier a party, without showing some adequate reason therefor, is not only ground of demurrer, but a valid objection even at the hearing, and good ground for a plea.

Where all the defendants in such proceeding reside in the county where the suit is instituted, they must be embraced in a single writ, and no copy of the petition need accompany it. If they reside in different counties, separate writs issue to each county, and a copy of the petition must accompany each writ, which issues to a county different from the one where the suit is brought.

Upon sustaining and allowing a plea that the actual occupier of the land is not made a party, the Court should not abate or dismiss the suit, but should give the plaintiff leave to amend his petition, upon the payment of costs within a reasonable time.

On failure to amend upon the terms prescribed, the suit might be dismissed.

Proceeding under Chap. 101 of the Revised Statutes, to foreclose a mortgage on land, determined in Pulaski Circuit Court, in April, A. D. 1841. before the Hon. John J. Clendenin, one of the Circuit Judges.

McLain & Badgett filed their petition, setting forth a promissory note, made to them by Smith, for $224 87-100; and a mortgage to secure the payment of the note, with the certificates of the proper officers, showing it to have been acknowledged and recorded, alleging the debt to remain unpaid, to their damage $100; praying pro-

cess of summons against the appellee, and that judgment might be rendered against him for the debt and interest due on the note; that his equity of redemption on the mortgaged premises might be for ever barred and foreclosed, and the lands mortgaged sold to satisfy their demand.

A writ of summons issued according to the prayer of the petition. Smith, at the return term, filed two pleas, which in the transcript are styled pleas in abatement of the cause. In the first, he prays judgment of the writ, because (he says) that no copy of a bill or petition did accompany said writ of summons, according to the form of the statute in such cases made and provided, to wit: "at the county aforesaid, and this he is ready to verify;" concluding with a prayer of judgment of the writ, and that the same may be quashed. In the second, he "comes and defends the wrong and injury, and prays judgment of the said writ and petition, because (he says) that at the time, and before the commencement of this suit, one George W. Scott was, and still is, the actual occupier of said real estate, to wit: in the county aforesaid, specified in said deed of mortgage, and in the said plaintiffs' said bill of complaint, who is not made a party defendant to this suit, according to the form of the statute in such case made and provided: Wherefore, because the said George W. Scott is not joined in said petition with this defendant in said suit, and because no writ has ever issued in this cause against the said George W. Scott, according to the statute in such cases made and provided, he the said Green prays judgment of the said writ, and that the same may be quashed."

To these pleas McLain & Badgett demurred, setting forth specially several causes of demurrer, and the appellee joined. The Court overruled the demurrers, and McLain & Badgett failing to reply to the pleas, entered up the following judgment: "It is therefore considered by the Court, that this cause abate, and that the said defendant have and recover of the said complainants all the costs in and about this suit expended." McLain & Badgett appealed.

Fowler, for the appellants.

Blackburn, contra.

By the Court, Ringo, C. J.

The 4th section of Chapter 101 of the Revised Statutes of this State provides, that "all mortgages of real estate, when the debt secured amounts to fifty dollars, or upwards, may file a petition in the office of the Clerk of the Circuit Court, against the actual mortgagor and the actual occupiers of such real estate, if any, setting forth the substance of the mortgagé deed, and praying that judgment may be rendered for the debt, and that the equity of redemption may be foreclosed, and that the mortgaged property may be sold to satisfy the amount due." The 6th section of the same chapter declares, that "the Clerk of the Circuit Court shall issue a summons, commanding the defendant to appear and answer such petition at the return day thereof: And if there be two or more defendants, and they reside in different counties, a separate summons shall be directed to each county, including all the defendants therein, and the service and return of such summons shall be made as in actions at law." And the 7th section provides further, that "a copy of the petition shall accompany each separate summons."

These are believed to be the principal statutory regulations affecting the questions which arise upon the pleadings, as they are presented in this case; but before we proceed in the investigation, it may be proper to state that the case, in our opinion, is unquestionably within the jurisdiction of a court of equity; and although, under the existing organization of our judicial tribunals, the Circuit Court has jurisdiction over it, its powers in this respect are derived from the provision in the Constitution investing it with jurisdiction in matters of equity. And, therefore, notwithstanding the proceeding is in many respects prescribed and regulated by statute, where this is not the case, the proceedings must be governed by the principles of equity, and rules of practice in similar cases in courts of equity. Instead of conforming to these rules, the pleas filed by the appellee have more of the form of pleas in abatement to an action at common law, than pleadings in a suit in chancery, although the statute, in regard to such defence, is entirely silent; and the whole proceeding appears from the record to have assumed, in its progress through the

Circuit Court, more of the forms appropriate in a suit at law, than of those used in proceedings in a court of equity.

Considering it then as a proceeding in a court of equity, we will proceed to examine the questions presented by the record. The object of the petition is to foreclose a mortgage upon real estate, but the mortgagor alone is made a party defendant to the suit, and the petition is wholly silent as to the actual occupiers of the land; although the statute is imperative that it shall embrace and be against both the mortgagor and the actual occupiers; nor is there even an attempt to justify or excuse the omission to proceed against the actual occupier, or to warrant the conclusion that the premises were unoccupied. If they were occupied, there can be no doubt that, in proceedings under this statute, the occupant, without any regard to his interest in the subject matter of the litigation, was a necessary party to the suit, because the statute has so declared, and its injunction cannot be disregarded; and until he was legally before the Court as a party to the proceedings, no valid judgment or decree could be pronounced in favor of the petitioners; and if there was in fact no occupant of the lands, or if they were in the actual possession of the mortgagor, that fact should appear in the petition. And the omission to make the actual occupier a party, without showing some adequate reason therefor, would in such cases not only be a ground of demurrer, but also a valid objection to any decree against the mortgagor, even at the final hearing. See *Mitford's Pleading*, 133 *to* 147.

The first plea is evidently founded upon the supposition that, according to the provisions of the 6th and 7th sections of the statute above quoted, a copy of the petition ought to have accompanied the summons issued against, and served upon, the appellee; but this, according to our understanding of said provisions, was not necessary or required by them. They authorize a separate summons to issue to each county in all cases where the parties defendant reside in different counties; but each summons must include all of the defendants residing in the county to which it is directed. Now it appears to us obviously, upon the reading of these provisions, that where all of the defendants reside in the county where the suit is instituted, they must be embraced in a single writ, and no copy of the petition need

accompany it; but where they reside in different counties, a separate summons from that issued to the county where the suit is brought, must be issued against the defendants residing in another county, and if they reside in several counties, other than that where the suit is brought, a separate writ must issue to each county, where they are so resident, and a copy of the petition accompany each separate writ so issued, and be served upon the defendants therein named. The object of this provision appears to have been, to enable the defendants residing in other counties, at a distance from the court in which the suit is brought, to answer the petition, or otherwise make their defence to the suit, without the inconvenience and expense of traveling to the place where such court is held. Besides, any other construction, as it seems to us, must be attended with this absurdity, that where the defendants all reside in the county where the suit is brought, they shall not be served with a copy of the petition; but if a portion reside in a different county, then not only the latter, but also the former shall be served with a copy. Such construction is not, in our opinion, authorized, and therefore the first plea set up no matter constituting a valid objection to the proceeding, of which the appellee could, in any manner, take advantage, and ought to have been overruled or disregarded by the Court.

But the second plea shows expressly, that the mortgaged premises were, at the time of the institution of this suit, actually occupied by a person other than the mortgagor, who, according to the express provisions of the statute, was a necessary party to the suit. And the omission to make him a party to the petition was a defect, of which, according to the well settled rules of proceeding in equity, the defendant could take advantage, either by demurrer, or on the hearing of the cause, if it appeared on the face of the petition; and, if it did not so appear, then by pleading the matter necessary to show it. *Mitford*, 226. 3 *J. C. R.* 427. It is an objection showing the want of proper parties; and, notwithstanding the statute, by other provisions contained in it, may have dispensed with the necessity of making any other persons parties to the suit, (except the mortgagor and actual occupants of the mortgaged premises), however much they may be interested in the property mortgaged, it has, as we have already seen, made the

actual occupiers, without regard to their real interest in the property, parties to the petition; and, therefore, the matter shown by the second plea constituted a good objection, of which the appellee could well avail himself, as the relief sought by the petition could not be granted; nor was the appellee bound to answer it until the necessary parties were legally before the Court; and there was no error in the decision of the Circuit Court sustaining said objection. But, upon the plea being sustained and allowed, the Court, according to the equity practice, should not have entered a judgment or decree thereupon, peremptorily abating or dismissing the suit, but ought to have made an order, giving the appellants leave to amend their petition, upon the payment of costs, within a reasonable time, because the suit is not determined by the allowance of such plea; but, upon their failure to avail themselves of such leave, or to comply with the terms upon which it was allowed, within the time allowed them by such order, it would have been regular, and consistent with the practice in courts of equity, to have dismissed the suit. It is true, that the appellants failed to reply to the pleas, and appear to have rested the case upon their demurrers to them, without asking leave to amend their petition, yet, as their effect, according to the practice in courts of equity, would not be to abate or otherwise determine the suit at once, the Court erred in peremptorily abating it thereupon, without first granting leave to the appellants to amend their petition within a reasonable time, upon the payment of costs.

Judgment reversed, and case remanded, with instructions to overrule the first plea, and to allow the second, and thereupon enter an order, allowing the appellants to amend their petition within a reasonable time, upon the payment of costs; and, if they fail to avail themselves of such leave, and comply with the terms of such order, then to dismiss the suit, with costs, and for other proceedings.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

4 88 251 609

In July Term, A. D. 1842, being the sixty-sixth year of our Independence.

Nicks' Heirs and Others *vs.* Rector.

In equity, matters of practice are within the discretion of the Chancellor, and if any error or mistake is committed by him, it cannot be taken advantage of in this Court on appeal, especially when such questions do not enter seriously into the merits of the decree.

This Court is not authorized to reverse a decree upon mere questions of practice, unless the Chancellor has expressly violated some important principle of equitable jurisprudence, or disregarded some plain and authoritative command of the statute upon that subject.

The rigid application of the rules of English practice to our Courts, would, in many cases, be wholly impracticable, and, if allowed, would work most manifest injustice and wrong.

The Chancellor, upon the hearing, has power to permit a commission, under which testimony has been taken, to be amended, by filling up the blank direction with the words, "to any Judge or Justice of the Peace," &c. For the commission is nothing more than the process of the Court, which may, at any time, be amended in an unimportant point, on suggestion.

It is not necessary, under our statute, for exhibits referred to in a deposition, to be attached to, and returned with it, in a case where they are made a part of the bill, and filed with it. All the statute requires is, that the exhibits should be identified and their execution proved.

Under our statute, the power is expressly given the Chancellor to permit an exhibit to be proved *viva voce* at the hearing, provided the party is not taken by surprise, or any serious wrong committed thereby.

And in case of an exhibit attached to the bill, and there being no pretence that the other party had not a fair opportunity, if he desired, of questioning its genuineness, it may be proved *viva voce*, without any previous order or notice.

And permitting such exhibit to be so proven, is, at any rate, matter of *practice*, of which no advantage can be taken on appeal.

Where it was proven that a subscribing witness to an instrument had gone to another State four years before, that nothing more had been heard of him, and he was supposed to be dead, this proof being uncontradicted, his hand-writing was properly permitted to be proven.

Although parts of the contents of a paper read on the hearing may be irrelevant, yet it cannot be presumed that such matter could have had any influence on the mind of the Chancellor, nor could it exclude other portions, relevant and legal.

The seal of the General Land Office, and the signature of the Commissioner to copies of original papers required by law to be deposited in his office, *prima facie* prove themselves; and such copies are competent evidence in our Courts.

Where by one paper signed by both, A. sells B. his improvement on the public lands, and gives him authority to locate the same with a donation claim, the land, when so located, to be for the joint benefit of both, and to be divided in a certain manner; and by a note of the same date, B. promises to pay A. a certain sum, by a day certain, as the price of his improvement, *on the condition that* B. *should by that day* secure the same land by a donation claim; the two instruments in law constitute one entire contract.

The rule of law is, that where a transaction is evidenced by two papers, the connection between which is established by their contents, without any necessity of referring to other matter to connect them together, they will be taken as an entire *agreement*.

In all agreements there must be a mutuality of obligation upon the respective parties, to render them obligatory; and a court of equity will never decree a specific performance, unless the remedies are mutual, or where one party only is bound to perform.

As B., therefore, could avoid the payment of the note by deferring the location; consequently, on his failure to make the location by the day fixed, the authority given to him expired, and the obligation on him to pay the money also expired at the same time.

The clause in the act of Congress of 6th January, 1829, providing that any location of a donation claim on the improvement of any actual settler, before the same should have been offered for sale, without the consent of such actual settler, should be null and void, creates a mere personal privilege or protection to the actual settler.

If by any means the settler transferred this right or privilege, or signified his consent to the location, it would be a mere waiver of his privilege, and perhaps a personal covenant that would bind him so long as he continued to reside on the land. It might be made to operate by way of an equitable estoppel, and probably could not be revoked, if in terms absolute and unconditional; it would be otherwise, if in terms conditional, and limited to a particular time.

Such agreement would be binding as long as he remained upon, and in possession of the land; if he voluntarily abandoned the land, his consent to the location was of no avail.

Such a license to locate, given by the actual settler, does not create a power coupled with an interest, nor is irrevocable.

A power, coupled with an interest, must be engrafted on an estate in the thing. The interest must be an interest in the *thing itself*, and the power and the *interest must* be united in the same person. It is not a power, by the exercise of which the estate is to be created; for in such case, the power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences.

Where an actual settler gave another person a license to locate the land with a donation claim, *within a time certain, he did not thereby constitute that person his* agent although the land was to be located for the joint advantage of both.

And when, after such time expired, the actual settler sold to others, who settled on the land, there were no equal equities, as between them and the original purchaser. The principle as to equal equities did not apply.

A., the first actual settler, had neither a legal or equitable interest in the land. He had a mere inchoate and imperfect right of possession, good against all the world except the United States, but only good so long as he continued on the land.

And where B., the person to whom he originally gave a license to locate the land, entered the same with a donation claim, after the time agreed on had expired, after

A. had sold all his right to D. and C., and removed from the land, leaving them the only actual settlers upon it; such location, without the consent of D. and C., was *in fraudem legis*, and wholly null and void.

And it makes no difference if D. and C. had notice of the original contract between A. and B.

The decisions of the Register and Receiver, under the pre-emption and donation laws, are conclusive as to all matters within their jurisdiction, in the absence of fraud. Thus, under the donation law, as to the facts of the settlement in the country ceded to the Cherokees, and the removal from it, by the claimant, necessary to entitle him to his donation, the decision of those officers was conclusive, because to decide these facts appertained strictly to their jurisdiction. But if they undertook to decide that the improvement of an actual settler and pre-emption claimant had been legally located by a donation claim, then they were deciding in a matter entirely beyond their jurisdiction.

The person entering a donation claim, located it at his peril. If he located it on lands occupied and improved by an actual settler, and without his consent, such location is null and void, and the settler relievable in equity. And the entry being void, the patent issued upon it confers no title.

In such case, the actual settler, especially if having a valid pre-emption claim, is entitled to a decree for ever quieting his possession against the patent.

And, such entry being void, if the actual settler has a valid pre-emption claim, and has in due time proven it up, and tendered to the proper officer the purchase money, he or his assignee has a vested, legal, and equitable right, equivalent to an interest in the land.

The rule in regard to a tender is, that if a debtor offers to produce the money, and its production is dispensed with by the creditor, the tender is sufficient, without the money being actually produced; and this rule holds under the land laws, in case of an application to enter land.

And not only the pre-emptor himself, claiming under the pre-emption act of 1834, but his assignee, to whom he assigned subsequently to January, 1832, may proceed in equity to have his possession quieted in such case. Such an assignment was contrary neither to the letter or policy of the law; and one who was prevented from purchasing, by the fraud of a third person, and the dereliction of duty and negligence of the officers of the United States, could dispose of his interest as fully, as one who had actually been allowed to purchase and enter his land.

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THIS was a suit in Chancery, determined in Crawford Circuit Court, in September, 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Rector filed his bill in 1839, in which he stated, that, in December, 1828, or early in January, 1829, William Duval and Peter A. Carns, then partners, rented of William Morse a log-house, then and for some time before occupied and in the possession of Morse, standing on the north-east fractional quarter of section 8, in T. 8 N., R. 32 W., in the county of Crawford, which tract Morse was then occupying and living on, improving, and cultivating, as an actual settler. That Duval & Carns then took possession of the house, and occupied it as a store-house, and thence continued to have the exclusive occupancy and possession of it. That, by two instruments of writing, executed by Morse, one on the 29th of June, 1829, and the other on the 29th of July, 1829, Morse, for a valuable con-

sideration, sold and transferred to Duval & Carns all his right, title, interest, and claim, of, in, and to, the tract of land, as a settler and occupant thereon, and all his improvement, reserving the privilege of taking off the crop then growing; and Duval & Carns then obtained full possession of the land, subject only to that reservation; and so ceased to be tenants of Morse, and became the sole occupants of the land, and exclusive owners of the improvements on it. That Duval & Carns, in 1829, dug a well on the land, cleared part of the land, and cultivated it in turnips, and built and enclosed a house on it; and thence continued, up to 1833, to hold, occupy, and own, the improvements on the land, the same being public land of the United States; and, as such actual settlers and cultivators, became entitled to a pre-emption right on the land, under the act of 1830. That the tract contains 136 acres. That, on the 21st of January, 1829, Morse and one John Nicks, since deceased, entered into an agreement, in writing, in which it was stipulated that Nicks should be allowed, on or before the 15th of May, 1829, to locate on the land any donation claim, under the act of 24th May, 1828; which agreement was contained in two several instruments, both dated Jan. 21, 1839, and signed, one by Morse and Nicks, and the other by Nicks alone; the first of which authorized Nicks to locate the land, under certain stipulations, and the other was obligation for the payment to Morse, by Nicks, of $250, on the 15th of May, 1829, *upon the condition* that Nicks should so locate the land, and both constituting one entire agreement. That no such location was made by Nicks previous to May 15, 1829, and submitting that Nicks had no power to locate afterwards.

That, in the latter part of May, or early in June, 1829, Morse demanded of Nicks payment of the sum mentioned in the obligation, but Nicks refused to pay, because no location had been made, for want of surveys not returned to the land-office; upon which, Morse revoked his consent to the location, and demanded a return of his agreement, which Nicks refused, but consented to the revocation.

That after the revocation, Morse sold to Duval & Carns all his right, title, interest, and claim to the land, for $595, to him in hand paid; and that in October, 1829, they sent an agent to the Land-office at Batesville, to locate for them a donation claim on the land,

which the agent was prevented from doing by the land officers, on the ground that the written authority of Duval & Carns had not been acknowledged before a Justice of the Peace; which was not necessary, as the written authority had been attested by a witness, and by him proven; and that such were then the instructions from the General Land-office.

That, by the act of Congress of Jan. 6, 1829, in regard to such donation claims, it was provided, that any location of such a donation claim, upon any tract of land, except by the consent of the actual settler thereon, should be absolutely null and void. That, in October or November, 1829, while Duval & Carns were actual settlers on the land, in the exclusive possession and occupancy thereof, the sole and exclusive owners of the improvements thereon, and of all right, title, or claim to the land, against all the world except the United States, and when no other person was the occupant of the land, or any part of it, except as tenants of Duval & Carns, and at their sufferance, Nicks located the land, at the land-office at Batesville, with a donation claim granted to Andrew Matthews, and deposited, in his own name, in the General Land-Office, the requisite certificate of such location, to enable Nicks or his heirs, to obtain a patent for the land; and, that some time previous to May, 1831, a patent issued to Nicks, on the location. That the location was made without any consent from Duval & Carns, or either of them; that Nicks' consent had been revoked; and, if not, that the location was null and void, without the consent of Duval & Carns.

That, on the 16th April, 1832, Matthews executed his deed for the land, to the heirs of Nicks. That the location was made by Nicks, with a full knowledge that Duval & Carns were actual settlers, and with the deliberate intention of defrauding them, and depriving them of the rights vested in them by the act of Congress. That, in May, 1831, Duval went to the land-office in Batesville, and offered to the land officers there, the requisite proof to establish the right of preemption of Duval & Carns to the land, under the act of 1830; which proof they refused to receive, on the ground that the land had been previously located by Nicks. That then Duval made application for redress, at the General Land-office, from which instructions were sent,

directing the land officers, at Batesville, to take the proof which both the contending parties should furnish, in relation to the land, and to forward the same to the General Land-office. That, under these instructions, Duval & Carns established, by the legal and requisite proof, that they did occupy, improve, and cultivate the land, in 1829, and were in possession of it when the act of 1830 passed, and that, under said act, they were entitled to a pre-emption. A copy of the proof was exhibited.

That Nicks died in the latter part of 1831, or early in 1832, leaving two minor children, John Q. and Elizabeth P. Nicks, and a widow, Sarah P. Nicks, who has intermarried with Robert S. Gibson.

That, when Nicks' location was made, the land had not been offered for sale by the United States. That, after the proof of pre-emption had been so taken, Duval purchased of Carns all his interest in the land, improvements, and right of pre-emption, for which Carns executed a deed to him, on the 10th of December, 1832, for the sum of $500; and that, on the 4th of February, 1837, Duval sold and conveyed to Rector all his interest in the tract of land, and pre-emption right; and, that no person claims any title to the land, except the heirs of said Nicks, Gibson and his wife, and Rector.

That the heirs of Nicks have instituted an action of ejectment against Duval, tenant in possession under Rector, for the recovery of the land, and will succeed in evicting him, unless the arm of equity interpose.

Carns, Nicks' heirs, Gibson and wife, Matthews, and Duval, were made defendants; injunction prayed to stay proceedings at law, and a decree perpetually enjoining the heirs of Nicks from any action under the patent, and from asserting or setting up any claim to the land under the patent; and perpetually enjoining Gibson and wife from asserting any claim to, or instituting any proceeding for, dower; and finally quieting Rector's possession.

Exhibits A. and B. were the deeds of Morse, by which he sold to Duval & Carns.

Exhibit C. was the agreement between Morse and Nicks, by which Morse covenanted and agreed with Nicks, to permit, and gave him full power, to locate a donation claim on the land; and it was agreed

that the land should be divided between them in a certain manner. Dated Jan. 21, 1829.

Exhibit D. was Nicks' writing of the same date, in these words: "On or before the 15th day May next, I promise to pay, or cause to be paid, to Wm. Morse, two hundred and fifty dollars, for value received of him.

"The condition of the above obligation is such, that if I shall be able to secure, by donation, recently created by Cherokee Treaty, a patent to (describing the land), then the above obligation to be in full force; otherwise of none effect." Signed, "John Nicks"—but not sealed.

Exhibit E. was the deed from Matthews to Nicks' heirs.

Exhibit F. was the pre-emption proof, consisting of the affidavit of Duval, and the confirmatory affidavits of Curry Barnett and Matthew Moore, fully proving the right of Duval & Carns to a pre-emption, under the law of 1830, taken Nov. 18, 1831.

Exhibit G. was the deed from Carns to Duval; and Exhibit H., the deed from Duval to Rector. Exhibits A., B., C., D., G., and H., were the *originals*. Exhibits E. and F. were copies.

The injunction was obtained. Subpœna issued, and was served on all the defendants, except Matthews and Carns.

At September term, 1839, Gibson and wife answered. They stated, that Duval & Carns rented the log-house, as stated; that it was situated on, and made a part of, the improvement of Morse. They deny knowledge of the contract made by Morse, with Duval & Carns, and exhibits A. and B. They learned from rumor, that Duval & Carns had bought of Morse, and with a full knowledge of the previous purchase made by Nicks. That Nicks' purchase never was abandoned or revoked. That Duval & Carns, expecting the land to increase in value, persuaded Morse to get off from, or disregard, his contract with Nicks, and sell to them, and to go to Fort Gibson to rescind the contract. That he told Duval & Carns that Nicks had refused to abandon his contract, and that they bought with a full knowledge of these facts. That they knew that Nicks refused to rescind the contract, when Morse went to Fort Gibson, and told Morse

that he intended to perform his part of the contract, and that he (Morse) should perform his.

That Nicks' purchase was a bona fide one, for valuable consideration. That it was then commonly the case that donation claims were furnished, to be located on the shares; and the terms made with Morse by Nicks, were more liberal than usual.

Admit that Duval & Carns resided on the land, as stated: think it probable, but do not know, they made the improvements alleged, in 1829, but deny all knowledge and belief of any cultivation in that year. Admit exhibits C. and D. Deny that the power given by Morse to Nicks was limited to May 15, 1828. Nicks had no other power; but *that* power was absolute, unconditional, and gave him an interest in the land. Admit that the location made by Nicks was *after* the date mentioned in the bill.

Deny that Nicks was bound to pay Morse any thing, until after the location. Deny that Morse ever demanded money of Nicks. Nicks never stated to Morse that the money would not be paid, nor that the land could not be located, for want of surveys. Admit that he did not pay Morse, nor deliver him the agreement. Deny the demand of either money or exhibit D.; deny that Morse ever revoked, offered to revoke, or had power to revoke; deny any mutual agreement to revoke. Nicks always expressed his determination to locate, and to fulfil his agreement with Morse.

That Duval & Carns should have investigated the character of the claim they bought of Morse; that there was no fraud; that the facts stated in the bill do not, in law, constitute a revocation.

Admit that improvements of value have been made on the land by Duval & Carns, and continued by Rector, but know nothing as to their value. That the improvements are on the part of the land which would fall to Nicks, by the agreement between him and Morse. That Duval well knew this, and Nicks' claim to the land. That four-fifths of the improvements have been made since suit in ejectment commenced. That Rector knew of Nicks' claim when he purchased.

Deny knowledge of exhibits G. and H.; of the application of Duval and Carns to locate with a donation claim; and deny that they

had any right to locate such a claim. Admit the death of Nicks; the character of the defendants; the patent to Matthews, and his deed.

That Duval & Carns did attempt to prove a pre-emption; but, whether the copy of proof exhibited is true, or whether they were entitled to a pre-emption, ignored.

That the land officers at Batesville refused to receive the proof, because it was insufficient, and because the land had been entered. That Duval & Carns appealed to the Commissioner of the General Land-office, who ordered the land officers at Batesville to notify Duval, Carns and Nicks to appear with their testimony, and that they should re-investigate the claim of Duval & Carns to a pre-emption. That notice was given to all, requiring them to appear and produce testimony; Duval & Carns, to prove their pre-emption; Nicks, to show cause why the pre-emption should not be allowed. That Nicks did so, and made all the proof required, as to his right and claim to the land: That Duval & Carns did not appear, in obedience to the notice, or offer any proof of their right to a pre-emption, but wholly abandoned the same: That the location was confirmed, and a patent issued to Mathews: That Duval & Carns never afterwards attempted to establish their pre-emption, but wholly abandoned it.

That Gibson and wife have no claim to the land; but it belongs exclusively to Nicks' heirs.

The exhibits attached to the answer were the deed of Matthews and wife to Nicks' heirs, and the patent to Matthews and his heirs.

Upon filing this answer, the defendants moved to dissolve the injunction, and the complainant filed exceptions to the answer. The exceptions were allowed, by consent.

The heirs then answered, by general denial. Gibson and wife answered, further, that, to the best of their knowledge, Nicks entered the land in October, 1829, at which time Duval & Carns were actual settlers on the land; but, whether sole and exclusive occupants, ignored. That Nicks bought half of Morse's interest in the land and improvements, and took his obligation, with full power to locate the same by a donation claim, as appears by exhibits C. and D. to original bill. That, when Nicks bought, Duval & Carns had rented a storehouse of Morse, on the land, and were boarding with Morse, who was

then sole owner of all the improvements on the land. That Duval & Carns bought with knowledge of Nicks' purchase, and subject to his interest and claim. Deny that Duval & Carns were sole and exclusive owners of all the improvements on the land, and of all right, &c., in the land, against all the world except the United States; and aver that, when Nicks located, he had ownership, right, &c., in the land, as by exhibits C. and D. of the bill.

Admit Duval & Carns were occupants when it was located. Whether any other person was occupant or resident, ignored.

To the answer of the heirs, by guardian Robert S. Gibson, and to the original answer and amendment of Gibson and wife, the complainant filed general replications. Order of publication was then taken against Carns and Matthews. Duval filed his answer, admitting every thing. The complainant replied, and the case was continued.

At March Term, 1840, order of publication having been published, a decree *pro confesso* was taken against Carns and Matthews.

In December, 1840, the complainant filed a supplemental bill, stating, that the value of the land is at least three thousand dollars. That when Duval proved up his pre-emption at Batesville, and immediately on such proof being made, he made formal application to enter and purchase the land, and tendered the government price for it, in such funds as were receivable at the land-office. That the land officers refused to permit the entry, and the Receiver refused to receive the money, on the ground that the land had previously been entered.

The defendants, Gibson and wife, and Nicks's heirs, were ruled to answer the supplemental bill. Gibson and wife answered, admitting the value of the land; but, as to the tender, &c., ignored. The infants denied, generally, and the complainants filed replications.

Samuel L. Griffith, who had intermarried with Elizabeth Q. Nicks, was afterwards made a party, and the case was heard, and a final decree rendered for the complainant, in conformity to the prayer of the bill.

The evidence on which the case was heard, was as follows: James Hervey's deposition stated, that he was well acquainted with Morse and Nicks, in their lifetime. That they were both dead. That wit-

ness made the first improvement ever made on the land, in 1825. In 1826, he sold to Morse, and gave him possession, it being then public land. That Morse settled on the land, commenced living in the house which witness had erected, and continued to live on it until after January, 1829; and Nicks was living at Fort Gibson, west of the present State of Arkansas. That, in July, 1829, witness went with Morse from Fort Smith to Fort Gibson. Previous to going, Morse had bought a number of horses, for which he had not paid, and he went to Fort Gibson to get the money of Nicks, to pay for them. After their arrival, Morse told Nicks that he was bound to pay for the horses, and that he must have his money, or his place back, so that he could dispose of it to somebody else; and demanded of Nicks that he should either pay him the money, or give him back his bond. Nicks said he had no money, and added, "D—n the place! I don't believe I can save it with a donation claim." On the 29th of July, 1829, saw Morse receive from Duval a quantity of silver, amounting to from $200 to $250, out of which Morse paid, for the horses, $205. The money was paid in the store-house occupied by Duval. Duval & Carns took possession of the store-house in the fall of 1828, and had occupied it from that time until the 29th day of July, 1829; at which time (it being a double log building), they occupied one part as a store-room, and the other as a sleeping-room, and were boarding with Morse, who lived in another house on the same land. In 1829, Morse cultivated a field of corn on the land, and Duval & Carns cultivated a different place, of about an acre, in turnips and other vegetables, on the same tract, and built a new store-house, and sunk a well on it. They continued to live on the tract through the years 1829 and 1830; and thence up to this time, either Duval & Carns, or Duval alone, has resided on it, and Duval still resides on it. Duval & Carns were residing on, and actually occupying, it, on the 29th of May, 1830, and believes that, before then, Morse had removed and gone away from it. Henry Mahon died about six years ago. Nathan Barnett left this State, for Kentucky, about four years ago, and has never been heard of since, and is supposed to be dead. Thomas J. Duval is not now in this State. [*Mahon* and *Barnett* are witnesses to exhibit B.; *Mahon*

and *Duval* to Exhibit A]. Duval & Carns originally obtained possession of the store-house, by renting it from Morse.

The deposition of John Rogers stated, that Duval & Carns, late in the fall, thinks in December, 1828, settled upon the land. When they first came, they took possession of, and thence commenced to occupy as a store-house, a double log-cabin, on the land; had possession of the store-house in 1828, and through the year 1829. Did not know whether they rented it or not. They opened a stock of goods in it, and carried on merchandizing in it. Duval came on with his family, in 1829; thinks in the summer; certainly before the fall; and thence to the present time, he and his family have, without intermission, resided on the land. For a short time after they took possession of the store-house, Morse continued to live in one end of it, but soon moved below, into another house on the same tract. Morse cultivated a field of corn on it, in 1829, and Duval & Carns also cultivated a small place on the same tract, in the same year, in vegetables. In the summer of 1829, Duval & Carns built a new store-house, and Duval then occupied the old store-house as a dwelling-house. The piece of ground cultivated by Duval & Carns, was near the old store-house; and they, in the same year, dug a well near it. Late in the fall of 1829, but does not know whether it was before or after he gathered his crop, Morse moved away with his family from the tract, from which time to and on 29th May, 1830, Duval & Carns resided on it.

Has frequently seen John W. Flowers and John Nicks write. They are both dead. The signatures of "J. W. Flowers," and "John Nicks," to exhibit D., of the original, "which I have here now inspected," are the true signatures of Flowers and Nicks. [Flowers was the only subscribing witness]. Knew Henry Mahon and William Morse, who are both dead. Did not know Nathan Barnett. Has seen Mahon and Morse write. Mahon's signature to exhibit B. is genuine. Thinks Morse's signature to exhibit B. genuine. [Mahon and Barnett sole subscribing witnesses]. Signature of Henry Mahon to exhibit A. genuine. Thinks the signature of William Morse to same genuine. [Mahon and Thomas J. Duval sole witnesses]. Is acquainted with J. H. Rose, G. W. Brand, and Peter A. Carns. [Rose and Brand sole subscribing witnesses, and

Carns grantor, to and in exhibit G]. "They are all now beyond the limits of this State." Their signatures to exhibit G. genuine.

Has seen Elias Rector write. [Complainant and sole witness to exhibit H]. Signature to exhibit H. genuine.

The land was never offered for sale by the United States, until the year 1830. The lands adjoining first offered in 1831. Land worth $3000.

The deposition of Curry Barnett proved the renting of the log-house, the residence of Duval & Carns, through 1829 and 1830, and afterwards; the cultivation by Morse in 1829; *that Morse removed* some time in the fall of 1829—as he believes, in September or October; that since then, Duval & Carns, or Duval alone, have constantly occupied it; clearing land, digging well, building house, and cultivation by Duval & Carns in 1829; that in October, 1829, *after Morse had removed, and ceased to occupy the land*, Duval & Carns purchased a donation claim, and employed witness to go to Batesville, and locate the land with it, for them. Witness went there, in October, 1829, and made application to locate the land with it. Col. Boswell, Register, was satisfied with the power of attorney, and Mr. Redmon, Receiver, was not, and would not consent to the entry. Witness returned, and Duval & Carns then gave him another power of attorney to locate the land, acknowledged before a Justice of the Peace. Witness then went again, and the officers informed him that the land had been located the day before by Nicks. At the time when Nicks made his location, Morse had ceased to reside on the land, and Duval & Carns were the sole occupants of it.

In the spring of 1831, witness went to the land-office, with William Duval and Adam Carnahan, to prove up Duval & Carns' pre-emption. The Receiver refused to hear the proof. Then in the fall of 1831, witness again returned, with Duval and Matthew Moose, and the proof was then received.

The deposition of Matthew Moose stated, that in the fall or winter of 1828, Duval & Carns were living on the land, and continued so to live on it until 1832, when Carns removed. Duval continued to live there until the overflow in June, 1833, when he went away for a short time, but returned in the fall or winter of 1833, and has lived

there ever since. In 1829, Duval & Carns built a house on it, cleared land, cultivated it, and dug a well. Morse removed early in the fall of 1829, and from that time until 1832, Duval & Carns were the sole occupants. In the fall of 1831, witness went with Duval & Barnett to Batesville, as a witness, to prove the pre-emption of Duval & Carns, when his affidavit was taken.

The complainants then read a transcript from the General Land-office, duly authenticated, containing copies, first, of a letter from the Commissioner of the General Land-office to the land officers at Batesville, dated 12th August, 1831, in which he transmitted certain evidence filed in the General Land-office by Duval & Carns, and stated, that agreeably to their representations, and accompanying affidavits, the act of January, 1829, directly prohibited the location of the land by Nicks, in consequence of its being occupied, and the occupants having given no consent. He therefore required them to report on the facts in the case to the General Land-office, as soon as practicable, and permit Duval & Carns to file such further and additional testimony as they might have to adduce, and to return the accompanying papers to the General Land-office.

Second—Of the response of the land officers, stating that they had notified the parties, and after receiving proof, would forward a report. Dated December 8, 1831.

Third—Of letter from Batesville land-officers, dated 5th December, 1831, enclosing a certified copy of all the papers on file, and stating that Nicks had permission from Wm. Morse to locate.

Fourth—Copies of the affidavits forwarded to the Commissioner, to which he referred in his first letter; being the affidavit of Duval, that he and Carns made a permanent settlement in 1829, in January, and cleared land, sowed turnips, built a house, and sunk a well, in 1829, and thence continued in possession until the date of the affidavits, 6th June, 1831. The affidavit of Adam Carnahan and Curry Barnett, that the facts stated in Duval's affidavit are true. The affidavit of Adam Carnahan and Curry Barnett, that on the 28th of May, 1829, Duval offered testimony as to the pre-emption right of Duval & Carns, at the Land-office at Batesville, which the officers refused to hear, because the land had been already located by Nicks;

and that Duval then tendered the price; and the affidavit of Curry Barnett, that in the fall of 1829, he went to Batesville, for Duval & Carns, to locate the land with a donation claim, which was refused, because the power of attorney from Duval & Carns to him was not acknowledged before a Justice of the Peace.

Fifth—A power from Morse to Nicks, of the same date, (January 21, 1829), as the papers connected with the same transaction, marked as exhibits C. and D., authorizing Nicks to locate the land. Proven before a Justice of the Peace.

Sixth—A protest by Nicks, addressed to the land-officers at Batesville, February 28, 1829, against any person locating the land "by virtue of my improvement, which can be made more fully to appear by evidence which I am ready to adduce;" with the affidavit of George C. Pickett, of same date, as to *Morse's* improvement; and a power from Matthews to locate his donation claim, proven by a subscribing witness.

Seventh—The affidavit of Preserved Morse, son of William Morse, taken October 7, 1831, that Morse and Nicks made the agreement aforesaid; that when this agreement was made, all the improvements on the land had been made by Morse, and Duval & Carns had only rented the store-house for one year, to expire 31st December, 1829; and if they cultivated, it was done under that lease.

Eighth—The pre-emption proof of Duval & Carns, being the affidavits of Duval, and of Curry Barnett and Matthew Moose, taken November 18, 1831, before the Register and Receiver at Batesville, proving all the facts, as to their occupancy, possession, and cultivation, in 1829, and their possession in 1830, and ever after they purchased of Morse, in July, 1829. The affidavit of Barnett further proves his attempt to locate with a donation claim.

Ninth—Of a letter from the Commissioner to the Register and Receiver at Batesville, dated blank, informing them that he had received their letter of the 5th December, 1831, covering copies as above stated; that the act of 6th January, 1829, required that the consent of the *actual* settlers should be obtained before a donation claim could be located; that whether such actual settlers were tenants or original settlers, was not a question arising under the act; that Duval &

Carns *were* the actual settlers, and their consent was necessary to the legal location of the donation claim of Matthews; but as the patent had issued to Matthews, the only redress of Duval & Carns would be in the courts of Arkansas, to whose decision they might appeal; the equity jurisdiction thereof being competent to the most ample relief in the case.

Tenth—Of the President's proclamation, dated 25th March, 1831, offering for sale the adjacent lands, on the 1st Monday of July, then next ensuing.

Eleventh—Of certificate of land-officers at Batesville, that Matthews' donation was located on the 19th November, 1829.

The complainant then read his several exhibits. The defendants offered no evidence, except the two exhibits to the answer of Gibson and wife.

In regard to the evidence, the following questions arose, and were brought before this Court by the appeal:

First—When the complainant offered to read the deposition of John Rogers, the defendant objected to reading that part of it which referred to the exhibits in the bill, because the exhibits were not annexed to, and made a part of, the depositions; the *original* exhibits being annexed to the bill. The motion was overruled, and defendants excepted.

Second—They then objected to reading the depositions of Rogers and Hervey, because the direction in the commission under which they were taken, was in blank, thus: "The State of Arkansas to ———, greeting." The Court overruled the objection; and the complainant then moved to amend the commission, by inserting the words, "to any Judge or Justice of the Peace in any of the United States;" which was granted, and the commission amended. To all this the defendants excepted.

Third—The defendants objected to reading the transcript from the General Land-office, because the certificate was insufficient, (it being in these words: "I, James Whitcomb, Commissioner of the General Land-office, do hereby certify, that the foregoing fourteen pages and one-half, are truly copied from the records and files in this office." The caption being, "General Land-office, June 15th,

1841;" and the attestation, "In testimony whereof, I have hereunto set my name, and caused the seal of said office to be hereunto affixed, the day and date above written." Signed, "Jas. Whitcomb, Commissioner," and sealed with the seal of the General Land-office of the United States). Because much of the transcript did not relate to the issue; and because many of the letters bear no signature. These objections were overruled, and the defendants excepted.

Fourth—The defendants objected to reading exhibit B. of the bill, upon the proof of its execution contained in the depositions of John Rogers and James Hervey. It will be recollected that exhibit B. was the deed from Morse to Duval & Carns, attested by Henry Mahon and Nathan Barnett. Hervey said, in his deposition, "Henry Mahon died about six years ago. Nathan Barnett left this State, for Kentucky, about four years ago, and has never been heard of since, and is supposed to be dead." Rogers said, in his deposition, "I was acquainted with Henry Mahon and William Morse. They are both dead. I was not acquainted with Nathan Barnett." He then proved the signatures of Mahon and Morse. The objection was overruled, and defendants excepted.

Complainants then offered to prove exhibit H. viva voce, at the hearing, (no order therefor having been obtained, or notice given), by Matthew Moose, subscribing witness. The defendants objected, but the Court overruled the objection, and allowed the proof; and they excepted.

The defendants then objected to reading exhibit F., [which was a copy of Duval & Carns' pre-emption evidence, corresponding exactly with that contained in his transcript from the General Land-office]. The objection was overruled, and the defendants excepted.

The defendants then objected to the reading of exhibit A., as proven by the depositions of John Rogers and James Hervey. This was Morse's deed, witnessed by Henry Mahon and Thomas J. Duval. Hervey said, in his deposition, "Thomas J. Duval is not now in this State;" and Rogers, in his deposition, taken at the same time, proved Mahon's death, and the signature of Mahon and Morse. The objection was overruled, and the defendants excepted.

The defendants, after decree entered, moved the Court to set it

aside, because it was for the complainant, when it should be for the defendants—because it was rendered without sufficient evidence, and contrary to equity—and because illegal and impertinent evidence was admitted. The motion was overruled, and the defendants excepted, referring in their bill of exceptions to all the evidence, and appealed.

The case was argued in this Court by *D. Walker* and *Paschal*, for the appellants, by written arguments, not allowed, by the rule of the Court, to be published.

Pike, Trapnall & Cocke, contra.

Permitting a deed, which was an exhibit, attached to the bill, to be proven viva voce, at the hearing, without previous order or notice, was a proper exercise of discretion by the Court below, and cannot be reviewed on appeal. Our statute in regard to the manner of taking testimony in cases in Chancery, instead of restricting the Chancellor, enlarges the discretion allowed in England.

The English rule was, that some matters might be proved by a viva voce examination, at the hearing: such as deeds, writings, or other documents, which might be proved on production, without entering on any examination which would admit of a cross-examination. In the case of a will, this mode of proof at the hearing was not permitted, because the *due* execution might come in question, which could not be examined to *ore tenus*, at the hearing of the cause; neither was this evidence admitted to prove witness's hands, who were dead; but the Court itself had a right, whenever it saw fit, to examine *viva voce;* and, in the case of an exhibit, attempted to be proved at the hearing, the Court would examine viva voce, on the suggestion of any question. The English practice further was, that, to authorize the proof of any exhibit viva voce on the hearing, an order to that purpose was to be previously obtained, *which was granted, of course*, and a copy of the order was to be served, two days previous to the hearing of the cause, upon the adverse clerk in Court. 1 *Newland's Ch. Pr.* 284. 2 *Maddock's Ch. Pr.* 426, 427. 1 *Smith's Ch. Pr.* 414. *Graves vs. Budgell*, 1 *Atk.* 444. *Walker vs. Symonds*, cited 1 *Mer.* 37. *Pomfret*

vs. Windsor, 2 *Ves. Sr.* 479. *Eade vs. Lingood*, 1 *Atk.* 203. *Turner vs. Burleigh*, 17 *Ves.* 354. *Banks vs. Farques*, *Amb.* 145.

An English Chancellor, where the evidence proposed to be given related only to the proof of a document; where no undue advantage could accrue to the plaintiff, nor any surprise happen to the defendant; where the defendant knew the document was to be proved; where the proof was not to let in some new matter, and the defect had not happened through design, but by a mere slip, would allow a re-examination, even after the case had come to a hearing. *Cox vs. Allingham*, 1 *Jacob* 337. *Lake vs. Skinner*, 1 *Jac. & Walk.* 9. *Chervet vs. Jones*, 6 *Madd.* 267.

In New-York, the regular practice established by the Courts is, to allow the proof, on *notice*, served four days before the hearing; and the courts there have gone so far as to allow papers and writings of every description to be proved viva voce, at the hearing, and the witnesses to be cross-examined, at the discretion, and under the direction, of the Court. It is treated by them as wholly a matter of discretion, and they have dispensed with the notice, whenever it could be done without surprise. *Consequa vs. Fanning*, 2 *J. C. R.* 481. *Barrow vs. Rhinelander*, 1 *J. C. R.* 559. *Desplaces vs. Goris*, 5 *Paige*, 252. *S. C.* 2 *Edw.* 423. *Pardee vs. DeCala*, 7 *Paige*, 134. See also, *Higgins vs. Mills*, 5 *Russ.* 287. *Cartwright vs. Cartwright*, *Dick.* 245. *Barnes vs. Lee*, 1 *Bibb*, 528. *Hughes vs. Phelps*, 3 *Bibb*, 199. *Crist vs. Brashiers*, 3 *Marsh.* 171. *March vs. Walker*, *Finch*, 416. *Bishop vs. Church*, 2 *Ves. Sr.* 105.

And this is a mere matter of practice, which the Circuit Court had the power to settle for itself. The practice shifts, from time to time, to meet the new exigencies of society, and the pressure of peculiar circumstances; and a court of equity never suffers itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. *Poor vs. Carleton*, 3 *Sumn.* 76. *Smith vs. Babcock*, 3 *Sumn.* 588. *Raymond vs. Simonson*, 4 *Blackf.* 80.

That the Court permitted the amendment of the commission, is *too frivolous*, even in its character of an objection to form, to merit refutation. *Mobley vs. Hamit*, 1 *Marsh.* 590. *Winthrop vs. Union Ins. Co.*,

2 *Wash. C. C. R.* 7. *Coleman's Cas.* 55. *Cooke vs. Gibbs*, 3 *Mass.* 195. *Prescott vs. Tufts*, 7 *Mass.* 209. *Ripley vs. Warren*, 2 *Pick.* 591.

Matters of practice, or resting on discretion, cannot be reviewed, on appeal. *Rogers vs. Hosack's Ex'rs*, 18 *Wend.* 319. *People vs. Rector*, 19 *Wend.* 569. *Rowley vs. Van Benthuysen*, 16 *Wend.* 369. *Armstrong vs. Wright*, 1 *Hawks.* 93. *Mandeville vs. Wilson*, 1 *Cranch*, 15. *Wyman vs. Dorr*, 3 *Greenl.* 183. *Clap vs. Balch*, 3 *Greenl.* 216. *Foster vs. Haines*, 1 *Shepley*, 307.

Positive evidence that the subscribing witness was not then in the State, was sufficient to admit evidence of his hand-writing. *Brown vs. Hicks*, 1 *Ark.* 242. *Wilson vs. Royston*, 2 *Ark.* 315. *Jackson vs. Gager*, 5 *Cowen*, 385. *Jackson vs. Cody*, 9 *Cowen*, 149. *Jackson vs. Chamberlain*, 8 *Wend.* 620. *Pelletreau vs. Jackson*, 11 *Wend.* 123. *McPherson vs. Rathbone*, 11 *Wend.* 96. *Jackson vs. Waldron*, 13 *Wend.* 178. *Russel vs. Coffin*, 3 *Pick.* 143. *Van Dyne vs. Thayer*, 19 *Wend.* 162. *Emery vs. Twombly*, 5 *Shepley*, 65. And these cases show that proof that another witness had gone to Kentucky, four years before, had never been heard of since, and was supposed to be dead, was also sufficient.

That the exhibits should have been attached to the depositions, is an objection that requires no notice. They were attached to the bill, part of the files of the Court, and so identified.

The transcript under the seal of the General Land-office, was properly read. *Pardee vs. De Cala*, 7 *Paige*, 134. *Pacific Ins. Co. vs. Catlett*, 4 *Wend.* 75. *Tuttle vs. Jackson*, 6 *Wend.* 213. *Harris vs. Doe*, 4 *Blackf.* 372. *U. S. vs. Benner*, *Bald.* 234. *U. S. vs. Willard*, 1 *Paine*, 539. *Bleecker vs. Bond*, 3 *Wash. C. C. R.* 529. *Smith vs. U. S.* 5 *Peters*, 292. *Peck vs. Farrington*, 0 *Wend.* 44. *Catlett vs. Pacific Ins. Co.*, 1 *Wend.* 561.

Is a paper, referred to, but not copied or incorporated, in a bill of exceptions, a part of the record? *Maulding vs. Rigby*, 4 *Howard*, 222. *Carmichael vs. Browder*, 4 *Howard*, 431.

The donation claim of Matthews was located on the land when Duval & Carns were the only actual settlers on it, having lived on it nearly a year, when they had cultivated and built on it, and before it was offered for sale.

It is a matter of no importance whether Morse's license was limited as to time, and expired on the 15th of May, 1829, or not, or whether it was revocable or not. Duval & Carns were actual settlers on the land, and the location, without their consent, was null and void, by the condition attached by law to the grant.

Morse had no *interest* in the land. He was a mere trespasser. *Land Laws, vol.* 1, *pp.* 509, 551, 677, 716, 735. Instructions and opinions, published by order of the Senate of the United States, in 1838, *pp.* 1, 16, 181. *Smith vs. Rankin*, 4 *Yerger*, 1.

Duval & Carns had as much right to settle on the land, as Nicks had. They could not be his tenants, nor could they hold under him, or buy of him any thing in the land. The original agreement under which they entered, was not a lease, but a mere license to enter, and guaranteed them against any disturbance by him, without conferring on them a solitary right. He had no right which he could confer.

If there could be a tenancy, Morse's conveyance to them would have vested his estate in them immediately, and made him their tenant.

The instrument executed by Morse and Nicks, and Nicks' note of the same date, form one contract. When a transaction is evidenced by two papers, the connection between which is evidenced from their contents alone, without any necessity of a reference to parol evidence to make out that connection, they are considered, in law, as constituting one agreement. *Freeport vs. Bartol*, 3 *Greenl.* 340. *Boydell vs. Drummond*, 11 *East*, 150. *Chitty on Contr.* 23. *Redhead vs. Cator*, 4 *Camp.* 188, *S. C.* 1 *Bing.* 9, 196.

Nicks had power to extinguish the obligation of his note, by postponing the location until after the day specified. Upon the ground, therefore, of mutuality, and that mutual promises must be alike obligatory on each party, if he failed to make the location by the day, he could not afterwards make it. A court of equity will never decree performance where the remedy is not mutual, or where one party only is bound by the agreement. *Parkhurst vs. Van Cortlandt*, 1 *J. C. R.* 282. *Benedict vs. Lynch*, 1 *J. C. R.* 373. *Troughton vs. Troughton*, 1 *Ves.* 86. *Bromley vs. Jefferies*, 2 *Vern.* 415. *Lawrenson vs. Butler*, 1 *Scho. & Lef.* 13.

The agreement did not give Nicks a power coupled with an interest. The clause in the act of 6th January, 1829, afforded a mere personal protection to Morse, in his character of settler. It created no interest or right in the land which he could convey, nor any personal privilege even which he could bestow on another, but a mere negative exemption and immunity, which he could waive. It was nothing that was transferable or assignable.

His consent to the location might amount to a personal covenant that he would not impeach it, and so operate by way of estoppel; but it would be a mere *personal* covenant, and could convey or create no interest or power; nor could it be of any avail after he should leave the land. His leaving it might be a breach of covenant.

The interest which can protect a power after the death of the person who creates it, or which is irrevocable, must be an interest in the thing itself. The power must be *engrafted* on an estate in the thing. A power *coupled* with an interest, is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. *This interest is not an interest in that* which is to be produced by the exercise of the power, for then they are never united. The power to produce the interest must be exercised, and, by its exercise, is extinguished. The power ceases when the interest commences, and therefore cannot be said to be *coupled* with it. *Hunt vs. Rousmaniere*, 8 *Wheat.* 74. *S. C.* 1 *Pet.* 1. *Story on Agency*, 155, 495.

The interest here was to be produced, if there was any power, by the exercise of the power. There was no power, but a mere waiver of an exemption. The word *power*, in this connection, means an authority to do some act connected with an existing estate.

Here was no agency. The act was not to be done for Morse, nor in his name. It was a mere license to Nicks, to do an independent act.

On the ground of agency, the same result follows. An agency is revoked by operation of law, in many cases, by a change of condition or of state, producing an incapacity of either party. The derivative authority expires with the original authority from which it proceeds. *Story on Agency*, 500, 521. When Morse left the land, his power to consent to its location ceased.

The refusal of the Register and Receiver to permit Duval & Carns to enter the land, is not conclusive. Power is given these officers, by the act of May 24, 1828, to adjudicate on the facts of settlement in, and removal from, the country ceded to the Cherokees. As to these matters, their decision was conclusive, in the absence of fraud. If they undertook to decide that Duval & Carns were not actual settlers on the land, or that it was legally subject to location by the donation claim, they were deciding a matter entirely beyond their jurisdiction. *Wilcox vs. Jackson*, 13 *Peters*, 490.

Duval & Carns proved a valid pre-emption right. To this point, the evidence is ample. See *Ins. & Op.* 97, 529, 108. This gave them a sufficient interest in the land, which they could transfer or convey, to entitle them, or their assignee, to have their possession quieted. *Ins. & Op.* 16, 59, 112. Even an entry and purchase, by a *bona fide* purchaser, would not be good against their claim. *Ins. & Op.* 60, 553, 613.

The tender was sufficient. If the debtor is prepared, and offers, to produce the money, and its production is expressly dispensed with by the creditor, it is complete and valid, without actual tender. *Chitty on Contr.* 305, 306. *Douglas vs. Patrick*, 3 *T. R.* 683. *Read vs. Goldring*, 2 *M. & S.* 86. *Braynard vs. Fisher*, 6 *Pick.* 355. *Thomas vs. Evans*, 10 *East*, 101. *Kraus vs. Arnold*, 7 *Moore*, 59. *Dunham vs. Jackson*, 6 *Wend.* 22.

Bank notes are a good tender, unless specially objected to on that account. *Snow vs. Perry*, 9 *Pick.* 539. *Wright vs. Reed*, 3 *T. R.* 554.

The same principles apply in the General Land-office, to cases arising under the land laws. *Ins. & Op.* 118.

The jurisdiction is clear. Where the Legislature declares certain instruments illegal and void, as the British annuity act does, or as the gaming acts do, there is inherent, in the courts of equity, a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the Legislature. So to cancel a patent, declared by the Legislature to be void. *Clark vs. Smith*, 13 *Peters*, 195. *Underhill vs. Harwood*, 10 *Ves.* 218. *Byne vs. Vivian*, 5 *Ves.* 604. 2 *Yerger*, 521.

The sales of Carns to Duval, and of Duval to Rector, were subsequent to the passage of the act of Congress of 23d January, 1832,

which legalized the assignment of pre-emption rights, by those who had previously purchased. Rector's rights cannot be defeated, because Duval & Carns were prevented from purchasing by the fraud of a third party, or the dereliction of duty and negligence of the officers of the government.

By the Court, LACY, J. (The Chief Justice not sitting in the case).

The complainant in this case sets up title to the land described in his bill, as the legal owner of a pre-emption right of Duval & Carns, under the act of Congress of 29th of May, 1830, which was rejected, and the entry refused by the Register and Receiver of the Land-office at Batesville, by reason of a prior fraudulent location of the same land, by John Nicks, made by virtue of a donation claim, granted to Andrew Matthews, upon which a patent had issued, and conveyed by Matthews in fee to the heirs of Nicks. The respondents claim under the location of the ancestor, which, they say, was made in good faith, and under an authority given to him in his lifetime, by William Morse, the actual settler upon the premises, and, therefore, their patent rightfully issued, and they are entitled to possession under it. The bill prays to enjoin Nicks' heirs from instituting any proceeding under the patent, and Gibson and wife from setting up any claim of dower, perpetually quieting the possession of the complainant, and that of Duval, who holds under him. The decree affords the relief prayed for; to reverse which, an appeal has been taken to this Court.

Before we proceed to an investigation and decision of the several important questions that arise in this case, we will first notice and determine a number of minor points, that were raised upon the hearing, and insisted upon here.

These relate, principally, to matters of practice, and, as such, may readily be disposed of in a few words. The objection to filling up the blank in the commission, by the insertion of the words, "to any Justice of the Peace," that the exhibits were not annexed to the depositions proving them, and to establishing the exhibit of the deed from Duval to Rector, viva voce, without notice or a previous

order, all of which points the Chancellor overruled at the hearing, we regard as mere matters of practice, clearly within the exercise of his discretion. And this being the case, if there was any error or mistake committed, it cannot be taken advantage of in this Court upon appeal, especially when these questions do not enter seriously into the merits of the decree. The authorities are clear and express upon the point, that much allowance must be made for infirmity and errors upon mere rules of practice, falling within the equitable exercise of his authority. And this Court is not authorized to reverse a decree upon mere questions of practice, unless the Chancellor has expressly violated some important principle of equitable jurisprudence, or disregarded some plain and authoritative command of the statute upon that subject. In the present instance, we perceive no such violation of principle, or disregard of any positive injunction. This rule is all-important for the government of our systems of chancery practice, and, without its enforcement, it would be impossible for the Chancellor to proceed with the business of the Court. The rigid application of the rules of English practice to our courts would, in many cases, be wholly impracticable, and, if allowed, would work most manifest injustice and wrong. The Chancellor, upon the hearing, unquestionably possessed the power to cause the blank in the commission to be filled up. For the commission is certainly nothing more than the process of the Court, which may, at any time, be amended upon suggestion, in an unimportant point. The provision in our statute, requiring the exhibits to be attached to the depositions, and to be sealed up, and returned with them, was only intended for greater certainty and security in proving them, and does not, in our opinion, apply to a case where the exhibits are made a part of the bill, and filed with it. The design and object of the law are certainly answered, if the exhibits are shown to the witnesses, and they are identified. And upon no principle of fair construction, can a party be required to take them from the rolls, for the useless purpose of attaching them to the depositions; nor would it be proper to allow it. All the statute requires is, that the exhibits should be identified, and their execution proved.

That clause in the statute regulating the proceedings in chancery,

that requires the testimony of witnesses to be taken in writing, unless otherwise directed by the Court upon the hearing, so far from denying to the Chancellor the right of causing an exhibit to be proved *viva voce* upon the trial, expressly gives him authority to do so, provided, in the exercise of his discretion, he does not take the party by surprise, or commit any serious wrong. In the present case, the exhibit proved *viva voce* upon the hearing, was filed with the bill, and there can be no pretence that those who wished to controvert it, had not a fair opportunity afforded them of questioning its genuineness. It is surely a more regular practice, and one more consonant with the principles of equity, to prove the exhibits before the examiner. It is likewise usual, where an exhibit is proved *viva voce*, first to obtain an order, *ex parte*, accurately describing it, and giving four days' notice before the hearing; but this rule has been changed, and a reasonable notice, instead of an order, is now substituted in its stead. And there are many cases to be found, where both the order and notice have been dispensed with, upon the ground, that no injustice was done by permitting the exhibit to be proved *viva voce* upon the hearing. And in the case of *Desplaces vs. Goris*, 5 *Paige Rep.* 252, Chancellor WALWORTH said, in a case where a written agreement was proved upon the hearing *viva voce*, and that, too, where no notice or order was had; "that there was no pretence, on the part of either of the defendants, that they had any reason to believe that the agreement was not in fact executed, or that the translation, as stated in the bill, was incorrect; that the only effect of denying the application would be, to subject the parties to the delay of a new suit, as it would, under the circumstances, be a matter of course to permit the bill to be dismissed without prejudice." In that case, the objection, that the the agreement was not sufficiently proven, was taken after the plaintiff's counsel had closed the opening argument, and the defendant's counsel had responded. And in *Poor vs. Carleton*, 3 *Sumner*, 76, Justice STORY well remarks, "there are numerous cases which show the gradual mutation and changes, often silent, and almost imperceptible, which have been introduced into the practice of courts of equity, to obviate inconveniences, which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of

society." These remarks apply with peculiar force to our courts of chancery jurisdiction, which only sit once in six months, and then but for a limited period, with no rule days, and no opportunity afforded for taking the necessary and regular steps in the proceeding, which is happily the case in other chancery systems, better organized and more fortunately situated than our own. *Consequa vs. Fanning et al.* 2 *J. C. R.* 481; *Barrow vs. Rhinelander* 1 *J. C. R.* 551. But whether the decision of the Chancellor upon this point be right or wrong, we deem it immaterial. Regarding it, as we do, to be a mere question of practice, and within the discretion of the Court, there can be no advantage taken of it upon appeal. *Rogers vs. Hosack's Ex'r*, 18 *Wend.* 319. *Mandeville vs. Wilson*, 1 *Cranch*, 15. *The People vs. Rector*, 19 *Wend.* 569. *Prescott vs. Tufts*, 7 *Mass.* 209.

Another objection raised is, that the evidence of the hand-writing of Nathan Barnett, one of the witnesses to the conveyance of Morse to Duval & Carns, ought not to have been received, his absence not being sufficiently accounted for. The rule upon this subject is properly stated in the case of *Brown vs. Hicks*, 1 *Ark. Rep.* 232, and *Wilson vs. Royston*, 2 *Ark. Rep.* 315, and in the authorities there cited. The principles there established, fully authorize the Chancellor to receive secondary evidence of the hand-writing of the witness proving the execution of the agreement. It was proved, upon the trial, that four years ago, the witness had gone to the State of Kentucky, and that he was supposed to be dead, and nothing more heard of him. This proof is uncontradicted by any opposing evidence, and, certainly, according to all the adjudicated cases upon the point, the hand-writing of the witness may be proved. *Jackson vs. Gager*, 5 *Cow.* 385. *Jackson vs. Cody*, 9 *Cow.* 140. *Jackson vs. Waldron*, 13 *Wend.* 178.

It is contended, that the evidence offered under the certificate and seal of the commissioner of the General Land-office, was improperly received. It is said to contain irrelevant testimony, and the certificate not to be in due form of law. It may be, and probably is true, that a considerable portion of the matter contained in that record is not strict proof in the cause, but it surely will not be presumed that could have had any influence upon the mind of the Chancellor, in

determining the matter, or, that certain portions of the record being irrelevant, should exclude other portions, which were relevant and legal. The act of Congress organizing and establishing the land-office, makes all records, books, or papers, belonging to the office of the commissioner, authenticated under his signature, and the seal of his office, competent evidence in all cases in which the original record, books, or papers, could be evidence. *Gordon's Digest, p.* 320. It was evidently the design of Congress to place the seal of the office on the footing with seals of courts of record; and, consequently, the seal of the General Land-office, and the signature of the commissioner to copies of originals, required by law to be deposited in his office, *prima facie* prove themselves. *U. S. vs. Bonner*, 1 *Bald.* 236. *Bleecker vs. Bond*, 3 *Wash. C. C. R.* 529. *Smith vs. U. S.* 5 *Peters*, 229.

Having disposed of these preliminary points, we will now consider the main questions in the cause. The first inquiry is, what is the nature and character of the agreement entered into between Nicks and Morse? There are two agreements, evidencing the contract of the parties, and both executed on the same day, to wit: on the 21st of January, A. D. 1829. The first part of the contract is, a sale from Morse to Nicks, of his improvement, with an authority to locate the same by a donation claim; and when the land was thus secured, it was to be for the joint benefit of both, and to be divided according to the stipulations therein contained. This agreement was signed by both Morse and Nicks. The second part of the contract, which was signed by Nicks alone, was a note of hand, by which he bound himself to pay Morse two hundred and fifty-nine dollars, the price of the improvement, on or before 15th of May, A. D. 1829, containing this express stipulation: if he, Nicks, should secure, by a donation claim, a patent to the land on which the improvement was made, then the obligation was to be in full force, otherwise, it was to be of no effect.

It is clear that these two instruments are to be taken together, as constituting one entire contract. They both have relation to the same subject matter, and bear date of the same day. The rule of law upon the subject is, that when the transaction is evidenced by two papers, the connection between which is established by their

contents, without any necessity of referring to other matter to connect them together; they will be taken as one entire agreement. *Boydell vs. Drummond*, 11 *East.* 140. *Chitty on Con.* 23.

By one agreement, Morse gives authority to Nicks to locate the land by a donation claim, for their joint benefit, upon certain terms. By the other, Nicks was to pay the note only on the condition that the location should be made by a certain day. It was in the power of Nicks to defeat the payment of the note, by postponing the location. It was certainly not competent for Nicks to release himself from all liability, and to hold Morse bound by his license. In all covenants, there must be a mutuality of agreement upon the respective parties, to be obligatory. Should the time have elapsed for location, could Nicks have enforced the specific execution of the agreement against Morse? Certainly not. And it is equally as clear, that after that period, Morse could not have enforced the payment of the note by Nicks. A court of equity will never decree a specific performance, unless the remedies are mutal, or where one party only is bound by the agreement. Upon Nicks' failure to make the location upon the day fixed, the authority given to him expired, because he was not bound, beyond that day, to pay for the improvement. The terms of the contract bound the parties to the performance of their mutual agreements, upon a day certain; and both the license given to Nicks, to locate, and the obligation to pay the money, expired at that period, and at one and the same time.

The clause in the act of the 6th January, 1829, was a mere personal privilege, or protection, afforded by law to the actual settler, in the peaceful enjoyment and occupation of his improvement. The policy of the government upon this subject, has ever been, to protect the *bona fide* occupant of the soil against an unjust and unwarrantable intrusion. Hence, his improvement and settlement are secured to him; and this privilege has ever been guarded assiduously by courts of justice, unless it clearly appeared that the settler either waived his privilege, or had transferred his improvement and interest, *bona fide*, to another. If, by any means, the settler transferred this right or privilege, or signified his consent to the location, it would be a mere waiver of his right to his improvement and settlement;

and possibly a personal covenant that would bind him so long as he continued to reside on the land, and the agreement be made to operate by way of an equitable estoppel; and it probably could not be revoked, if its terms were absolute and unconditional. But it would be otherwise, where its terms were conditional, and limited to a particular time. Such an agreement would certainly be binding, so long as the actual settler remained upon, and continued in possession of, the land. But should he voluntarily abandon his possession, then his consent to such location would seem to us to be of no avail. The act of Congress certainly contemplated the consent of the actual settler upon the land; for it has so expressed it. It makes the location of a donation claim, without such consent, if the land had not been previously offered for sale, absolutely null and void. But it is contended, in behalf of the defendants, that the location by Nicks, in this instance, is taken out of the operation of the act of Congress of 6th of January, A. D. 1829, upon the ground, that the authority and license granted by Morse to make the location, was coupled with an interest, and, therefore, irrevocable. Justice STORY, in his accurate and admirable treatise upon agency, page 495, says, "where a power or authority is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether expressed so on the face of the instrument conferring the authority, or not;" and he puts several cases by way of illustration—a power to levy a fine, as a part of a security to a creditor; letter of attorney to sell a ship, as a security upon a loan of money, and the like. This doctrine was fully considered and determined in the case of *Hunt vs. Rousmanier*, 8 *Wheaton*, 174, and the distinction between a mere power, and a power coupled with an interest, is there clearly defined. In that case, Chief Justice MARSHALL remarked: "It becomes necessary to inquire, what is meant by a power coupled with an interest? Is it an interest in the subject on which the power is to be exercised? Or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of

the person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted upon an estate in the thing. The power and the interest are united in the same person." In the present case, is the power here engrafted upon the estate in the land? Was not the estate in the land to be created by the exercise of the power? It certainly was. For by the exercise of the license or authority given to Nicks, to make the location, the land upon which the improvement was situated, was to be secured; and the interest in the estate, or thing, was by the entry to be produced, by the exercise of the power. This being the case, in the language of that Court, the power, to produce the interest, must be exercised, and by its exercise, it is extinguished. The power ceases when the interest commences, and, therefore, in the present case, there is no pretext whatever, that the license given to Nicks was a power coupled with an interest, or irrevocable.

Morse never constituted Nicks his agent. In making the location, Nicks acted for himself, and not for Morse, and this their agreement clearly shows. There are no equal equities established between Nicks and Duval & Carns. The principle, as to an equal subsisting equity, does not apply—that he who is prior in time, is first in right. Morse had neither a legal nor equitable estate in the land. He merely possessed an inchoate, or imperfect right to the possession of the improvement, against all the world, except the United States, and that only so long as he continued to reside upon it. In no respect can Morse or Duval & Carns be regarded as the tenants of Nicks. Nicks had neither a fee in the land, or a life estate in the freehold, or any kind of interest which would create the relation of landlord and tenant. Neither Morse, Duval, or Carns ever professed to hold under him, or derive any title whatever from Nicks' supposed interest. The proof unquestionably establishes the fact, that Morse applied to Nicks for the payment of his note, after it became due; that Nicks refused to pay, from some cause or other; and from that time forward, Morse considered the contract and treated it as dissolved. Upon Morse's failure to obtain the purchase money from Nicks, he immediately sold his improvement to Duval & Carns, for the sum of five hundred and ninety dollars, which they paid him the 29th June; and

upon the 29th July, A. D. 1829, they acquired all his right and title therein, by regular conveyance, executed in their behalf by Morse, and claimed to be the sole and exclusive owners of the improvement, and the actual settlers upon the land. Morse never set up any adversary claim, or disputed either their right of improvement or possession. He abandoned the entire occupancy to them in October of the same year, and moved off the premises, leaving them in the actual and quiet possession of the land, and its improvements. After their purchase, the proof shows they added other valuable improvements upon the land, and were in the cultivation, and actual and sole possession of it, when Nicks made his location in November, A. D. 1829; and that Duval has, for Carns and himself, and for himself individually, and for the present complainant, continued to reside on the same tract ever since, and now holds it in possession. In the view we have taken of this case, it matters not whether Duval & Carns had notice or not of Nicks' purchase from Morse; for, after his leave to locate had expired, Nicks had no interest whatever in the improvement. Shortly after Duval & Carns purchased from Morse, they applied to the proper land-office to secure their improvement, by a donation claim, before Nicks located the same; but their application was rejected, for a supposed informality in giving their consent to the location. It was after this, that Nicks located the land; and whether he was apprised or not, that Duval & Carns were the actual settlers on it, he made his location at his own election and peril, and he must abide the consequences. If they were settlers—and that they were, there can be no doubt—then, without obtaining their consent, (which is not pretended in this case), his location, being made before the land was offered for sale, by the express terms of the law, is declared to be held null and void. His authority to locate is a gratuity, on the part of the government, to the original claimant, whose rights he acquired, given upon express compliance with certain conditions contained in, and annexed to, the grant, one of which is, if the donation claim is laid on the improvement of an actual settler, where the land has not been offered for sale, then, and in that case, the location is in violation, and in fraud of the law creating the grant; and, of course, the patent that issued on the claim must be

held to be void. After Nicks had made his location, Duval & Carns applied to the proper land officers, to enter their pre-emption right, but their application was rejected, not upon the ground that they had no right of pre-emption, or that it was not a good and valid one, capable of being fully established; but on the ground that the land had been previously entered by Nicks, and that, therefore, they were deprived of the benefit of the act of Congress of 29th May, A. D. 1830. Now, it must be perfectly manifest, if Nicks' location was void, being in fraud of law, of course Duval & Carns' right of pre-emption was not annulled by such location. It is equally clear, if Duval and Carns were entitled to the right of pre-emption, they cannot, on any principle of law or equity, be deprived of that right, by the land officers refusing the entry. Upon the case being brought to the consideration of the Commissioner of the General Land-office, he directed the Register and Receiver to take the proof, and report the facts to the department, which was accordingly done.

The patent issued to Matthews, A. D. 1831, and Nicks has obtained a deed from the original claimant, and brought an action of ejectment against the tenant in possession; and it is now contended, in their behalf, that the decision of the Register and Receiver is final and conclusive between the parties; and that, whatever right of pre-emption Duval & Carns once had, it has now ceased to exist. It will be borne in mind, that the Register and Receiver never passed upon the validity or genuineness of Duval & Carns' pre-emption, but they merely refused their entry, because the land had been previously located by Nicks, with a donation claim. The proof taken before them unquestionably established, beyond all doubt, that Duval & Carns strictly and fully complied with all the requisites of the act of 29th of May, A. D. 1830, and, as settlers and occupants, they were entitled to the benefit of the act. It is true, that the decisions of the Register and Receiver are conclusive as to all matters properly within their jurisdiction, in the absence of fraud; for the act of Congress, for many purposes, makes them judicial officers, and gives them exclusive cognizance of a particular class of cases. But we apprehend that the case now under consideration does not fall within the enumeration. The Supreme Court of the United States, in the case of *Wilcox vs.*

Jackson, 13 *Pet.* 490, has laid down the whole doctrine upon this subject.

The pre-emption act of 29th May, 1830, provides that, prior to an entry being made, proof of settlement and improvement, to the satisfaction of the Register and Receiver of the district in which the lands claimed are situated, shall be taken, agreeably to the rules prescribed by the Commissioner of the General Land-office. Upon this grant of power to the Register and Receiver, the Supreme Court remarks, "that the decision of the officers, in the absence of fraud, would be conclusive, as to the facts that the applicant for the land was in possession, and of his cultivating the land during the preceding year, because these questions were directly submitted to them." But, says the Court, "if they undertake to grant pre-emptions to land upon which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a court, whose jurisdiction was declared not to extend beyond a given sum, should attempt cognizance of a case beyond that sum." So the act of Congress, of the 24th of May, 1828, authorizes the Register and Receiver to take the proper testimony for the establishment of donation claims, according to the requisitions of the act. As to the facts of settlement and removal, agreeably to the provisions of the treaty, the decision of these officers is conclusive, because it appertains strictly to their jurisdiction. But when the Register and Receiver undertook to decide that Duval & Carns' improvement upon the land was legally subjected to a location by a donation claim, then they were deciding in a matter entirely beyond their jurisdiction. No power was given them by law, nor were they authorized or required by the instructions of the General Land-office, to allow an improvement of an actual settler to be located by a donation claim, without his consent. In regard to that matter, they had no jurisdiction. The person entering a donation claim, did so at his peril; and, if he located lands upon which there was an actual settler, without obtaining his consent, such location was null and void, and the settler is, in our opinion, relievable in equity. The entry of Nicks' location being void by law, of course the patent invests those claiming under it with no title.

The bill does not seek a decree for a title, nor does it pray to vacate the patent. It only asks, that the possession of the complainant shall remain undisturbed by a patent illegally issued, and palpably void—a patent procured by a grant of Congress, and yet obtained in express derogation of the condition annexed to the grant. Nicks' entry having been shown to be void, Duval & Carns, or their assignee, have the exclusive right of purchasing and holding the land. They have a vested, legal, and equitable right, equivalent to an interest in the land. Having tendered the purchase money to the government, to enter their pre-emption, their right becomes complete and fixed. Even an entry by a *bona fide* purchaser is not good against a valid pre-emption. The tender of payment in due time, and of the requisite amount, is sufficient, in ordinary cases, between individuals, to save the right of the parties making it. In cases of executory agreements, it will entitle him who made it, in a court of equity, to a specific performance of the contract. We take the same principle to hold good in cases arising under the land laws, between a settler and the government. The rule in regard to the sufficiency of a tender is, if a debtor offers to produce the money, and its production is dispensed with by the creditor, the tender is complete and valid, without being actually made. The tender, in this case, was sufficient, because the land officer refused to receive the money.

As to the jurisdiction of a court of equity in this case, we entertain no doubt. "Whenever the law declares certain instruments illegal and void, as the British annuity act does, or as the gaming acts do, there is inherent in the courts of equity, a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the Legislature; and, if this was not the case, a party would have a right without a remedy, or clear equitable interest or title without any means for its protection or enforcement." *Clark vs. Smith*, 13 *Pet.*, in which this language is used, to show that equity may cancel a patent, declared, by the Legislature, to be void. 10 *Ves.* 218. 5 *Ves.* 604. 2 *Yerger*, 524.

It only remains to be shown, that Duval's assignment to Rector of his pre-emption right, under the act of 1830, is valid. The act, it is true, declares all assignments and transfers of the right of pre-emp-

tion, prior to the issuing of the patent, null and void; but, by a supplementary act of 23d January, 1832, it was enacted, that from and after its passage, all persons who have purchased under the act of 1830, may assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee, any thing to the contrary notwithstanding. 2 *Land Laws*, 298. Carns did not sell his interest to Duval until after the passage of this act, to wit: in December, 1832, and Duval sold to Rector in 1837. At the time of neither sale, was the transaction contrary either to the policy or letter of the law; and, if a person whose pre-emption was allowed, could sell, certainly those who had only been prevented from purchasing, by the fraud of a third party, and the dereliction of duty and negligence of the officers of the United States, could have no less a right to dispose of their interest.

It seems to us, on a careful consideration of the whole case, that the complainant has amply shown, that he is entitled to the relief prayed for in his bill, and granted by the decree; and therefore it is ordered in all things to be affirmed.

Henry A. Engles *vs.* William Engles.

An agreement to convey a tract of land, executed by A., to B. and C., jointly, part of the purchase money being paid by each, cannot be cancelled and delivered up by A. and B., and a deed substituted to B. alone, without any authority from C.

One party cannot cancel or alter a contract, without the consent and agreement of the other. All the parties to it must agree and consent to its change or alteration. And, as a general rule, the contract can only be dissolved or cancelled by an instrument of equal dignity with the one that created it.

And, although C. directs B. to sell his interest in the land, and pay himself for money advanced, he can only sell to third persons, and cannot take a conveyance to himself.

Where an answer states that the land in dispute has been mortgaged, although, if this be true, the mortgagee should be a party, yet, if no mortgage is exhibited, nor any proof adduced to support the allegation, a decree, without the alleged mortgagee being made a party, will not be disturbed.

One part owner of the land, who has paid more of the purchase money than another, can have no lien, in preference to other creditors, for the excess of purchase money paid. If one part owner or partner pays more than his proportion, it is but a simple contract debt, constituting no lien or mortgage on the land.

THIS was a suit in Chancery, determined in the Independence Circuit Court, in August, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. The bill of William Engles stated, that, in 1835, he and Henry A. Engles, jointly, purchased of William Seamans, two tracts of land, described therein, for which they paid $260, and Seamans gave them his bond, to convey the land to them in fee simple. The bond was exhibited; but, as to the one tract, there was a variance in the description between the bill and the exhibit. That the complainant afterwards went to Texas, leaving the obligation with Henry, and that Henry has since procured a deed from Seamans, to himself alone, for the lands.

The answer of Henry A. Engles admitted the joint purchase, for their joint benefit, and alleged that he paid $160 of the consideration, and William, $100. That William never saw the bond, and went to Texas, leaving Henry largely bound for him, as security, promising to return in three months, and authorizing Henry to sell the land, or to keep it himself, as an indemnity for his securityship. That he paid, for William, as his security, $225. That William remained in Texas several years, and, while there, wrote to him to sell the land for what it would bring; on receipt of which, he gave up the bond, and took a deed to himself; after which deed was duly executed and recorded, he mortgaged the land to the Real Estate Bank, who accepted the mortgage, and he required the Bank to be made a party.

The answer of Seamans admitted the same facts, in regard to the execution of the bond and deed. To each answer a replication was filed. When the cause was set for hearing, an order was made that oral evidence might be introduced. The cause was heard upon bill, answers, replications, and evidence introduced, (the record not showing what was the evidence), and the Court decreed that the deed should be cancelled, and a bond executed by Seamans to convey the land to William and Henry, jointly, when the patent should issue; and that Henry should hold a lien on the land for thirty dollars, half the excess of purchase money paid by him, with interest, and should pay the costs. He appealed. The decree describes the land as in the exhibit.

The case was argued here by *Fowler*, for the appellant, and *D. Walker*, contra.

By the Court, DICKINSON, J. The main point in this case to be decided is, had Henry A. Engles and William Seamans a right to cancel and deliver up the agreement to convey a certain tract of land, executed by Seamans to Henry A. and William Engles, jointly, and substitute a deed in fee to Henry alone, in lieu thereof?

This question presents no difficulty whatever. The facts upon the record clearly establish, that the agreement made by Seamans with Henry A. and William Engles, to convey a certain tract or parcel of land, was given to them jointly, and the purchase money was paid by them both, Henry paying $100, and William, $100. Shortly after the agreement of the parties, William removed beyond the jurisdiction of this State, and, during his absence, Henry and Seamans cancelled the agreement, and substituted a deed in its stead, leaving out the name of William. And this they did without any authority, either written or verbal, from William. It is certain, that one party cannot alter and cancel a contract, without the consent and agreement of the other. All the parties to the contract must agree and consent to the change or alteration; and, as a general rule, the contract can only be dissolved or cancelled by an instrument of equal dignity with the one which created it. Henry and Seamans seem to have proceeded upon the ground of cancelling the agreement, and substituting another in its place, in which William was excluded, because William had, while absent from the State, directed Henry to sell his interest in the land, and to pay himself, for money advanced. This certainly gave him no power or authority whatever to take the deed from Seamans to himself. If he possessed any power at all, it only authorized the sale of the land to third persons. This proposition seems to us self-evident. The answer states, that the respondent, Henry A. Engles, has mortgaged the land to the Real Estate Bank of this State, and therefore the Bank ought to be made a party to this suit. There is no proof adduced to support this allegation, nor any mortgage exhibited; consequently, the Bank is not shown to have such an interest as to entitle her to be made a party.

The Chancellor below has decreed, that the deed between Henry

A. Engles and Seamans be cancelled, and given up, and a deed be executed by Seamans, in like terms and tenor as the former, to Henry and William, jointly, and that the land be charged with thirty dollars and interest, as William's equal half of the purchase money, that sum being paid for him, by Henry. This latter part of the decree, we deem erroneous. We know no principle which would authorize the Chancellor to decree, that one partner, who had paid more of the purchase money than another, should have a lien in preference to other creditors, for the excess of purchase money paid. The partners, or part owners, stand toward each other in the relation of vendor and vendee, in the purchase of real estate. Should one of the partners pay a greater amount than the other, to the vendor, then he can charge the amount against him as a simple debt which the partnership owes, or against him individually, as the equity of the case warrants. But this certainly constitutes no lien or mortgage upon the land. In this particular, therefore, the decree of the Court below is erroneous, and must be reversed, and in all other respects affirmed, and this cause remanded for further proceedings.

Pelham, Adm'r of Ryan, *vs.* Wilson, Cravens, et al.

The interest that a person has in an improvement on public land, is of a peculiar kind, known only to our laws. It is a possessory right against all the world but the United States. It partakes, in some degree, of the nature of a chattel real, and vests in the personal representatives of the deceased.

The executor or administrator can sell it, without the intervention of the Probate Court.

If the administrator professes to sell, and the purchaser supposes he is buying, *a pre-emption right*, and there is, in fact, no pre-emption, the contract will be rescinded. If only an *improvement* is sold, the purchaser buys at his peril, and must comply with his contract.

This was a suit in chancery, determined in the Johnson Circuit Court, in December, 1840, before the Hon. Richard C. S. Brown, one of the Circuit Judges. The original bill was filed by *Joseph*

Cravens, against *Josiah Perry*, as administrator of John Ryan. It stated, that the complainant, some time in the year 1834, purchased, at public auction, of Perry, as administrator of Ryan, a pre-emption right to a certain parcel of land, in the county of Johnson, whereon Ryan, in his lifetime, had resided, and for which complainant, with Twitty Pace as his security, executed his bond to Perry, for the sum of two hundred and four dollars, payable in twelve months, and that the pre-emption right was the only consideration for which the bond was given. That Perry had no right vested in him, as administrator, to any pre-emption which Ryan, in his lifetime, might have been entitled to. That Ryan, in his lifetime, had no right of pre-emption to the land, and that the bond was given without any good or *bona fide* consideration---and prayed that it might be given up and cancelled, and for general relief.

The defendant demurred to the bill, and the Court having overruled the demurrer, he filed his answer, which, in substance, stated, that on the 14th day of February, 1835, as administrator of Ryan, and by virtue of an order of the County Court of Johnson County, and agreeably to public notice given, he *did sell*, at public sale, to the highest bidder, the improvement of John Ryan, deceased, with such right and title as was vested in him, as administrator; and that complainant was the highest bidder for the improvement so sold, and executed his bond as alleged, with Twitty Pace as his security, and that complainant was in the full possession and knowledge of the kind of title he was purchasing. The answer referred to the terms of sale exhibited, which, it alleged, was publicly exhibited on the day of sale; and that it was with the knowledge and consent of complainant, that he gave his bond. Defendant denied that he sold complainant any pre-emption right, as administrator, or that the bond was given without any *bona fide* consideration.

The following is the exhibit referred to in the answer: "The terms of the sale is, the highest bidder to be the buyer, by the purchaser giving bond, with approved security. I will give such title as may be vested in me as administrator of the estate of John Ryan, deceased, at the time the purchase bond is made payable, if the bond is complied with, or so soon as it is complied with."

At the March term, 1838, the suit abated by the death of Perry; and at the September term following, it was revived against William Pelham, as administrator, *de bonis non.* Afterwards, Joseph Cravens and Twitty Pace filed their supplemental bill, showing, that appellant, since the filing of the original bill, had obtained a judgment at law against them upon the bond, and praying that Pace might be permitted to become a complainant to the original bill, and supplemental bill, and for an injunction. Pelham filed his answer, admitting that letters of administration, *de bonis non*, had been granted to him, on the estate of Ryan, and that he had obtained a judgment at law against complainants. *Joseph Cravens* having died, his administrators, *John M. Wilson* and *Josiah Cravens*, were substituted complainants in his stead.

No depositions were taken on the part of the appellant. Joseph Ryan, in his deposition, taken on the part of the appellees, stated, in substance, that he was present at the sale, and that the terms of the sale were written by Mr. Mason, Sheriff of the county, assisted by the advice of Josiah Perry, then administrator of John Ryan, deceased, and were, as well as he could recollect, in the following words: I shall proceed to sell (as witness thought,) two improvements, pursuant to an order of Court, as the property of John Ryan, deceased, on a credit of twelve months, at which time the administrator will prove up a pre-emption right, in the name of John Ryan, deceased, or so soon thereafter as the bond is complied with. The Sheriff, in a short time, began to cry the sale of said improvement. It was some time before any one bid for it. The Sheriff discovered that the people were fearful about bidding. He paused and explained the nature of the sale, and said, it is a fair sale; the administrator will make such a title to the pre-emption as he can make. Some of the bystanders asked why he said, "so soon thereafter," in the article of sale. He said the money might have to be sued for, and so soon as the bond or note was paid to the administrator, such a title as he could make, would be made to the purchaser. Then the people present commenced bidding. Joseph Cravens bid off both improvements, and gave his notes therefor, amounting to two hundred and four dollars. Witness was called upon by one of the parties present, to attest the

note, which he did. When Mr. Mason commenced the sale, Mary Ryan, the mother of witness, forbad the sale, and claimed the improvement as her possession. Another witness deposed, that he went over to the sale for the purpose of buying one improvement. About the time the sale was to commence, the widow Ryan came out, and forbad the sale. Josiah Perry said he would make a pre-emption right to the purchaser, and said it was the property of John Ryan. The same fact was substantially, but in stronger terms, proven by another witness. At the December adjourned term, 1840, the cause was submitted to the Chancellor, upon bill, amended bill and answers, replications, and depositions; when it was decreed, that the judgment at law "should be set aside, and held for naught, and the bond for two hundred and four dollars debt, and all damages and costs, for ever cancelled; and if any execution thereon had issued, that it should be recalled and cancelled, and that Pelham, as administrator, and all others, be for ever perpetually enjoined from collecting, or attempting to collect, the bond, or the judgment, of which it was the foundation, and for costs against Pelham, as administrator." Pelham appealed.

The case was argued here by *Ashley & Watkins*, for the appellant, and *Trapnall & Cocke*, contra.

By the Court, Dickinson, J. The first inquiry is, to whom did the improvement pass, upon the death of Ryan? To the administrator, or to the heirs? The interest that a party possesses in an improvement upon public land, is of a peculiar kind, and known only to our laws. He certainly has a possessory right or interest against all the world but the United States; and this is secured to him upon the principles of natural justice. It partakes, in some degree, of the nature of a chattel real, which Sir Edward Coke says, "concerns or savors of the realty," as being an interest issuing out of, or annexed to, real estate, of which they have one quality, viz: immobility, belonging to the realty, but want sufficient duration to constitute them chattels; such for instance, as a term for years; wardship in chivalry, while military tenures existed; the right of presentation to a church; statute staple; leases, and the like; and a tenantry, from year to year, as long as both parties please. All these interests vest in the personal repre-

sentatives of the deceased. The case of a tenancy, from year to year, determinable at the pleasure of either party, so passes, says *Toller*, in his *Treatise on Executors*, 139; 2 *Black. Com.* 312; *Dukehart and Wife vs. State*, 4 *Har. & John.* 506.

Whether the interest would pass differently, if there was a right of pre-emption to the improvement, is a question not properly before us, and will not now be considered. We think it, however, clear, that the personal representatives of the deceased had a right to sell the improvement, without the intervention of the Probate Court.

The testimony is so contradictory, and so ambiguous and uncertain in its character, that, though we consider it as slightly preponderating in favor of the appellant, yet it is not so conclusive as to satisfy our minds, as to the kind and extent of title sold; for, if the administrator sold, and Cravens understood that he was purchasing, a pre-emption right, and that fact had been substantiated, he would certainly have been entitled to relief. If, however, the improvement alone was sold, then it is equally as clear that he bought at his peril, and must comply with his contract.

Upon the whole view of the case, as presented by the bill, answer, and depositions, we are of opinion that the decree directing the obligation of the appellees to be cancelled and delivered up, ought to be reversed, with costs, and the case remanded for a hearing *de novo*, and that each party have leave to take additional proof, if asked for.

Smith and Wife, and Others, *vs.* Yell.

Under our statute as to chancery practice, a decree *pro confesso*, taken at the first term after process executed, or publication, is a final decree, so far as that an appeal to this Court may be taken, at the same term. If that term is suffered to elapse, no appeal can afterwards be taken, unless by an application to this Court, or one of its judges, within one year.

The extension of time to the first three days of the next term, before the decree shall become absolute, is but a privilege, of which the defendant can avail himself or not, as he thinks proper. No further action of the Circuit Court is necessary to make the decree absolute.

Where a husband purchases land, pays the purchase money, and causes the deed, on consideration of affection merely, to be made to the wife, and afterwards improves the land, if his wife thereafter dies without issue, leaving other landed estate, one-half of which vests in him, and he voluntarily relinquishes to her heirs his interest in such other estate, not upon the consideration that the heirs shall release or convey to him the lands so purchased and paid for by him; this gives him no right, in equity, to have such lands enure to, or be conveyed to, him.

In Chancery, determined in the Pulaski Circuit Court, in March, 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. In January, 1840, *Archibald Yell* filed his bill in that Court, against *Andrew D. Smith and wife*, and the heirs of his own deceased wife, *Maria*. The bill stated, that the complainant intermarried with Maria Ficklin, in the year 1836, and, in the following year, purchased four half lots in the city of Little Rock, and caused the deed, as matter of grace and favor, to be executed to his wife Maria. That he paid the price of the purchase money out of his own funds, and has made valuable improvements upon the lots, and now holds them in possession. That in 1837, his wife Maria died, without issue. That at the time of her death, she was seized and possessed of other landed estate, in Arkansas, Missouri, and Kentucky, one-half of which, by the statute of descents and distribution, vested in the complainant; and that he, afterwards, voluntarily relinquished to the heirs of his wife, Maria, all his right, title, and interest to said landed estate, excepting only the lots in Little Rock. There was no allegation that this relinquishment was made in consideration that the heirs would convey or release to him their right and interest in the premises in dispute. The purchase was made of Smith and wife, and a deed executed and acknowledged by them to Maria Yell, while she was a *feme covert*.

The prayer of the bill was, that the deed be cancelled, and that Smith and wife execute a like deed, to the complainant, in fee.

Process was executed upon Robert Smith and wife, two of the defendants, and returned not found as to the others. An order of publication was then made against the non-resident defendants, that they, and the other defendants, Smith and wife, be and appear at the March term of the Circuit Court of Pulaski county, or that the bill will be taken as confessed against them. None of the defendants appeared, and accordingly, the bill, at that term, was taken as confessed,

and a decree entered in accordance with the prayer of the bill. At the same term, the defendants appealed.

The case was argued here by *Trapnall & Cocke*, for the appellants, and by *Fowler*, contra.

By the Court, DICKINSON, J. The appellee insists that the decree was interlocutory, and did not become final until after the expiration of the first three days of the next September term of the Court. *Sections* 15, 21, 22, *Rev. Code*, 160, 161, all relate to the service of process upon the defendants, and what notification shall be considered sufficient to authorize the bill to be taken as confessed, and an interlocutory decree entered. *Sec.* 24 declares, that "no exceptions or plea shall be filed after an interlocutory decree; but, if the defendant appear, within the first three days of the next term after such decree is entered, and show good cause for not before appearing, the decree may be set aside, and the defendant allowed to file his answer, or demur to the bill." *Sec.* 137, *p.* 174, authorizes the Circuit Court to grant an appeal from any final decision or decree, only during the term at which it is made; and the Supreme Court, or a judge thereof, in vacation, upon inspection of the record, may make an order granting an appeal at any time within one year after the making of the final decision, order, or decree. It is evident, that the extension of the time to the first three days in the next term before the decree shall become absolute, is but a privilege, of which the defendant can avail himself or not, as he thinks proper. No further action of the Circuit Court is necessary to make the decree absolute. And if the party deeming himself aggrieved, fails to take an appeal at the same term in which it is made, his only relief is, by an application to the Supreme Court, or a judge thereof, in vacation. The objection to the appeal, as to time, is not tenable.

We shall pass by the irregularities in entering up the decree, and proceed to determine whether the bill contains any equity upon its face.

Do the facts stated in the bill authorize this decree, or entitle the complainant to equitable relief? In this case, the bill states that the husband expressly assented to the conveyance to his wife, and caused

it to be made to her, at his own instance and request, as a matter of mere grace and favor. The property being vested in her, and she dying without issue, and without a re-conveyance to her husband, of course, the fee remained unaltered, and he is only entitled to receive his share in the distribution. There is no principle of equity, that we are aware of, that will make the deed enure to the benefit of the husband, upon the ground of his having paid the purchase money. It was a mere gift on the part of the husband to the wife, growing out of motives of regard and attachment; and, consequently, the title to the property was vested in her, in the same manner as if she had acquired it from any other source. The authorities upon this point are explicit. *Coke Lit.* 356. *Doug.* 435. 2 *Com. Dig.* 223, 224. The allegation, that the complainant conveyed other property to the heirs of his wife, furnishes no ground for relief. The bill does not state that they accepted the same in consideration of the interest in the four half lots, or that they ever agreed to relinquish their title to the same.

Decree reversed, and case remanded, with instructions to allow complainant to amend his bill, if leave be asked; if not, to dismiss, with costs.

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4 296
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Sorrells *vs.* Sorrells.

Whatever parol agreement may exist between the grantor and grantee of real estate, in regard to a trust existing in parol, it is wholly nugatory, as to any purchaser from the grantee in the absolute deed, who relies on the statute of frauds in his defence.

If a defendant, by his answer, admits the parol agreement, and relies upon the statute of frauds, he is fully entitled to the benefit of it. If he denies the agreement, he need not insist on the statute. The plaintiff, in such case, must produce legal evidence of it.

An innocent purchaser, for a valuable consideration, without notice of a secret trust, will always be protected against it.

In Chancery, heard in Crawford Circuit Court, in February, 1842, before the Hon. Richard C. S. Brown, one of the Circuit Judges. *Matilda Sorrell*, widow, and *John Sorrell*, sole heir of *John Sorrell*, deceased, filed their bill, stating, in substance, that John Sorrell and

James, his brother, a defendant, purchased, in 1836, of *John McPhaill*, a defendant, the N. W. quarter of Section 2, in Township 9 N. 31 W., which was entered by McPhaill, and a patent certificate issued to him. That McPhaill had never conveyed the land to any of the parties to the bill. That John and James Sorrell, in the same year, purchased of McPhaill his improvement and pre-emption right on the S. W. quarter of Section 35, 10 N. 31 W. That the purchase money of the first tract, *or a part of it*, was paid into the Land-office at Fayetteville, by John Sorrell, and McPhaill promised to make him a fee simple title to the same. That John Sorrell paid McPhaill the purchase money, *or a part of it*, for the improvement on the latter tract, as was evidenced by an instrument of writing exhibited, dated April 16th, 1836, by which McPhaill relinquished to John Sorrell all his right and title to a field, known as *McPhaill's upland field*, in Sec. 35, T. 10, R. 31 W. That the latter tract was afterwards entered in the name of James Sorrell, to whom a patent certificate issued. That it was afterwards agreed between John and James Sorrell, that John Sorrell should reside on, and be the owner of, the former tract, and James of the latter, and each took possession accordingly.

That on the 11th day of June, 1838, John Sorrell being about to leave the State, and desiring to leave the former tract in such condition that it could be either sold or mortgaged to the Real Estate Bank, he executed an absolute deed of the former tract to his brother James, in which his wife Matilda joined; which deed was made upon the verbal agreement, that James should hold the land as trustee to mortgage or sell, and for no pecuniary consideration, although one is expressed in it. That James was to act as attorney and trustee, and reconvey when required. That soon after executing this deed, John departed from Crawford county, but died before leaving the State, and his widow returned, and has ever since resided on the former tract of land. That in March, 1840, against her will, James sold that tract to one Hutchinson, a defendant, Hutchinson knowing all the facts; and that Hutchinion threatens to eject her; praying discovery, injunction, a cancellation of the deeds, and title from McPhaill. The deed from John and wife to James, was duly witnessed, acknowledged, and recorded.

McPhaill answered, that he sold his pre-emption right on the first tract to John and James jointly; proved it up, and had it allowed, and transferred it in the land-office to, as he supposed, John and James jointly, but, as he is informed, to John alone. That, as he is informed, a patent issued for it direct to John; and if not, he relinquishes. That he never sold any interest in the latter tract, but merely relinquished any right he might have, and is no way bound to make title; and that he knows nothing of the other matters in the bill.

James Sorrell answered, that he originally purchased McPhaill's pre-emption on the first tract, and gave John an equal interest in it; that it was entered with funds belonging equally to each of them, and that it was wrongfully entered in John's name alone. That the pre-emption right to the latter tract was not purchased by them jointly, but by himself alone, and entered by him alone, and with his own money, and a patent issued to him alone. That there was no such agreement as to each owning a particular tract. That the deed from John and wife was executed for the purpose of giving him unlimited control over the land, to sell or mortgage, as he might think best. That there was no pecuniary consideration. That he never agreed to re-convey the land. That, in pursuance of the power vested in him, he sold the land to Hutchinson, for $1000, and as half the tract belonged to himself, he is ready to account to the estate of John for one-half of the proceeds, as the Court shall direct.

Hutchinson answered, that he knew nothing of the facts stated in the bill, even from rumor. That he purchased without any notice whatever of any opposing claim, upon inspection of the title papers, which were perfect; and contracted to pay for both tracts $1500, on payment of which, title was to be made. That he furnished James with $200, to enter the last tract, and has paid him $600 of the consideration money, and is ready to pay the residue; and he insisted, as an innocent purchaser, on the protection of the statute of frauds.

A general replication was filed to each answer. The cause came on for hearing, on bill, answers, replications, and exhibits, no testimony being taken on either side, and the Court *decreed*, that as the deed from John and wife to James, was executed without any good and

valuable consideration, and only in trust, and the answer of James, so far as he alleged title in himself to one-half of the first tract, was unsupported by evidence; and as Hutchinson's answer, alleging his purchase and payment, was also unsupported by evidence, *therefore*, that the deed to James Sorrell should be brought in and cancelled; that McPhaill should convey to the complainants his title to the first tract; that complainants should be quieted in their possession, and James Sorrell and Hutchinson be enjoined from troubling the possession; and that James Sorrell should pay all the costs. Whereupon, he appealed.

Pike & Baldwin, for the appellant. Whatever parol agreement may have existed between John and James Sorrell, it is utterly nugatory as against Hutchinson, who relies, in his answer, upon the statute of frauds. If a defendant, by his answer, admits the parol agreement, and relies on the statute, he is fully entitled to it. It is not necessary to set it up in a plea. *Story's Eq. Pl.* 589, 590. *Whitchurch vs. Bevis*, 2 *Bro. C. R.* 559. *Reeve vs. Teed*, 15 *Ves.* 375.

If a defendant denies the agreement, he need not insist on the statute. The complainant must, in such cases, produce legal evidence of it, which cannot be done by parol. *Corine vs. Graham*, 2 *Paige*, 181. *Ontario Bank vs. Root*, 3 *Paige*, 481.

It was a good defence for Hutchinson, that he was an innocent purchaser, for valuable consideration. The bill admits that he *had* purchased, but alleges notice, which his answer expressly denies, and throws the proof, as to notice, on the complainant. An innocent purchaser is always protected. *Story Eq. Pl.* 462, 463, 464. 1 *Story Eq.* 75. *Whittick vs. Kane*, 1 *Paige*, 202. *Hughson vs. Mandeville*, 4 *Desau.* 87. *Garland vs. Rives*, 4 *Rand.* 282. *Bensier vs. Lenoir*, 4 *Car. Law Rep.* 508. *Owings vs. Jouitt*, 2 *A. K. Marsh*, 381.

Hutchinson offered his defence properly by answer. He could have done it by plea, but as he was ready to answer *fully*, he did so, as he rightfully could. *Story Eq. Pl.* 653. He could not set up this defence in his answer, without answering fully, but that he was ready to do, and choosing to answer fully, was entitled so to make his defence. *Story Eq. Pl.* 649. *Jerrard vs. Saunders*, 2 *Ves. jr.* 454, 458.

In no case need the statute be pleaded. It is always sufficient for the defendant to rely on it in his answer. *Rowton vs. Rowton*, 1 *Hen. & Mun.* 92.

General replication having been put in, and the case being heard without evidence, all the allegations in the answers responsive to the bill, were to be taken strictly as true. *Mortimer vs. Orchard*, 2 *Ves. jr.* 243. *Cook vs. Clayworth*, 18 *Ves.* 12. *Savage vs. Brocksopp*, 18 *Ves.* 335. *Hagthorp vs. Hook's adm'rs*, 1 *Gill, & J.* 270. *Roberts vs. Salisbury*, 3 *id.* 425. *Moffatt vs. McDowall*, 1 *McCord*, 434. *Hopkins vs. Stump*, 2 *Har. & J.* 301. *Maupin vs. Whiting*, 1 *Call*, 224. *Blanton vs. Brackett*, 5 *Call*, 232. *McCan vs. Blewit*, 2 *McCord, Ch.* 102. *Leeds v. Mar. Ins. Co.* 2 *Wheat.* 380. *Stafford vs. Bryan*, 1 *Paige*, 239. *S. C.* 3 *Wend.* 532. *Searcy vs. Pannell, Cook*, 110. *Hart vs. Ten Eyck*, 2 *J. C. R.* 92. *Green vs. Vaughn*, 2 *Blackf.* 324. *Neilson vs. Dickenson*, 1 *Desaus.* 134. *Clark vs. Van Reinsdyk*, 9 *Cranch*, 153. *Estep vs. Watkins*, 1 *Bland*, 488. *Clason vs. Morris*, 10 *J. R.* 525. *Knickerbocker vs. Harris*, 1 *Paige*, 209. *Higbie vs. Hopkins*, 1 *Wash. C. C. R.* 230.

Where a discovery is asked of defendant, as to a particular fact, his answer is conclusive. *Lemon vs. Cherry*, 1 *Bibb*, 253. *Pollard vs. Lyman*, 1 *Day*, 156. *Ragsdale vs. Buford*, 3 *Hayw.* 192.

An answer to a bill charging fraud, responsive to the bill, denying the charge, and uncontradicted by evidence, refutes the idea of fraud. *Murray vs. Blatchford*, 1 *Wend.* 583. *Cunningham vs. Freeborn*, 3 *Paige*, 557.

James Sorrell admits, what is, in fact, stated broadly in the bill, that the land was conveyed to him to sell or mortgage, and absolutely denies that he was to re-convey. Hutchinson denies all knowledge of the parol agreement, even by rumor.

The bill itself states, that John and James purchased *jointly* of McPhaill, the N. W. quarter, and the answer of James admits it, but denies that the whole purchase money was paid by John, and denies that there was any parol partition.

There certainly could be no decree, without evidence against these answers.

What right had the widow to a conveyance to herself and child?

It was erroneous, in any event, to adjudge all the costs against James Sorrell.

Paschal, contra. The defendant admits that the deed was executed without any valuable consideration, and acknowledges that no part of the sum of six hundred dollars, acknowledged to have been paid, was ever, in fact, paid, or promised to be paid, to his brother. We contend that the deed is, therefore, void. 2 *Black. Com.* 295. 4 *Kent's Com.* 464. James Sorrell does not pretend that the deed was for a valuable consideration, but for a part consideration, which he does not attempt to prove.

The deed was the creation of a trust, to be executed by James Sorrell, for the use of the *cestui que trust*, John Sorrell. It becomes, then, a power coupled with an interest, and such an one as cannot be executed after the death of John Sorrell. See the authorities referred to, and argument, in the case of *Gibson et al. vs. Rector*.

If the complainants have a right to have the deed cancelled, any sale by James Sorrell would be void; but, so far as the record and pleadings show, no sale was, in fact, ever made: none is set forth or attempted to be proven. The presumption is always taken most strongly against those pleading title. It is therefore to be presumed, that no written sale was ever made, or the parties would have offered evidence to support it.

By the Court, Dickinson, J. The decree in this case is evidently erroneous. Whatever parol agreement may have existed between James and John Sorrell, in regard to the trust, is wholly nugatory as to Hutchinson, who sets up the statute of frauds in his defence. If the defendant, by his answer, admits a parol agreement, and relies upon the statute, he is fully entitled to the benefit of it. *Story's Eq. Pl.* 590. *Reeve vs. Teed*, 15 *Ves.* 375. If a defendant denies an agreement, he need not insist upon the statute. The complainant, in such case, must produce legal evidence of it. *Corine vs. Graham*, 2 *Paige*, 180. *Ontario Bank vs. Root*, 3 *Paige*, 481.

It was a good defence for Hutchinson, that he was an innocent purchaser, for a valuable consideration, without notice. The bill

charges, that he purchased with notice, which the answer expressly contradicts. An innocent purchaser is always protected. *Story's Eq. Pl.* 462. 1 *Story's Eq.* 75. *Whittick vs. Kane*, 1 *Paige*, 202. *Garland vs. Rives*, 4 *Rand.* 283. It is clear that the decree was, therefore, erroneous as to Hutchinson.

The answer of James Sorrell admits the statement in the bill, but denies that he was to re-convey. It also admits the trust as charged, and states that he is ready to account to John's estate for one-half of the amount of the money for which he sold the land; and such should have been the decree. Hutchinson's being an innocent purchaser does not discharge James from his liability for the one-half of the amount of the sale to Hutchinson, which he admits to be in his hands.

Decree reversed, and case remanded.

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James S. Conway and Others, *Ex Parte.*

The general jurisdiction of this Court is *appellate*, and most of the writs that it is authorized to issue, are in aid of its appellate powers; but it has undeniable authority to issue other writs, as a portion of its *original* constitutional jurisdiction, among which is the writ of mandamus.

It has been the constant and invariable practice of this Court, to issue writs of mandamus, whenever the party applying showed that he was legally entitled to their benefit, and to direct them either to ministerial or judicial officers.

When addressed to *judicial* officers, they can be executed only in term time; but when addressed to ministerial officers, they may be executed at any time.

The issuing or refusing an injunction, is not a *judicial* act, but the exercise of a ministerial discretion.

If, therefore, an injunction has been improperly refused, this Court will, under our statute, award a peremptory mandamus to the Judge, commanding him to grant the writ.

Trustees appointed by a deed of assignment for the benefit of creditors, executed by a bank, have a right to proceed in equity against directors who refuse to deliver over to them the property and assets of the Bank, in order to have the property surrendered, and the directors enjoined from intermeddling with it; and the bill, in such case, is a bill to have the trust established and protected.

And, the deed in such case conveying the property absolutely, by words of present grant, and expressly providing that the property shall be delivered to the trustees, immediately on the execution of the deed, a stipulation in the deed that each trustee shall execute a certain bond, is not a *condition* at all, in the technical meaning of the term, and, if a condition, is only a condition subsequent, and not a condition precedent, to be performed before the estate vests, or the trustees are entitled to the property.

And, therefore, when the bill is filed to obtain the property, it is no ground for refusing the relief, that part of the trustees have not given bond.

There is no necessity for the trustees to sign such a deed, to make it valid, in the first instance; but any act done by them, which shows their assent, will make it obligatory on them, and equity will enforce the trust.

Resolutions, passed by the directory who ordered the deed to be made, and approved it before its execution, restricting the delivery of the property, cannot alter or vary its legal tenor or effect; and, if such resolutions provide that the property should not be delivered until a third person should certify to the directory that certain of the trustees had executed bonds, the accidental or culpable negligence of that person could not prejudice the rights of the trustees, much less those of the stockholders and *cestuis que trust.*

The moment the deed was executed, the relation of trustee and *cestui que trust*, placed the estate under the jurisdiction of a court of equity; and, if there could possibly arise any difficulty upon the subject, that jurisdiction would still pursue the estate, and transfer its possession to the trustees who had given bond, holding it for the others to come in and give bond, and, if they failed, in a reasonable time, to do so, would remove them from office, and cause others to be put in their places.

The right of a court of equity to entertain such a bill, flows from the familiar and universally attested fact, that the establishment, enforcement, and protection of trusts, constitute one of the great original branches of equity jurisdiction.

As chancery will compel the performance of trusts, so it will assist the trustees, and protect them in the due performance of the trust, whenever they seek the aid and direction of the Court, as to its establishment, management, and execution.

It is a fundamental rule, that if, originally, the jurisdiction attached in equity, on account of any supposed defect of remedy at law, the jurisdiction is not changed or abridged by courts of law now entertaining suits in cases where they were formerly rejected.

It is no objection to the jurisdiction of courts of equity, that a party has a remedy at law, unless it be shown that the legal remedy is *plain, direct* and *complete.* No action at law would, in the present case, afford such a remedy.

A court of chancery will interfere, by injunction, where the remedy at law is doubtful or difficult, or to prevent a multiplicity of suits.

In such a bill by the trustees, where the bill prays, "to the end that the trust smay be established, and the complainants protected and aided in the performance and discharge thereof," that the defendants "be perpetually restrained from further intermeddling with any of the property, effects, or assets of the Bank;" this is tantamount to a prayer that the property may be surrendered and delivered to them; and there is no necessity for a prayer for general relief, or a particular prayer for the surrender and delivery of the property. To restrain the directors from intermeddling with it, necessarily transfers it to the trustees.

It is true that the general principle is, that the Court will not, by a preliminary injunction, change the possession of property, and transfer it to the complainant. But this is a rule to which there are exceptions.

The interference, in the present case, as in cases of nuisance, rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented.

If the possession of the defendant is a mere *interruption* of the prior possession of the plaintiff, the interruption will be remedied by injunction, if the right is clear and certain, without driving the plaintiff to establish his title at law.

And the general rule only holds, in cases where the right to possession cannot be settled until a final decree.

By filing such a bill, the trustees become officers of the Court, stand in the same attitude as if they had originally been appointed by the Court, and are to be regarded, in this point of view, merely as receivers.

A debtor, in failing circumstances, has a right to prefer one creditor, or set of creditors, to another, in all cases not affected by the bankrupt or insolvent laws.

He may make the assignment for the benefit of a single creditor, in exclusion of all others; or he may distribute his property in unequal proportions among a part or the whole of them. No matter how, or on what principles the distribution is made, provided he assigns the whole of his property for the payment of his just debts.

And a corporation, whether public or private, unless it is restrained by the provisions of its charter, has the same power as an individual, to assign its property to trustees to pay its debts; and, like an individual, it may make such an assignment, whether it is solvent or insolvent. And this is true, whether the assignment be partial or general, if it transfer the whole fund, in good faith, and without fraud.

Neither the stockholders or local directories of the Real Estate Bank could make such an assignment. The *Central Board* is the only organ by which that Bank can speak and act.

And the Central Board could order the Bank, by her corporate seal, to pass the legal right and possession, by a *bona fide* assignment to trustees, for the benefit of her creditors.

It is a universal rule, in the construction of all deeds, that fraud is never to be presumed.

That ten of the trustees were also members of the Central Board, who ordered the deed to be made, and composed a majority of it, is no objection to the deed.

The corporation is one thing, and its directors and stockholders entirely distinct and different things. They are different *legal* persons, having separate and distinct wills in law.

Nor can it be said that the Central Board, being themselves trustees, could not delegate their trust. They were not trustees, in the technical meaning of the term; nor amenable to a court of chancery for their acts. Nor was the ordinance, by virtue of which the deed was made, a delegation of power.

There is no necessity that the trustees should execute such a deed, or enter into covenants to perform the trusts. The moment it is made, the right of property passes, and vests in the assignees, and the relation of trustee and *cestui que trust*, as between them and the creditors, is at once established, so that the assignor cannot recall the deed.

And the creditors are presumed to give their assent to such deeds, unless they come in, and specially object.

Though part of the trustees should be incompetent to take, a court of equity would not permit the trust to fail. It never wants a trustee.

If a trust is created, by deed, will, or operation of law, and no one appointed trustee, equity will follow the estate, and cause the trust to be executed. So, if the trustee dies, or is incompetent, equity will appoint.

It is no objection to such a deed, that it provides for reducing, after a certain time, the number of trustees.

Nor is it any objection, that part of the trustees are largely indebted to the Bank. Their appointment as trustees does not release or extinguish the debt. Their co-trustees may sue them in equity; and their failure to pay would be a breach of trust, and good cause for removal.

Nor does the assignment to debtors create the slightest presumption of fraud.

Any assignment, which unnecessarily delays, or unjustly hinders, creditors in the collection of their debts, is, of course, fraudulent, and therefore void.

The Real Estate Bank is a public corporation, and the Court is bound judicially to know the condition of her liabilities and assets; for these are to be found in the general history of the country, and in the reports of the Legislature, and her own sworn officers.

And from the condition of the Bank and of the country, the Court knows that the provision in the deed allowing the debtors of the Bank to pay their debts by equal annual payments, in eight years from the first of January, 1843, does not unnecessarily delay its creditors, but is a reasonable and proper indulgence; and a less time would have seriously injured, as well the creditors, as the stockholders and the State.

No profits can arise to the trustees, in any case whatever.

Each trustee is responsible, for every *devastavit* he commits, not only to the extent of his bond, but to the full amount of waste committed.

It is no objection to such a deed, that it provides that the trustees may at once extinguish all its debts, by turning over all the assets to the bondholders.

It was not necessary for the Bank to be insolvent, or in failing circumstances, before it could make an assignment; and moreover, the Court judicially knows that she was in failing circumstances.

A bond, given as required by the deed, to the attorney of the Bank and his successors in office, is as legal as one given to the Executive and his successors in office. In both cases, the law makes the party to whom it is given, hold it only for the benefit of those for whom it was executed; and if he vacates the office, it passes, with all its attaching rights, into the hands of his successors, for like just and equitable purposes.

Whether the bonds are sufficient, as to amount, was a matter of discretion with the Central Board, which this Court cannot inquire into, unless it was so flagrantly unjust and inequitable, as to raise a presumption of fraud; which is not the case here.

The compensation of the trustees is, in the present case, a question only of policy and propriety, not affecting the validity of the deed, or raising any presumption of fraud.

That more onerous terms are imposed on debtors who have been sued, and against whom judgments have been obtained, is a matter of the same kind.

That the schedule attached to the deed is imperfect, is no objection. It may be completed hereafter.

The deed of assignment made by the Real Estate Bank, is, therefore, valid on its face, and contains no provisions that can defeat its operation, or raise an imputation of fraud against it.*

THIS case was presented to the Court on a petition for a *mandamus*, prayed to be directed to the Hon. JOHN J. CLENDENIN, Judge of the Fifth Judicial Circuit, requiring him to grant the injunction prayed for by the petitioners, *James S. Conway*, and others, trustees of the Real Estate Bank of the State of Arkansas, against *William Field*, and others, five of the directory of that Bank, at Little Rock. The original bill, praying the injunction, which was presented to the Chancellor, in April, 1842, and from which the case will be fully understood, was as follows:

To the Hon. JOHN J. CLENDENIN, *Judge of the Circuit Court of the State of Arkansas, for the county of Pulaski, sitting as Chancellor:*

Complaining, show unto your Honor, your orators, James S. Conway, Sam C. Roane, Carey A. Harris, Daniel T. Witter, George Hill, Enoch J. Smith, Henry L. Biscoe, William F. Moore, John Preston, jun., John Drennen, Robert S. Gibson, Lorenzo N. Clarke, Sandford C. Faulkner, Anthony H. Davies, and Silas Craig, all citizens of the State of Arkansas, that, on the first day of April, A. D. 1842, the Central Board of the Real Estate Bank of the State of Arkansas, at a meeting of said Board, held at the banking house, in

*The CHIEF JUSTICE held, that the bill, upon its face, showed no such case as authorized a court of equity to interfere, by injunction, because the *pretences* alleged in the bill, and the *charges* in response could not be considered in looking into the equity of the bill, and because there was no prayer for general relief; and further, and principally, because the trustees had a plain and adequate remedy at law. He further held, that the execution of their bonds by the trustees was a *condition precedent*. He agreed, that if the bill showed a proper case, this Court could grant the mandamus; and declined expressing any opinion as to the validity of the deed.

the city of Little Rock, adopted an ordinance, in the words following, to wit: "Whereas this Bank is, at present, unable to pay the immediate demands upon it, to resume the payment of specie on its notes, to meet the interest on the bonds of the State issued to it, or to protect its debtors from harassment and oppression, by the holders of its notes; and whereas, it is deemed just and reasonable, that its creditors should be secured, paid and indemnified, and its circulation called in, and, at the same time, its debtors guarded against oppression and ruin, and enabled to discharge the debts due by them to the institution: Therefore, be it ordained by the Central Board of the Real Estate Bank of the State of Arkansas, that the affairs of this Bank be placed in liquidation, by an assignment of all the property and assets of this Bank to trustees, to be appointed by this Board, upon whom shall be conferred the power of settling the affairs of the Bank, by collecting the debts due to it, in certain instalments, and at certain times, and paying its debts and liabilities, in a certain order, to be in said assignment provided, with all other powers necessary to carry into effect the objects of the trust so created; and that the attorney of the Bank prepare such deed of assignment, which, when approved by this Board, shall be duly executed, and take effect."

Your orators further represent, that, in pursuance of said ordinance, a deed of assignment was prepared by said attorney, and was, on the second day of April, A. D. 1842, duly executed by said Bank, signed by Carey A. Harris, as President thereof, and sealed with the seal of said Bank, whereby said Bank conveyed unto your orators, who had been appointed trustees by said Central Board, and in conformity to, and under said ordinance, all and singular the estate, real and personal, debts, choses in action, property, effects, and interests, either legal or equitable, of every description, belonging to said Bank, or in which it had any right or interest whatever, mentioned, contained, or referred to, in the schedule thereto annexed, to have and to hold the same to your orators, their heirs, assigns, successors, and survivors, to their use and behoof for ever; but upon trust, that your orators should, with all reasonable speed, sell and dispose of such of said trust property and effects as were of a saleable nature, and use their best endeavors to obtain, recover, and receive such parts of the same, as

consisted of debts, and other outstanding interests, into their hands and possession, in a certain manner, by certain amounts and instalments, and at certain times, in said deed particularly specified; and that they should, forthwith, after the receipt of any moneys from any source, after deducting and retaining the compensation due for their services, as in said deed provided, and all such costs, charges, damages, traveling expenses, and other expenses and disbursements, as should be sustained, incurred, or reasonably due, in, for, or in relation to, the execution of the trusts of said deed, then upon trust, that your orators should appropriate all moneys, so received, to, and in payment of, all the debts, liabilities, and obligations of said Bank, in a certain manner and order, therein provided: which deed also contained special provisions for calling in the circulation of said Bank, and redeeming the same in specie, and gave your orators power to compromise debts, and to settle with debtors and creditors, agents and servants of said Bank, and to sell said trust property, for cash, or on credit.

Your orators represent, that, by said deed, said Bank constituted your orators, and their successors and survivors, to be its attorneys irrevocable, in their names, or in the name of said Bank, or otherwise howsoever, as the case might require, but to and for the trusts in said deed provided, to sue for, recover, and receive the outstanding debts, interests, trust property, and effects aforesaid, and to institute, prosecute, and defend, all such suits and processes, at law, or in equity, and to execute, perform, and transact, all such deeds and writings, acquittances, acts, matters, and things, as should be necessary or expedient to carry into effect the trusts, uses, intents, and purposes in said deed declared or contained.

Your orators further represent, that it was by said deed provided, that each of your orators should give bond, to the attorney of the Bank, for the time being, and his successors, for the benefit of all persons concerned or interested, in the sum of twenty thousand dollars, conditioned for the faithful discharge of his duties; that said deed constituted five committees of said trustees, and an executive board, and defined their powers and duties, and their compensation; provided, that the executive board should meet regularly, at Little Rock, and

constituted your orators, Carey A. Harris, Henry L. Biscoe, Sandford C. Faulkner, Daniel T. Witter, and Lorenzo N. Clarke, the first executive board, to act until the first day of July next; provided for the election of new members of said board by each committee, and for filling vacancies in said committees, or executive board; that, at the expiration of two years, the number of trustees should be reduced to five; that each committee should employ a clerk; appointed a cashier and secretary, and an attorney for said trustees, and fixed their salaries; provided for the removal of said attorney, and cashier, and secretary, for cause; gave to said trustees the power to employ and remove agents, attorneys, and clerks, and to fix, determine, and pay their compensation; and that, if any vacancy in said trustees should not be filled within three months after its creation, it should be filled by the proper chancellor; provided, that a majority of each committee, and of the Executive Board, should govern; and that it should not be necessary for all or either of said trustees to unite in doing any act, unless when it was in said deed specially provided. And it further provided, that said trustees might authorize, by power of attorney, one of their number to execute, and acknowledge conveyances; that said trustees should be liable to removal by the Chancellor, for misfeasance, mal-feasance, or non-feasance; and that, in case of any such offence, on charges preferred, the other trustees should suspend the offender. And it further provided, that, immediately upon, and after the execution of said deed, each of the boards of directors of said Bank should deliver over to the respective committees, all the effects, books, papers, notes, and other evidences of debt, and all the moneys, bills, notes payable, and other assets in their possession, including all the circulation; and all the circulation thereafter received should be cancelled, registered, and burned; that the Directors of said Bank, and Presidents, and Central Board, should still exist, and be elected, but that no officer of said Bank should, thereafter, receive any compensation as such; that the bonuses due the State should be paid, from time to time, and the charter retained, with other minor provisions therein contained; which said deed was then executed by your orators, Sam C. Roane, Lorenzo N. Clarke, Daniel T. Witter, George Hill, Sandford C. Faulkner, Anthony H. Davies, William F.

Moore, Silas Craig, Henry L. Biscoe, and Carey A. Harris, the residue of your orators not being present. And said trustees so executing the same, covenanted thereby that they would execute and perform the trusts in them reposed, to the best of their judgment and discretion; provided, that each trustee, his executors and administrators, should not be liable or accountable for more money or effects than he should receive, nor for any loss or damage which might happen thereto, except the same should arise by or through his own wilful default; and that each should be answerable for himself, and not for the others: which deed was then, on said 2d day of April, duly acknowledged and delivered to your orators, as by a true copy thereof, and of said schedule, which is herewith exhibited, marked A, will more fully and at length appear; to which exhibit your orators pray that reference may be had, and the same taken as part of this bill.

Your orators further represent, that they thereupon entered on said trusts, and appointed Ewing H. Roane, in the absence of Thomas W. Newton, their Cashier and Secretary, to be the clerk of said Executive Board, who thereupon gave bond, and was by your orators placed in possession of the assets, and property of said Bank, at Little Rock. They farther represent, that, in the schedule annexed to, and referred to, in said deed, was embraced, among other things, the banking-house at the city of Little Rock, with all the furniture, and other property therein; all the bills, notes, and other evidences of debt due said Bank, then in the charge of the directory at Little Rock; all the money, assets, and circulation in said Bank at Little Rock, and every other species of property, and interests, effects, and credits of said Bank, under the control, and in the charge, of said directory.

They further represent, that said directory at Little Rock, and the stockholders of said Principal Bank, were fully represented in said Central Board, by all the delegates allowed said Principal Bank, by the charter, to wit: by Carey A. Harris, President; William Field, a State director; and Sam C. Roane, a director of the Principal Bank; and that all the stipulations and provisions of said deed, except the names of some of said trustees, and a few unimportant exceptions, in details, were *unanimously* approved by said Board; and, particularly, that said ordinance was passed by a unanimous vote; and,

by a like unanimous vote, the number of said trustees was determined at fifteen, and it was agreed that they should be stockholders.

Your orators further represent, that since said deed was executed, it has been approved of and assented to by a large majority of the stockholders of said Bank; as well, as they believe, of those at the Principal Bank, as at the branches; that possession has been readily delivered to your orators of all the effects and assets at the branches at Van Buren and Columbia, at which latter branch many notes have already been renewed to, and in the name of, the trustees; that the directory of the branch at Washington, on Saturday, the 16th instant, ordered a schedule to be made out of all their effects and assets, and appointed a meeting on Saturday last, for the purpose of delivering over the same, which your orators do not doubt, but believe, has been done; that the directory and stockholders of the branch at Helena, as far as your orators are informed, and as they believe, are ready and willing to deliver over their effects and assets, and would ere now have done so, if there had been any meeting of said directory; and that, so far as your orators have had the means of judging, the stockholders at the different branches are perfectly satisfied with the transaction, except in a very few instances of objection to the details of said deed: And furthermore, that a majority of said trustees have given bond as required by said deed.

And your orators hoped they would in like manner have obtained possession of the assets and property of said Bank at Little Rock, and kept possession of the same without difficulty or dispute, and been suffered and permitted to execute the trusts imposed on them, as in all faithfulness, integrity, and honesty, they desired to do. But now so it is, may it please your Honor, that the said Wiliam Field, after aiding in perfecting said deed, together with William Cummins, lately appointed a State director for said Principal Bank, and Charles Rapley, William W. Stevenson, and James C. Anthony, all stockholders in said Bank, and all members of said directory, constituting a bare majority thereof, combining and confederating with other persons to your orators unknown, but whose names, when discovered, your orators pray may be inserted herein, with apt and sufficient words to charge them in the premises, and they made defendants hereto, for ends and pur-

poses to your orators unknown, but manifestly endeavoring to thwart and hinder your orators in performing the trusts conferred and imposed upon them, have taken possession of all the assets and property of said Bank at Little Rock, aforesaid, and refuse to deliver the same over to your orators, or to make or permit to be made any schedule thereof, or to permit your orators to receive and control the same, or perform the trusts aforesaid: For reason whereof, they pretend that said deed is void and fraudulent; whereas, your orators submit that said Central Board had the power to make the same, and that the same is good in law; and they also pretend that they are desirous of having its validity tested before the proper tribunal; whereas, they refuse to file a bill before your Honor to set the same aside, although your orators have requested them to do so: And they have, moreover, refused to permit your orators to institute an action of trover, in said Circuit Court against them, for some article of said property, and to appear to said action without process, so that said suit may be determined at the adjourned term of said Court, in May next, and in which suit the only question shall be the validity of said deed, although this proposition has been made to them by your orators: Wherefore your orators charge, that they do not desire to act legally in the matter, nor believe that said deed is illegal, but determine to hold said property with strong hand, and illegally and violently.

All which actings and doings are contrary to equity, and tend to defeat the object and purposes of said deed, to delay the creditors of said Bank, to depreciate sitll more her circulation, to prevent the collection of debts due her, to throw her affairs into irremediable confusion, and to ruin the stockholders, and work great loss and injury to the State. In tender consideration whereof, and inasmuch as said trusts can in no other way be enforced without great and ruinous delay, and tedious legal proceedings in a court of law, except by the interposition of your Honor, as Chancellor; and inasmuch as all of your orators, who have executed said deed, and their Cashier and Secretary, have executed such bonds as are required by said deed. To the end, therefore, that said trusts may be established, and your orators protected and aided in the performance and discharge thereof, and that said William Field, William Cummins, Charles Rapley,

William W. Stevenson, and James C. Anthony, may, on their oaths, full, true, direct, and perfect answer make, to all and singular the allegations and charges herein contained, as fully and particularly as though the same were here again repeated, and they thereto specially interrogated; and that, by a decree of your Honor's court, the said Field, Cummins, Rapley, Stevenson, and Anthony, who are made defendants hereto, and their agents and confederates, may be perpetually restrained and enjoined from further intermeddling with any of the property, effects, or assets, so assigned and transferred, may it please your Honor to grant unto your orators the State's writ of injunction, so restraining and enjoining them until the further order of this Court, as also the State's writ of subpœna, and your orators will ever pray, &c. *Pike & Baldwin, Solicitors.*

The bill was sworn to by four of the trustees, and a copy of the deed exhibited with it. On the 2d of May, the Chancellor endorsed on it his refusal of the injunction, "for want of jurisdiction." The trustees then presented to this Court their petition for a mandamus, under the statute authorizing the Supreme Court, or a judge thereof, to issue a mandamus in such a case.

On the argument in the Supreme Court, the following was filed and admitted:

In the application of James S. Conway, and others, for an injunction against Field and others, before J. J. Clendenin, Judge of Pulaski Circuit Court, it was admitted, on the argument of the application to said Clendenin, that the Central Board that directed the assignment consisted only of Carey A. Harris, Sam C. Roane, L. N. Clarke, D. T. Witter, G. Hill, S. C. Faulkner, A. H. Davies, W. F. Moore, Silas Craig, H. L. Biscoe, William Field, and Elias Rector —ten of which first are the same persons named as assignees. It was also admitted, that many of said assignees were, at the time of assignment, largely indebted to the Real Estate Bank. It was also admitted, that at the same session of the Central Board that ordered said assignment, the resolutions herewith accompanying this statement, marked A and B, were passed, and were admitted as part of

the said application, before said Clendenin, and used in argument on said application.

[*Resolution marked A.*]

Mr. Field offered the following resolution:

Resolved, That the local Boards shall not be required to turn over to the trustees in the assignment of the Real Estate Bank of the State of Arkansas, any bills, bonds, or notes, mortgages, moneys, or any books, assets, or other things, belonging to the said Bank, until it shall have been certified to them by the attorney of the Bank, that there has been filed with him the necessary bonds of said trustees, and securities, as required by the assignment of said Bank." To which resolution Mr. Moore offered the following amendment: *Provided, however*, That, so soon as a majority of the Executive Board and local committee have entered into bond and security, they shall be competent to take charge of the assets assigned at the office at Little Rock; and, whenever two of the three appointed for the other offices have given bond, they shall be competent to take charge of the assets assigned at the several offices." And the ayes and noes being called for, were as follows, viz: *Ayes*—Messrs. Biscoe, Faulkner, Hill, Clarke, Witter, Craig, Roane, Davies, and Mr. President. *Noes*—Mr. Field. Mr. Field then moved to withdraw the resolution, which was assented to. Mr. Biscoe then offered the resolution withdrawn by Mr. Field, as his, adding to it the amendment as offered by Mr. Moore; on the adoption of which the vote stood as follows: *Ayes*—Messrs. Biscoe, Moore, Faulkner, Hill, Clarke, Witter, Roane, Davies, and Mr. President. *Noes*—Messrs. Craig and Field. So the resolution was adopted.

I, Thomas W. Newton, Cashier of the Real Estate Bank of the State of Arkansas, do certify, that the foregoing resolution, and proceedings thereon, are truly copied from the minutes of the Central Board of said Bank, at their called meeting, on the 4th day of April, 1842.

Tho's W. Newton, Cashier.

[*Resolution marked B.*]

Mr. Field then offered the following resolution:

Resolved, That the trustees and assignees of this Bank shall call

upon the local Boards, after having filed the bonds required by the deed of assignment, for the books, papers, bonds, mortgages, and assets of said Bank; and it shall be the duty of said local Boards, under their own supervision, and that of the trustees, to make out a schedule of all the notes, books, moneys, &c., belonging to, and appertaining to, said local Boards, and take a receipt from said trustees for the same, and file the same with the Secretary of State;" which resolution was unanimously adopted.

I, Thomas W. Newton, Cashier of the Real Estate Bank of the State of Arkansas, do certify, that the above resolution, and proceedings thereon, are truly copied from the minutes of said Central Board, at their called session, on the 4th day of April, 1842.

Tho's W. Newton, Cashier.

Pike & Baldwin, for applicants. Courts of equity exercise a very extensive influence in giving relief in case of chattels. It is said their influence is justified, and, was probably mainly caused by the insufficient and imperfect relief obtained in a court of law, by replevin. *Wallwyn vs. Lee*, 9 *Ves.* 33. *Fells vs. Reed*, 3 *Ves. jr.* 70. *Lowther vs. Lowther*, 13 *Ves.* 95. *Lloyd vs. Loaring*, 6 *Ves.* 773. *Duke of Somerset vs. Cookson*, 3 *P. Wms.* 390. 1 *Vern.* 273.

An injunction will be granted to prevent a multiplicity of suits. Even where the right is doubtful, and is to be sent to be tried at law, it will be sent *with an injunction.* But where the right is clear, an injunction is never refused. *Livingston vs. Van Sugen*, 9 *J. R.* 562, 569, 585. 3 *Story Eq.* 207, 226. *Nicoll vs. Trustees of Huntington*, 1 *J. C. R.* 166.

Courts of equity will always assist and protect trustees, and establish the trusts. 2 *Story Eq.* 229, 255, 302, 303. 1 *Story Eq.* 506, 507. *Mitford*, 4, 133.

Upon an assignment for the benefit of creditors, the assets are held to be placed under the jurisdiction of the court of equity. *Benson vs. Le Roy*, 4 *J. C. R.* 651, 656.

Equity has jurisdiction where the remedy at law is doubtful or difficult. *Rathbone vs. Warren*, 10 *J. R.* 595. *American Ins. Co. vs. Fisk*, 1 *Paige*, 90.

In case of an assignment like the present, if the assignor neglects to make out a schedule, the assignee may file a bill for discovery against him, and to obtain a delivery of the property; and is entitled to an injunction, restraining him from wasting the property. *Keyes vs. Brush*, 2 *Paige*, 311.

A debtor in failing circumstances, may prefer one creditor, or set of creditors, to another, by assigning his property for their benefit, in exclusion of his other creditors; provided, that he devote the whole of the property assigned to the payment of his just debts; that the assignment be absolute, and unconditional; that it contain no reservation, or condition, for his benefit; and does not extort from the fears or apprehensions of his creditors an *absolute* discharge, as a consideration for a partial dividend. These assignments have grown into use, and been sanctioned, by judicial decisions, in most of the States of the Union. *Grover vs. Wakeman*, 11 *Wend.* 187.

An assignment, for the benefit of all creditors, is good against subsequent attachments, although all the creditors are not parties to the deed before the attachments. The assent of creditors to an assignment, not stipulating a release, will be presumed. A general assignment is good, though it has imperfect schedules annexed to it, or does not fully enumerate all the debts, or describes the property generally, or gives preference to certain classes of creditors. The sole question that can arise, independent of the bankrupt laws, is, whether the conveyance is *bona fide* or fraudulent. It can be no question whether it is for a valuable consideration or not; because the debts due to the creditors constitute a valuable consideration, in the highest sense of the term; and the obligation of the trustee to perform the trust, according to the provisions of the deed, is a sufficient valuable consideration, so far as he is concerned. *Halsey vs. Whitney*, 4 *Mason*, 229. *Pickstock vs. Lyster*, 3 *M. & S.* 371. *Rex vs. Watson*, 3 *Price*, 6. *Cunningham vs. Freeborn*, 11 *Wend.* 240. *Mackie vs. Cairns*, 5 *Cowen*, 547. *Murray vs. Riggs*, 15 *J. R.* 571. 2 *J. C. R.* 565, *S. C.* *Estwick vs. Caillaud*, 5 *T. R.* 420. 2 *Ans.* 381, *S. C.* *Tarback vs. Marbury*, 2 *Vern.* 510. *Vredenburg vs. White*, 1 *J. Cas.* 156. *Hatch vs. Smith*, 5 *Mass.* 42. *Marbury vs. Brooks*, 7 *Wheat.* 556. *Brooks vs. Marbury*, 11 *Wheat.* 78. *Hastings vs. Baldwin*, 17 *Mass.* 552.

Stevens vs. Bell, 6 *Mass.* 339. *Wilt vs. Franklin*, 1 *Binn*, 502. *Lippincott vs. Barker*, 2 *Binn.* 174. *Livingston vs. Bell*, 3 *Watts*, 198. *Hower vs. Geesaman*, 17 *Serg. & R.* 251. *Dowdel vs. Hamin*, 2 *Watts*, 63. *Mintingham vs. Lafoy*, 7 *Cowen*, 785. *Wildin vs. Wynne*, 6 *Cowen*, 284. *Pearpoint & Lord vs. Graham*, 4 *Wash. C. C. R.* 232. *Todd vs. Bucknam*, 2 *Fairf.* 41. *Marston vs. Coburn*, 17 *Mass.* 454. *Andrews vs. Ludlow*, 5 *Pick.* 28. *Lupton vs. Cutter*, 8 *Pick.* 298. *Fox vs. Adams et al.* 5 *Greenl.* 245. *Canal Bank vs. Cox*, 6 *Greenl.* 395. *Russell et al. vs. Woodward*, 10 *Pick.* 408. *Ingraham vs. Wheeler*, 6 *Conn.* 277. 5 *Hammond*, 293. *Tucker vs. Aisby*, 12 *Pick.* 22. *Gore vs. Aisby*, 8 *Pick.* 555. *Baxter vs. Wheeler*, 9 *Pick.* 21. *New Eng. Bank vs. Lewis*, 8 *Pick.* 113; *Spring vs. S. C. Ins. Co.* 8 *Wheat.* 268. *Brashear vs. West*, 7 *Peters*, 608. *Moffat vs. McDowall*, 1 *McCord*, 434. *Armstrong vs. Byrne*, 1 *Edw.* 79. *Wakeman vs. Glover*, 4 *Paige*, 23. *Egberts vs. Wood*, 3 *Paige*, 517. *Cunningham vs. Freeborn*, 1 *Edw.* 256. *Lentilhon vs. Moffat*, 1 *Edw.* 51. *Maitland vs. Newton*, 3 *Leigh*, 714.

Such an assignment can be made by a bank, as well as by an individual; and the bank is under stronger obligations to make it than the individual, because she is not subject to the insolvent or bankrupt laws. *Union Bank of Tennessee vs. Ellicott et al.* 6 *Gill & John.* 371. *State of Maryland vs. the Bank of Maryland*, 6 *Gill & John.* 216.

This power, inherent in a corporation, can only be exercised through its agents. A corporation acts wholly by agencies. *Thomas vs. Dakin*, 22 *Wend.* 37, 70. In every corporation a majority acts, and binds the whole, irrespective of consent from the constituent, except by his representative. 22 *Wend.* 97.

The corporation is, in law, a single person, totally distinct from, and of another species, than the corporators. The property is vested in the corporation, and not in the individuals composing it. 22 *Wend.* 104. *Warner vs. Beers*, 23 *Wend.* 103, 173. *Pratt vs. Bacon*, 10 *Pick.* 126.

The corporators could not directly make the assignment, and their previous assent is wholly unnecessary. The Central Board was the legislature of the Bank. Having power to buy and sell property,

they could sell in payment of a debt, and could, consequently, transfer to trustees for the same object. *Union Bank vs. Ellicott*, 6 *Gill & John.* 371. *State of Maryland vs. Bank of Maryland*, *ib.* 216. *Catline vs. Eagle Bank*, 6 *Conn.* 233. *Savings Bank vs. Bates*, 8 *Conn.* 512. *Anderson & Wilkins vs. Tompkins*, 1 *Brock.* 461. *Brooks vs. Marbury*, 11 *Wheat.* 78. *Bank of Maryland vs. Ruff*, 7 *Gill & John.* 459, 465.

The directors of a bank can, at a meeting of a mere majority, by vote, order the President, who is one of them, to execute a power of attorney, constituting himself attorney in fact for the bank, to transfer notes and mortgages in payment of debts; and this gives the directory unlimited control over all the property of the bank. *Northampton Bank vs. Pepoon*, 11 *Mass.* 292.

The power of the Central Board was unlimited, except in the particulars in which it was restrained by the charter. *State vs. Ashley*, 1 *Ark.* 548. By means of its legislative powers, it represented the unity, sovereignty, and indivisibility of the corporation. *Id.* The directors bear the same relation to a corporation, as the legislature to a republic. 23 *Wend.* 123. 22 *Wend.* 91.

Directors of a bank are not such trustees as that they cannot appoint an attorney in fact, or delegate their control over the property of the bank. *Sturt vs. Mellish*, 2 *Atk.* 610. *Murray vs. Coster*, 20 *J. R.* 583. *Slee vs. Bloom*, 20 *J. R.* 683. *Shaw vs. Cunliffe*, 4 *Bro. C. R.* 145. *Atto. Gen. vs. Utica Ins. Co.* 2 *J. C. R.* 384. *Mayor, &c. vs. Lowton*, 1 *Ves. & Bea.* 226. 6 *Conn.* 244.

Nor is this a *delegation*, but an *execution* of power. It is appropriating the property of the bank to pay its debts.

The objection that the Central Board conveyed to themselves, is futile. Five of the trustees are liable to no objection on this score; and a trust is never allowed to fail on account of the disability of a trustee. *Sonley vs. Watchmakers' Company*, 1 *Bro. C. C.* 81. *White vs. White*, 1 *Bro. C. C.* 12. *Atto. Gen. vs. Downing*, *Amb.* 550. *Atto. Gen. vs. Parker*, 2 *P. Wms.* 125. *Mogridge vs. Thackwell*, 3 *Bro. C. C.* 517. *S. C.* 1 *Ves. jr.* 475. *S. C.* 7 *Ves.* 36. *S. C.* 13 *Ves.* 416. *Ellison vs. Ellison*, 6 *Ves.* 663. *Pain vs. Archbishop of*

Canterbury, 14 *Ves.* 364. *Wells vs. Farmer*, 1 *Mer.* 55. *McCartee vs. Orphan Asylum*, 9 *Cowen*, 484.

If part of the trustees are incompetent, the only consequence is, that the Chancellor would displace them, and appoint others. The deed is not, for that reason, invalid. There are trustees who are competent to take, and they, having accepted, cannot renounce. The Chancellor cannot decline the jurisdiction. *Shepherd vs. McEvers*, 4 *J. C. R.* 136. The creditors are entitled to affirm the trust. *Neilson vs. Blight*, 1 *J. Cas.* 205. *Moses vs. Murgatroyd*, 1 *J. C. R.* 119. *Shepherd vs. McEvers*, *ub. sup.* *Cumberland vs. Codrington*, 3 *J. C. R.* 261. *Willis on Trustees*, 199. *Nutland vs. Eyre*, 2 *Ves. jr.* 94. *Lake vs. De Lambert*, 2 *Ves. jr.* 592. *Buchanan vs. Hamilton*, 5 *Ves.* 522. *Uredale vs. Ettrick*, 2 *Ch. Ca.* 26. *Bennett vs. Honeywood*, *Amb.* 710. 1 *Hilliard*, 241.

The objection that the trustees conveyed to themselves, is a mere technical, legal objection, as, that a man cannot sue himself. But in this case, the corporation, which is grantor, and the stockholders and members of the Central Board, who are grantees, are entirely distinct persons in law. *Pratt vs. Bacon*, 10 *Pick.* 126. *Thomas vs. Dakin*, 22 *Wend.* 104. *Warner vs. Beers*, 23 *Wend.* 103, 173. The author of a trust may create *himself* a trustee. *Lewin.* 15.

And it has been directly decided to be no objection, that a president and three directors, being a bare majority of a board of seven, ordered a deed to be made, appointing the president the attorney in fact of the bank, to transfer notes and mortgages in payment of debts. *Northampton Bank vs. Pepoon*, 11 *Mass.* 288.

The objection that the Bank was not *represented*, because, leaving out the ten members of the Central Board, who were made trustees, there was not a quorum remaining, and that these ten represented themselves, and not the Bank, is a mere plausible fallacy.

Legally, the Bank was represented, if she and the trustees were distinct persons in law, so that she could grant, and they take, by the same deed.

Equitably, she was represented, if they protected her interests, and were guilty of no fraud.

Legally, therefore, the objection is merely the technical one, that a party cannot be both grantor and grantee in the same deed.

Equitably, it is an objection to be determined by the consideration, whether the deed is, in its nature, provisions, and effect, fraudulent.

It is true, that an agent cannot be both *seller* and *buyer*. This is on the principle, that an agent, to sell, cannot act for his own benefit, to the injury of his principal. *Banks vs. Judah*, 8 *Conn.* 145. *Parkhurst vs. Alexander*, 1 *J. C. R.* 394.

Here the trustees do not *purchase*, nor take any beneficial interest. They remain *agents*, as they were before. The nature, kind, and terms of their agency are merely changed. They still act for the exclusive benefit of the Bank.

The principle goes no further, in its very utmost extent, than this, that a trustee, or agent, to sell, cannot *purchase*, and if he does, the sale is voidable, at the election of the principal.

The purchase must be absolute, and for his own benefit. Equity will consider him as holding as a trustee.

Suppose A is an agent, with power of attorney to sell a piece of property, or convey it in trust, to pay a debt of his principal. Suppose he executes a deed in the name of his principal, conveying to himself the property, *on the self same trusts*. Is it not good? He *represents* the principal, by seeing to his interests, carrying his wishes into execution, and taking on himself the trouble of the trust. There would be no *legal* objection to such deed. Would there be any in equity?

There is no law to be found any where, that a *debtor* cannot be made a trustee. Their debts are not extinguished by their appointment. Even the appointing of a debtor as *executor*, is no more than parting with the *action*, and the debt remains a trust for the creditors, or next of kin; and if there are not assets enough to pay the debts and legacies, the executor must pay his original debt, and his omission to do so is a *devastavit*. 3 *Bro. C. R.* 110. 19 *J. R.* 189. *Hall vs. Hall*, 2 *McCord, Ch.* 304. *Decker vs. Miller*, 2 *Paige*, 149.

Trustees are never responsible except in equity; no deed can make them responsible elsewhere. If a trustee owes the bank, and does not pay, the debt will become assets in his hands, and he will

not only be compelled to pay it, but be ousted. If his colleagues connive at his holding it, they will be equally responsible with him. 2 *Story Eq.* 229, 303, 525, 526, 527. 6 *J. C. R.* 1, 16. *Harden vs. Parsons*, 1 *Eden.* 145. *Brice vs. Stokes*, 11 *Ves.* 319. *Case vs. Abeel*, 1 *Paige*, 393. *Brackenridge vs. Holland*, 2 *Blackf.* 377. *Myers vs. Myers*, 2 *McCord, Ch.* 235. *Mumford vs. Murray*, 6 *J. C. R.* 16, 452.

Trustees are never jointly liable, except for default, or connivance. In other cases, they are liable only for what they receive. 2 *Story Eq.* 520, 521, 522. 1 *P. Wms.* 83. *Pybus vs. Smith*, 1 *Ves. jr.* 190. *Leigh vs. Barry*, 3 *Atk.* 583. *Willis on Trustees*, 196. The provision of the deed, in this respect, is almost universally inserted in trust deeds. *Fellows vs. Mitchell*, 1 *P. Wms.* 81. *Bartlett vs. Hodgson*, 1 *T. R.* 42. *Kiss vs. Deniston*, 4 *J. R.* 26.

There was no need of any provision for surrendering or paying over the residue of the property, after payment of debts. The law implies that, and creates a residuary trust. 2 *Story Eq.* 443. 3 *P. Wms.* 20. 7 *Ves.* 425, 435.

There was no legal necessity for a bond to be given.

The word "heirs" is always used in such deeds, in order to convey the fee. The trustee can convey no greater estate than he receives.

In all corporations, a majority of the stockholders govern, in all cases. *Gordon vs. Preston*, 1 *Watts*, 385.

A majority have ratified this deed. "*Omnis ratihabitio retrotrahitur, et mandato priori equiparatur.*" *Story on Agency*, 235.

Though the deed might be disaffirmed, and set aside by creditors, it is still good, as between the assignor and assignee. *Mills et al. vs. Argall et al.* 6 *Paige*, 577.

That the power was legally given to the trustees, to fill vacancies in their own number, is clear. *Willis on Trustees*, 144. *Sharp vs. Sharp*, 2 *B. & A.* 405. *Webb vs. Earl of Shaftsbury*, 7 *Ves.* 480.

It was proper that the compensation to the trustees should be fixed in the deed. It was matter of agreement at the creation of the trust, and if made in good faith, will not be disturbed. No person can interfere as to this, unless the allowance is so disproportionate to usage,

and the nature of the service, as to be evidently a colorable disposition of property to defraud creditors. *Hendricks vs. Robinson*, 2 *J. C. R.* 216.

A trustee is not entitled to commissions on sales of the trust estate, or to any compensation for his care and pains in executing the trust; but he is entitled to an allowance *per diem* for his time, and expenses of travel, &c. *Green vs. Winter*, 1 *J. C. R.* 27. *Manning vs. Manning*, 1 *J. C. R.* 527.

A corporation is not dissolved, or its charter forfeited, by a surrender or sale of all its visible property. *Brinckerhoff vs. Brown*, 7 *J. C. R.* 225.

The *Resolutions* could not vary the effect of the deed. No assent of the creditors was necessary, nor any execution by the trustees. The moment the deed was made, the right of property passed, and vested in the assignees, and the relation of trustee and *cestui que trust*, as between them and the creditors, was at once constituted, so that the assignor could not recall the deed. *Cunningham vs. Freeborn*, 1 *Edw.* 262. *Ellison vs. Ellison*, 6 *Ves.* 656. *Bunn vs. Winthrop*, 1 *J. C. R.* 329. *Brooks vs. Marbury*, 11 *Wheat.* 78.

The assignment was perfectly good, without all the trustees assenting. *Nicholson vs. Wardsworth*, 2 *Swanst.* 370. *Adams vs. Taunton*, 5 *Mad.* 438. *Bonefant vs. Greenfields*, 1 *Leon.* 60. *In the matter of Stevenson*, 3 *Paige*, 420. *King vs. Donelly et al.* 5 *Paige*, 46. *In the matter of Schoonhover*, 5 *Paige* 559.

That *assignees* have not executed the deed, or entered into any covenant to perform the trusts, is no objection. These are mere formalities. If the assignee had accepted the trust, is ready to take possession, and enter on the performance of the trusts, he is as much bound as if he had covenanted. *Cunningham vs. Freeborn*, 1 *Edw.* 261.

Moreover, where assignees do not assent at the time, but afterwards, their assent *relates* to the time of the executing the deed. In no view, therefore, does the execution of the deed, by the Bank, depend on its execution by the trustees. *Wilt vs. Franklin*, 1 *Binn.* 518.

Where a deed or lease is made to be executed by two, the cove-

nants in it are binding on one who executes it, though the other, who was intended to be a party, never executed it. *Adams vs. Bean*, 12 *Mass.* 142. *Cutter vs. Whittemore*, 10 *Mass.* 442.

Cummins & Ashley, contra.

That the deed is void, and an absolute nullity, vesting no right whatever in the assumed grantees, we think clear, on two grounds:

1st. That there were not proper parties, or no parties at all.

A *majority* of the Central Board of the Real Estate Bank, which majority had full power to control the action of the Board, and to exercise, on behalf of the Bank, all the powers belonging to said Board, prepare the deed, fix its provisions and details, and do this for the Bank; but, at the same time, they act for themselves, and on their own behalf, as grantees, and claim to take the estate by the deed made by themselves. Such an act surely cannot be found on record. If the Board had possessed the power to convey the estate, and the conveyance had been made to less than a majority of the Board, a majority being left to represent the Bank, there might have been the semblance of legality in it; but, when a majority of the Board were acting for themselves as grantees, and taking the estate, and agreeing to the terms on which they would take, no quorum of the Board was left to represent the Bank. There was, in truth, no Board. The Bank could only act through agents, not *per se*. Her agents leave her, and act for themselves. In this pretended contract, the Bank was unrepresented; was no party; made no grant; and no right vested in the assignees. See 22 *Wend.* 37, 70, 104; *Angel & Ames on Corporations*, 129, 130, 139; *Com. Dig.*, *title* "*Fait;*" *Bac. Abr. Deed, &c.;* 2 *Cranch*, 127; *Head vs. Providence, &c.*, 1 *Conn. Rep.* 371; 6 *Wheat.* 593; 5 *Conn. Rep.* 196; 4 *Peters*, 514; *Providence Bank vs. Billings & Pitman*, 4 *Peters*, 152; *Beatty vs. Knowles; Angel & Ames, &c.* 149, 150, *&c.*, 163, 166, 169.

2d. That, under the charter, the Central Board have no power to make an assignment. Being mere agents for specified purposes, and with strictly limited powers, no such transfer could be made, violating the legal possession of the Bank and its assets, by its owners and proprietors, destroying their power to use, govern, and take care of the

same, which rights are secured to the proprietors by express legal provision. *Angel & Ames on Corporations, power of directors,* &c., 139, &c., 2 *Peters,* 536; *Bank United States vs. Owens and others,* 2 *Cowen,* 664, 678, 699; *New-York Firemen's Insurance Co. vs. Ely,* 15 *J. R.* 383; 6 *Cranch,* 199; 7 *Cowen,* 604; and the cases referred to in case *Real Estate Bank vs. Dawson and others.* This Board has a mere legislative authority, and no power to transfer. The Bank can only act through its agents. When the agents are not authorized to do the act by the bank, it cannot be done.

In an equitable point of view, this deed would be esteemed void by a chancellor, on the grounds that it is a direct fraud, in violating the rights of the State and stockholders, to govern, keep, and use the assets of the bank, through their agents, to be appointed by themselves annually.

The Central Board being mere trustees, admitting that they had, as a board, power to transfer the whole assets of the Bank, with possession and legal interest in themselves, could not transfer to themselves, as they have done in this instance. This deed, thus made, is unquestionably void. See *Lewin on Trusts and Trustees. Law Library, new series, No.* 22; *Whole, No.* 70, *April,* 1839, *p.* 9; *marginal page* 16, *p.* 13, *p.* 39: (this shows the rule for construing the powers of the Central Board); *p.* 44, *p.* 69, (power of Central Board), *pp.* 119, 130, 132, 133, 146, 135, 153, 156, 157, 160, 162, 188, 190, 191, 192, 203, (power of Central Board), *pp.* 209, 218.

No crisis is shown or pretended, to justify the assignment of the $2,200,000 of assets. They do not show the amount of debts now due, but the deed shows, and the laws show, that the principal debt of the Bank, the 1500, or upwards, of State bonds, ($1,530,000), is not due short of about 20 years. Why now assign assets to pay these bonds? Can any reason be given? None is offered. All decisions show, that assignments alone are to be justified, even those of partners, on the grounds of present emergency, present indebtedness, never on the grounds of future and immature liabilities. Why are the funds appropriated by this deed and taken out of legal custody 20 years in advance? Can these assignees be permitted to decide for the State and stockholders, that they, the said trustees, ought to have

the management of the funds, and that they can better manage the said funds than the State and stockholders? This would be a new jurisdiction, and one which we think a court of equity could not recognize. The assumption of the control of these funds is unsupported by any authority expressed in law, or presumed by courts of equity. The assignment of so much as is reasonably sufficient to pay the debts due at the time of the assignment, is alone justified by courts of equity.

The statute of Maryland, referred to, states that deeds, executed by corporations in that State, according to the directions of the act, "shall be deemed and construed, in law and in equity, as valid and effectual, and of as much force in conveying, mortgaging, selling, assigning, transferring, and releasing any estate, right, title, interest, or claim, therein expressed, or therein intended to be conveyed, aliened, mortgaged, sold, assigned, transferred, or released, as if such deed had been or were duly executed and acknowledged by any individual citizen of this State, having or being seized," &c.

What was the intention in passing this law? Was it not to give the same effect in law and equity to the deeds of corporations as to the deeds of individuals? Does it not provide a means by which corporations can make as good deeds and valid assignments as individuals could? This is the avowed object. The deed of the corporation is declared to be as good as that of a citizen. The deeds of corporations are to every purpose made good and available. When they can make such deeds, is not the power given to make them? Surely this cannot be denied. Then the act confers the power to make the deeds, by declaring when made they shall be as good as the deeds of every or any citizen.

Again, the enactment is evidence that, without such law, corporations could not make valid deeds. The validity of the deed, and its effects in law and equity, are its essential existence. The act of Maryland confers on those deeds their vital principles and effect. Has this deed before the Court vitality and effect conferred on it by the laws of Arkansas? No law is shown here, as in Maryland, and none can be shown. This deed, then, as we contend, has neither vitality nor legal and equitable effect or power before this Court.

It never was contended, on the argument of the quo warranto case,

that the Central Board possessed any powers to set aside the provisions of the charter; no general powers beyond the execution of the declared rights of the charter were ever contended for; no specific power claimed for the Central Board, in that case, beyond the expressed purposes of the charter, has been, or can be, stated. The decision in the quo warranto case expressly declares, that the Central Board is limited in its action by the provisions of the charter. How can it be claimed that under this decision, the Central Board can annihilate the charter, destroy the rights, possession, and control of the State and stockholders, when the decision expressly points to the charter as a boundary, and inflexible rule of action for the Central Board? This effort is remarkable, because the authority is denied by the decision it is claimed under.

The charter expressly puts the funds in keeping and control of the local boards. They have the legal holding. How can this be broken and destroyed by the Central Board, unless according to the charter? No authority is shown. The power to settle the general accounts of the Bank is given to the Central Board. Their exercising this power does not destroy or interfere with the other powers given to the local boards. Each local board is limited to its special grants of power, and each must keep within its own orbit. But it is claimed that the power to settle the general accounts is so large as to destroy all power of the local boards. No argument is necessary to show that the power of the local and central boards can exist together, and they must be so exercised.

[The argument in response, will be found in the appendix to this volume.]

By the Court, Lacy, J. This is an application in behalf of the trustees of the Real Estate Bank of the State of Arkansas, asking this Court to issue a peremptory *Writ of Mandamus*, directed to the Judge of the Fifth Judicial Circuit, commanding him to grant an *injunction* against certain named persons, who constitute a majority of the local directory of the Principal Bank, restraining them from further intermeddling with the property and assets of the corporation. The ob-

ject of the bill is, to have the trust estate established, by coercing the surrender and delivery of the property and effects of the Bank into the hands of the trustees.

The application is founded upon a petition, regularly sworn to, and filed in the names of all the trustees, except Carey A. Harris, who has departed this life since the execution of the trust; to which is annexed the bill of complaint that was submitted to the Chancellor of the Circuit Court, and upon which is endorsed his refusal to award the injunction, for want of jurisdiction.

The first question to be determined is, has this Court the power to issue a mandamus in such a case? The general jurisdiction of the Supreme Court is unquestionably appellate, and co-extensive with the State, and most of the writs that it is authorized to issue, are in aid of its appellate powers. Still, it has undeniable authority to issue other writs, as a portion of its original constitutional jurisdiction; and among these, the writ of mandamus is specifically named, and fully provided for. The power is given to this Court to issue such a writ, by express grant of the constitution; and the Court is invested by that instrument with a supervising power and control over all inferior courts of law and equity. The due exercise of these powers is indispensable, in maintaining the supremacy of the authority of this Court, and for preserving a consistent uniformity of action among the inferior judicial tribunals. It has been the constant and invariable practice of this Court, to issue writs of mandamus, whenever the party applying for them showed that he was legally entitled to their benefit, and to direct them either to ministerial or judicial officers. When addressed to judicial officers, they can only be executed in term time; but, when addressed to ministerial officers, they may be executed at any time. The distinction between a ministerial and a judicial act, as contemplated by the constitution, is laid down and explained by this Court, in the case of *Toby and others vs. Bower*, 3 *Ark.* 351. Whenever the writ operates as an auxiliary process, to bring the parties or subject matter in dispute before the Court, the acts of the officers issuing these writs are said to be ministerial; and this holds true in such cases, although, in granting or refusing them, the relative rights of the parties may be seriously affected, and incidentally decided; still, it is the

exercise of ministerial discretion, and not of judicial judgment; such, for instance, as a clerk's issuing an execution, a sheriff's taking a delivery bond, a justice of the peace awarding an attachment, or a judge of a circuit court issuing a *ne exeat*. Now, should these writs be denied a party, when it was lawful for him to have them, this Court would interfere by mandamus, and compel their emanation. And it would do this upon the principle, that the party shows himself to have a specific, legal, vested right, and no other specific and adequate legal remedy. The issuing or refusing of an injunction, is but the exercise of a ministerial discretion. It usually includes a higher degree of discretion, than the issuing of the other writs that have been put by way of example. The issuing of an injunction is sometimes said to be a remedial, and sometimes a judicial process; but in no sense can it be affirmed, that its issuance or refusal is the exercise of that kind of judicial power, which was contemplated by the constitution, and which, as this Court has said, consists "in the distribution of justice by a legal trial and determination of the suit." To grant or to refuse an injunction, can, in no sense, be said so to operate, as to try and determine the matter between the parties. It only brings the question of right and equity before the Court, to be decided by future adjudication; and hence, the uses of the writ are either preventive or restorative. The granting or refusing of an injunction being, then, the exercise of a mere ministerial discretion, and the constitution, and the laws, in establishing and organizing the circuit court system, having given this power expressly to these tribunals, in term time, and to the judges in vacation, it therefore necessarily follows, that, if the injunction has been improperly refused, this Court will award a peremptory mandamus to the judge, commanding him to grant the writ.

This brings us to the consideration of the second question, which is, taking the allegations of the bill to be true, (and the Chancellor was bound so to consider them), had he equity jurisdiction of the case?

The equity of the bill depends upon the validity of the assignment, and the allegations and exhibits made in support of it. The bill is filed in the name of all the trustees; ten only having signed the deed,

and executed bonds for the performance of the trust. The true object and intention of the bill are perfectly apparent. The right of property, as well as possession, is claimed to belong to the trustees; and they come into equity for its aid and assistance, in protecting and establishing the trust. The allegations of the bill, in some respects, are not very precise or accurate in the details; but all the important and substantive facts are stated with sufficient clearness and distinctness, so as to leave no doubt as to the true object and design of the complainants. The bill shows that, upon the execution of the trust, the trustees obtained possession of the property, and that afterwards, it came into the hands of the defendants, who are charged, in express words, "as being members of the local directory of the Principal Bank," and that "*they constitute a majority thereof*," and that they "refuse to deliver over the property and assets of the Bank to the trustees, or to permit them to receive, or *control the same*, or *perform the trust*." The bill further alleges, that they will neither make, or permit to be made, a schedule of the property and assets of the Bank, and that they are determined to hold the property illegally and violently. We understand this charge to mean, not only that the defendants are now holding the trust estate illegally, but that they will so continue to hold it, if not restrained. The defendants are said to resist the deed of assignment, solely upon the ground that it is fraudulent and void, and, therefore, conveys no title or interest to the trustees. If these averments do not charge them with doing these acts, as a majority of the directory of the local Board of the Principal Bank, then we are unable to perceive how any terms or words can make such an allegation. The trustees declare that they claim under the deed, and that defendants claim by virtue of the authority they possess, as a majority of the local directory. It is only in their capacity as a directory, that it can be pretended they can set up any right to the possession or property of the Bank; for if its custody and management do not belong to the trustees by the assignment, then it is undeniably true, that it appertains to the central and local boards of the corporation. It is equally clear, that the trustees seek to have the trust established, because they allege that a majority of the local board will not permit them *to perform the trust*, by refusing them the

management and control of the assets of the Bank. Besides, the injunction is prayed for upon "the express ground that the trust may be established, and the trustees protected and aided in the performance and discharge of the duties thereof." If this language does not seek the establishment and performance of the trust, we should like to see any other mode of expression adopted, more significant or exact. Again: the defendants are asked to be perpetually enjoined and restrained from further intermeddling with any of the property, effects, or assets of the Bank, assigned and transferred over to the trustees. It is surely as a majority of the local directory, and not as private individuals, that the defendants are charged with refusing to furnish a schedule of the property and assets of the Bank, or ot permit one to be made out. The same remark is equally applicable and true, when the bill seeks to enjoin the defendants from further intermeddling with the property and assets of the Bank; for, as private persons, these defendants (according to the statements of bill and exhibits,) do not set up any title or claim whatever to the property and assets in dispute. The acts of the defendants, the bill alleges to be illegal; and it states, that they have a tendency to defeat the objects and purposes of the deed; to delay the creditors of the Bank, and to depreciate the paper; to prevent the collection of her debts, and seriously prejudice the rights of the stockholders, and of the State. We have been thus particular in quoting, literally, the language of the bill, that its real object and design could not be mistaken—which are, to have the trust established; and that can only be done by causing the property and assets of the Bank to be surrendered into the hands of the trustees, and put under their management and control. We think that we have sufficiently demonstrated these two propositions: first, that the complainants have come into equity to have the trust estate protected and established; it seems to us to be a self-evident proposition, that the trust estate can neither be protected nor established, unless the property and assets of the Bank are put into the possession, and under the control, of the trustees, without molestation or interruption. Second, that the defendants are charged by the bill as constituting a majority of the directory of the Principal Bank, and not as private persons.

The jurisdiction of the Court may possibly be called in question upon another ground, which we deem it proper to notice. It is this: that admitting the deed to be valid, still the trustees are not entitled to the possession of the property, as only ten of them have signed the deed, their right of possession depending upon the precedent condition, that all of them shall execute bonds before the estate could vest. The error in the proposition stated consists in this: that the principle in dispute is assumed to be true, which we utterly deny; and we ask to be pointed to the proofs, to show that the execution of the bonds of all the trustees is a precedent condition to the vesting of the right of property and right of possession. The deed, certainly, declares no such thing. The assignment vests the property absolutely in the trustees, *in presenti*, by proper terms and appropriate words, immediately upon its execution. How, then, can the execution of the bonds be said to be a condition precedent? That principle is forbidden by the very terms of the deed itself, which declare, that the estate shall vest and pass into the hands of the trustees the instant it is executed, and be held for the payment of the debts of the corporation, according to the provisions and limitations of the deed.

That some of the trustees have not executed the bonds required by the deed, we regard as a matter of no importance. We consider it perfectly plain, that the execution of the bonds is not, technically, a *condition* either *precedent* or *subsequent*. It is a mere *stipulation*, a duty imposed on the trustees, like the other duties created or imposed by, or growing out of, the deed; for there are certain words proper to make a condition, and which distinguish a condition from a *covenant* or *stipulation*. The words "upon condition," are the most appropriate expression, or the words may be "*so that*," "*provided*," "*if it shall happen*," *&c.* *Co. Lit.* 203 *a. b. Litt. sec.* 325, 330. *Mary Portington's case*, 10 *Co.* 42. *Lord Cromwell's case*, 2 *Co.* 69.

If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction. 4 *Kent*, 132. If a man make a feoffment in fee, *ad faciendum*, or *faciendo*, or *ea intentione*, or *ad effectum*, or *ad propositum*, that the feoffee shall do or not do such an act, none of these words make the estate in the land conditional; for in judgment of law, they are no words of

condition. *Co. Litt.* 204 *a.* The words, "if it happen," do not make a condition, unless followed by a clause of re-entry. 2 *Hilliard*, 363. A conveyance to a person, "he erecting buildings," &c., is not a conveyance upon condition. "Paying and yielding rent," &c., "paying and performing," &c., never constitute a condition, unless there is a clause for re-entry. There must be technical words to make a condition. 8 *Cowen*, 296. 2 *Show.* 202. 1 *Sid.* 280. 2 *Mad.* 35.

Moreover, admitting the provisions in regard to the execution of bonds to be a condition, it is a condition subsequent, and not precedent. It will be here remarked, that this question has no connection with that large class of cases in which *executory* covenants are discussed, and in which cases the question has most commonly arisen whether covenants were dependent or independent. This is not such a case. It is not a contract *executory* for a conveyance *in futuro*, but an executed contract; a deed with words of conveyance absolute and *in presenti*. A condition is "a qualification or restriction annexed to a conveyance, by which, upon the happening or not happening of a particular event, or the performance or non-performance of some act by the grantor or grantee, an estate shall commence, be enlarged or defeated." 1 *Hilliard*, 247. 4 *Kent*, 121. 2 *Cruise*, 4. And the rule by which to determine whether a condition be precedent or subsequent is, whether the thing is to happen before or after the estate is to vest. If before, the condition is precedent; if after, it is subsequent. *Doe vs. Scudamore*, 2 *B. & P.* 298. If the particular clause in question, or the whole instrument, shows that the condition must be performed before the estate can vest, the condition is precedent; but if the act prescribed does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent. *Finlay et al. vs. King's Lessee*, 3 *Peters*, 374. Examples of a condition precedent are, where an estate is limited to A., to vest on his marriage; and where a lease is made to commence on a certain day, on condition that B. pay a certain sum of money within that time. 4 *Kent*, 125. A condition precedent must expressly delay the vesting of the estate, until performance of the condition, and we know of no authority conflicting with this rule. In determining whether a con-

dition be precedent or subsequent, the *intention* is the only thing to be considered. Though the words might seem to make a condition precedent, yet, if the intention is otherwise, this will govern, and not technical terms or the collocation of the words used. 3 *Com. Dig.* 88. *Hotham vs. E. Ind. Co.* 1 *T. R.* 638. *Worsley vs. Wood*, 6 *T. R.* 710. *Howard vs. Turner*, 6 *Greenl.* 106.

In *Green vs. Thomas*, 2 *Fairf.* 320, the Court say, "whether a condition is precedent or subsequent, must be determined by the intention of the parties; and not upon technical terms or the collocation of the words. The stipulation, *that the grantee shall come into immediate possession*, seems to have been introduced for the express purpose of avoiding the construction that he was to have nothing until the conditions were performed. He was to have immediate possession upon the conditions expressed." So in *Finlay et al. vs. King's Lessee*, the Supreme Court of the United States said, in regard to a will, "The testator has expressed clearly his intention that the lands encumbered with his wife's estate should come to the possession of William King, at her death. He gives the estate at that time, without requiring that the conditions annexed to it should be previously performed. The estate then vests in possession, whether the condition on which it was to depend, be or be not performed. *It cannot be supposed to have been his intention that the devisee should take possession under this devise, before the interest vested in him.* The interest, therefore, must have vested previously, or at the time."

These two cases, without further authority, would settle this question. This deed is absolute in its terms. It conveys the property *per verba de presenti*, and vests it in the trustees unconditionally. The property passed and vested in the trustees, by force of the language of the deed, *at once.* The relation of trustee and *cestui que trust*, between them and the creditors, was at once created, and the Bank could not recall the deed. *Cunningham vs. Freeborn*, 1 *Edw.* 262. If the trustees fail to give bond, this cannot deprive the creditors of their rights under the deed. Moreover, in the language of the Supreme Court of Maine, the provision in this deed, which provides, *that possession of all the assets of the Bank shall be given to the trustees immediately on the execution of this deed*, seems to have been intro-

duced for the express purpose of avoiding the construction, that the trustees were to take nothing until they should execute their bonds; and, in the language of Chief Justice MARSHALL, the Bank has clearly expressed her intention that the property should come to the possession of the trustees immediately on the execution of the deed. The deed provides that possession shall be taken "*immediately*," without requiring that the bonds shall be *previously* executed. The estate vests in possession whether they be executed or not. It cannot be supposed to have been the grantor's intention, that the trustees should take possession under the deed before the interest vested in them.

Again: a covenant to be performed without limitation of time cannot be a condition precedent to another covenant. *Barksdale vs. Toomer*, 2 *Bailey*, 180. So, another rule is, that if an estate is given on a condition, for the performance of which no time is limited, the party has his life for performance; or, as the authorities hold, he is bound to perform in a reasonable time. Such a condition can never be a condition precedent. 3 *Peters*, 374. Where a prompt performance of a condition is necessary to give the feoffor the whole benefit contemplated to be secured to him, or where its immediate fruition formed his motive for entering into the agreement, the feoffee shall not have his lifetime for a performance, but only a reasonable time. *Hamilton vs. Elliott*, 5 *Serg. & R.* 384. Where the condition is to do a transitory thing, without limiting any time, it ought to be done in convenient time. *Co. Lit.* 208 *a.* 1 *Rol.* 1, 15 *to* 30. 6 *Petersd. Abr.* 67. 3 *Bibb*, 105. 1 *Bibb*, 461. 3 *Bibb*, 329. 3 *Mon.* 446.

It is, therefore, clear to our minds, that the provision, requiring the trustees to execute bonds, is not, at all, a *condition precedent*, but that, if a condition at all, it is merely a condition subsequent; that the trustees are bound to give their bonds in a reasonable time; and, if they do not do so, it will be the duty of the Chancellor, on a proper application, to cause it to be done, or to remove such as are in default, and appoint others. The failure of any of them to give bond, cannot operate so as to re-vest the property in the Bank. It certainly requires the trustees to execute bonds, with sufficient security, to be

approved by three of the stockholders, but does it state when these bonds shall be executed or approved? or does the deed contain any intimation that the trust cannot vest until the bonds are executed? There are no express terms in the grant indicating such intention. Doubtless, the bonds would have to be executed for greater security and protection; but is the conclusion either rational or legal, that because there has been a failure upon the part of some of the trustees to execute the bonds, that therefore the estate does not vest, nor are a majority even entitled to receive it, although they have strictly complied with the condition of the assignment in this particular. In such a case, would a court of equity refuse to entertain jurisdiction upon the ground that all the trustees had not executed bonds, although two-thirds had? And must the omission or negligence of the co-trustees prejudice the rights of those who had done all to secure the the estate? And would such an obligation hold good against creditors and third persons whose rights had vested under the deed? Surely not. Would not a court of equity, if an application was made, permit those trustees, who had failed to sign, to come in and execute the deed, and file the necessary bonds? Most unquestionably it would; for, if this was not the case, then indeed courts of equity would act with greater strictness and technicality than even a court of law, which frequently allows a party to amend a defective bond for costs, and that, too, in cases after trial had, and while the suit is pending before a superior jurisdiction. The objection raises a precedent condition by mere inference and intendment, which, according to the view we have taken, is unconditionally disproved by the deed itself, and that, too, in the case of a trust estate, where it is shown that, if equity does not interfere, the trust estate must fail. But, it may be said, that the bill should have been only in the name of the ten trustees who had executed their bonds; and therefore the present suit must be dismissed for want of proper parties. And what, in the mean time, becomes of the trust estate? Is it to be left in possession of those who now claim to have its control and management? We think it was not at all necessary, to give validity to the deed, that the trustees should sign it; and this position is clearly demonstrable, both upon reason and authority. The resolutions that were passed by the

Central Board, after the deed was executed, could not vary or alter the legal tenor and effect of the deed of assignment previously executed. And if this be true, and there can, we apprehend, be no doubt about it, then it meets and answers the objection, that the trustees were not entitled to the possession of the property until the attorney of the Bank notified the local boards of the execution and approval of their bonds. Even if this proposition could be questioned, still the accidental or culpable negligence of the attorney could not prejudice the rights of the trustees, much less those of the stockholders and *cestuis que trust.* Such an allegation was wholly unnecessary upon another ground. It is expressly averred in the bill, that the defendants set up their claims, and base their right to retain the property, upon the exclusive assumption, that the deed was fraudulent. We lay down this general and unqualified proposition, that there was no necessity whatever for the trustees to have signed the deed, to make it valid, in the first instance; but any act done by them, which showed their assent, will make it obligatory, and equity will enforce the trust. And we feel confident, that no case can be found, impugning this doctrine in the slightest degree, unless it be a case where the deed, upon its face, contains express and imperative covenants, requiring the trustees to sign it, which cannot be pretended in the present instance. This, all the authorities prove; and, as we shall hereafter have occasion fully to consider and determine that point, we will now make no further comment upon it than barely to remark, that the bill shows, in the present case, that all the trustees have assented to take upon themselves the trust; and that there has already been transferred to them a large amount of funds of the Bank; and that they now ask the aid of a court of chancery to get the residue. As it was not necessary, then, for any one, much less for all, of the trustees, to execute the deed, and as they are all now present, urging its establishment, the suit is properly brought in their joint names. The moment the deed was executed, the relation of trustee and *cestui que trust* placed the estate under the jurisdiction of a court of equity, and, if there could possibly arise any difficulty upon the subject, that jurisdiction would still pursue the estate, and transfer the possession to the ten trustees, who were entitled to receive it, holding it for the

others to come in and execute the necessary bonds; and if they failed, in a reasonable time, to do so, would remove them from office, and cause others to be put in their places.

That a court of equity has full jurisdiction in this case, seems to us to be a proposition perfectly free from all doubt. The object of the bill, as before remarked, is, to have the trust estate protected and established. Can this be done while that estate is in the hands, and under the control, of others?

The cognizance of a court of chancery flows from the familiar and universally attested fact, that the establishment, enforcement, and protection of trusts, constitute one of the great original branches of equity jurisdiction.

Lord HALE considered that one of the two things which gave original jurisdiction to courts of equity, or at least contributed much to its enlargement, was the invention of *uses and trusts*, which were frequently necessary, especially in times of despotism, touching the crown. Lord COKE says, there be three things to be adjudged of in a court of conscience or equity, covin, accident, and breach of trust. 4 *Co. Ins.* 84. And Justice STORY declares, that, in matters of trust and confidence, the ordinary courts take, in a variety of instances, no cognizance; and he adds, "positive law being silent upon the subject, courts of equity consider the conscience of the party bound for the performance of the trust, to prevent a total failure of justice." And so, while they compel the performance of trusts, they will assist the trustees, and protect them in the due performance of the trust, whenever they seek the aid and direction of the Court, as to its establishment, management, and execution. 2 *Story's Equity*, 229. It has even been held, that the most appropriate remedy in all trusts, is to be found in a court of equity. And there may be cases, say the authorities, where a party might have an adequate remedy at law for breach of trust, but the cases are few, (if any exist); and we have been unable to find a single one where a court of equity has refused, upon that ground alone, to uphold the trust. 23 *Pick.* 148.

The jurisdiction of courts of equity, if not created, was soon afterwards extended, for the purpose of protecting and enforcing the execution of trusts. 2 *Fonb. B.* 1, *Ch.* 1, *sec.* 1, *note a.* Trusts, says

Justice STORY, that arise under general assignments for the benefit of creditors, are, in a *special sense, the objects of chancery jurisdiction.* 2 *Story's Equity*, 303.

It is a fundamental rule, that if, originally, the jurisdiction attached in equity, on account of any supposed defect of remedy at law, the jurisdiction is not changed or altered by courts of law now entertaining suits in cases where they were formerly rejected. The reason assigned is, that it cannot be left to courts of law to enlarge or restrain the powers of courts of equity. 1 *Story's Equity*, 81. *Atkinson vs. Lemond*, 3 *Bro. C. C.* 218. *Ex parte Greenway*, 6 *Ves.* 81. In *Garth vs. Cotton*, 1 *Ves.* 524, 526, Lord HARDWICKE is reported to have said, that is the duty of the trustees to *preserve the estate*, and every assistance will be granted by a court of equity in support of the trust, and to aid them in its due performance. These authorities unquestionably show, that courts of equity entertain jurisdiction to protect the trust, and that they will assist the trustees in its management and execution. Now, according to the authority of *Garth and Cotton*, equity makes it the express duty of the trustees to preserve the estate. If it is their duty to preserve the estate, how can they do this, unless they can acquire possession of the property? We ask, how is the trust to be protected or upheld, if the funds or assets that constitute the estate, are not delivered into their hands, and placed under their management? This is all that is asked for in the present instance. All the parties to the deed have an unquestionable right to have the trust executed. Certainly the creditors or stockholders could apply to a court of equity, for the purpose of having the trust estate, which was created by the deed of assignment, protected and established. Upon what principle could they come in? The inquiry gives the answer. Having an equitable interest in the deed, they have equitable rights to compel the trustees to execute it, and equity would hold the trustees bound for the faithful performance of the trust. Now, if they have an undoubted right to the jurisdiction of the Court, the trustees, whose duty it is to preserve the estate, have equally as unquestionable a right to relief. The trustees are not acting for themselves, but for the benefit of those very persons who are presumed to have assented to the deed; and upon this ground alone, the trustees

are entitled to the assistance of a court of equity, in the performance of their trust. If that were not the case, the entire fund might fail, and they be responsible for the loss. Would this be either just, or legal, or equitable, or conscientious?

It is no objection to the jurisdiction of a court of equity, that a party has a remedy at law, unless it be shown that the legal remedy is plain, direct, and complete. The remedy at law, to be adequate and complete, and attain the full end and justice of the case, must reach the whole mischief, and secure the whole right of the party in a perfect manner, *in præsenti* and *in futuro*. *Bacon vs. Leroy*, 4 *J. C. R.* 355. Courts of law deal with contracts as a violation of legal duty, and compensate the party for the injury sustained by way of damages. Courts of equity regard contracts in a wholly different light. They treat their breach as a violation of moral as well as of legal duty, and enforce their execution by acting upon the conscience of the culpable party. No one, we think, will hazard the assertion, that any other action at law, except replevin, would afford the trustees any remedy whatever. The inquiry now is, would replevin, under the peculiar circumstances of this case, give to the trustees a plain, direct, adequate, and complete remedy? If the deed be valid, the trustees are unquestionably bound to see that it be carried into execution. By the deed, the property became assets in their hands to be administered, and equity charges them with the execution of the trust. The interest of the creditors and the Bank will not permit the trustees to stand still, until a decision could be had at law, upon the validity of the deed; which, in the course of things, might and probably would be delayed for a considerable time. The estate, during this period, might be seriously injured. The trustees certainly cannot be required to proceed in the execution of the trust, so long as the question as to the legality of the deed remains undetermined. The trustees are entitled not only to the right of possession of the property, if the deed be valid, but to have the title to it settled as speedily as possible. Now, replevin would only give the present possession of the property, leaving the whole question of title to be determined thereafter by a court of equity; at least, as to the fraudulent intent of the deed in regard to the *cestuis que trust*. Does the action of replevin, in such a case, afford

a complete as well as adequate remedy, and will it reach the whole mischief of the case, and answer, in a perfect manner, the ends of justice? It certainly would not. Again, trustees being bound for the execution of the trust, of course equity will free them from all onerous burdens and impediments of every kind. It may well be doubted whether the trustees could be required to enter into the necessary bonds, with security, to obtain possession of the property by replevin. Unless they bound themselves, with sufficient security, in double the amount sought to be replevied, (which, in this case, would be exceedingly large), of course they could not get possession of the property. The statute makes the execution of the necessary bonds an indispensable pre-requisite to obtaining possession of the property. Suppose they could not give the bonds, must the trust fail on that account? They have no interest in the matter, except the mere compensation allowed them for their services. Would it, then, be just or reasonable to bind them in such heavy responsibilities, in order that they may administer the trust that equity puts in their hands? If they are entitled to the possession of the property and assets of the Bank, it is because the estate vested upon the execution of the deed, and it cannot be encumbered with any other conditions than those contained in the assignment. The Chancellor gives them the property, if they are entitled to it, according to the provisions of the deed, without any improper let or hinderance whatever. But how is it possible for the trustees, in this instance, to sue out replevin? The bill expressly charges, that the local directory will not make out a schedule of the property and assets of the Bank, nor permit it to be made out; nor will they permit the trustees to have access to the books of the Bank, for that purpose. The property and assets of the Bank consist of a great number and variety of choses in action, and other securities, incapable, under the state of case shown, of being described, and therefore could not be replevied. How, then, can the action of replevin afford a plain, direct, adequate, and complete remedy?

A court of chancery will interfere by injunction, where the remedy at law is doubtful or difficult. *American Ins. Co. vs. Fisk*, 1 *Paige*, 90. *Weymouth vs. Boyer*, 1 *Ves. jr.* 416. *Rathbone vs. Warner*, 10 *J. R.* 595. *Hanson vs. Gardner*, 7 *Ves.* 308. *Norway vs. Rowe*,

19 *Ves.* 147. Would the remedy at law here be free from doubt or difficulty? We certainly think it would not. Then, on this ground also, equity would have jurisdiction.

Equity would entertain jurisdiction upon another ground: it will always interfere to prevent a multiplicity of suits. In *Keys vs. Brush*, 2 *Paige*, 311, which was a case where the defendants had failed to comply with their obligations to make out an inventory of the assigned property, it was held that the trustees might come into equity for discovery, and coerce the delivery of certain books, and other securities. If it was not beneath the dignity of a court of equity to interfere, and compel the delivery of an heir-loom, a jewel, a picture, of family slaves, and the like, as the cases of *Fells vs. Read*, 3 *Ves. jr.* 70. *Pusey vs. Pusey*, 1 *Vern.* 273; *Walwyn vs. Lee*, 9 *Ves.* 24; *Lloyd vs. Loaring*, 6 *Ves.* 772; *Lowther vs. Lowther*, 13 *Ves.* 95; *McRea vs. Walker*, 4 *Howard*, 456, all unquestionably prove, then, indeed, it would be strange, if it would not protect trustees in an estate, where millions are involved; and where property of a peculiar, transitory nature, is required to be collected and administered by the trustees, as speedily as practicable, in order to preserve the trust estate. In the class of cases just mentioned, Lord Bacon, in his celebrated ordinances, says, it has been the constant and invariable practice of courts of equity to grant relief, by decreeing a specific execution of the chattel, from time immemorial. And in the case of *Harrison el al. vs. Rowan*, 4 *Wash. C. C. R.* 202, there was a bill filed by the trustee with others, claiming the benefit of the trust created by devise, to have the will established, that the trustee might be put in possession of the land, with the muniments of title, for the purpose of executing the trust. Objection was made to the jurisdiction of the court, because the remedy by ejectment, and other actions at law, was said to be complete. Justice Washington, in responding to the objection, said, that there was a number of cases in which a concurrent jurisdiction was exercised by the two courts; and that in many of them, the ground of the equity jurisdiction is not, that the common law courts are incompetent to afford a remedy, but that such remedy is less complete than a court of equity, from the nature of its organization, is capable of affording: that where a case is otherwise proper for the

jurisdiction of a court of equity, it is no objection to its exercise, that the party may have a remedy at law; and that the inquiry always is, *whether the case is within any of the general branches of equity jurisdiction, as claimed and exercised by the court.* The application of the principle here stated, puts for ever at rest the question of jurisdiction. The remedy at law, in the case cited, is far more adequate and complete, than it ever could be made to be when applied to the one now before the court. In both cases, the trust estate is sought to be protected and established, and the possession of the property to be surrendered to the trustees, to preserve the estate.

The prayer of the bill is, "To the end, therefore, that the trust may be established, and the complainants protected and aided in the performance and discharge thereof," that the defendants "be perpetually restrained from further intermeddling with any of the property, effects, or assets of the Bank, assigned and transferred over to the trustees." We hold this prayer to be tantamount to a prayer for the surrender and delivery of the property, effects, and assets of the Bank to the trustees. The trust cannot be established without the surrender and delivery. How can the assets be collected or administered, according to the deed, and applied in payment of the debts of the Bank, unless the trustees are put in possession of them, or have their control and direction? It is clear that the trustees and local directory cannot have the possession and direction of the property and assets, at one and the same time; one or the other of them must be entitled to the entire possession, or absolute control. The local directory, according to the charter of the Bank, never had any thing but a qualified possession or control over the property and assets of the Bank, always subject to the will and government of the Central Board. This Board, which represents the corporation, has, by its deed of assignment, transferred the property and possession to the trustees, who claim by virtue of its authority. This arrangement, if it be good, supercedes and annuls the jurisdiction of the local boards over the assets and funds of the Bank, and they have no other powers except what are retained by the deed. Again: the trustees can neither be protected or aided in the performance or discharge of their duties, unless the property and assets of the Bank pass into their possession,

and are put under their control. The bill prays that they be protected and aided in the performance of their trust duties. If they are entitled to this relief, can it be extended to them, while the property and assets remain in other hands? How can they proceed to collect the assets, pay the debts of the corporation, or receive renewals of the notes of the debtors, or do any other act required by the deed, when the means by which these things are to be performed, are withheld from their possession, and not liable to their government. Beside, they have already obtained possession of the property and assets of two of the Branches, and two more are making the necessary preparation for delivery and surrender; and the trust, to a considerable extent, has already been carried into operation. But a majority of the directory of one of the local boards refuse to surrender up the property and assets. Now, if they have a right to the possession and control of the funds and assets of their Branch, then we should have the strange anomaly presented, of the trustees administering the property and assets of the corporation, belonging to two or four of the Branches, as the case might be, and the local directory of the Principal Bank administering the funds and assets of their Board. If such a state of things is allowed, the interest of the State, the creditors, the stockholders, and the corporation itself, would all be equally prejudiced. A large amount of means appertaining to all these parties, would, in this conflict of authority, be wasted and destroyed. Is it just or reasonable, taking the deed to be valid, that one-fifth part of the local directory can defeat the objects of the other four parts, and overthrow the entire will of the corporation itself? While this controversy, in regard to the matter, is going on, it is clear, to our minds, that the possession of the property and assets of the Bank must remain, and be, either with the trustees or local board. One or the other is, unquestionably, entitled to it. To direct it to be placed in the hands of a third party, to await the ultimate decision of the cause, would be, to abstract the whole amount of assets in dispute from the use of the corporation, in the payment of its debts; and this would, necessarily and inevitably, produce great inconvenience and loss. Has a court of equity power to interfere, in such a case, to preserve the trust estate? The peculiar and transitory nature of the estate;

the absolute necessity that exists for the possession of the assets being confirmed, and put under the management of one or other of the contending parties, conclusively prove, that a court of equity, having all these facts before it, ought to make such an order in the case as will preserve the estate. And we cannot perceive how the trust can be protected or established, unless the assets and property are under the control and management of the trustees. Besides, judging from the agreed facts in the case, it seems to us to be the aim and desire of both the contending parties to test the validity of the deed, and that the right of possession should follow the right of property. These facts are upon the record, and they demonstrate that the defendants claim as a majority of the local Board. The resolutions of the Central Board, passed after the assignment was executed, were introduced by the defendants as evidence, for the purpose of showing, that they were not regularly notified of the execution of the bonds of the trustees, and that, therefore, they, as a local directory, were not bound to recognize the assignment. This evidence certainly shows the character in which they claim to hold, and their willingness that their title to the property should determine the possession. Again: these defendants, by introducing an agreed statement upon the record, that ten of the trustees were largely indebted to the Bank, clearly manifested their intention to attack the deed upon the ground of illegality and fraud, and not to contest the right of possession, unless the deed should be adjudicated to be void and fraudulent. The bill charges, that they resist the authority of the trustees, upon the ground that the assignment is void; and the evidence introduced by them, as far as it goes, corroborates and confirms the idea. The bill, then, does not stand alone, but is aided, in this particular, by the admitted facts in evidence, upon an agreed case between the parties, from which, it appears to us, that the right of possession is a secondary consideration, and made to depend and turn upon the authority and power which the respective parties were entitled to exercise over the management and control of the assets and effects of the Bank.

The effect of perpetually enjoining and restraining the defendants from further intermeddling with the property, effects, and assets of the Bank, necessarily places them in the hands of the trustees, and, there-

fore, there was no necessity for a general prayer for relief, or for a particular prayer that they be surrendered and delivered up. The very moment these defendants are restrained from all further intermeddling in the matter, thereupon the whole property, effects, and assets, which they claim to manage as a majority of the local directory, pass, and are transferred, according to the deed of assignment, and that gives the right of possession and property, agreeably to its provisions and limitations. We know of no rule in equity, where the facts are all before the court, and rightfully placed by the pleadings, that will prevent the chancellor from doing justice and equity in the premises. If the party should even fail, in his specifications, to ask for what he is entitled to receive, still, if the facts and statements in the bill authorize the general prayer, as made, and that necessarily includes the relief sought to be obtained, of course the chancellor is bound to afford it; and such we hold to be the case in the present instance. The ground upon which this Court will interfere, in this case, to restore to these trustees the possession of the assets, the right to the possession of which accompanies the right of property, is precisely the same assigned by Chancellor KENT, *clarum et venerabile nomen*, for the interference of the court, to prevent and remove an interruption to the possession of property in the nature of nuisance. The foundation of the jurisdiction in such a case, and the removal of such interruption by injunction, is said, by that great and good man, to be the necessity of a *preventive* remedy, where great and immediate mischief, or material injury, would arise to the comfort and useful enjoyment of property. "The interference," said he, "rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented." *Gardner vs. Newbury*, 3 *J. C. R.* 165. It is true, that the general principle is, that the court will not, by a preliminary injunction, change the possession of property, and transfer it to the complainant. But this is a rule to which there are, and must be, exceptions. If the possession of the defendant is a mere interruption of the prior possession of the plaintiff, that interruption will be removeo by injunction, if the right is clear and certain, without driving the plaintiff to establish his title

at law. In this case, by the *agreed facts*, the whole question, in truth, turns on the validity of the deed; and, if it be valid, the plaintiff's title and right to possession are clear and certain. Moreover, the general rule only holds in cases where the right to the possession cannot be settled until a final decree, as where partners come into a court of equity for account and settlement, in which case a receiver would be appointed. If, in this case, the trustees are entitled to relief, the court cannot mock them with the shadow, and deny the substance. To deprive the defendants of possession, without giving it to the trustees, and therefore to appoint a receiver, would be to destroy the trust, and totally defeat the objects of the deed, besides exposing the transitory and peculiar property, and the State, to irreparable injury. The Court will not say that the trustees have a right to come into equity for protection, and can, in no other way, be protected, and, in the same breath, that, by so doing, they must necessarily destroy the trust. They are the officers of the court, for, by filing this bill, and submitting themselves to its jurisdiction, they stand in the same attitude as if they had originally been appointed by the Court; and the Court will so shape its remedial process as fully to protect them, and enable them to execute their trust, and to administer the assets which the assignment has placed within the jurisdiction of the Court, and, therefore, in this point of view, they are to be regarded but as receivers.

When the bill states, in this case, that the deed of assignment was regularly executed, and specifically sets out all of its provisions; that it was made upon a good and valuable consideration; that the trustees had accepted the trust; that the defendants, being a majority of the local directory, had refused to surrender up the trust estate, or permit a schedule to be made of the property and assets of the Bank; and that the trustees sought to have the trust estate protected and established, every averment was made that was necessary to give to the Chancellor clear and unquestionable jurisdiction. And these averments, when coupled with a prayer to have the trust estate protected and established, and the defendants perpetually enjoined from further intermeddling with it, entitled the complainants to have the property restored to them, and the title confirmed, if, upon inquiry, the deed

should not appear to be fraudulent. We hold the jurisdiction in the case, and the relief sought for, to be within the legitimate exercise of one of the great and primary branches of equitable relief, in regard to trust estates, which has grown up with the chancery system, and been indissolubly interwoven with it for centuries.

Before we proceed to discuss and determine the several points that arise upon the deed of assignment, it is proper to extract its general and leading features, and such other portions of it as may be thought to bear upon these questions.

The assignment was regularly executed and acknowledged, in the city of Little Rock, in the State of Arkansas, by the Real Estate Bank, in the name of the President, by virtue of her official seal, upon the one part, and by ten trustees upon the other part. It was executed in obedience to an ordinance of the Central Board; and it is admitted that the trustees, who signed the deed, composed a majority of the Central Board when the ordinance was passed, and that they are largely indebted to the corporation. The objects of the assignment were stated to be, to secure and pay the creditors of the Bank, to call in the circulation, to protect its debtors from ruin, and enable them to pay their debts. The reasons for making the assignment are, that the Bank was unable to pay the immediate demands against it, to resume specie payment upon its notes, or pay the interest upon the State Bonds, and to protect its debtors from oppression by the noteholders. The assignment is of all the property and assets of the Bank, to fifteen trustees, five of whom have not, as yet, signed the deed. The trustees are apportioned into five committees, and each committee consists of three members; one is placed at the Principal Bank, and each of its Branches. An Executive Board is formed out of each of these committees, and consists of five trustees. The duties of the committees are made to consist, principally, in taking charge of the books and papers of the respective offices; in attending to the arrangement and collection of debts due to the Bank; taking renewal of notes; determining upon the sufficiency of the security offered; and to forward the funds on hand to the Executive Board, and to report to it at its regular meetings. The Executive Board is required to make settlements, pay off all liabilities, and to do all other

acts and things which, by the deed of assignment, the trustees were authorized to do, when these duties do not come in conflict with those conferred upon the committees by the assignment; and they are authorized to delegate certain duties to the committees. The committees fill their own vacancies, if any occur; and, failing to do it, in a given time, the vacancy is to be filled by the Chancellor. The committees have authority to appoint their own officers, and so has the Executive Board. The salaries of officers are fixed by the deed. The trustees are required to give bonds to the attorney of the Bank, for the faithful execution of the trust; and the Cashier and clerks to give bonds to the trustees. The salaries of the trustees, and all the officers, are fixed by the assignment. After the expiration of two years from the assignment, all the trustees are required to meet, by an order of the Executive Board, thereupon to elect five of their own number, who shall be sole residuary trustees; and all the books, records, property, and assets of the Bank shall, from that time, vest absolutely and unconditionally in them; and the duties of the Executive Board and of the committees shall thereafter cease, and finally determine. The directory of the respective local Boards, and the members of the Central Board, are required to be kept up, according to the provisions of the charter. They are to possess no power or control over the funds and assets of the Bank, but are placed as a kind of supervisor over its affairs, to inspect and watch over the conduct of the trustees. The trustees are required to keep a full and complete account of all their acts and doings, and their books and proceedings are required to be constantly kept open for the inspection of the stockholders.

The assets of the Bank are required to be realized as fast as practicable, by the trustees; and, forthwith, after the receipt of money arising from any source, the funds are to be applied in the payment of the debts, in the following manner and order:

First—Paying all balances due the officers of the Bank.

Second—The deposites.

Third—Calling in the outstanding circulation.

Fourth—The interest upon all State Bonds, except those hypothecated to the North American Trust and Banking Company.

Fifth—Bonuses due the State.

Sixth—The principal of all the State Bonds, except those hypothecated.

Seventh—Whatever is legally due upon the Bonds hypothecated.

The fourth and sixth classes are to be paid rateably. The circulation is required to be called in and cancelled. All persons indebted to the Bank, with certain exceptions, are to be allowed to pay by instalments of one-eighth per annum; the whole to be paid by the year 1851, by discharging back interest, and interest in advance for one year, by the 1st January, 1843. The stock debts to be paid according to the charter; and all the debts to be paid in paper of the Bank. Money due upon judgment or suit, is made payable immediately, and in specie, where the debt has been attempted to be disputed; with a discretion to the trustees to extend the time. Power is given to the trustees to compound debts due to, or by, the Bank; to receive or dispose of property in payment of debts; to remove liens to save debts; to sell property for cash or credit; to compromise disputes, or submit to arbitration. A general power is given to the trustees, to turn over all the assets of the Bank to the bond-holders, they first releasing the stockholders from all liabilities, and indemnifying the State.

The first inquiry that arises upon the deed of assignment is: can a debtor, in failing circumstances, make a *bona fide* assignment of all his property to his creditors, in payment of his debts, or to trustees, for their benefit; and whether a corporate body, unless restrained by its charter, or some general law of the land, can execute a like conveyance under similar circumstances? Or, in other words, whether the law places natural and artificial persons upon the same footing in regard to such assignments?

It never was nor can be a question, either in England or the United States, but that a solvent debtor could make a valid assignment of his property to his creditors, to pay his debts. It is impossible that a question of fraud can arise in such a case; for that would be denying a man's right to pay a just debt, which certainly never yet has been, and never will be, a matter of dispute in a court of justice. The cases in which the question of fraud has come up, have been, where

a debtor was in failing or insolvent circumstances; and, in such a case, it is now perfectly well settled, in both countries, that an individual debtor has a right to prefer one creditor, or set of creditors, to another, in all cases not affected by the bankrupt system or insolvent laws. He may make the assignment for the benefit of a single creditor, in exclusion of all others; or, he may distribute his property in unequal proportions, to a part or the whole of them. No matter how, or upon what principles the distribution is made, provided the debtor assigns the whole of his property for the payment of his just debts. In such a case, neither law nor equity inquires into the reasons or motives of his preference. The right to prefer may have originally rested on the supposition that just and proper grounds of preference did in most cases exist. Be the reason of the rule what it may, the abstract right itself cannot now be questioned, either in law or equity, if the assignment be *bona fide*, and free from the imputation of fraud.

The right of a creditor to make an assignment of all his property for the payment of his just debts, necessarily results from that absolute ownership and dominion which every man claims over that which is his own. The exercise of this right is but the honest performance of a duty, which cannot be deemed a fraud. Whatever may have been the foundation of the rule, it has now become absolute, without any regard to the reason upon which it is supposed to depend. In *Grover vs. Wakeman*, 11 *Wend.* 181, it is said that "it is now too late to agitate the question, whether these assignments, either partial or general, are sustained by considerations of true policy and wisdom." They have now become thoroughly incorporated into our whole system of laws, and form a large and integral portion of the municipal regulations of the country. All that remains for the Court now to do is, to see that these assignments fairly appropriate all the debtor's property, or such portions of it as he undertakes to transfer to the payment of his just debts; and that they are not made the instruments of fraud and injustice, in placing his property beyond the reach of his creditors, or of reserving it secretly for himself and family. The assignment of a debtor's property, if made *bona fide* and free of fraud, was held by Justice STORY, in *Halsey et al. vs. Whitney et al.*, 4 *Mason*, 210, to be good; and so far, says that eminent and learned Judge, from being

prohibited, (except when they fall within the operation of the laws of bankruptcy), are expressly encouraged and upheld by the principles of the common law. And it was remarked by Lord ELLENBOROUGH, in *Pickstock vs. Lyster*, 3 *M. & S.* 371, that such assignments are to be referred to an act of moral duty, rather than of fraud. And the Court, in pronouncing judgment in the case of *Holbird vs. Anderson*, 5 *Term Rep.* 235, declare such assignments to be the most honest act that a party could do. It is merely paying one's honest debts, which is certainly a high moral as well as legal duty. And this doctrine has been asserted in a case where the very object of the conveyance was to prevent a judgment creditor from obtaining a satisfaction out of the property of his debtor by execution. The Court held, that it was not sufficient that the creditor was defeated and delayed in his remedy by such a conveyance; but the act, to be void, must be proved to be fraudulent. *Halsey vs. Whitney*, 4 *Mason*, 229. *Rex vs. Watson*, 3 *Price*, 6. *Mackie vs. Cairns*, 5 *Cowen*, 547. *Murray vs. Riggs*, 15 *J. R.* 571. 2 *J. C. R.* 565, *S. C.* *Vredenburg vs. White*, 1 *J. Cas.* 166. *Hatch vs. Smith*, 5 *Mass.* 42. *Hastings vs. Baldwin*, 17 *Mass.* 552. *Wilt vs. Franklin*, 1 *Binn.* 502. *Livington vs. Bell*, 3 *Watts*, 198. *Hower vs. Geesaman*, 17 *Serg. & R.* 251. *Wilden vs. Wynne*, 6 *Cowen*, 284. *Todd vs. Buckman*, 2 *Fairf.* 41. *Andrew vs. Ludlow*, 5 *Pick.* 28. *Canal Bank vs. Cox*, 6 *Greenl.* 395. *Baxter vs. Wheeler*, 9 *Pick.* 21. *Brashear vs. West*, 7 *Peters*, 608. *Wakeman vs. Grover*, 4 *Paige*, 23. *Maitland vs. Newton*, 3 *Leigh*, 714.

It is perfectly clear, both upon authority and reason, that if a debtor, in failing circumstances, can make a valid assignment of all his property to his creditors, to pay their debts, he can execute a like conveyance to trustees or third persons, to discharge the demands of his creditors. The trustees are the medium through which the payment is directed to be made. They are seized of the legal estate for the benefit of the creditors, all equity being in the *cestui que trust*, and the assignment only constitutes the means and appointment by which the debts are to be paid. If a debtor can pay his debts directly to his creditors himself, what is to prevent him from directing third persons or trustees to pay them for him? If, in one instance, it is a moral as well as a legal duty for the debtor to pay, in the other it is but the

performance of the same act, and of course must be supported by the like just consideration. The *quantum* of debt cannot alter the right to make payment, no more than can the means by which the debts are directed to be paid; and so it was expressly decided in *Anderson & Wilkins vs. Tompkins et al.*, 1 *Brock. Rep.* 446. Precisely the same point was ruled in *Marbury vs. Brooks*, 7 *Wheat. Rep.* 556, and in 11 *Wheat Rep.* 78, and in *Brashear vs. West et al.*, 7 *Peters*, 609. Indeed, such assignments are usually made to trustees, because the mode of distributing the fund is, in general, far more convenient and equitable, than for the debtor to make payment directly to the creditors themselves. It is doing the same thing indirectly, instead of directly, and in a manner more consistent with the principles of justice and equity; and this opinion the authorities conclusively prove.

This brings us to inquire into the nature and properties of public corporations, and to see whether they possess the same power of making assignments of all their effects and property, that individual debtors do, in like circumstances. A corporation, or body politic, is described by JUSTINIAN, to be "those who are permitted to form themselves into a body, under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in the similar cases of a republic, property in common, and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community, may be transacted." *Pothier's Pand. of Justinian, Book* 3, *p.* 109, *Paris Ed.* 1833.

"A corporation (says Kyd) is not a mere capacity, but a political person, in which many capacities reside." "It is an artificial person, a succession of individuals, or an aggregate body, considered by the law as a single continuous person, limited to one particular mode of action, and having power only of the kind and degree prescribed by the law which conferred it." *Kyd on Corporations*, 13. A still more clear and striking exposition of the term is given by Chief Justice MARSHALL, in the celebrated case of *Dartmouth College vs. Woodward*, 4 *Wheat.* 518, where he says, "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those proper-

ties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." And among its most important attributes, are its immortality and individuality; properties by which a perpetual succession of many persons may be kept up, so that they may act with the will of a single individual. 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 punishable 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 of the grant. This investiture of its personality by law, endows the corporation with certain powers and franchises, which it exercises by means of its legal or duly appointed agents.

Having its individuality conferred upon it by law, it unquestionably possesses all the attributes and properties of a natural person. It can acquire and transmit property, according to the provisions of its charter, so long as it confines itself to the objects and purposes of the grant. To deny to a corporation, whether public or private, unless it is restrained by the provisions of its charter, the power of making an honest assignment of all its assets, to pay its debts or creditors, is literally to disfranchise it of all its rights and privileges, and thereby to repeal the act of incorporation itself. Being a creature of law, so far as the investiture of the rights of its individuality goes, to that extent, and no more, it is placed on an equal footing with a natural person. The principles of ancient common law, as well as the principles of natural justice, favor and encourage the alienation of property, and especially of personal chattels. Unreasonably to attempt to fetter this power, or uselessly encumber its free and salutary exercise, is directly to invade public liberty, by assailing the rights of private property. The rights of individuals and of corporations are both secured and guarantied by law; and, so far as they are analogous, they possess the same immunities and qualities of acquiring and transmitting property. To endeavor to draw a line of separation between them, except that which the law prescribes, is to confound the plainest dictates of justice and of common sense, and at the same time obliterate all distinctions

between right and wrong. The assertion of such a principle, if carried into practical operation, would enable the banking corporations of the country to defeat the claims of their creditors, while it would permit them to perpetuate a gross fraud upon the community, by coercing payment from their debtors, and refusing to make payment themselves. It would, in effect, be saying, that these corporations could not be put into liquidation by any means, however much it might be desired by their agents and servants, or imperiously called for by the condition and exigency of public affairs. Such a proposition, we apprehend, will never meet the approbation or support of a court of law or equity; nor find favor or protection in a government that proves its title to its freedom by exhibiting the records of its justice. If the power that created these corporations, or that rightly represents their wills, possesses no means of winding up their affairs, by directing an assignment of all their assets in payment of their debts, then indeed we are hopelessly doomed to suffer the incalculable evils of a depreciated paper circulation. The bare suggestion of such a principle comes with its own unqualified condemnation.

The principle here stated is expressly recognized in *Catline vs. The Eagle Bank*, 6 *Conn. Rep.* 233, where the mortgage and assignment to the Savings Institution, a preferred creditor by the corporation, was held to be good and valid. And in the *Union Bank of Tennessee vs. Ellicott et al.* 6 *Gill & John.* 375, the court say, "It is our opinion, that the assignment was a good, valid, and effectual deed, and that the president and directors of the bank were authorized to transfer all the property of the corporation for the payment of the debts." *Savings Bank vs. Baten*, 8 *Conn.* 512.

The assignment of the Maryland Bank to Trustees, is very similar to the case now before the Court. The assignment was made by order of the directory, to trustees, to pay its debts; and the reasons assigned are the same. The corporation in that, as in this case, made the assignment under their official seal. In the case of the *The State vs. the Bank of Maryland*, 4 *Gill & John.* 219, it was expressly decided, that "a corporation, as well as an individual, is bound to provide for the discharge of its debts;" and whether the payment is made with money from its vaults, or by the sale or assignment of its effects,

for that purpose, can make no difference. The principle is precisely the same. As its property may be seized and sold, as in the case of an individual, under execution, for the payment of its debts, what reason, then, can be given, why the corporation itself, instead of waiting for judgment and execution, cannot sell and convey its own property for the payment of its debts? No satisfactory reason has been advanced, and "none (says the court,) can be perceived." A corporation, then, in failing circumstances, unless restrained by some provision in its charter, (which is not pretended to be the case here), may assign its property to preferred creditors, or to trustees, for their benefit, as well as individuals in like circumstances. And this is true, whether the assignment be partial or general, if it transfer the whole fund in good faith, and without fraud. The power to make the assignment grows out of the relation of debtor and creditor; and a bank, like an individual, may assume to itself, by its charter, this relation. The law holds it to be its duty; and when a debtor distributes all his property among his creditors fairly, for the payment of his debts, no one can reasonably complain of the act, or question his power or its propriety.

The assignment now under consideration is taken out of the operation of the general bankrupt law, by an express provision; and this State has no insolvent laws affecting the rights and franchises of corporations.

Whether the assignment amounts to a forfeiture, or not, of the charter of the Bank, is a point upon which we express no opinion, as that question is not now properly before us, upon the present application for an injunction. Besides, no objection has been taken to the deed upon the ground that it is a forfeiture of the charter. But should the stockholders or directory ever again attempt to exercise the privileges of banking, the State is fully authorized to sue out a *scire facias* at any time, and test the question of forfeiture.

Having shown that the Real Estate Bank of the State of Arkansas can make a *bona fide* assignment of any part, or all her assets, to pay her debts, it now remains to be seen what power represents the will of the corporation. Is it the stockholders, the local directory, or the

Central Board? It cannot be the stockholders, for they have no right or authority to bind the corporation, either in their individual or collective capacity. They no more represent the corporation, in a legal point of view, than do the people the legislative powers of the government. Their rights and franchises are fixed by the charter, and so far they can go, and no farther. It is equally clear that the several local boards do not represent or embody the will of the corporation; for, if they did, then there would have to be as many corporations as there were wills in these directories; and, consequently, there would be more banks than two, which is expressly forbidden by the constitution. This question is no longer left open for investigation or decision. The point was fully and conclusively adjudged by this Court, in the case of *The State vs. Ashley and others*, 1 *Ark.* 548, 549, 550, 551, 552. The respective powers of the central and local boards were then analyzed and compared with each other, and their several jurisdictions and authorities specifically defined. The Court held, in the opinion then delivered, that the duties enjoined and powers conferred upon the Central Board, by the charter, were of the most general and important character, and that it was 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 local agencies or offices, in order that the credit and welfare of the Bank might be kept up and preserved. The general interests of the Bank are committed to its custody and care, by express grant; and so is the power to settle and control the general accounts of the institution. It is invested with complete and plenary power for the well-governing and ordering the affairs of the Bank; and, finally, it is said, "that the Central Board represents the unity, sovereignty, and indivisibility of the corporation, by means of its legislative powers." The corporate existence of the Bank, which is composed of separate and component parts, is held together by this bond of union; and it is the *Central Board alone* that makes it, in the language of the constitution, *one banking institution*, and *one indivisible corporation*. It is a perfectly clear position, then, that the Central Board alone is the organ by which the Real Estate Bank of the State of Arkansas speaks and

acts; and its voice and mandate must be respected and obeyed, while the government of its affairs continues to move within the appropriate orbit of its charter.

If this be true, it is manifest that the legal title and possession of all the property of the Bank, and all its assets and effects, appertain, as matter of right, as well as of duty, to the corporation. The argument, then, that the Central Board could not order the Bank, by her corporate seal, to pass the legal right and possession, by a *bona fide* assignment to trustees, for the benefit of her creditors, utterly fails. It is true, that a trust estate can only be created or carved out by a party who is entitled to the fee, or who possesses the legal interest. The Bank has the legal estate; and being entitled by law to its government and direction, she unquestionably possesses the power of appointing trustees to manage the estate. A corporation can only act by agencies; it can do nothing by itself. Being, in contemplation of law, a person, invisible and intangible, its authority and power can only be felt and seen by the acts of its agents, who are its officers and servants. In the present case, this agency has acted by the President of the Bank, in the name of the corporation, and under the authority of its official seal, by making the assignment of all the property of the Bank, and its assets and effects, in trust for the benefit of its creditors.

It is a universal rule, in the construction of all deeds, that fraud is never to be presumed. The reason of the rule rests upon such plain principles of justice and propriety, that it needs not the force of argument, or weight of authority, to support it. The party that charges fraud is bound to prove it, and that, too, by legal and competent evidence. This evidence may be found in the deed itself, or it may be established by other affirmative proof. But still, in both cases, fraud, either actual or constructive, must be brought to light with reasonable certainty, and shown to be fairly applicable to the agreement sought to be impeached. Mere conjecture or surmise, however probable or persuasive, is never allowed to establish fraud. To impute legal or moral guilt upon such grounds, would be to overthow the whole doctrine of the law of evidence, and produce the utmost uncertainty and injustice in the construction of all contracts or agreements.

Keeping in view this plain and familiar principle, we will now proceed to analyze the deed, and to compare its provisions with the rules of law and the principles of equity. It is proper here to remark, that, as the trustees have come into a court of equity, and have asked its aid to assist them in the trust, by requiring the assets of the Bank to be delivered into their hands, the deed must show, upon its face, that it has all the formalities and solemnities that the law requires, and that it contains no unjust or inequitable provision. In either of these events, it will be held to be invalid, and, of course, the trust under it cannot be protected or enforced. The maxim is, if you ask for equity, you must do equity.

Has the deed the proper parties? Are there a legal grantor and grantee? The deed was duly executed and acknowledged, in obedience to an ordinance of the Central Board, by the President of the Bank, under the official seal of the corporation, and ten trustees, by their private seals, who composed a majority of the Central Board that passed the ordinance. This being the case, it is said, that neither the Bank nor the stockholders were represented in the contract, or that there was not the junction or assent of the two distinct and separate wills, which is necessary to make a binding agreement. Is this position true? The definition and nature of a corporation show it to be an artificial being, invisible and intangible, speaking only through its constituted organ, under its official seal. This legal personage, invested with the individuality of a corporate being, is wholly distinct, and widely separated from the agents and officers of the Bank, through whom the action of the corporation is felt and seen. The corporation of the Real Estate Bank of the State of Arkansas *is one thing*, and the directors and stockholders an *entirely distinct and different thing*. The Central Board represents the legislative functions of this corporation, and its will, when it has the sanction of official authority stamped upon it, speaks in the name and in behalf of the corporation. In the present case, it is the corporation, acting under her official seal, that is the grantor, and the trustees are the grantees. In their character as trustees, they are seized of the legal interest, for the benefit of the State, the creditors, and the stockholders, holding the fund to be distributed agreeably to the provisions of the deed. They are, cer-

tainly, not the corporation, either in point of fact or law. That the trustees constituted a majority of the Central Board that passed the ordinance, does not prove that this ordinance divested the corporation of the power to contract, or in any manner invaded its rights or franchises. By becoming trustees, they may, and probably do, cease to be directors. A corporation is compelled to act by agencies, but, when the act is completely executed, it is then the act of the *corporation itself*, and, as such, is entitled to full faith and credit. There were, in the present case, then, two distinct and separate wills, founded upon a valuable consideration, entering into, and forming, the deed of assignment; the corporation of the Real Estate Bank of the State of Arkansas, *upon one side*, who was *the grantor*, and the trustees upon the *other side*, who were the *grantees*. The deed of assignment is, then, the contract of these two parties. The corporation is, in law, a single person, totally distinct from the directory or corporators that compose it; and these latter individuals have no greater interest in the corporation, or control over its affairs, than the qualified ones of electing its officers, receiving the dividends and profits, and doing whatever other things accrue to them as rights, by the act of incorporation. *Warner vs. Beers*, 23 *Wend.* 103, 173. *Pratt vs. Bacon*, 10 *Pick.* 126.

The assignment, in this instance, seems to us not to be wholly without warrant or precedent. Similar conveyances, embracing the like principle, were executed by the Bank of Maryland, and the Berkshire Bank of Massachusetts. The directory, in the first case, appointed Thomas Ellicott sole trustee, and he afterwards joined with the Bank *in conveying to himself*, and two other trustees. In the second case, the directory, consisting of four persons, of whom the President was one, appointed the President an *attorney in fact*, with power to assign a negotiable note, in payment of a note of the Berkshire Bank. In both cases, the deeds were held good, and the Supreme Court of Massachusetts, (11 *Mass. R.* 292), in delivering the judgment in *The Northampton Bank vs. Pepoon*, say "there is no reason why the power should not be exercised by one of the body which authorized its execution, with the consent of the rest, who sanctioned it by their votes." Now, if the directory could appoint one of their body an attorney in

fact, to make the assignment, no reason can be shown why they could not have empowered any number of that body to perform the same act. And we have already seen, that the quantum of interest assigned can make no difference in principle. If one note could be thus assigned to pay a specific debt, all the assets, surely, might be conveyed, in payment of all the liabilities of the corporation. But it is contended, that the Central Board, being trustees themselves, could not delegate their powers. The answer to this objection has been already given: They are not trustees in the technical meaning of the term. While in the discharge of their appropriate duties as a Central Board, they were not amenable for their conduct to a court of chancery. In ordering the assignment, they acted in the capacity of representatives, declaring the sovereign will of the corporation. Their ordinance, then, was not, legally speaking, a delegation of power, but it was simply the appointment of trustees to pay the debts of the corporation. This they had a right to do. The deed, then, in this respect, possesses all the requisite formalities of law, and, of course, must be held to be good, unless it be shown to violate some other legal or equitable principle applicable to such conveyances.

Another objection taken to the face of the deed is, that all the trustees did not sign it, and, therefore, it is void. Ten out of fifteen signed: the other five have not, as yet, put their names to it. Is such a signing good? We certainly hold it to be so. It was not necessary for any of the trustees to have signed, to make the deed valid. All that equity requires, is their assent and acceptance of the trust. If they have done any one act by which their assent may be implied—for instance, if they have agreed to take upon themselves the execution of the trust, equity holds them bound for its performance, and will not release them from their voluntary obligation.

There is no necessity for the execution by the trustees. Any act done in relation to the property, showing that they claimed it, as trustees, or that they desired to reduce it into possession, undeniably proves their assent.

The moment the deed was made, the right of property passed and vested in the assignees; and the relation of trustee and *cestui que trust*, as between them and the creditors, was at once established, so that

the assignor could not recall the deed. *Cunningham vs. Freeborn*, 1 *Edw.* 262. *Ellison vs. Ellison*, 6 *Ves.* 656. *Brun vs. Winthrop*, 1 *J. R.* 329. *Brooks vs. Marbury*, 11 *Wheat.* 78. *Nicholson vs. Wardsworth*, 2 *Swans.* 370. *Adams vs. Taunton*, 5 *Mad.* 438. *Bonefant vs. Greenfield*, 1 *Leon.* 60. *In the matter of Stephenson*, 3 *Paige*, 420. *King vs. Donnelly*, 5 *Paige*, 46. *In the matter of Schoonhover*, 5 *Paige*, 559.

That assignees had not executed the deed, or entered into covenants to perform the trust, is no objection. If the assignee has accepted the trust, and is ready to take possession, and enters upon the performance of the trust, he is as much bound as if he had covenanted; and this principle the case of *Cunningham vs. Freeborn* proves. Moreover, where assignees do not assent, at the time, but afterwards, their assent relates to the time of executing the deed. In no point of view, then, does the validity of the deed depend upon the execution by the trustees, unless there should be some express covenant, making it indispensably necessary that they should sign; which is certainly not the case here. *Wilt vs. Franklin*, 1 *Binn.* 518. These authorities seem to us unquestionably to prove, that there was no necessity for any one, much less for all, of the trustees to sign the deed, to make it valid. *Nicholson vs. Wardsworth*, 2 *Swans.* 370. *Adams vs. Taunton*, 5 *Mad.* 439. *Bonefant vs. Greenfield*, 1 *Leon.* 60. The law is, that even creditors are presumed to give their assent to the deed, as it is made for their benefit, unless they come in and specially object to it. Deeds of trust are often made for the benefit of persons who are absent, and even for persons not in being; whether they are for the payment of money, or for any other purpose, no expression of the assent of such person is necessary. And such trust is always held to be executed, upon the principle that the deed is complete when the trustees take upon themselves its performance. It is not even necessary to the validity of such assignments, that the creditors should be consulted. Creditors are always presumed to be willing to receive their debts from any hand that will pay them. And these principles have been fully recognized and conclusively settled by the Supreme Court of the United States, in *Brooks vs. Marbury*, 11 *Wheat.* 78, and in *Brashear et al. vs. West*, 7 *Peters*, 608.

But even suppose that the ten trustees, who signed the deed, were incompetent to take, still, the other five being competent, a court of equity would not permit the trust to fail; for it is a rule in equity which admits of no exception, that a court of equity never wants a trustee. Whenever a trust is created, either by deed or will, or by operation of law, and no person is appointed trustee, equity will follow the estate, and cause the trust to be executed. If no trustee is named, or he dies, or the trust devolves upon an incompetent person, the trust shall prevail, and the Chancellor will appoint trustees. *White vs. White*, 1 *Bro. C. C.* 12. *Att'y Gen'l vs. Rupin*, 2 *Peere Wms.* 425. *Ellison vs. Ellison*, 6 *Ves.* 663. 2 *Story's Equity*, 241. *Co. Lit.* 113, *a*, *n.* 1. *McCarty vs. Orphan Asylum Society*, 6 *Cowen*, 337.

Page 125 Atty Gen v. Rupin Wholly Irrelevant

It is contended that, as the entire legal estate vested by operation of the deed in the whole number of the trustees, of course it cannot, afterwards, be divested out of them, and the legal estate pass into a less number. This argument takes for granted the point in controversy to be proved. The vesting of the estate is by operation of the deed. If the deed be valid, it must all stand together, provided its parts can be made to harmonize. The trustees take under the deed, and by its authority. When that authority is limited to a particular period of time, and made then to terminate, of course the estate vests according to the condition of the grant. That condition is, that, at the expiration of two years from the execution of the deed, the whole trust estate shall vest, solely and absolutely, in five residuary trustees. It is certainly true, that the estate must vest according to the provisions of the deed, and the trustees hold under it agreeably to its legal tenor and effect. Now, to say that the deed is valid, and the condition void, would be to give to the instrument such a construction as would practically defeat its true object and design. This provision of the deed is nothing more nor less than an agreement among the trustees, to elect five out of their number, after the expiration of two years, in whom the whole trust estate shall, thereupon, absolutely vest. It is the same thing as if the deed had contained a clause, that, if ten of the trustees had resigned their office, their places should not be filled, but that the other five should administer the whole fund. Now, we hazard nothing in saying, that such a clause, inserted in a deed,

would not vacate it. Until the contingency happens, upon which the estate vested, the whole trustees are seized with the legal fee, subject to the condition of the deed. Whenever the condition takes effect, their right to continue trustees depends upon their election to fill the office. In the case of the Bank of Maryland, after the assignment was first made, the trustees were increased from one to three, by the second deed, subsequent to the first conveyance. Why, then, may they not be diminished from fifteen to five by the first original deed, containing such a condition? If there can be any sensible distinction drawn between the two cases, we confess we cannot perceive it. To give to a party a right to make an assignment, according to the exercise of his own free will, and, at the same time, to deny him the choice of his own form of the deed, would, in effect, be to destroy the privilege granted to him.

We will now look into the provisions of the deed, and determine the true nature and character of the assignment.

The Bank has assigned all her real, personal, and mixed estate, together with all her assets and effects, to the trustees, to pay her debts and creditors. There is no secret reservation in favor of herself, nor is there any resulting trust created for the benefit of the State or stockholders. All the property is assigned, to pay all her debts; and she has made it the duty of the trustees to proceed, as speedily as possible, to realize all her means, and *apply them, forthwith*, to the payment of her debts, in the manner and order designated. Is that order just and equitable? We have already shown that the power to make an assignment of all a debtor's effects, gives him the privilege of preferring one creditor, or set of creditors, to another, provided, that, in the exercise of the right, he commits no fraud. There has been no exception taken to the manner of payment of any of the classes of the debts mentioned in the deed, except as to the payment of the seventh and last class, which is said to be unjust and inequitable. The deed discloses, on its face, enough of the history of the five hundred bonds of one thousand dollars, which are in the hands of Holford & Co., of London, to have made it necessary to insert a particular clause in the assignment to meet that case; and it states the true reason why these bonds were postponed to the seventh and last

class. The Bank had hypothecated the bonds to the North American Trust & Banking Company, for a given amount, and by them they were sold or pledged to Holford & Co. for a much larger amount. Holford & Co. claim to be innocent purchasers of the bonds, for a valuable consideration, without notice; and, therefore, they insist that they are entitled to full payment upon the bonds. In behalf of the Real Estate Bank, it is said, that the North American Trust & Banking Co. improperly sold and delivered them to Holford & Co., in violation of their agreement with the Bank, of which Holford & Co. had notice. Now, the deed provides, that the trustees shall pay whatever amount, with interest and exchange, was actually received by the Bank, upon the hypothecation of the bonds, in the event that they can be cancelled or delivered up. This provision is just and equitable. But had the deed stopped there, and contained no other clause in reference to the matter, it might, and probably would, have committed a fraud upon the rights of Holford & Co. provided they were innocent purchasers without notice. But it goes on expressly to declare, that "whatever legal amount shall be found to be due upon the bonds, shall be paid." What that amount is, the Bank does not pretend to fix, but leaves the matter open for an amicable arrangement, or for legal inquiry and decision. The object of the deed, so far from intending to defraud Holford & Co. of payment, or unnecessarily to delay or hinder them in the collection of their debt, expressly covenants, that whatever is due them, either legally or equitably, shall be paid, whenever ascertained. It leaves the courts of justice open to these creditors, and it invites them, by compromise or suit, to ascertain what amount is legally or equitably due. And that amount, be it greater or less than the sum received by the Bank upon the hypothecation, it pledges all the assets of the Bank to pay, and commits its funds to the hands of the trustees for that purpose. It is true, it postpones the payment to the last class, but that neither invalidates the claim, nor questions its equity. In *Holbird vs. Anderson*, 3 *T. R.* 235, and in *Pickstock vs. Lyster*, 3 *M. & S.* 371, it is laid down, that a sale, assignment, or other conveyance, is not necessarily fraudulent, because it may operate to the prejudice of a particular creditor. The Bank is liable for the payment of these as well as the other bonds.

Should her assets, however, unfortunately prove insufficient, then the State is responsible for whatever amount is justly and equitably owing by her; and the holders of these bonds, as well as those of our other public securities, need be under no apprehension, but that she will faithfully and honorably discharge, to the utmost farthing, all her engagements, regardless alike whether they be in the hands of foreign or domestic capitalists. The principles of private virtue, as well as of public justice, (which we are confident our citizens and our government will ever respect and obey), utterly forbid the idea that this young, free, and prosperous State, will ever permit one jot or tittle of her plighted faith, or recorded honor, to fall to the ground.

It is admitted, by agreement upon the record, that ten of the trustees are largely indebted to the Bank; and that being the case, it is asserted, with much earnestness and confidence, that a corporation cannot make its debtors trustees for the payment of its debts; for that would release their own liabilities, and thereby perpetrate a fraud on the rights of creditors. If a creditor appoint a debtor his executor, it is unquestionably true, that such nomination shall operate as a release and extinguishment of the debt, on this plain principle, that a debt is merely a right to recover the amount due by way of action. And as the executor cannot maintain a suit against himself, his appointment by the creditor to that office discharges the right of action, and, with it, the legal remedy for the debt. It is, in fact, a release at law of the debt, by an extinguishment of the right to recover it. The legal remedy is for ever destroyed, by the act of the party himself; but this is not the case, where that remedy is suspended by the act of law, as the administration of the effects of a creditor. This is only a temporary deprivation of the remedy, by the legal operation of the grant. In equity, the rule is different. It will never permit the testator, by constituting his debtor his executor, to disappoint or annul the claims of his creditors. If there is not a sufficiency of assets to pay the debts, the debt of the executor becomes assets for that purpose, and the duty remains unchanged to contribute, although the action at law is gone. It would be highly unreasonable, as well as unjust, to permit the claims of friendship or affection to defeat the rights of justice or of honesty. In respect to legatees, equity will,

generally speaking, allow the appointment of a debtor executor to operate as a discharge of his debt. This rule, however, is subject to a great variety of circumstances. Equity will not release the debt against the legatees, if there be a reasonable presumption that the testator did not intend to extinguish the debt; for the debt is considered in the light of a specific bequest or legacy to the debtor, and for the express purpose of discharging his liability. If the testator leaves the executor a legacy, it is a sufficient indication that he did not mean to release the debt; and, in such a case, the executor will be considered as a trustee for the amount of his debt, to the residuary legatee or next of kin. *Carey vs. Goodrich*, 3 *Bro. C. C.*, 310. *Toller on Executors*, 350. Where a debtor was appointed executor, even without a legacy, and it appearing by the will that the testator considered him in the light of a *mere trustee* of his whole property, it was held that his debt was clearly not extinguished. Now, if this be true, it unquestionably follows, from the authorities above cited, and the reasons adduced in support of them, that whenever a party is constituted trustee, that very fact shows, conclusively, that it was not the intention of the grantor to discharge his debtor's liability. The moment that he becomes trustee, there is no principle in his favor to release the debt, unless the deed or will clearly and expressly discharges him from all liability. His acts being in a fiduciary capacity, his debt becomes equitable assets in his hands, which he can be made at any time to account for, and pay over in a court of equity. We can perceive no reason why his co-trustees, in a court of equity, could not bring a suit against him. His failure to pay would be a breach of trust; and equity would enforce its performance, or the entire estate might fail. Besides this responsibility, we have no doubt that his failure to pay his own debt would furnish a court of chancery good cause for his removal from office. Whether the assignment to a debtor is an extinguishment of his debt, must ever be a pure question of intention. And when property vests in trust, such intention is absolutely and expressly negatived and disproved; and there can be no longer any shadow of pretext that the debt was intended to be extinguished. The relation of trustee and *cestui que trust* carries with it conclusive evidence, that the debt of the trustee was intended to

be paid. If a testator should devise all his property to his executor, in trust for the benefit of his wife and children, and the whole or a large portion of his estate consisted of the liabilities of his executor, could any one assert that the debt of the executor was released? The same principle must follow if the trust be created by deed; and the case put is no stronger than the one now before the Court.

The assignment to the debtors of the Bank, neither delays, defeats, nor in any manner embarrasses the rights of creditors. Their remedy against these debtors is as full, as speedy, and as ample, as against any other class of persons. All the legal interest vests by the assignment *nominally* in the trustees, but *substantially* in the *cestuis que trust*, or creditors, (they being entitled to all the profits or equity); and the residuum, if any, after the payment of the debts, results to the stockholders or grantor. The trustees have not even a beneficiary interest in the estate; they are seized for *others*, and not for themselves. The moment they are seized, that moment all the substantial benefits of the fee pass out of them into others. They are merely the legal recipients or organs, by which the conveyance is rendered valid for higher and more beneficial purposes. In no possible event or contingency can they take or retain any interest in their own hands for themselves, without being called to account, and pay over to those who are equitably entitled to take it. All the parties to the deed have a right to come into a court of equity, to have the trust specifically executed. Upon its execution, all the assets are first appropriated to the payment of the creditors, and the residuum returns to those who created the trust, or who are entitled to its resulting benefits. These principles are primary and universal, and seem to us to demand the assent of every rational mind. If they be true, then it necessarily follows, that the assignment of the Bank to her debtors neither releases their debts, nor creates the slightest presumption of fraud against the deed or trustees.

The objection taken to the deed, that it extends too great indulgence to the debtors of the Bank, by allowing them to pay in eight annual instalments, until the whole amount of their liabilities is discharged, is, certainly, at first blush, plausible and imposing; but, in our judgment, it is neither sound nor tenable. It is unquestionably

true, that any assignment which unnecessarily delays, or unjustly hinders creditors in the collection of their debts, would, of course, be fraudulent, and therefore void. The difficulty is to determine what length of time would raise this presumption. It must always remain a question of fact, to be judged of according to the nature of the transaction, and the condition of things that existed at the time of the execution of the deed. It has been correctly remarked, in *Grover vs. Wakeman*, that "every conveyance of property to trustees, is, to a certain extent, a hindering and delaying of creditors. It interrupts and presents obstacles to their legal remedies; and every such assignment is absolutely void, if it does not appoint and declare the uses for which the property is to be held, and to which it is to be applied. A provision, that the uses shall be subsequently declared by the assignor, will not do; they must accompany the instrument, and appear upon its face, in order to rebut presumption of a fraudulent intent. But where the assignor parts with all control over the property, for the benefit of his creditors, without any reservation or stipulation for his own benefit, the honesty of his intention is so clear, and the advantages to the creditors so apparent and decisive, that they cannot be said to be obstructed or delayed in their remedies."

The Real Estate Bank is a public corporation, and we are bound judicially to know the condition of her liabilities and assets; for these are to be found in the general history of the country, and in the reports of the legislature, and her own sworn officers. The laws of commerce, and the usages of trade, and the character of the exchanges, as the circulating medium of the country, are always received as judicial evidence; and all contracts in reference to them, must be construed and determined according to the existing state of things under which such agreements were executed. The importance and necessity of this general rule cannot be overlooked or disregarded, without committing great violence upon the language used in such instruments, and grossly perverting the true object and real intention of the parties to the contract. This principle has been repeatedly recognized and affirmed by the highest authority. 1 *Stark. Ev.* 455. *Plow.* 12. *Kirk vs. Norvell*, 1 *T. R.* 118. *Erskine vs. Murray, Lord Raym.* 1542. Upon the like principle, this Court held,

in the case of *Dillard vs. Evans*, that the term "common currency," meant Arkansas Bank notes, as they, at the time of the contract, constituted the common circulating medium of the country, which we were bound judicially to know. It was determined, in *Warner vs. Beers*, 23 *Wend.* 235, that acknowledged, uncontradicted facts of the times, of any law or constitution, have always been judicially appealed to, for aiding the Court in the decision of doubtful, constitutional, and legal interpretation. Now, if this be true in regard to the constitution and laws of a country, surely the principle cannot be false when applied to the construction of a deed of assignment. And the Court aptly remarked, in the case that has been cited, that the history of those times, and the journal of the Convention, were not set down to be passed on by a jury, but were to be used as the proper materials of judicial reasoning.

The liabilities of the Bank, according to her own showing, and what is admitted to be true by the respective counsel engaged in this cause, amount to a fraction over two millions two hundred and fifty thousand dollars, while her assets are set down at about the same sum, possibly a fraction more. In this calculation are included all the debts that are owing to her; and in realizing these assets, it is but reasonable to suppose that she must sustain a considerable loss in their collection. Her circulation is near half a million. The debtors to the Bank received loans, under the tacit and implied agreement that they should be paid up in such proportions or instalments as might be required. Neither the Bank nor the debtors ever contemplated that the whole amount should be paid up suddenly, or by oppressive calls; nor did the creditors look to this kind of payment for their indemnity. The condition of things, when these debts were created, and the present state of affairs, are widely and essentially different in every respect. Great pecuniary embarrassment and distress are now acknowledged and felt by all classes of society. The pursuits of labor yield but a meagre and scanty reward; and property of all kinds and every description is universally admitted to be greatly depressed in price, and, in most cases, far below its real and intrinsic value. This state of things has been produced by a great number and variety of causes, among which, the facility afforded by banks, and

their depreciated currency, have contributed in no small or measured degree. Now, would it would be just or equitable for the Bank, in this season of universal distrust and embarrassment, to coerce immediate or hasty payment of two millions of dollars from the debtors? Such a course, we apprehend, would neither be consistent with justice or equity; and it would be wholly impracticable to enforce immediate and hasty payments from an agricultural and embarrassed people, and would end in disappointment and ultimate loss. The creditor, instead of being benefited by such a course, would be injured; for the assets of the Bank would be materially lessened, and a considerable portion of its means utterly destroyed. In the present state of things, the Bank can only secure her creditors by allowing her debtors reasonable indulgence. Her debtors can only make payment by the means arising from labor, or the sale of property. Time must be given to labor, to make its profits available. In the nature of things, the means arising from labor must be somewhat slow and progressive; and hence the reasonableness of the indulgence given to the debtors of the Bank. Again: if the property of her debtors was speedily or hastily brought into market, the Bank would inevitably lose a large amount of her assets, and thus her creditors would be seriously injured. Besides this loss, the oppression upon her creditors would be insupportable. The constitution contemplated that the Bank, when established, would aid the agricultural interest of the country; and in no event ought its affairs to be so managed as to ruin it. Under all these circumstances, the inquiry is, are eight years an unreasonable extension of payment, or was it improper to allow the debtors to pay in annual instalments? We deem the time but reasonable and just, and the mode of payment judicious and equitable. A less time would have injuriously affected the vested, legal, and equitable rights of all parties; and any other mode of payment would have greatly prejudiced their interest. Of the amount of debt owing by the Bank, the principal of her bonds is not due until the year 1862. This debt she is certainly not delaying, but has provided means of payment to meet it, about eighteen years before it becomes due. The interest of her bonds is nearly one hundred thousand dollars, accruing semi-annually. Now, if she is reasonably successful in

realizing her means, and provident in their application, there certainly cannot be any serious delay in paying this debt, and taking up her circulation. If there be any pretence for saying that there is fraud in this matter, on whom, then, is it made to operate? Certainly not upon the bond-holders, nor upon the holders of the notes, nor upon those who are entitled to receive the semi-annual interest. Will it, then, fall upon the State or the stockholders? The privilege and indulgence given to her debtors, are the only probable means by which the State can be indemnified, or the interest of the stockholders protected. If we are right in this position, then no inference or badge of fraud is shown, or can be presumed, from the indulgence or time given to the Bank's debtors to make payment.

It is objected to the deed, that the trustees are not at liberty to pay off the interest and principal of the bonds before they fall due. This objection is unfounded. The assignment requires them to make collections as speedily as may be safe or convenient, and forthwith to proceed to pay off the liabilities of the Bank, in the manner and order designated in the deed. It is said that the bond-holders will refuse to part with their securities before they become due; and that being the case, that, as the trustees have no power to make any disposition of the fund, the whole outstanding capital will remain unpaid at the expiration of eight years, and therefore, in this respect, the deed commits a fraud upon the stockholders. It is barely possible, that a creditor may refuse payment before his debt becomes due; but we certainly think that such a presumption is violent in the extreme, in the present condition of things. In the language of Chief Justice Marshall, "it is but reasonable to presume, that a creditor will be always willing to receive payment from any hand that tenders it." And the present, and we fear the future, depreciation of American stocks, in our own as well as in foreign markets, gives to this presumption the dignity of full and uncontradicted proof. The deed of assignment created a trust; and the moment the estate vested, it was placed under the peculiar jurisdiction of a court of equity. The trustees are bound to make the funds available, and apply them properly. No profits can arise to the trustees, in any case whatever. Equity holds them to do every act that reasonable or discreet agents

can do, to make the assets of the Bank answer its ends; and it will charge them for the slightest dereliction of duty. It will charge each trustee for the funds coming to his hands, and will hold him personally responsible for every devastavit he commits, not only to the extent of his bond, but for the full amount of the waste committed, and that, too, under the penalty of removal. The trustees can make no contract whatever, that will accrue to their benefit; but whatever advantage might arise therefrom, necessarily results to the benefit of those for whom they hold the estate. They are bound, not only for wilful neglect, but for all misfeasance and nonfeasance in office; and that would be the case, if there was no clause in the deed fixing upon them any such responsibility.

We are at a loss to conceive how the stockholders, State, or creditors, can be injured, if the trustees can pay all the debts by the assignment of all her assets. Judging from the present condition of the Bank, such an assignment, so far from injuring any of the parties to the contract, would essentially benefit them all. For its liabilities, it will be remembered, are nearly, if not quite, equal to its assets, without taking into account the loss that must accrue from bad and doubtful debts.

It is asserted that the Bank cannot make an assignment, unless she is in failing or insolvent circumstances; and that, as the deed does not show such a state of things, therefore it is fraudulent as to the stockholders. We hold this proposition to be wholly untrue, both upon reason and authority. The power of a bona fide assignment is given to a solvent as well as an insolvent corporation; and, like assignments by individual debtors, there never can, by any possibility, arise a question of fraud as to the first case. We deem it, however, unnecessary to discuss this point; for surely it cannot be difficult to show, that a Bank, which has suspended specie payment for years, and that has not the means of resuming, and whose circulation is depreciated more than one-half at her doors, is surely in failing circumstances. And we think we cannot be accused of great presumption, should we even add, that she was in so critical a condition, that her affairs required an immediate assignment, of some kind or other. Many of these facts appear upon the face of the deed, and the rest are matter of public history.

The argument, then, fails, for there is no basis upon which it can be made to rest.

The objections taken to the illegality and insufficiency of the trustees' bonds; the compensation to the officers; the want of a proper schedule of the assets; the onerous stipulations in regard to debtors that have been sued, and against whom judgments have been obtained; —all go, except the first and fourth, to question the policy and propriety of the assignment, and can, in no contingency whatever, affect the validity of the deed, or raise a presumption of fraud against it. The first objection, as to the legality of the bonds, is certainly entitled to but little notice. A bond, given to the attorney and his successors in office, is as legal as one given to the Executive and his successors in office. And in both cases, the law makes the party to whom the bond is given, hold it only for the benefit of those for whom it was executed; but in the event of his vacating the office, it passes, with all its attaching rights, into the hands of his successors, for like just and equitable purposes.

The imperfectness of the schedule creates no objection against the deed, for the assignment contains the evidence by which it can be completed hereafter; and the assets are described with sufficient certainty, as the cases of *Stover vs. Bell*, 3 *Wash. C. C. R.* 339, and *Halsey vs. Whitney*, 4 *Mason*, 219, clearly establish.

In regard to the insufficiency of the bonds of the trustees, and other officers, to secure the parties interested from loss or injury, that is a discretionary question for the Central Board, which this Court cannot inquire into, unless it was so flagrantly unjust and inequitable as to raise a presumption of fraud, which is certainly not the case here.

A supervising control of the central and local boards is placed, by the assignment, around the acts of the trustees; and the books and accounts of the Bank are required to be kept open for the inspection of all the stockholders; and every other person legally or equitably interested in the deed could require their production. And when, to these guards, are added the protection and scrutiny of a court of chancery, it appears to us that the corporation, acting by the Central Board, has taken, for the benefit of the State, the stockholders, and

creditors, a fair and reasonable share of personal responsibility. It is certainly true, that this trust, like all others confided to human hands, is liable to abuse; but that is no argument against its validity. Man is compelled to trust much to his fellow-man; and, after all, the higher and nobler properties of nature constitute the best security, and most effectual guaranties, that can be either given or taken in defence of life, liberty, or property.

Having now gone through the investigation of this cause, we will briefly state, by way of distinct propositions, the leading points and principles we have discussed and decided:

That this Court possesses the power to issue a peremptory mandamus cannot be denied, for the constitution gives it, by express grant.

That the Judge of the Circuit Court had jurisdiction, and should have granted an injunction, we cannot doubt. The peculiarity of the property, and the nature of the assets, forbid the idea, that due compensation could be given, in damages, for their improper use and destruction. The property being a trust estate, is placed peculiarly, if not exclusively, under the jurisdiction of a court of equity. To turn away the trustees, under such circumstances, would, in our opinion, be for ever to close the doors of chancery against the most numerous, helpless, and meritorious class of her suitors.

To question the power of an individual debtor, or banking corporation, in failing circumstances, to make an honest assignment of all their property to pay their debts, would be to assail one of the principal safeguards of public liberty, by fettering the free enjoyment of private property.

To say that the Central Board does not represent the will of the corporation, is to assert, that there can be more banks than two, which the constitution expressly forbids.

To contend that the deed wants proper parties, is to make two things, which are wholly separate and distinct, one and the same. It is, in fact, to make an artificial being a natural person, which is a legal as well as physical impossibility.

To argue that the trustees cannot be reduced in number, according

to the provisions of the deed, is to deny its validity by defeating its operation.

To question the order and manner of the assignment, is to impeach the right of preference, which constitutes the only legitimate and distinguishing privilege of such conveyances. The deed, by declaring that whatever amount is found to be due Holford & Co., of London, either in law or equity, can be paid, certainly covenants, unconditionally, to pay them. No objection can lie to it, then, in this respect.

The trust fund cannot be abused, so long as the parties to the deed attend to their own interest, or a court of equity does its duty.

To allege that it is invalid, because only ten of the trustees have signed it, is, in effect, to destroy a court of equity, in regard to the management and direction of such estates.

To affirm that the trust must fail, because the estate is vested in the debtors of the Bank, is to violate the dictates of natural justice and of equitable assignments, that make their debts assets for the payment of creditors.

To endeavor to raise a presumption of fraud against the deed, on account of the time of payment allowed to its debtors, is to destroy alike the interests of the creditors, the corporation, and the stockholders. The idea of less time being given, or the mode of payment materially altered, amidst universal embarrassment and great pecuniary distress, we are sure, can never find countenance or support in a court of equity, which is, emphatically, called a court of conscience.

To say that we must close our eyes and shut our senses against the universally admitted distressed condition of the country, and the probable means of the debtors of the Bank to make payment, would be to require us to exclude light, lest truth might be revealed and established.

The deed, upon its face, carries, to our minds, strong and persuasive evidence, that it is not only free from the imputation of fraud, but that it was executed in good faith, and under the firm belief that it would cure the evils intended to be remedied; which were, that its creditors should be secured and paid, its circulation called in and cancelled, and its debtors protected against injury and oppression. It proposed to do this, because the Bank was unable to meet its immedi-

ate demands, to pay specie upon its notes, or to discharge the interest upon the bonds of the State. These objects were, certainly, just and equitable, and the reasons adduced in support of them, cogent and conclusive.

The law presumes the creditors and stockholders to have assented to the assignment. They are represented by the trustees; for the assignment is held to be made for their benefit. Neither of these parties has come in and sought to impeach the deed for want of the requisite formalities of law, or for want of consideration, upon the ground of fraud. Whenever they apply to a court of equity, they will be heard against the deed; and, if it can be shown to be fraudulent, it will be set aside as unjust and inequitable. The validity of the assignment is now questioned, and its authority attempted to be defeated, by a majority of the local directory of the Principal Bank, whose jurisdiction and control over its assets and funds ceased and were extinguished, the moment the deed was executed. This Court cannot allow them to retain possession of the property and effects of the Bank, under such circumstances, as they hold the deed to be lawful, and therefore operative, and, of course, they are bound to protect all the vested rights that have sprung up under it.

We are fully impressed with the magnitude of the interests, as well as the importance of the principles, involved in this case: our decision will seriously touch both public and private rights; and we have, therefore, given to each of the several questions we have investigated, the most mature consideration and deliberate reflection; and the result of all our inquiries and researches is: we are firmly convinced that the deed of assignment is valid, upon its face, and that it contains no such unjust or inequitable provisions as will defeat its operation, or as will raise an imputation of fraud against it.

In coming to this conclusion, we have not deemed ourselves at liberty to imagine fraud, or calculate consequences. The one must be proved by clear and satisfactory evidence; the other weighs less than nothing in the scales of justice. This Court can alone tread the path of law and of duty, made clear and manifest by the light of reason and force of authority.

It is therefore ordered, that a peremptory mandamus be issued out

of this Court, commanding the Judge of the Fifth Judicial Circuit to grant the injunction prayed for, agreeably to the rules of chancery practice, and in conformity with the opinion here delivered; which is, that an injunction be granted, without requiring any additional security from the trustees, who have already given bond for the faithful performance of the trust; and that the property, assets, and effects of said Principal Bank, be immediately surrendered into their hands, and that a reasonable time be allowed the other trustees to execute their bonds required in said deed, and thereupon they be permitted to join in the management and control of the trust estate; and that, if they fail to execute the bonds within the time allowed, other trustees be appointed in their place.

Ringo, C. J., after giving a summary of the bill, &c., said: Previous to any consideration of this case, as made and presented by the bill, I deem it proper to state some of the leading and governing principles in relation to the frame and structure of original bills in equity, generally, which, in some measure, depend upon the object sought to be obtained. But, according to my understanding, the rule is universal, that every bill must have for its object, one or more of the grounds upon which the jurisdiction of a court of equity is founded. That jurisdiction sometimes extends to the final decision of the subject matter of the suit; sometimes it is only auxiliary to the decision of a present suit brought, or to a future suit, to be brought in another court; sometimes it is merely of a precautionary or preventive nature, to avert a meditated or threatened wrong; and sometimes it is merely to require, that the parties really interested in a controversy, should be compelled to litigate their rights, without peril or expense to a mere stakeholder having no interest therein. The bill may, therefore, either complain of some injury which the party exhibiting it suffers, and pray relief according to the injury, or, without praying relief, it may seek a discovery of matters necessary to support or defend another suit; or, it may seek to preserve or perpetuate testimony; or, it may complain of a threatened wrong, or impending mischief; and, stating a probable ground of possible injury, it may pray the assistance of the court, to enable the party exhibiting the bill, to protect or defend

himself from such wrong or mischief, whenever it shall be attempted or committed. *Story's Com. Eq. Pl.* 7. The same author (p. 8) also gives another rule, which I understand to be universal, that "whatever may be the object of the bill, the first and fundamental rule, which is always indispensable to be observed, is, that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal, in every stage of the cause, and can never be cured by any waiver, or course of proceeding by the parties; for consent cannot confer a jurisdiction not vested by law. And, though many errors and irregularities may be waived by the parties, or be cured by not being objected to, the Court itself cannot act, except upon its own intrinsic authority, in matters of jurisdiction; and every excess will amount to an usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity."

Another general rule, but one to which there are some exceptions, I admit, unless the rule be made universal by our statute, *Rev. St. p.* 158, *S.* 1, as to which I deem it unnecessary, now, to inquire, is, that a court of equity "has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law." 1 *Story's Com. on Eq.* 32. And the converse of this rule I consider equally as well established as the rule itself.

Another rule, applicable to all original bills praying for relief, is, that it must be founded on some right claimed by the party plaintiff, in opposition to some right claimed, or wrong done, by the party defendant. And, in order to enable the Court to understand the case, and administer the proper remedial justice, as well as to apprise the opposite party of the nature of the claim, and of the redress asked, and to enable him to make the proper defence thereto, it is indispensable that the bill should contain a clear and exact statement of the material facts. It must, therefore, show, with reasonable certainty, the rights of the plaintiff, the manner in which he is injured, the person by whom it is done, the material circumstances of the time, place, manner, and other incidents; the relief sought; the prayer therefor; that the defendant may answer, upon oath, the matters charged against him, and that the case, as stated, and the relief, as asked, are

properly within the jurisdiction of a court of equity. *Story's Com. Eq. Pl.* 19. And care must be taken, that the equity of the plaintiff's case should be fully averred in the stating part of the bill; for, if it should only be stated in the charging part of the bill, and thus consist only in the pretences, the charge in answer to those pretences, and the admissions, it will be insufficient. *Ib.* 28, 214. It is, also, a general rule, that a prayer of general relief, without a special prayer of the particular relief to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires, may, at the hearing, be prayed at the bar; but it is not universal. And if there is no prayer of general relief, but a prayer for special relief only, then, if the plaintiff mistake the relief to which he is entitled, no other relief can be granted him, and his suit must fail, at least, unless an amendment of his prayer is allowed him. *Ib.* 40, 41.

Having thus stated some of the leading principles which, as it seems to me, should influence the decision of the present case, I will pass over the question as to the power of this Court to issue a writ of mandamus, to compel the Judge of the Circuit Court to award the writ of injunction, as prayed for by the complainants, as, in respect thereto, I concur with the Court, and proceed to consider whether they have shown themselves entitled to such writ. Admitting the deed of assignment to be valid, the bill shows, in such of the complainants as have complied with the conditions therein prescribed, by executing the deed, and giving the security thereby required, a legal title to all of the property and assets of the Bank, held subject to the trusts thereby and therein declared; that the complainants were in possession thereof; that the defendants have taken possession of all the assets and property of the Bank at Little Rock, and refuse to deliver it over to complainants, or make, or permit to be made, any schedule thereof, or to permit them to receive and control the same, or to perform their trust, and prays a decree that the defendants, their agents, and confederates, may be perpetually restrained and enjoined from further intermeddling with any of the property, effects, or assets, so assigned and transferred, and a writ of injunction, so restraining and enjoining them, until the further order of the Court. This I under-

stand to be the whole scope and substance of the allegations contained in the bill. There is no prayer of general relief; no allegation as to the time when, or the circumstances under which, or the character in which, the defendants possessed themselves of the property, or that their possession is illegal, or was taken without the authority and consent of the complainants; nor is there any allegation as to the character in which they hold the possession, whether as directors of the Bank, or mere individuals, or that they set up or claim any right or title whatever to the property, or the possession thereof, either legal or equitable, in opposition to the rights of the complainants; nor is there any allegation that the defendants have, in any manner, used, assigned, or disposed of, the property, or any part of it, or that there is any apprehension or danger that they will do so; nor of their wasting, injuring, or destroying it, or making any unlawful, unauthorized, or fraudulent use thereof, or that they are either bankrupt, insolvent, or unable to pay the value thereof; nor is there any allegation particularly describing the property and effects so in the possession of the defendants, or stating its value; nor is there any allegation that the complainants are ignorant thereof, or unable to show it, or that it is a matter only within the knowledge of the defendants; nor any prayer that they shall discover or make out a schedule of it, for or with the complainants, or otherwise; nor is there any allegation that the defendants obtained the possession of the trust property, either by fraud or accident. And, therefore, according to the general rules stated above, as laid down in *Story's Com. Eq. Pl.* 28, and reiterated and illustrated at page 214 of the same volume, the case of the complainants could not be aided by any thing contained in the bill, consisting only of the pretences of the defendants, and the charges in answer thereto, even though some equitable ground for relief was thereby suggested or shown. And this rule prevails, even when the facts rest within the knowledge of the defendant; if it constitutes a material allegation in the bill, and is the foundation of the suit, it must be clearly stated; and that every fact essential to the plaintiff's title to maintain the bill, and obtain the relief, must be stated in the bill, otherwise, the defect will be fatal; for no facts are properly in issue, unless charged in the bill, and, of course, no proofs can be gen-

erally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent, from the other parts of the pleadings and evidence; for the Court pronounces its decree "*secundum allegata et probata.*" And, therefore, neither the showing of the pretences of the defendants, that the deed of trust is fraudulent and void; nor the charge in answer thereto, that the Central Board had power to make it; that it is good in law; that the defendants do not desire an adjudication as to its validity, or to act legally in the matter; and that they do not believe the deed illegal, determine to hold the property with strong hand, and illegally and violently, can, consistently with the rules and principles uniformly and universally admitted as governing the pleadings in courts of equity, be regarded as facts upon which either the title of the complainants to relief, or the jurisdiction of the Court can be based.

The case made by the bill, when divested of the matters brought into view, consisting only of pretence and charges in answer thereto, cannot, as I conceive, in any respect in which it can be viewed, be considered as essentially different from what I have stated it to be; at least it cannot, from the facts, as shown by the bill and exhibits, be more favorable to the demands of the complainants.

The first inquiry, then, in this, as in every other case, is, has a court of equity jurisdiction of the case? If it has, and the facts, as stated in the bill, are such as entitle the complainants to the specific relief prayed, the judge was bound to grant it. But if the case is not within the jurisdiction of that court, or fails to show the complainants entitled to the relief prayed, it was correctly refused. To determine this question correctly, it will be necessary to advert to some of the grounds upon which the jurisdiction of that court is maintained, and see if this is such a case as they embrace. The most fundamental principle in respect to the jurisdiction of a court of equity, I understand to be, that it exercises jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The power of the court rests upon this principle mainly; and although there are some cases of concurrent jurisdiction, they are comparatively few, and exist only where the courts of law, acting

upon more enlarged and liberal principles than they anciently did, afford a remedy in such cases, which was denied when courts of equity first assumed jurisdiction thereof. But there can be no pretence, I apprehend, that this case belongs to that class. Subject to the general rule just stated, courts of equity have, as I conceive, jurisdiction of all cases of alleged fraud, accident, or trust. No one, I presume, will attempt to maintain, that a court of equity has jurisdiction of this case, on either the ground of fraud or accident, as there is nothing in the bill stating, or tending even to establish either. But those who claim for that court this jurisdiction, rest their claim, as I understand, exclusively upon the ground, that the case made by the bill is one of trust. And it is upon this ground, as I am informed, that this Court determines the case to be within the jurisdiction of a court of equity; and in its opinion asserts the broad principle, that the court of equity, when the trust was created, acquired jurisdiction immediately over the trust property, and every right and incident connected with it. I do not so understand the law. A trust I consider as something essentially different from the property which is the subject matter of the trust. STORY, in his Commentaries on Equity, when treating of trusts, vol. 2, p. 230, uses the following language: "A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property, in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly or in part to others. The legal estate in the thing is thus made subservient to certain uses, benefits, or charges, in favor of others; and these uses, benefits, or charges, constitute the *trusts* which courts of equity will compel the legal owner, as *trustee*, to perform in favor of *cestui que trust*, or beneficiary." So Lord HARDWICKE, in *Sturt vs. Mellish*, 1 *Atk.* 612, thus defines it: "A trust is where there is such a confidence between parties, that no action at law will lie; but is merely a case for the consideration of this court," referring to the court of equity where he then presided. And Lord COKE, in describing the nature of a use or trust, in land, according to the common law, is said by

Judge STORY to have used the following language: "A use is a trust or confidence reposed in some other, which is not issuing out of the land, and to the person touching the land; scilicet, that *cestui que use* (beneficiary) shall take the profits, and that the terretenant shall make an estate according to his direction. So as *cestui que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law; but for breach of trust his remedy was by subpœna in chancery: so that the original fiduciary estate, from its nature, imported the enjoyment of the profits of the land, as distinct from the seisin of the land, and the rights issuing thereout." *Story's Com. Eq.* 232. These authorities I consider as conclusive upon the question, as to what a trust is, and as drawing the line which divides the jurisdiction of the courts of equity, and courts of common law, in respect to controversies relative to the trust property, so plainly and distinctly, and, at the same time, so accurately, that it would be difficult indeed, by any manner of elucidation, to make it more plain. The true principle established by all of the authorities, I understand to be this: that a court of equity has jurisdiction of all trusts, when its aid is shown to be necessary, either to establish the trust, to enforce its execution, or to protect and preserve the estate; and in such case it will be exercised either at the instance of the trustee or the *cestui que trust;* but it can never be exercised at the instance of the trustee, or indeed any part, in a case where the remedy is plain, adequate, and complete at law. And here it may be proper to remark, that the remedies afforded to the *cestui que trust*, to protect and enforce their rights, are generally, if not universally, cognizable alone in the courts of equity. The reason is, because their rights are always equitable rights, the legal estate not being in them, but in the trustee, while, on the contrary, the remedies of the trustee, in respect to the trust estate, are generally to be sought alone in the common law courts; the reason of which is, because the legal title is in him, and therefore his rights being legal rights, he has a plain, adequate, and complete remedy at law to enforce them. If this is not the true rule, and the principle asserted in the opinion of the Court constitutes the true one, any party having legal demands against another, who prefers having them adjudicated in a court of equity instead of a court of law, may,

by the simple process of assignment, vest the legal title in a trustee, for the use of a third party or himself, and thereby transfer the adjudication from the legal to the equitable forum. Apply this principle to the case under consideration, and every debtor to the Bank may be sued by the trustees, in a court of equity. Let it also be applied to another class of trustees, and they, too, may prosecute every legal claim held by them in a court of equity. I allude here to executors and administrators, between whose rights, in this respect, and the rights of trustees created by deed, I can perceive no distinction, either legal or equitable; and thus the principle, when carried out to its legitimate consequences, enables a plaintiff to elect, at will, the forum in which he will prosecute his demand.

The principle upon which the opinion of the Court, as to the question of jurisdiction, is based, is therefore, in my opinion, not well sustained, either by authority or reason. Can it be pretended that the deed of assignment, from the Bank to the complainants, *if valid*, does not vest in such of the trustees as have accepted the trust according to the terms of the deed, the legal title to the property, money, and choses in action, belonging to her at the time it was executed? Under our statutes of assignments, the legal title could be transferred; and, although it is the usual practice to endorse the assignment of bonds, notes, bills, &c., on the back of the instrument itself, I presume no one will contend that an assignment thereof, by a separate instrument, or on a different paper, will not be as effectual to pass the legal title, as if the like assignment was endorsed upon the instrument itself. If this be true, will it be pretended that the trustees, without showing any equitable ground, whatever, for so doing, can resort to a court of equity, simply to coerce the payment of such demands, and thereby deprive every debtor of the Bank of his legal right to submit his case to a jury? I presume not. In this respect, as before remarked, I know of no legal distinction between the rights of trustees, whether created by deed, by will, or by law. And I think no one would be so bold as to contend, that an executor or administrator could sue the legal debtors of his testator or intestate, in a court of equity, upon the simple showing that he holds the demand as trustee. And yet, for

aught that I can discover from the bill of the complainants, his right to do so would be equal to theirs.

Now, for the purpose of testing this principle a little more fully, suppose an executor, having actual possession of a horse, the property of his testator, should lose him, without fault on his part, and afterwards find him in possession of a third person, who refuses to restore him, on the ground that the will of the testator is void, could the executor, upon simply showing these facts, resort to a court of equity, to enjoin such person from intermeddling with the horse, or to compel him to deliver up the possession? In my opinion, he could not. Again, suppose the complainants, under the conveyance to them as trustees, once had the possession of the real estate and banking-house, in Little Rock, but were ousted, and forcibly ejected therefrom, by persons claiming the possession adversely; or, setting up no right whatever, should refuse to surrender the possession to them, could they, by simply showing these facts, entitle themselves to an injunction, restraining those in actual possession from intermeddling with the premises, or occupying them, or recover possession in a court of equity? In my judgment, that court would have no jurisdiction of the case; and their only remedy would be in a court of law. How much stronger is the case made by the bill, in respect to the real estate and banking-house, alleged to be in possession of defendants, to prevent whom from intermeddling therewith, the bill prays an injunction. If there is any material difference between the case supposed and the facts stated in the bill, as regards the real estate and banking-house at Little Rock, I am unable to discover it.

Now, suppose such injunction was granted, what would be its effect? Would it so operate as to oust the defendants of their possession, and restore it to the complainants? If this would be its operation, I know of no principle, either in law or equity, authorizing it. If such would not be its effect, what good purpose would be accomplished by it? I can discover none. And these remarks apply with equal justice to all of the trust property and assets alleged to be in the possession of the defendants; for, upon the present bill, containing neither a general prayer for relief, nor any special prayer for the restoration and delivery up of any of the property and assets to the complainants, no

decree directing the possession thereof to be delivered to them, could, without violating and overstepping all the rules of proceeding in equity, ever be pronounced, as, I trust, has already been sufficiently shown; and if that end could not be attained by such decree as the Court would be warranted in making, upon the final hearing, *a fortiori*, it cannot, by means of an injunction, awarded upon the institution of the suit, or before the final hearing. Now, unless the injunction is designed to effect a transfer of the possession of the property from the defendants to the complainants, I cannot understand what benefit the complainants could possibly derive from it; and, inasmuch as there is no statement in the bill showing, or even conducing to show, that there is even a shadow of danger that the defendants even contemplated making any unlawful or unauthorized use of the property, or that there is even the most remote probability that it will suffer deterioration or injury at their hands, or from their possession, I can perceive no ground upon which an injunction restraining them simply from further intermeddling with it, can be based. This is the extent of the prayer of the bill. Can the injunction, if one be granted, be more comprehensive? If not, the property and assets would, notwithstanding the injunction, remain in the possession of the defendants; and the act of the Court awarding it would, as it seems to me, be not only unauthorized, but nugatory. Now, in respect to a change of the possession, I hold it to be a universal rule in equity jurisprudence, that the possession of the property will never be transferred, or passed over from one of the parties litigant to the other, by injunction or otherwise, previous to a decree establishing the right; and this rule rests, as I conceive, upon the soundest principles of reason and law. A contrary practice would be nothing short of taking an estate, recognized by law, from one person, and giving it to another claimant, without first affording to the former any opportunity of being heard in vindication of his rights; the law, always regarding the actual possessor as the rightful owner until the contrary is established by some adjudication, not only determining the right, but also binding upon the parties. Having thus shown, as I think, conclusively, that the court of equity cannot exercise jurisdiction of the case on the ground of trust, I will proceed to examine shortly, whether the complainants, for aught that is shown

in their bill, have not a plain, adequate, and complete remedy at law, for every right or thing claimed by the bill. That they have to recover the possession of the real estate and banking-house, has been sufficiently shown already; and if the deed of assignment has passed to them the legal title of the choses in action, which it purports to assign and transfer to them, and of which, as they show themselves, they took and had the possession under the deed and assignment, what obstacle or impediment is stated, or shown to exist, in the way of their legal remedy? If they have the legal title, will it be pretended that they cannot maintain either an action of replevin or detinue, for the books, papers, bonds, notes, and bills, to recover them specifically, or an action of trover, for the money and choses in action? No one can doubt it. In what respect, then, is their legal remedy deficient? The evidence, to establish their right, must be presumed and taken to be in their possession or power, because the contrary is neither stated nor suggested. The ability of the defendants to satisfy their demands, must be either presumed or considered as admitted, as it is nowhere denied, or even questioned. Is the remedy, by these actions at law, so complicated, so abstruse, or so little understood, as to render the prosecution thereof difficult, or the result uncertain? This, I presume, no one will attempt to maintain. Is it, then, inadequate? By the action of replevin, they could obtain the immediate possession of the books, and, perhaps, of the various choses in action, and other papers. So, by the action of detinue, the books, papers, and choses in action, could be recovered with less delay than they regularly could be in a court of equity; and in an action of trover, the value of the money, choses in action, and all other personal estate, (exclusive, perhaps, of the books), could be recovered to the uttermost farthing. I cannot, therefore, doubt that the complainants' remedy at law, from their own showing, is in every respect plain, adequate, and complete.

Having said thus much in regard to the claim of jurisdiction on the ground of trust, and inadequacy of the legal remedy, I consider it not amiss to state, that the bill wholly fails to show any such relation between the parties, as excludes either from litigating the matters in controversy in a court of law, as, between them, no trust or privity whatever is shown. Nor does the bill seek to establish a trust, either

as between the parties to it, or any other parties whatever; but, on the contrary, it shows a deed purporting to be executed by the Bank, in which all of the complainants, and no other person whatever, are named as trustees; and they are all claiming to act in the execution of the trusts declared in the deed, as appears conclusively, so far at least as it regards this case, from the fact that they have all joined in the prosecution of the suit. What trust is sought to be established by the bill? None, that I can discover; for the deed, exhibited with the bill, establishes the trust, and there is no express allegation in the bill that it is defective, imperfect, or incomplete, nor that there is any defect of trustees qualified to receive the estate and execute the trust; nor is the Court called upon by the bill to supply any such defect or deficiency. And here I will simply remark, that I am not aware of any principle upon which the trustees, under such circumstances, could be warranted in calling upon a court of equity to adjudicate upon the sufficiency of the deed, or the Court could be justified in proceeding to a decree as to its validity. And I think I cannot be mistaken in asserting the principle, that this cannot be done in any case, in the absence of the *cestuis que trust* specially provided for by the deed; because it is for their interest alone, every trust is supposed to be executed; and yet, notwithstanding, not a single beneficiary is brought before the court by this bill, or otherwise made a party to the suit. A strange and unprecedented mode, this, as it seems to me, of obtaining an adjudication upon the validity of a deed, on its face good, at least as to the execution of it, and as between the complainants, who are the trustees created by it, and the Bank; and these, if I understand the scope of the bill, are, and were designed to be, the sole and exclusive parties represented in the proceeding. Now, I hold, that neither party represented here, can, according to the plain principles of law and equity, consistently with the case made by the bill, call upon any court either to establish or overthrow the deed, and thereby confirm or defeat the trusts created by it. But why is it that they cannot? One reason is, because neither party has, or can have, any beneficial interest in it. The trustees have no such interest, and, as trustees, can receive nothing beyond a fair compensation for their services; for the payment of which, the deed, in this instance, ex-

pressly provides. See 2 *Story Com. on Eq.* 241, 510; 2 *Fonb. Eq. b.* 2, *ch.* 7; *J. Ch. R.* 527, 532 to 535, *Manning vs. Manning.* The defendants, as directors or representatives of the Bank, can have none, because the whole property and assets of the Bank are, by the deed, transferred to and vested in the others, and so placed beyond her power and control, for the exclusive use and benefit of her creditors; and even though the deed might be fraudulent in respect to the latter, they might, nevertheless, I apprehend, waive the fraud, and take under it, according to its provisions. But if it was even admitted to be fraudulent as regards creditors, I am not aware of any principle upon which either the Bank or the trustees could call upon a court of equity, either to confirm or avoid it. And, in this respect, the case, as it appears to me, would bear a striking analogy to one where several partners convey and deliver the possession of the whole of their partnership estate and effects to a trustee, for the payment of the debts due by the firm; and one of the partners, subsequently obtaining possession of a part of the estate so conveyed, refuses to restore it to the trustee, under pretence that the deed is void; and the trustee brings a bill against him alone, stating these facts merely, and thereupon insists upon a decree establishing the deed and confirming the trust, and an injunction in the mean time. Would any court of equity entertain such cases? The answer, I conclude, must be in the negative; and this, not only for the reasons before stated, but also upon the additional ground, that the decree, when made, would bind no party whose rights were not already concluded, fixed, ascertained, and established, by the deed. Besides, if such proceeding should be authorized, and the decree pronounced upon it be held to establish the validity of the transaction, it would be opening too wide a door to the perpetration and consummation of frauds, the consummation of which it is the peculiar province of courts of equity to prevent. But suppose the Court should, upon the ground that it is necessary and proper to establish the trust, proceed to decree, not only that the deed has every essential requisite of a valid instrument of conveyance and assignment, but also that the transaction is *bona fide*, as it must do, if it makes any decree to establish the trust; and then suppose the transaction impeached by the *cestuis que trust*, as they have an un-

questionable right to do, not being parties to the decree, on the ground that it is not *bona fide*, but fraudulent and inequitable, and designed expressly to obstruct, hinder, delay, or defeat their legal demands, or upon any other ground whatever. In what attitude would the Court stand in adjudicating their rights? This I leave those who undertake to maintain the jurisdiction of the Court, to answer.

I have carefully examined all the cases and authorities cited in the brief, in reference to the question of jurisdiction, but find nothing in them to warrant its exercise in a court of equity, in such case as the present; but, on the contrary, they, in my opinion, confirm fully the principles above stated. In the case of *Walwyn vs. Lee*, 9 *Ves.* 33, the bill was filed to obtain possession of, and compel the delivery up of, conveyances and title deeds to land, which was in the possession of the complainant, and of which he claimed to be the legal owner. The defendant pleaded that he was a *bona fide* purchaser of the land, for a valuable consideration, without notice, and the plea was allowed.

The case of *Fells vs. Reed*, 3 *Ves. Sr.* 70, was a bill to obtain possession of, and compel the delivery up of, a certain silver tobacco box, and two silver cases, belonging to a company, and adorned with engravings, &c., which was decreed.

Lowther vs. Lowther, 13 *Ves.* 95, was a bill to obtain possession of, and compel the delivery up of, a certain picture; and the bill was entertained.

Lloyd vs. Loaring, 6 *Ves.* 772, was a bill exhibited by a society of freemasons, against some of their officers, to obtain possession, and compel the delivery over, of certain books containing the proceedings of the society, &c. The bill stated, that the defendants threatened to burn or destroy the books, papers, &c., of the fraternity; that the complainants were ignorant of the specific articles, and that the defendants refused to discover them; and prayed for injunction, discovery, and general relief.

The case of the *Duke of Somerset vs. Cookson*, 3 *P. Wms.* 330, was a bill to obtain the possession of an old silver altar-piece, remarkable for a Greek inscription, and its dedication to Hercules. The suit was entertained.

The four last cases were entertained on the ground, that the things sought to be recovered were of such a nature, that their loss could not be compensated in damages, and, therefore, all legal remedies therefor were inadequate.

The bill in the case of *Nicoll vs. Trustees of Huntington*, 1 *J. Ch. R.* 166, was retained on the principle that it was necessary to prevent a multiplicity of suits. The case of *Benson vs. Leroy*, 4 *J. Ch. R.* 651, 656, was that of a bill by creditors against trustees, executors, &c., created by will, stating that they held property for or subject to the payment of their demands, and prayed a discovery and sale for that purpose, which was supported on the ground that the remedy at law was inadequate. The case of the *American Ins. Co. vs. Fisk*, 1 *Paige*, 90, was that of bill showing an accidental obliteration of the marks on cotton bales, the right to which was the matter in controversy; and the court took jurisdiction of it, principally, on the ground that the remedy at law would be difficult or doubtful, because of the impossibility of identifying the property, so as to establish the legal ownership. The bill also stated some other equitable circumstances.

And in the case of *Keyes vs. Brush*, 2 *Paige*, 311, the bill exhibited by a trustee against his assignor, stated, expressly, a design on the part of the assignor to sell, assign, and transfer certain choses in action, goods, &c., which were, or were intended to be, embraced in and by the deed of assignment, which were particularly described in the deed; but the assignor had expressly stipulated to make out a schedule thereof, and that the complainant was ignorant of the particular notes, choses in action, property, &c., so assigned; and the defendant refused to make a schedule thereof. The court entertained the bill, and awarded the injunction, on the ground that it was a proper case for discovery, and the injunction was necessary to prevent irreparable injury, and therefore the complainant's remedy at law was inadequate.

These are believed to be the principal cases relied on; and it must, I think, from the concise statement above made, of the principle upon which the court proceeded to exercise jurisdiction in each case, be apparent, that the present case, as made by the bill, is not embraced within any of the principles upon which the court of equity exercised its jurisdiction over either of them; but, on the contrary,

they expressly recognize the principles which I have stated, and proceeded in accordance therewith.

But there is another principle which I consider applicable to the present case, to which I will here advert. I hold it to be a general rule, that all of the complainants named in the bill must be shown to have a present joint right to the thing demanded, and the relief sought; otherwise, the bill is defective on its face, and no relief can be granted upon it. Now, the bill in this case shows on its face, that the deed of assignment, in express terms, requires each and every one of the trustees to execute it; and to give bond with security, in the sum of twenty thousand dollars, to the attorney of the Bank, which is required to be approved by three stockholders. These conditions are prescribed by the deed itself, and are equivalent to an express declaration of the intention of the assignor not to part with the estate until such security as was deemed sufficient to insure the faithful performance of the trust, was given by the trustees; and it is such a condition as the assignor had, as I consider, an unquestionable right to prescribe; for, as the legal owner of the estate, voluntarily parting with it, the assignor could certainly have parted with it *bona fide*, absolutely, or upon any lawful condition, or could have retained it at will; and it was in the full exercise of this right that the Bank, in this instance, consented to convey and transfer to trustees, for the benefit of her creditors, all her property of every description; but only upon the express condition, that the trustees should execute the deed, and give the security prescribed by it. This, as I understand it, constituted a condition precedent, to be performed by the trustees, before any right vested in them; and upon the performance of these conditions, but not otherwise, they could accept the trust, and take the property. These conditions, as the bill states, have never been complied with by five of the complainants named in it, and therefore the case falls within the rule last above stated; and as no amendment of the bill can be admitted here, the Court is not warranted in granting relief to those, even, who have performed these conditions, notwithstanding their right should be admitted, or plainly appear; because they claim a joint right, which the Court, under these circumstances, has no authority to sever.

I am, therefore, after the most mature consideration of the case, clearly of the opinion, that it cannot, in any aspect in which it can be viewed, as presented by the present bill, be considered as within the jurisdiction of a court of equity, and that if it was within such jurisdiction, no relief could be granted, because some of the parties complainant are shown, by the bill itself, to have no right whatever to demand it. And further, as none of the *cestuis que trust*, or parties beneficially interested in the transaction, are made parties to the bill, or in any way represented in the case, I consider an adjudication upon the deed, either to confirm or avoid it, as both improper and unauthorized, and therefore refrain from expressing any opinion as to its validity.

For these reasons, the motion for the mandamus, in my opinion, ought to be denied.

W. & E. Cummins, for the respondents, presented the following petition for reconsideration:

The directory of the Real Estate Bank at Little Rock would respectfully submit to the Court the following points, in which they believe, and are confident in pledging themselves to show, that error exists in the opinion of the majority of the Court, delivered on the motion for a mandamus.

Before proceeding to notice the points intended to be laid before the Court, it is due to the merits of the question to state, that the directory here have no opportunity of answering the charges contained in the bill of complainants. That no fraud, however gross; no violations of public and private right, however flagrant; no violations of law, however palpable and direct; no usurpation of power by the Central Board of the Real Estate Bank, in giving existence to this pretended deed, could, by the directory, be presented to the Court, other than what the applicants have voluntarily chosen to develope. Neither has the directory, as the case is presented to this Court, any opportunity allowed them, by any legal rule, to show that the act of the Central Board, in declaring the Bank unable to pay its liabilities, in other words, insolvent, and by assigning the assets, so as to remove them from direct liability to her note-holders, and thus delaying the

payment of her debts, and postponing her creditors; and this, too, without publishing to the world a statement of her assets and liabilities, had the immediate effect to depreciate the money in the hands of the people, and deeply injure the credit of the State, and the money of the other Bank.

The opinion delivered rests solely on the alleged equity contained in complainants' bill. Never having urged objections to the exercise of jurisdiction by this Court, by mandamus, over the action of the Chancellor, we shall confine ourselves to the considerations of the power of the Chancellor over the rights set forth in the bill.

The views of the Chief Justice in relation to the charges, &c., contained in the bill, are so forcible, and so fully sustained by authority, that we shall not attempt to support them by additional authority.

The opinion delivered assumes, that the bill charges the adverse holding the assets of the Bank and Banking-house, to be done and committed by the directory of the Bank at Little Rock. How is this fact charged and made known to the Court? This directory being vested with corporate powers and trusts, can act but in one mode; by assembling, according to the charter, and declaring its will according to the vote of a majority, which will or vote can only be manifested or proven by the records which the Board is required to keep. The acts and will of this Board are to be shown in the same manner with the acts of corporations or courts. The act or will of a court can, like the directory, only appear or be evidenced by the record which the court is bound by law to make. The rule of chancery is, and the same is declared in our statutes—*Revised Statutes, p.* 104, *sec.* 50, that a party relying on any record or writing, shall state the substance thereof in his bill or answer, and exhibit an authenticated transcript. Is not this alleged action of the Board the ground of complaint in the bill? If the Board cannot act otherwise than by its vote of record, what other showing could be made before the Chancellor, than the certified record? The action of the Central Board has been so shown to the Court in this case. Surely, by law, this Court can receive no other evidence in this case, than that which the statute, and the practice of the Courts, require. How can the

common requisites of the Courts be waived in this particular instance? This material allegation, on which the whole case rests, is, then, not properly shown, and the Chancellor cannot waive the allegations. There can be no such act, as the Court alleges is set forth in the bill, without there being a record of it. But there is no allegation, that any demand or call was ever made on the local Board. In truth, none was ever made, and no notice was ever given, or is alleged to have been given, to the local Board, of the presence of the trustees or their readiness to take the property. The local Board, by the rule made by the trustees themselves, could not be required to surrender possession until the securities were given. If they choose to waive their own rule, should they not, at least, be required to give notice of this waiver to the local Board? How could the local Board know that they denied possession, otherwise than as they had pointed out? The bill is most clearly defective, in failing to show a notice of readiness, at least, to receive an appearance of the trustees to take possession.

The local Board were not notified by the deed, or the resolutions of the Central Board, when the trustees were to be present, and would take. They set up some claim to have been in possession. How is this shown? We confess, the statements that they appointed E. H. Roane their secretary pro tem., and put him in possession, &c., is, to our minds, novel, as tending to show a legal possession. The trustees had passed a solemn resolution, that possession was not demandable by them until they had given bonds, &c., and then the local Board was to surrender. How did they manage to get possession, dispossess the local Board, and instal their officer in the manner here stated? Was this legal conduct? What had so early in the business disturbed the minds of those individuals? Did their great haste to pay the debts of the Bank prompt this act? Can a Chancellor decide this to be an equitable proceeding? Equity regards consistency of action, straight-forwardness, and singleness of purpose. Are these things to be overlooked in this particular case? But what sort of a possession was it? They now allege, in another part of the bill, that they do not know what it was they had possession of. Altogether, the statements in the bill omitting to show a possession derived

from the local Board, which was admitted to be in possession, amounts to a new method, which we have not seen in the law books, of acquiring a legal possession. That a court of equity would respect this proceeding, is equally novel. Did haste, darkness of the night, or other emergency, prevent the accurate knowledge of the acquisition? In the opinion delivered by a majority of the Court, it is stated, that the complainants have come into equity to have the trust estate established and protected, and the property conveyed by the deed put into their possession, and placed under their management.

We are at a loss to ascertain from what part of the bill this statement is derived. There is in the bill no prayer to have the property placed in the hands of the trustees. The prayer alone can indicate the relief sought. The opinion, in this particular, most clearly rests in mistake; and no such thing is asked, as stated in the opinion. The opinion must rest on the allegation in the bill, not on facts or assertions not contained in the bill. This opinion is based on an allegation nowhere to be found. The bill simply prays for an injunction; nothing else. The opinion alleges, that possession of the property is demanded, through the aid of the Chancellor; and, on this foreign assertion, the opinion alleges that the bill seeks the establishment of the trusts, and that the estate may be placed in their hands. We cannot be mistaken in reading the bill. The prayer shows but one object—asks but one thing. Suppose the prayer granted, would that establish the trust, or give possession? Surely not. Then the bill does not demand possession, or the establishment of the trusts. It is on this assumed state of facts that the opinion rests. The facts not appearing on the face of the bill, the opinion does not apply to the bill or its facts. There is nothing else to which it could properly apply. It is, therefore, clearly erroneous.

Again: The opinion delivered states, that the property mentioned, house, assets, &c., are now said to be held violently and illegally, by a majority of the local directory. We most respectfully ask the Court, where this is stated, except in the opinion? It is not in the bill. The statement in the bill is, therefore, your orators charge, that they (the local directory) do not desire to act legally in the matter, nor believe

that said deed is illegal, but determine to hold said property with strong hand, and illegally and violently.

Here is a mere charge that the directory *determine* to hold *illegally* and *violently*, not that they do, or have done so, but determine to do so. The *determination* is but the act of the operation of the mind, and not the act. The act itself is not charged. Can a court of equity take notice of, and adjudicate on, the determinations of the parties? We have met with no instance of this, and are sure none can be produced. The desire of the local board, and their belief, are also charged, in the same sentence. These are things not within the cognizance of courts. How can they be modified and embodied in the opinion, as the grounds of judicial action? The Court must act on the case as stated, and on nothing else. The case cannot consist in mere opinion of parties, desires, or determinations, but in things done and made certain. The Court, therefore, cannot act on the allegations of the bill.

Again: The effects of the alleged holding by the directory, as stated in the bill, are repeated in the opinion. These effects are conjectural, prophetic, and exist not in reality, but are placed in the *unexplored future.* The statements are, that "their acts (of the directory) tend to defeat the objects and purposes of the deed, to delay the creditors of the Bank, and to depreciate the paper," &c. The tendency of things—future events, are here dwelt on. No acts of the board are stated, to sustain the conjectures. The majority of the Court takes these things, which have never happened, are not in existence, not pretended to be shown as grounds on which the opinion rests; and, by these statements appearing in the opinion, the world will consider the facts as proven and true. The legal consequences of acts may, perhaps, in agreement, be stated, but these are not legal consequences, nor are they so stated.

These things seem to be embodied in the opinion, to illustrate the objects of the complainants, in filing the application. The Court surely cannot decide any thing relating to the objects or purposes of parties. The decision of a court must rest on facts, and be a declaration of the law on the facts. We must most earnestly protest against the repetition of these matters in the opinion, both on the

grounds of their immateriality, and total want of legal effect, and on the ground that their insertion in the opinion tends directly to affect unjustly individuals who have had no opportunity here or elsewhere to answer the facts, conjectural as they are. The erasure from the opinion of these statements is respectfully claimed, on the ground above stated. We must repeat, that a statement of the objects or purposes of any party, as his expectations or fears, constitutes no part of a judicial investigation. What would the Court say to the conjectures which might be alleged by the defendant in this motion? Would the Court repeat them, uncertain as they would be, and false as they might be. Consequently, such things do not belong to that accuracy, as to law and fact, which is always required in judicial proceedings.

The opinion of the majority of the Supreme Court rests upon these words, as declared, and the principles therein contained, to wit: "We have sufficiently demonstrated these two propositions: that the complainants have come into eqnity, to have the trust estate protected and established, and the property conveyed by the deed put into their possession and placed under their management; and that the acts complained of are charged against the defendants not as private individuals," &c. To the latter proposition, we will add nothing to what we have said. Our business is with the first and the following: "That a court of equity has full jurisdiction in this case, seems to us a proposition perfectly free from all doubt. The object of the bill, as before remarked, is to have the trust protected, and the estate delivered," &c.

The above remarks contain the statement of the grounds on which the majority of the Court assumes equity jurisdiction: that a trust estate is presented to them by the bill, and that a court of equity is bound to protect such estate.

Now, if, on examination, it should appear, that no *trust estate whatever* is presented to the Court, by the bill, we think the error in the opinion must be manifest. We hold ourselves ready and prepared to establish, by the authority of every writer whose works can be produced on the subject of trust estates, that the bill in this case does not

present to the Court a trust estate, nor does it ask any thing in aid of a trust estate.

A statement of the allegations of the bill is itself proof of our position. The bill states, that on the 2d of April, 1842, a deed of assignment was prepared, and, on the same day, was duly executed by the said Bank, (Real Estate), signed by Carey A. Harris, President thereof, and sealed by the seal of said bank, whereby said bank conveyed unto your orators, who had been appointed trustees by said Central Board, and in conformity to, and under said ordinance, all and singular the estate real and personal, debts, choses in action, property and effects, and interests, &c., belonging to said bank; to have and to hold the same, &c., to your orators, their heirs and assigns, &c. To obtain part of the property acquired by this deed, by complainants, and to prevent the local directory from intermeddling with it, this bill is brought. The bill relates to and sets up before the Court the right and estate acquired by this deed, and no other right or estate. Is not this estate or right the same that any other person acquires by deed, to himself, his heirs, &c. Can he not hold it, sue for it, and protect it in law? Could not the trustees do the same thing under their deed, if it is such as they represent, that other persons can? Is not this right of the trustees to the property claimed, as full, ample, embracing every legal attribute of a perfect, direct, legal title, as language can express, as the mind conceive? Possession is given with unrestrained, absolute right to control, manage, and sell, in the same manner they could any other property, however acquired? Is there any other kind or description of estate presented to the Court by the bill? None can be shown to which the prayer applies, but what is acquired by the deed.

Is this property thus acquired, the rights thus vested in these grantees, a *trust estate?* For they are only taking care of their own estate. We never deemed it necessary on the original argument, to attempt an illustration from authority showing that this was not a *trust estate.* No work can be opened on the subject, which does not show the truth of our position, that this is no *trust estate.*

We will add a few to those which have been presented in the opinion of the Chief Justice.

Fonblanque, vol. 2d, p. 7, defines a *trust estate* thus: "Now, an use is a *trust or confidence*, which is not issuing out of the land, but as a thing *collateral, annexed in privity to the estate*, and to the persons concerning the land, viz: that *cestui que use* should take the profits, and that terretenant should make the estate according to his directions," &c. "So that *cestui que use* had neither *jus in re*, nor *ad rem*, *i e.* neither a right in possession, nor in action, but only a confidence and trust, which the common law, though it took notice of, would not protect, nor give him any remedy for it; but his remedy was only by subpœna in chancery."

Here, then, is a trust estate: a thing collateral; *annexed* in *priority* to the estate, and to the persons concerning the land, neither a right in possession, nor in action, but only a *confidence and trust*, which the common law would not protect.

Now, have these trustees shown such an estate as this in themselves? Is their right to the property collateral? No, it is direct. Is it annexed in priority to the estate? Not so, for they take it to themselves and heirs. Is their right neither in *possession nor in action?* The majority of the Court have decided that, under the deed, they take the immediate possession of the property on its execution. Is not this right to immediate possession a thing recognized and protected by common law? Most surely it is. The trustees taking, under the deed, the direct and entire right in the property, the present possession, not a thing incident to, or collateral, and a right which the common law will protect, and for injuries to which ample remedies are thereby provided, took, by the deed, a legal estate, and most clearly not a trust estate.

How it can be contended, or on what grounds, that the trustees hold a trust estate, we are entirely at a loss to inquire. The estate they hold has none of the characteristics of a trust estate. *Cestui que trust*, or the beneficiary, holds the trust estate, but this is neither *in re* nor *in rem*, neither in possession nor action, but a mere trust—a mere confidence collateral to another estate, which is the legal *cestui que trust*, having no present possession or direct legal right, can only be protected in his latent right, considered under the legal, in a court of conscience. Over this right existing in, and consisting of, the trust,

a court of equity has direct and uniform jurisdiction. This not being such a case, the jurisdiction cannot attach.

There are, on the face of the deed before the Court, trusts created. These trusts rest on others than the trustees. The trusts rest in the creditors, note and bond-holders, and stockholders. They hold a pure trust estate. They have a right collateral to, and issuing out of, the legal estate in the trustees, to be paid their respective debts; but they have not a present possession in any right which a court of law could recognize. If the trustees break the trust, or injure the trust estate, or fail to comply with the contracts of the deed, then they can protect their rights before a court of equity. The trusts created for their benefit belong to them—cannot be claimed, or enjoyed, or enforced, by others, before a chancellor; and this is what is meant by establishing a trust. It is the enforcement of his rights, in a court of equity of *cestuis que trust*, which they alone can bring before the Court, being the owners thereof.

Now, the trustees, having the legal interest, are bound to take care of the estate which is in their own hands, and themselves to confirm and execute the trusts. They have no right to come before a court of equity, setting up the trusts which belong to others. *Cestui que trust*, or his representative, must do this.

We think no authority necessary to establish this principle. No man can come before a court of law or equity, claiming the rights of others. These trustees can only set up, in this Court, their own rights, which, in this case, are strictly legal. The *cestuis que trust*, or beneficiaries, can only claim their rights and equitable interests. It must, therefore, be clear, that, as the trustees cannot present to the Court any other than their own rights, and as the estate they hold is strictly a legal estate, our proposition is established, that no trust estate is presented to the Court by the bill.

In further support of our position as to what constitutes a trust estate, we will refer to *Levin on Trusts and Trustees*, *p.* 9, who defines the estate precisely as above; that the two estates are distinct in their nature—the legal and equitable; and, when they both vest in the same person, the equitable is lost in the legal.

Same work, *p.* 102: the trustees must hold the legal estate; and this everywhere.

How can it be a question, in this case, whether the trustees hold the legal estate or not, when, by law, they cannot be trustees, without the legal estate vests in them?

Having the legal estate, they cannot claim its protection before a court of equity. They do not show that they own the trust estate; and, if they did, the legal alone could exist.

On the same point, see 1 *Harrison Chancery, pp.* 20, 516; the same definition of a trust estate.

The case of *Benson vs. Le Roy,* 1 *Johnson C. R., p.* 651, is referred to, and relied on, to support the claim of the trustees, on the face of the bill, because it contains this remark, that "by the trusts created for payment of debts, the assets were placed under the jurisdiction of this Court," a court of equity.

This principle is laid down most truly, and we only ask this Court now to follow the principles elicited in the above case, by which the present decision of a majority of this Court would be at once set aside.

The case above stated was in a bill filed by creditors against trustees, to prevent them from wasting an estate, or destroying their trust estate in the assets, by permitting liens to operate to their prejudice, by exhausting the estate. The owners of the trust, *cestuis que trust,* could, as we contended above, have their rights protected, in equity. Trustees having the legal estate, and not the owners of the trusts, cannot, as is claimed here, bring their estates before the Chancellor for protection. See also, *Shepherd vs. McEvers,* 4 *J. C. R., p.* 106, which was a bill brought by a creditor to secure his trust estate, which was sought to be destroyed by the trustees. See also, 1 *J. C. R., p.* 52; *Dexter vs. Stewart.* Here was, also, the same principle asserted, in a bill by the representatives of *cestui que trust,* against the trustee and his assignees.

Here are three cases of the very highest authority, supporting our position, that a trustee cannot represent a trust estate in a court of equity, for the plainest possible reason, that it does not belong to him. One man cannot sue for another estate, nor apply to equity for its pro-

tection. We aver, with the utmost confidence, that no instance can be shown of a mere trustee, in that character, applying for the protection of the trust estate, or its establishment, the trust being dependent on the legal estate held by the trustees, as in the present case.

To assert that the trustees have a trust estate, is to disregard all legal distinctions—to destroy the defined boundaries between law and equity, and the subjects of their respective jurisdiction.

It is alleged that courts of equity will aid trustees, and protect them in the due performance of the trusts, &c. How, or under what circumstances, does this doctrine show, what is attempted to be established in this case, that a court of equity will aid the trustees in establishing the legal estate? It is the equitable only, the Court can consider, not the legal. The authority does not, in the remotest degree, tend to sustain the position on which this opinion rests.

The error consists in considering the estate of the trustees an equitable estate, in express contradiction to any rule on the subject.

No particular trust estate is here shown or brought forward. What is asked of the Court for the *cestuis que trust?* Why, that the trustees may get possession of their legal estate, as the Court construes the bill. It is not asked that a trust estate shall be defined, fixed, or satisfied. Then that authority does not apply to this bill.

We have not time to adduce authority on this subject, but have no fears in asserting, that no case, similar to the present, can be shown, in which equity has taken jurisdiction of the legal estate.

The opinion of a majority of the Court asserts: "Now, if they (*cestuis que trust*) have an undoubted right to the jurisdiction of the Court, the trustees, whose duty it is to preserve the estate, have equally an unquestionable right to relief."

Here the jurisdiction of the Court is claimed for the trustees, on the distinct ground, that *cestui que trust* has a right to the jurisdiction of the Court. This assumption is most clearly erroneous. They do not hold the same estates. Their rights are essentially different. How can the same remedy be applied? We pledge ourselves that this position cannot be sustained by any authority. With regard to the deed set up by the trustees, and its validity, we have not time to adduce much authority. It is admitted that a majority of the Central

Board of the Bank prescribed the terms of the deed, determined on the expediency of the measure, and acted for the Bank in producing this deed, by which she purports to convey all her estate to the trustees. It is also admitted, that the same men take the estate at the same time from the Bank, by the deed made by themselves. In other words, that they, at the same time, acted for the Bank, in making the deed, and for themselves, in taking under the deed.

The opinion of the Court, though not well understood by us, sustains this conduct as legal. We beg leave to submit to the Court the following uncontradicted authority, directly counter to the opinion of the majority of the Court, in this case:

"For he who undertakes to act for another in any matter, cannot, in the same matter, act for himself." See *Levin on Trusts and Trustees*, and *Whichester vs. Lawson*, 3 *Ves.* 750; *Ex parte Lacy*, 6 *Ves.* 625. Per Lord ELDON: "All acts done by parties pretending to act for themselves and others in the same matter, are declared fraudulent on their face, and uniformly held void by courts of equity."

Could the Bank, in making this deed, act for herself? She could not; but must act through her agents. They, in the matter, act for themselves and the Bank, at the same time, and in the same matter. Does the above rule not apply to them most directly?

This rule of law is uncontradicted. No authority can be shown against it. How can it be abrogated and disregarded in this instance? This Court does not, nor can any Court, claim the power to repeal a law of the land. The business of Courts is to declare the law. The suitors in this Court have a right to demand the declaration of the law, and the security of their rights under it. We feel assured the Court cannot, and will not, disregard this most plain rule of law, but will correct the opinion delivered, which is in direct violation of this rule.

See *Angel & Ames on Corporations*, *p.* 60: "Corporations can only act through their agents." This deed, then, could only be executed by the Bank, through her agents. The decision of the majority of the Court admits this deed was created through the action of the Central Board; but the majority of the Central Board made themselves trustees of the same, and in the same act; so that they give

away and alienate from the Bank, the State stockholders, $2,250,000, at the same time that they take the $2,250,000 to themselves. Here, then, they act for themselves and another in the same matter. They, then, clearly violate this rule of law, and their act is fraudulent and void. No authority can be adduced, nor is any pretended, to sustain such an act.

The opinion of the Court assumes the power to take care of trusts in the hands of trustees. For the argument, we will here admit the proposition, adding that if they have the power, it is their duty to do so.

Does it not appear, from the opinion delivered, and the bill in this case, that the local board hold the property mentioned, as trustees, for the benefit of the State, the stockholders, and creditors generally? This trust has been long established, held, and enjoyed, by express provisions of law, aided by individual contracts, rights, and liabilities.

Is not this trust estate, protected by law and solemn contract, entitled to the protection of this Court? Is not the right of one trustee as good as the right of another? But the local board have express legal authority to hold and possess this property from the State and others. We think the law is paramount and superior to the deeds of individuals, and vests higher and better title. Deeds made against the scope and object of laws, are void. Is not, then, the right of these trustees inferior to that of the local board?—the first claiming against law and express legal provisions, the latter claiming under laws of the State, which expressly give them power to hold the property, and require them to do so? Can violations of law be authorized and practised in this Court? We think not. Then the rights claimed by these trustees, being in violation of law, cannot be supported.

The Central Board of the Real Estate Bank has no power to infringe or disregard any of the provisions of the laws of the State, or the charter of said bank, as was decided by the Court, in the case of *The State vs. Ashley.*

Then having no power to act in violation of the charter, their acts cannot disturb the legal rights of the local board, who hold according to the provisions of the charter.

The local board holds as trustees for the people of the State and

stockholders under the law. Where is the power to violate this possession? None can be shown. Neither individuals nor corporate acts could divest them of their legal rights.

But the petition was refused.

After the motion for a re-consideration was refused, the respondents again, by *Cummins & Ashley*, moved the Court for a re-argument and re-hearing, and said, in their motion: "this motion is made by request of the Executive of the State of Arkansas, as appears by his letter herewith filed." And they moved for leave to file their reasons for a re-argument and re-hearing, at a future day.

The letter of the Governor, referred to in the motion, was as follows:

Executive Office, 23th Aug., 1842.

Messrs. Cummins & Ashley,

Attorneys for the Real Estate Bank:

Gentlemen—During the investigation of the legality of the deed of assignment by the Real Estate Bank, before the Supreme Court, I did not feel myself (as the Executive of the State) called on to take any steps while the subject was pending before a co-ordinate branch of the government.

A decision has been made by a majority of the Court, which, to say the least of it, will place the assets of the Bank, and the management or control of the institution, beyond the reach of the State, except by a bill in chancery.

The liability of the State for the whole capital of the Bank, independent of the protection which is due to the note and bond-holders, renders it a subject of deep and vital interest to the people of Arkansas, as to the manner in which the institution is controlled and wound up.

Without, therefore, intending to be considered by you as officially interfering, but from a sense of duty growing out of the position I occupy, and from a hope that a re-examination of the case will tend ultimately to place the institution in a situation which will be more acceptable and advantageous to all the parties concerned, and as I learn a second application for a re-hearing, although unusual, is not without precedent in the highest judicial tribunal in the United States, I

therefore respectfully suggest for your consideration, whether the interest of the State would not be promoted by an application for a rehearing, if you should not think it disrespectful to make the second application.

I have, at least, discharged what may be considered by some my duty, and shall leave the result and consequences to the proper tribunals.

I am, with respect, your obedient servant, A. YELL.

The motion was refused by Judge DICKINSON, who said:

That the question presented is of vital importance, as regards both the State and its citizens, is conceded. Such is the light in which it has been viewed by the Court. In this, as in all other cases, the difficulty in determining is not the amount in dispute, but the principle involved. No case has ever received more profound attention from this Court, than the one now before us; and in none has its judgment been more firmly convinced. Upon the argument for reconsideration, the whole ground was re-examined, with the same result. We know of but one rule for our guidance—*the law of the land.* Nor can I believe that any legal, unbiassed mind will, after a careful investigation of the authorities, differ with us in our opinion, as to the jurisdiction of the Court, and the validity of the deed. No considerations of public policy not warranted by law—no fears of popular indignation—will ever delay or hasten my decision, when my judgment is once convinced. Totally indifferent to the private views of individuals, however numerous, elevated, and influential they might be, I have never hesitated, even for one moment, in announcing the convictions of my mind. I speak as well for my brother judges as for myself. The labors of no appellate Court in the Union have been more serious than of this. It has been our task to meet questions of the most exciting and complicated character. We have had to interpret a constitution, differing in detail from all the American States, with a code of laws the most defective that was ever imposed upon a free people, and reconcile one with the other. We have endeavored to guard every interest that might be affected, and protect every citizen in the enjoyment of his rights. This Court, it is true, necessarily

possesses great power. That power has been exercised with an eye single to our public duties; and, conscious of the fearlessness and independence with which they have been discharged, we had hoped to create a confidence in the judiciary, equally as broad as its power. While we neither sought nor declined the responsibility which devolved upon us, whether as a court or as judges, we have exercised no authority not properly conferred upon us by the constitution and the laws, at the same time confining the other departments to their proper and legitimate spheres. And while we will not permit the rights of the humblest individual to be violated with impunity, we should impair, if not utterly destroy, the confidence of our citizens in the supreme tribunal of the country, if we should suffer it, on the other hand, to be controlled by individuals, or dictated to by either of the other departments. It is for the *legislature* to declare the public will, the *judiciary* to interpret it, and the *executive* to *enforce it.* The line of distinction is too broadly marked to be mistaken.

If the *executive* department shall so far lose sight of its boundaries, as to *encroach* upon, or *usurp* the powers of the *judiciary*, or attempt, under the pretext of a deep interest in the general welfare, to influence its judgment, or control its action, such interference should be repelled with firmness, but with dignity. We may have often erred in our judgment, but all, I trust, will do us the justice to admit, that where once convinced of our error, we have never hesitated to rectify it. We have never attempted to exercise legislative or executive powers, or influence the action of either. The constitution forbids it; and while I have the honor of a seat upon this bench, I cannot so far forget the obligations of that instrument, as to permit the rights and authority of this Court to be invaded by either of the other departments. If such an interference as is attempted in this instance should be submitted to, it would be but a precedent justifying the executive, in any case pending between individuals in this Court, to come in directly as a party, because he might think, however erroneously, that the interest of the State was jeopardized, and, after a decision, ask that it be again reviewed. If this is permitted in the one instance, it cannot, consistently, be refused in another. The right once admitted, cannot be limited. Then, indeed, would the community have

cause to tremble for their security. Better at once unite the two departments, if one is to be dictated to, or rendered subservient to the other. It has been my pride, while sitting here, to settle the law, if possible, upon a firm and sound basis; to extend protection to every individual, however humble he might be; to guard every interest, whether of the public or of individuals; to secure the confidence of the citizen, by rendering the judiciary respected at home, and elevating the character of the State abroad. If I have failed in any one of these objects, it has *not* proceeded from a *fear* to travel the path of duty, when sufficiently plain to follow it. And if, in the discharge of my public duty, I am not sustained by those upon whom it devolves to judge of my judicial acts, I must bow to their decision in silence.

I have discovered no sufficient cause to justify me in disturbing the judgment of the Court, as heretofore announced; and, as I cannot, without compromising the independence of this tribunal, recognize the right of the Executive to interpose his wishes or opinion upon a matter already solemnly adjudicated, the motion must be refused.

Gerard N. Causin *vs.* Creed Taylor.

A note payable on demand, bears interest from date.

In declaring on a note, expressed on the face to bear legal interest, it is not error, after judgment by default, that the breach in the declaration does not negative payment of the interest.

It is not error that the declaration and writ are against *Gerard N. Causin*, and judgment against *G. N. Causin.*

This was an action of debt, determined in Jefferson Circuit Court, in April, 1841, before the Hon. Isaac Baker, one of the circuit judges. It was founded on a note executed by Causin, payable on demand, with legal interest thereon till paid. Declaration and writ against Gerard N. Causin. Judgment against G. N. Causin, for debt,

and interest from the date of the note, as damages, by default. There being an excess of two dollars in the calculation of damages, it was remitted, in this Court.

W. & E. Cummins, for plaintiff in errror. There is no sufficient breach alleged. The contract is express to pay interest, and there is no allegation of non-payment of the interest, though judgment by default is taken for the entire interest accrued. It can make no difference, that the contract was to pay the legal rate of interest. The rule is universal, that where an express contract, in writing, is declared on, the breach must be as broad as the contract. See *Saund. Pl. & Ev. vol.* 1, *p.* 133 *to* 136.

At the common law, it was usual to aver a special demand in suits upon notes payable on demand; but the practice has changed, and the institution of suit is deemed a sufficient demand to sustain the action; and, upon every principle of law, the interest should run only from the institution of the suit. *Lewis vs. Lewis*, 2 *Hay.* 32. *Freeland vs. Edwards*, 2 *Hay.* 49. *Cannon vs. Beggs*, 1 *McCord*, 370.

The declaration and writ sent up in this case, ought not, perhaps, to be regarded as part of the record, and the judgment by default should be regarded as having been taken without writ or declaration.

The judgment is improperly entered against the defendant below, by a description and style not set out in the declaration, and in violation of the statute. *Rev. St.*, *Chap.* 43, *sec.* 18.

Hempstead & Johnson, contra.

By the Court, Ringo, C. J. Every question presented by the record and assignment of errors, is within some of the principles adjudged by this Court, in either the case of *Pullen vs. Chase*, *ante*, or *Davies vs. Gibson*, 2 *Ark.* 115; and, according to the judgment of this Court, then expressed and still entertained, they must be, respectively, determined against the plaintiff in error.

Judgment affirmed, except as to the $2 remitted, with costs.

4 410
60 130

4 410
63 403

McFarland and others *vs.* The Bank of the State.

The notes of the Bank of the State of Arkansas and its branches, are not bills of credit, within the meaning of the Federal Constitution.

To constitute a good plea of usury, the pleader must aver a corrupt intent.

It is no error to disregard a plea of non est factum, not sworn to.

The 1st and 5th sections of chap. 80, of the Revised Statutes, as printed, which are declared to be the law of the land, by act of 14th December, 1838, put in operation by proclamation of the Governor, issued in pursuance of that act, on the 20th March, 1839, do not repeal the acts of 3d March and 10th December, 1838, fixing the rate of interest to be taken by the Bank.

It is a universal rule in construing statutes, and a settled maxim of the common law, that all acts passed upon the same subject, or *in pari materia*, must be taken and construed together, and made to stand, if capable of being reconciled.

The *general* law in regard to interest does not apply to cases not within its meaning or reason, nor repeal a special law passed at the same session, applicable to a particular corporation.

This was an action of debt, determined in the Independence Circuit Court, in August, 1841, before the Hon. Thomas Johnson, one of the Circuit Judges. Declaration on a bond executed to the Bank of the State of Arkansas, on the 28th of April, 1840, due at six months.

The defendants pleaded, first, non est factum, not sworn to; second, that the bond was executed for a loan of the notes of the Bank, and that these notes were *bills* of credit; and third, usury, without averring any corrupt intent. Demurrers to the second and third pleas sustained, and judgment signed by the plaintiff, disregarding the first plea. The judgment was rendered for the debt, and interest at 10 per cent. from the time it became due.

All the questions raised in the case were decided in cases previously reported, except as to the right of the Bank to any higher rate of interest than six per cent., no rate being expressed in the instrument sued on.

The Bank of the State has no stockholders. The charter was passed on the second day of November, 1836. By it the Bank was authorized to take in advance, six, seven, and eight per centum per annum, on notes having certain times to run. By the acts of March 3d and December 10, 1838, she was authorized to do the same, with

some slight variations as to the times the notes were to run. But on the 13th of December, 1838, subsequent to the passage of the last of these special acts, the Legislature enacted that the Revised Code, *as printed*, should be, and it was thereby declared to be, *the law of the land*, and that it should be in force when the Governor should issue his proclamation to that effect, which he did on the 20th of March, 1839. This Revised Code provided, that no person or corporation should directly or indirectly take or receive, in money, goods, or things in action, or in any other manner, any greater sum or value, for the loan or forbearance of money, than was therein prescribed; and made all notes, &c., void, wherein or whereby such greater rate was taken or reserved. The rate so fixed was six per centum per annum, allowing the parties to stipulate *in writing*, for a higher rate, not exceeding ten per centum. This portion of the Revised Code was still in force when the bond in this case was made, and no rate of interest was stipulated in it.

Pike, for the plaintiffs in error:

The provisions in the Revised Statutes, prohibiting the taking of any greater rate of interest than six per cent., unless it is expressed in the contract, became *the law of the land*, by broad, unqualified enactment, of the 20th of March, 1839, by virtue of the act of Dec. 14, 1838, and consequently repealed the act of Dec. 10, 1838. *Pamph. act of* 1838, *pp.* 11, 27.

An *affirmative* statute does not repeal a precedent affirmative statute; and, if the substance be such that both may stand together, they have a concurrent efficacy. 11 *Co.* 636. *But, if the latter be contrary to the former, it amounts to a repeal of the former;* for it is a general principle, that *leges posteriores priores contrarias abrogant. Dwarris*, 638. *Rex vs. Carter*, 4 *Burr*, 2026.

An act of Parliament may be repealed by the express words of a subsequent statute, or by implication. *id.* 638, 673. 11 *Co.* 63, *a. Com. vs. Crowley*, 1 *Ashmead*, 173. 3 *Bibb*, 181. *Heyden vs. Carroll*, 3 *Ridg.* 599.

But this is a *negative* statute: "No person or corporation shall, di-

rectly or indirectly, take," like that of Marlbridge, "*non ideo puniatur Dominus*," or *Magna Charta*, "*nullus capiatur aut imprisonetur*." If a subsequent statute, contrary to a former, have negative words, it shall be a repeal of the former; and a negative statute so binds the common law, that a man cannot afterwads have recourse to the latter. *Dwar.* 639.

It is said that an act of Parliament cannot be altered or repealed in the same session at which it was passed, unless there be a clause inserted, expressly reserving a power to do so. *Dwar.* 673. But this was because, in England, every act had relation to the first day of the session. It is not so in the United States. 1 *Lev.* 91. *Atto. Gen. vs. Panter*, 6 *Bro. P. C.* 553. *Latless vs. Holmes*, 4 *T. R.* 660. *Perkins vs. Perkins*, 7 *Conn.* 558. *Matthews vs. Zane*, 7 *Wheat*, 104. *The Brig Ann*, 1 *Gall.* 62. *Goodsell et al. vs. Boynton et al.*, 1 *Scam. R.* 555.

An act of the Legislature can be repealed at the same session at which it was passed. *Peyton vs. Moseley*, 3 *Mon.* 80.

It is said that a later statute, which is general, does not abrogate a former, which is particular. *Dwar.* 674. But the instance given there is misquoted, and does not sustain the position. The *true* doctrine goes only to this extent, that a later statute, *in the affirmative*, shall not take away a former act; and *co potins*, if the former be particular and the latter general. *Gregory's case*, 6 *Co.* 20. See *Gage vs. Carrier*, 4 *Pick.* 299.

It is true, the law does not favor repeals, by implication, unless the repugnance is quite plain; unless there is a contrariety or repugnancy in them. *Dwar.* 674. *Dore & Gray*, 2 *T. R.* 365. 11 *Co.* 63. *Dyer*, 347. 15 *East*, 377. *Thornby vs. Fleetwood*, 10 *Mod.* 118.

Acts of Parliament, established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, *by any constrained construction out of the general and ambiguous* words of a subsequent act, to be abrogated. *Dr. Foster's case*, 11 *Co.* 63. But, *if they are contrary in matter*, especially if the latter is *negative*, the former is abrogated. *id.*, *Saul vs. His Creditors*, 5 *Mart. N. S.* 575. *Gaylis' Heirs vs. Williams*, 7

Louis. R. 166. *Com. vs. Crowley*, 1 *Ashm.* 179. *Procter vs. Newhall*, 17 *Mass.* 92. *Pease vs. Whitney et al.*, 5 *Mass.* 386.

If the latter part of a single statute is repugnant to the former part thereof, it shall stand, and, so far as it is repugnant, be a repeal of the former part, because it was last agreed to by the makers of the statute. *Dwar.* 675. *Fitzgib.* 195.

It is true, that the great object of the rules and maxims of interpretation is, to discover the true intention of the law, and whenever that intention can be indubitably ascertained, courts are bound to give it effect, whatever may be their opinion of its wisdom or policy. That the real intention, when ascertained, will always prevail over the literal sense of terms. *Pray vs. Edie*, 1 *T. R.* 313. 11 *Co.* 73. That whenever the intention can be discovered, it ought to be followed in a course consonant to reason and discretion. *Plowden*, 202. 11 *Mod.* 161. 1 *Show.* 491. That a thing which is *in* the letter, is not within the statute, unless it be within the intention of the matter. *Bac. Ab. Tit., Statute* 1.

But that *intention* is primarily to be discovered from the *words*. It is only where the words are not explicit, that the intention is to be arrived at from the occasion and necessity of the law. It is not true, as Plowden lays it down, that the best way to form a right judgment whether a case be within the equity of a statute, is to suppose the lawmaker present, and that you have asked him the question, did you intend to comprehend this case; and that you give such answer as you suppose that he, being an upright and reasonable man, would have given. *Eyston vs. Studd*, *Plowd.* 467. *Dwar.* 729.

Though the intention is to be explored, yet the construction must be such as is warranted by, or at least not repugnant to, the words of the act. Judges must not, in order to give effect to what they may *suppose* to be the intention of the Legislature, put upon the provisions of a statute a construction not supported by the words, *though the consequence should be to defeat the objects of the act.* *Rex vs. Stoke Damerel*, 7 *B. & C.* 569. *Opinion of Justices*, 7 *Mass.* 523.

Enlightened judges have long lamented the too frequent departure from the plain and obvious meaning of the words of the act, and hold it much the safer course to adhere to the *words*, construed in their

plain and ordinary import, than to enter into any inquiry as to the supposed intention of the parties who framed the act. *Rex vs. Inhab. of Great Bentley*, 10 *B. & C.* 527. *Rex vs. Barham*, 8 *B. & C.* 104. If the words go beyond the intention, the Legislature must make the alteration. *Notley vs. Buck*, 8 *B. & C.* 164. It is safer to adopt what the Legislature *have* said, than to suppose what they *meant* to say. 1 *T. R.* 52. *Rex vs. Turney*, 2 *B. & A.* 522. *Rex vs. Bray*, 3 *M. & S.* 20. *Brandling & Barrington*, 6 *B. & C.* 475. *Pennington vs. Coxe*, 2 *Cranch*, 33. *U. S. vs. Fisher et al.*, 2 *Cranch*, 358. *Wilkinson vs. Leland et al.*, 2 *Peters*, 662. *Clay vs. Hopkins*, 3 *Marsh.* 489.

A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. 1 *T. R.* 52.

Where the language of a statute is clear and unambiguous, the Court is bound to read it according to its usual and obvious signification, whatever may be their opinion of the expediency of the law. If they should give it a strained construction, even from motives of public policy, and for the advancement of apparent justice in a particular case, they would be justly chargeable with a usurpation of power, and a violation of the constitution they are sworn to support; and it makes no difference in the controlling operation of the latter, that the one is a *general* and the other a *special* statute. If the provisions in the two are repugnant, they cannot stand together. *Gage vs. Currier*, 4 *Pick.* 399. *Howe vs. Starkweather*, 17 *Mass.* 240.

Whenever a statute is intended to give a remedy against a wrong, to prevent fraud, tortions, usurpations, &c., the King or the government is bound by it. So by acts for the advancement of religion or learning. 2 *Inst.* 681. 5 *Co.* 14, *b.* If an act is general, and the government clearly included in the words, if it is to be made exempt, it must be by construction of law; and, in such case, such construction will be put upon the act as will suppress the mischief and advance the remedy. The government cannot be made an instrument of wrong. *Megdalen College case*, 11 *Co.* 67.

And, if the special and the general statutes are to be construed together, the effect is the same. In that case, the Bank could not take

more than six per cent. interest, *without providing for it in the body of the note.* If she omitted to do this, it was her own fault.

This question was also argued by *Hempstead & Johnson*, for the Bank, and the Reporter regrets that such a brief was not filed by them, as he is authorized, by the rule of the Court, to have published.

By the Court, LACY, J. We deem it unnecessary to notice the two first questions raised upon the record, further than to remark, that it was held in the case of *McFarland et al. vs. The Bank of the State of Arkansas, ante*, that the issues of the notes of the Bank are not bills of credit, within the meaning of the Federal Constitution. And that, to constitute a good plea of usury, the party pleading it must aver a corrupt intent. It certainly cannot be contended that the Court below erred in disregarding a plea of *non est factum*, which is not sworn to.

The only remaining inquiry is, do the first and fifth sections of the 80th chapter of the Revised Statutes, as printed, which is declared to be the law of the land, by an act of the General Assembly of the 14th of December, 1838, put in operation by the proclamation of the Governor, issued in pursuance of its authority, on the 20th of March, 1839, repeal the acts of 3d of March and 10th of December, A. D. 1838, prescribing the rate of interest for the Bank of the State? By the Revised Code, it is declared, that "no person or corporation shall, directly or indirectly, take a higher rate of interest for the loan or forbearance of money, than six per centum per annum, unless it is so expressed in the writing," and then not exceeding ten per cent. The acts of the 3d of March and 10th of December, 1838, prescribe the rate of interest for the Bank, and fix it higher than six per cent., without requiring it to be expressed in the contract, and give ten per cent. per annum upon all bonds, bills, and notes, which shall not be paid upon maturity, or be protested, or upon which suits may be brought. The question now recurs: Does the general law of interest, as contained in the Revised Statutes, repeal the special law upon that subject, as fixed by the acts referred to? This question is one of ac-

knowledged magnitude, and the Court has met with no inconsiderable difficulty in arriving at a satisfactory conclusion. It has been well discussed by the repective counsel engaged, and in a manner worthy the importance of the principle involved.

It is a universal rule in the construction of statutes, whether public or private, founded alike in justice and sound policy, that all acts passed upon the same subject, *in pari materia*, must be taken and construed together, and made to stand, if they are capable of being reconciled. We know of no exception to the universality of this rule. Indeed, the principle may now be considered as a settled maxim of the common law. Its application to the statutes now under consideration, will test the question in the present case. The rule of interest, as prescribed in the Revised Code, may properly be denominated a *general law*, including all cases within its terms. It does not apply to cases not within the meaning or reason of the statute. The rate of interest, as prescribed by the acts of the 3d of March and 10th of December, may justly be termed a *special law*, having exclusive reference to the Bank. Now, do the provisions of the general law of interest repeal a special law of interest, as applicable alone to the Bank? They certainly do not do it by any express words or terms.

The Revised Statutes declare, that no person or corporation shall take a greater rate of interest than is contained in the act of the code. But it does not refer to the Bank of the State by name, or declare that that institution is embraced by the word corporation. Does it, then, do it by necessary implication, or by any just interpretation of that term? The term "Corporation," if it stood alone, is a word of general signification, and would unquestionably embrace the case of the Bank. But is not its meaning restricted and confined to a more limited sense, and applying only to such corporations, other than the Bank, that were then in being, or might afterwards be created. There were many corporations besides the State and Real Estate Bank; for instance, the Little Rock Manufacturing & Mining Company; Little Rock Academy; Napoleon Public School and Church; numerous turnpike companies, &c.

To most, if not all of these corporations, was given, by the express provisions of their charters, the power of acquiring, holding, and

transmitting property, and making contracts. And the corporation of the Fayetteville Female Academy, by the third section of its charter, had express authority given it *to loan money on interest.* The term "Corporation," then, is justly applicable to all these corporate bodies, and hence the propriety of the term as used in the Revised Statutes. It is clear, that the term could not embrace the cases of interest of the Real Estate Bank, because the Legislature was incompetent to prescribe any other rule upon that subject, than was contained in the charter, without the assent of the stockholders; the charter being a contract between the State and the corporators. That they did not intend to apply the term corporation to the Bank of the State, is, we apprehend, pretty clear and certain. Had that been the intention, would they have left its repeal to mere implication, and that, too, in a case where the State was the sole corporator, and its honor and its means pledged for the redemption of the capital stock?

This view of the case is strengthened, by considering that both the general and special law of interest were before the Legislature at one and the same time, and that there were only four days between their respective dates. The proximity of these dates raises a violent presumption, if it does not amount to full proof, that the term "Corporation," used in the general law of interest, was never intended to embrace or apply to the transactions of the Bank. The rate of interest that was to govern that corporation, was fixed by special and particular acts, that were considered maturely, and separately passed; and the latter act upon the subject, might almost be said to reach the very verge of the date of the general law upon the subject, or run into its provisions in point of time. This idea receives an additional confirmation from the known and well established fact, that the laws of the Revised Code were passed in one collected body, as a code, and not in separate and distinct acts. This grew out of the errors and imperfections of the original rolls, as they appeared in the office of the Secretary of State, and hence the act of the 14th December, 1838, made the *Revised Code, as printed,* the law of the land. Having passed in this manner, is it reasonable to suppose that the Legislature could have intended, when using general words in a general

law, to repeal the provisions of special and particular acts not falling within the reason or spirit of the rule.

Besides, if this was the case, it must have been apparent to all that the Bank would be compelled to adopt the rate of interest as specified by her charter, and the amendatory acts engrafted upon it for a given time, until the Governor issued his proclamation; which it was reasonable to presume could not take place before the lapse of several months. Such being the state of things, to suppose that the Legislature intended, by the term "Corporation," to include the Bank, would argue a want of foresight, and inconsistency in their proceedings, which this Court is not allowed to infer. Such a presumption would give the debtors to the Bank one rule of interest to govern their contracts, during a given period, and, in a short time thereafter, would furnish a wholly different rule upon the subject, and that, too, in a case of importance, affecting the rights and franchises of a public corporation owned entirely by the State.

We deem it unnecessary to pursue the subject further; and if we even entertained serious doubts upon the point, we would feel ourselves constrained to declare, that the first and fifth sections in the Revised Statutes, relating to the general law of interest, do not repeal, either by express words, or by necessary implication, the acts of the 3d of March and 10th December, 1838. The magnitude of the mischief, and the manifest injustice of a contrary decision, if our judgment stood suspended upon the point, would incline the balance in favor of the construction we have put upon these acts.

Judgment affirmed.

PELHAM & MCFARLAND *vs.* THE BANK OF THE STATE.

HELD, that, where defendants reside in different counties, writs issue to each, and each writ contains the names of all the defendants, all the writs must be quashed, on motion.

THE BANK OF THE STATE *vs.* HUBBARD.

Where the declaration expressly states that the defendant executed a note, *as principal*, and the note produced on oyer, is executed by another person as principal, and by the defendant *as security*, the variation is fatal on demurrer.

THIS was an action of debt, determined in the Pulaski Circuit Court, in November, 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The Bank sued Hubbard, declaring that he executed the note sued on, *as principal*. On oyer craved, a note was filed, executed by another person as principal, and by Hubbard as security. He demurred for the variance. Demurrer sustained, and final judgment for the defendant. The Bank brought error.

Hempstead & Johnson, for plaintiff in error. A written instrument or contract should be stated according to its legal effect. *Com. Dig. Pleader*, C. 37. 2 *Saund. Rep.* 97, *n.* 2. *Stephen on Plead.* 432; *Close vs. Miller*, 10 *J. R.* 90. *Leiber et al. vs. Scott*, 2 *Wend. Roysdon vs. Sumner*, 2 *Ark.*

The party is not compelled to follow the precise form of words in which the contract was made; it suffices if he states its true legal effect and operation. It has been well observed, that a deed may be declared on without using a word which was contained in it, except the names of the parties and the sums. 1 *Chitty's Pl.* 334.

There is an obvious difference between an averment which seeks to identify an instrument, and one which seeks to set forth the liability of the party, of which latter kind is the averment in the declaration.

This is a joint and several obligation on its face, but if it were not so, it would have that effect by our statute. *Rev. Stat. sec.* 3, *p.* 475.

It is clearly agreed, that two or more may bind themselves jointly in an obligation; or they may bind themselves jointly and severally; in which case the obligee may sue them all jointly, or he may sue any one of them at his pleasure. 5 *Co.* 19; *Salk.* 393; *Bac. Abr. D. title Obligation.*

It is no objection on demurrer, that a joint bond is declared on as joint and several; for, by statute, all joint bonds may be sued on in the same manner as if they were joint and several. *Auditor vs. Woodruff*, 2 *Ark.* 73.

Where only part of the co-obligors in a bond are sued, it is not necessary to mention those who are not sued, in the declaration. *Taylor vs. Auditor*, 2 *Ark.* 174.

Another objection taken to the declaration is, that there is a variance in this, that it appears that other persons executed the instrument with the defendant, as co-obligors. The Court is referred to 1 *Saund. Rep.* 154, *n.* 1. It is asserted in this case, that where an action is brought against one of several joint contractors or obligors, the defendant can only take advantage of it by plea in abatement.

This is the rule, even where the contract is *joint*, and where the record shows that there is a non-joinder of parties. *Vide Cabell vs. Vaughn*, 1 *Saund. Rep.* 292, *n.* 4. *Rice vs. Shute*, 5 *Burr.* 2612. 1 *Chit. Pl.* 50.

Where a contract is *joint and several*, in an action against one, it is not necessary to notice the other. 5 *Co.* 119. 4 *Camp. Rep.* 34. *Chit. Pl.* 11, *n. k. Chit. on Bills*, 7 *ed.* 346.

If many bind themselves by these words: *obligamus nos et utrumque nostrum*, the obligation is joint and several, and all may be sued jointly, or each separately. 2 *Rol.* 148. *Dy.* 310, *a.* 5 *Com. Dig. title Obligations.*

As to joint and several obligations, see 5 *Com. Dig. title Obligations.*

Our statute gives the right of suit against one or all; but that there shall be but one satisfaction. *Rev. Stat.*

Fowler, contra. The declaration in this case cannot be sustained on the ground that the contract is set out according to its legal effect; nor is this princple perceived to be materially involved in the record. It is a question of description. A contract may be set out according to its legal effect, and yet fall far short of correct description. A trivial variance in setting out a contract, a record, or any written instrument, is fatal, because it does not appear that the contract, given

in evidence, is that on which the plaintiff declares it is matter of description. On page 307, it is laid down, that any variance is equally fatal, whether upon the contract itself, or upon any collateral matter. 1 *Ch. Pl.* 304.

The words "for value received," in setting forth a promissory note in a declaration, are words of *description*, and not an averment; and if the note, produced in evidence, want those words, it is a fatal variance. *Saxton vs. Johnson*, 10 *J. R.* 118.

If a note is payable at a particular place, if the place be omitted in the declaration, it is a fatal variance. *Sebree vs. Dorr*, 5 *Cond. Rep.* 680. *Sumner vs. Ford*, 3 *Ark.*

By the Court, DICKINSON, J. It is certainly true, as a general rule, that the contract sued on, need only be set out according to its legal tenor and effect; but, if the plaintiff elects to give a more precise and particular description of the instrument, he must set it out with accuracy. Having elected to set out the character in which the party contracted, the description must correspond with the obligation produced upon oyer. CHITTY, in his *Pleading*, 1 *vol.*, 304, lays it down as a general rule, that a trivial variance in setting out a contract, a record, or any written instrument, is fatal; because it does not happen that the contract in evidence is the same upon which he declares, it being matter of description. And this rule is said to hold good, whether it be upon the contract itself, or upon some collateral matter. 10 *J. R.* 418. 5 *Cond. R.* 680. The principle established by these authorities clearly show, that there was a variance between the description of the writing sued on, and the one given upon oyer. The defendant being described as principal, he cannot be charged, as security. We see no error in the proceedings of the Circuit Court.

Judgment affirmed.

ALSTON *vs.* BRASHEARS.

Under the territorial law concerning interest, if a party contracted for a higher rate of interest than six per centum per annum, he could only recover the principal, unless the rate of interest was stipulated in the contract, in writing, in which case it might be as high as ten per cent.

If the rate of interest, stipulated in writing, was higher than ten per cent., *only* the principal could be recovered.

THIS was an action of debt, by petition, tried in the Johnson Circuit Court, in June, 1840, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. It was founded on a bond, executed in June, 1836, bearing interest from date at twelve and a half per cent. per annum. Judgment by default for the debt and damages. The damages are stated, in the record, to have been estimated at twelve and a half per cent., *by consent of the parties*. The debt adjudged being for too much, the defendant in error *remitted* the excess, and so much of the damages as exceeded interest at ten per centum per annum.

The plaintiff in error still prosecuting his suit, the case was argued here by *Ashley & Watkins*, for the plaintiff in error, and *Pike & Baldwin*, contra.

By the Court, DICKINSON, J. The writing sued on was executed prior to the enactment of our present Revised Code; and the whole case rests upon the 3d section of the act entitled "Interest," in *Steele & McCampbell's Digest, p.* 311: that where a party contracts for a higher rate of interest than six per centum per annum, for the loan of money, he shall not be entitled to any damages by way of interest; consequently, the plaintiff below can only have judgment for the original amount loaned. The preceding section, *p.* 310, allows interest not exceeding ten per centum per annum, when it is so expressed in the agreement; but, as the contract, in this instance, is for a greater rate of interest than ten per centum per annum, it does not come within its provision.

Judgment reversed.

WEBSTER AND OTHERS *vs.* THE BANK OF THE STATE.

The Bank of the State is constitutional. Its constitutionality is not an open question.
In a suit by that Bank, she being properly described in the writ and declaration, if, in the caption of the judgment, the style is "The State Bank of Arkansas," it will be considered a mere clerical misprison.
The Bank of the State has a right to take a higher rate of interest than six per cent.; without specifying it in the note, bond, &c.; and bills, notes, and bonds, due her, bear interest from maturity, at the rate of ten per cent. per annum.

THIS was an action of debt, determined in the Washington Circuit Court, in May, 1841, before the Hon. JOSEPH M. HOGE, one of the Circuit Judges. The facts of the case were precisely like *McFarland and others vs. The Bank of the State*, except in one solitary point, mentioned in the opinion.

The case was argued here by *Gilchrist & Evans*, for the plaintiffs in error, and by *Hempstead & Johnson*, contra.

By the Court, LACY, J. The question as to the constitutionality of the Bank of the State of Arkansas, is not open for investigation, as that point has been expressly ruled, in several cases before decided by this Court. The objection that there is a variance in the judgment, it being rendered in the name of the State Bank, against the plaintiffs in error, we deem to be a mere clerical misprison. The declaration and writ show, that the suit was brought in the name of the Bank of the State of Arkansas. And when the judgment states that the plaintiffs below recover against the defendants, it certainly means, the legal corporation who had a right to sue. The objection to the writ, that there is no seal thereto, would be well founded, had it not been waived by consent, upon the record.

The question in regard to the interest has also been expressly decided, in the case of *McFarland and others vs. The Bank of the State of Arkansas*.

Judgment affirmed.

ELLIOTT AND OTHERS *vs.* THE PRESIDENT, DIRECTORS, &c.

Though the Bank of the State of Arkansas is authorized to sue, in the counties where the Principal Bank, or a Branch, is situate, and to have writs issued to any county in the State, yet, as there is no such corporation in the State as "The President and Directors of the Branch of the Bank of the State of Arkansas at Batesville," writs cannot so issue, in a suit purporting to be brought by such a corporation.

THIS was an action of assumpsit, determined in the Independence Circuit Court, in June, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. "The President and Directors of the Branch of the Bank of the State of Arkansas at Batesville, for the use and benefit of said institution," sued, and writs issued to the counties of Mississippi and Crittenden. Judgment was rendered by default. The case came up on writ of error, and was argued here by *W. Byers*, for the plaintiffs in error, and *Hempstead & Johnson*, contra.

By the Court, DICKINSON, J. The statute requires all suits to be brought in the county where the defendant resides, or may be found, except where the Bank of the State, or the Real Estate Bank, is plaintiff. In either of these cases, the Circuit Court of the county in which the Principal Banking-house, or that of one of its Bra ches, is located, may issue its writ to any county in the State. These banks must sue in their corporate names, viz: "The Bank of the State of Arkansas;" "The Real Estate Bank of the State of Arkansas." There is no such corporation in this State as the one by which the defendants in error have described themselves, nor is there any statutory provision in their favor. The Circuit Court of Independence county erred in issuing the writs to Mississippi and Crittenden counties.

We have not deemed it necessary to look into the question of misnomer, if there be one. The rules upon that subject are too well settled to leave any doubt as to the proper mode of proceeding.

Judgment reversed.

OLIVER *vs.* GRAY.

Where two persons own a horse jointly, and, by written contract between them, one of them agrees to keep the horse a certain time, at a given price, and that one-half of the expenses thereof shall be paid by the other, there is nothing in the contract making them partners, although they call themselves partners in it.

They are mere part owners, and the one keeping the horse may recover of the other, half of the expense, at law, or offset it, if sued by him for other cause of action.

THIS was an appeal from a justice of the peace, determined in the Hempstead Circuit Court, in October, 1841, before the Hon. WILLIAM CONWAY B., one of the Circuit Judges. Oliver sued Gray before a justice, on a note. Gray, as the justice's docket states, appeared and made defence, and filed his account, which was rejected; and Oliver had judgment for the amount of the note and interest, with costs.

The record of the Circuit Court states, that the case was submitted to the Court, "on the claim of the plaintiff, and demand of offset, filed before the justice." The account so filed, was for keeping a horse, $61 50 cents, and was endorsed by the justice as filed on the day of the trial before him. To prove his account, Gray produced an agreement, under seal, by which it was stated, that Oliver had sold Gray half of a certain horse, and that Gray was to keep him for eighteen months, "and the partners, Gray and Oliver," were to pay an equal portion of the expense of the horse during that time. He then proved that he had kept the horse for the time charged in the account, and that keeping him was worth the price charged. Gray had judgment for $20, and all the costs, and Oliver brought error.

Trimble, for plaintiff in error. The defendant's evidence was not competent to prove an offset, or for any other purpose. There was no notice of set-off given, as required by the statute. *Rev. Stat.* 498, *sec.* 49 *and* 50. There was no proof before the Circuit Court, that notice of set-off was given. 3 *Stark.* 1312, 1313, 1314. The debts, if any existed, were not mutual. *Mont. on Set-off*, 22. To constitute mutuality, it is necessary that the debts of each party be due in his

own right. *ib.* 22, 23. A joint debt and a separate debt, cannot be set off against each other.

Pike & Baldwin, contra. The *Revised Statutes*, *Chap.* 87, *sec.* 49, provide, that, in order to entitle a defendant to set off any demand, he must give notice thereof to the plaintiff, either *verbal* or written, before the jury is sworn, or the trial submitted to the justice. As this is not a matter required to be placed on the record, and, in the case of *verbal notice*, there would naturally be no evidence of it found among the files, the Court is now bound to presume that the notice was given, as the set-off is found filed by the justice; which is, of itself, sufficient evidence of the fact.

Oliver and Gray were not *partners*. They were merely *part owners* of the horse. *Nicholl vs. Mumford*, 4 *J. C. R.* 523. *Ex parte Young*, 2 *Ves. & Bea.* 242. *Ex parte Parry*, 5 *Ves.* 575. *Nicholl vs. Mumford*, 20 *J. R.* 635. 3 *Kent's Com.* 16, 17. *Story on Agency*, 42. There is nothing in the contract making them partners; no community of profit and loss; nor any provisions by which profits and losses could accrue; and it merely amounts to a joint ownership in the horse, and an agreement, on Oliver's part, to pay Gray one-half of the actual expenses of keeping him.

And even if there had been a partnership, Gray could have had his action for one-half of these expenses. One partner can maintain an action against another, for money advanced; for money paid; for contribution; for violation of a contract. *Venning vs. Leckie*, 13 *East.* 7. *Walker vs. Harris*, 1 *Ans.* 245. *Mavaria vs. Levy*, 1 *T. R.* 483, *n.* *Foster vs. Alanson*, 2 *T. R.* 479. *Abbott vs. Smith*, 2 *Black.* 947. *Merryweather vs. Nixon*, 8 *T. R.* 186. *Wright vs. Hunter*, 5 *Ves.* 792. *Deering vs. Lord Winchelsea*, 2 *B. & P.* 290. *Burnell vs. Minot*, 4 *B. Moore*, 340. *Campbell vs. Mesier*, 4 *J. C. R.* 334. *Craythorne vs. Swinburne*, 14 *Ves.* 164. *Cowell vs. Edwards*, 2 *B. & P.* 268. *Williams vs. Henshaw*, 11 *Pick.* 79.

By the Court, Dickinson, J. The plaintiff in error insists, that there was no debt due by Oliver to Gray, but to them jointly, as partners. We apprehend there is nothing in the contract consti-

tuting them partners. There is certainly no community of profit and loss arising out of their agreement. It amounts, in our opinion, to a mere joint interest in the horse alone, and an agreement on the part of Oliver to pay Gray one-half of the actual expenses incurred in keeping him. They styled themselves partners in the contract, yet the nature and terms of the agreement clearly show they are merely part owners. *Nicholl vs. Mumford*, 4 *J. C. R.* 522. *Ex parte Parry*, 5 *Ves.* 575. 3 *Kent's Com.* 16, 17. The debt accrued to Gray, in his individual character; and, as it was mutual, and subsisting with Oliver's demand against him, it was a proper subject of set-off.

Judgment affirmed.

Moss and Others *vs.* Gibson and Others.

Held, that when there are several defendants, one of whom is not served with process, nor appears, and judgment taken by default, against all, it is erroneous as to all.

Fowler and Others *vs.* Gibson and Others.

Where the record of a judgment on a delivery bond enables this Court to ascertain that the bond was executed for the delivery of property levied on by virtue of an execution issued on a judgment which has been reversed in this Court, the judgment on the bond will also be reversed.

This was a judgment on a delivery bond, rendered in the Pulaski Circuit Court, in September, 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. This bond was executed for the delivery of property levied on by virtue of an execution, issued on a judgment, obtained in the same Court, by L. & W. R. Gibson,

against Holden Moss and others, which judgment was reversed in this Court, as reported in the case last preceding.

By the Court, RINGO, C. J. The record before us shows, we think conclusively, that the execution, upon and by virtue of which the property mentioned in the condition of the delivery bond was seized by the sheriff, was issued upon the judgment which this Court has reversed, in the case of *Holden Moss et al. vs. Lorenzo Gibson et al.* And inasmuch as the judgment upon the delivery bond is dependent upon the judgment on which the execution issued, and on and by virtue of which the property mentioned in said bond was seized by the sheriff, and the latter has been reversed; therefore, the judgment on the delivery bond must also be reversed, annulled, and set aside, with costs, in accordance with the opinion of the Supreme Court of the United States, in the case of *Barton vs. Pettit & Bayard*, reported in 7 *Cranch*, 288, and also, 2 *Peters Cond. Rep.* 494.

RINGGOLD AND OTHERS *vs.* RANDOLPH.

Where a summons is served by leaving a copy with a member of the family of the defendant, the return must show that such member of the family was *white*, and over fifteen years of age. If it does not, judgment by default is erroneous.

THIS was an action of assumpsit, determined in the Pulaski Circuit Court, in March, 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. Randolph sued Ringgold, Owens, Palmer, and McFarland, without any allegation in the declaration as to their respective places of residence, and issued writs to three several counties, each against all of the defendants. McFarland was not served. The return, as to Owens, was "executed on the 8th day of February, 1841, by delivering a true copy of the within, to a white member of the family of the within named Elisha Owens, at the usual place of abode of the said Owens, in Conway county." Discontinued as to McFarland, and judgment by default as to the others.

By the Court, RINGO, C. J. The return, as to Owens, is manifestly defective, in not showing, as required by the statute, that the writ was executed upon the defendant, Owens, in any manner prescribed by law. When such process is executed otherwise than by reading the writ to the defendant, the officer must deliver him a copy thereof, or leave "a copy thereof at his usual place of abode, with some white person of the family, over fifteen years of age;" and in making out his return, the officer is required to "set out how, and in what manner, he executed the same." *Rev. Stat.*, *Chap.* 116, *sec.* 13, 20. The return before us omits to state, that the copy of the writ, left for the defendant, at his usual place of abode, was left with a white person of the family "over fifteen years of age," as required by law, and therefore, said defendant was under no legal obligation to appear and answer the action, and was not legally in default in failing to do so. Consequently, the Court erred in giving judgment against him by default.

Judgment reversed, and case remanded. Case to proceed as if Owens had been served with process.

TUCKER AND OTHERS *vs.* THE REAL ESTATE BANK.

A summons, directed to the sheriff of one county, commanding him to summon the defendant to appear before the Circuit Court of another county, *at the Court-house in the county aforesaid*, is good.

Want of profert cannot be taken advantage of, after judgment by default, but only on demurrer.

THIS was an action of debt, determined in the Pulaski Circuit Court, in September, 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The Bank sued Wood Tucker, Sterling H. Tucker, and Richard C. Byrd. A writ issued against Byrd, to Pulaski county, and against the other defendants to Jefferson. The defendants, Wood Tucker and Sterling H. Tucker, moved to quash the writ to Jefferson, because it could not legally issue there—because

there was uncertainty in it, as to the place where they were to appear. The writ ran thus: "State of Arkansas, county of Pulaski, sct. The State of Arkansas, to the Sheriff of Jefferson county—greeting: You are hereby commanded to summon, &c., to appear before the Judge of our Circuit Court of Pulaski county, at the Court-house *in the county aforesaid*," &c. Motion overruled, and judgment for plaintiff. The case came up by writ of error.

By the Court, LACY, J. An objection is taken to the sufficiency of the writ, in this case. In inspecting the record, we have no doubt but that the writ sets out, with sufficient certainty, the time and place where the defendants are required to appear. It does not, it is true, state that it is in the city of Little Rock, but avers that it is at the Court-house in the county of Pulaski, and at the time prescribed by law.

It is true, in this case, that there is no profert made of the writing sued on, but the defendants, by failing to demur, cannot now take advantage of it.

Judgment affirmed.

CALICO AND DRAKE *vs.* THE STATE.

Where defendants are jointly indicted, and do not ask to sever, in their pleadings, it is regular to assess separate fines, and render a judgment against them, jointly, for costs.

If they sever in their pleadings, the costs up to the time of severance only, should be taxed against them jointly.

THIS was an indictment for gaming, tried in the Madison Circuit Court, in May, 1842, before the Hon. JOSEPH M. HOGE, one of the Circuit Judges. Calico and Drake were indicted jointly, for betting with two other persons a glass of whiskey, of the value of fifty cents, at a game of cards, commonly called *three-up*. Joint plea, not guilty,

and verdict of guilty, assessing the fine of *each* at $10. Several judgments against each, for his fine, and a joint judgment against both for all costs. The defendants appealed.

The case was argued here by *D. Walker*, for the appellants, and *R. W. Johnson*, *Atto. Gen.*, contra.

By the Court, LACY, J. There is no error in the judgment, in this case. Calico and Drake were jointly indicted for gaming; they did not ask to sever, in their pleadings; the fine was assessed severally, and judgment rendered jointly, for cost. This the statute fully authorizes. If they had severed in their pleadings up to that time, it would have taxed them both, jointly, with the costs. Not having done so, they were, of course, jointly liable for the costs of the plaintiff below.

Judgment affirmed.

PALMER AND OTHERS *vs.* EDWARDS.

HELD, that where there are several defendants, one of whom is not served with process, nor appears, and judgment taken by default against him with the others, it will be reversed as to all.

TUCKER AND OTHERS *vs.* THE REAL ESTATE BANK.

The Legislature possesses the power to authorize the running of process from the Circuit Court of one county into another county, and its execution in the latter.

The act of March 3d, 1838, authorizing suits by the Bank of the State, or the Real Estate Bank, to be brought in the county where the Bank or Branch is situate, and process to run into any county in the State, is constitutional.

The Constitution, although it defines and limits the jurisdiction of the Circuit Courts, as to the subject-matter, is silent as to their powers in regard to issuing process out of the county, and as to their jurisdiction over the person of a defendant, or other person necessary to be called before them; and the power of prescribing the jurisdiction in these respects, is left to the Legislature.

Where two counties are named in a writ, and then the party is required to appear "at the Court-house in the county *aforesaid*," the word "*aforesaid*" relates to the last county named.

It is no objection to a writ, after judgment by default, that it does not call on the defendant to answer the demand for interest claimed in the declaration, in a suit by the Real Estate Bank, to which the law gives ten per cent. interest after the note, bond, or bill matures, or is protested.

THIS was an action of debt, determined in the Pulaski Circuit Court, in 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. Summons issued, directed to the sheriff of Jefferson county; after naming which county, the county of *Pulaski* was named, and the sheriff commanded to summon the defendants to appear "at the Court-house in the county aforesaid." The declaration demanded, as debt, the amount of the note sued on, but alleged, that, *by law*, it bore interest after maturing, at the rate of ten per cent. per annum. The writ said nothing about the interest. The writ was executed in Jefferson county. Without entering an appearance, the defendants moved to quash the writ, and set aside the return. Motion overruled, and judgment by default, for the debt, and interest at ten per cent. from the time the note fell due till paid, and costs. The case came up by writ of error.

W. & E. Cummins, for the plaintiffs in error. The writ, in this case, was void in every sense of the word. After judgment by default, the party may take all exceptions to the writ and service. *Gilbreath vs. Kuykendall*, 1 *Ark.* 50. *Bunn vs. Thomas & King*, 2 *J. R.* 190. *Burk vs. Burnard*, 4 *J. R.* 309.

The act of the Legislature, authorizing the banks to run process from the county in which they are situated to any part of the State, is in conflict with the constitution; and writs issued by authority of that act, are void. *State vs. Ashley et al.*, 1 *Ark. R.* 307. *Auditor vs. Davies*, 2 *Ark. Rep.*, 494. *Dillard vs. Noell*, 2 *Ark. Rep.* 449.

The writ should have been quashed, inasmuch as it varies from the declaration, in not calling on the defendants to answer the demand for interest as claimed in the declaration. The writ should have been

quashed, as it runs beyond the county and circuit in which the Court sits, without any allegation that the defendants were not residents of the county. *Taylor vs. Auditor*, 2 *Ark. Rep.* 174.

Pike & Baldwin, contra. There is no inaccuracy in the writ. "In the county aforesaid" refers to the last county named. *Ad proximum antecedens fiat relatio.* See this very case, at all points, in *The Queen vs. Halford*, 3 *Salk.* 199.

In *Womsley vs. Cummins*, the county where the Court was to be held, was not named at all.

That the writ does not demand the interest, is only an objection of variance between the declaration and writ, and not to be reached by motion. *Didier vs. Galloway*, 3 *Ark.* 501. Besides, the statement as to interest in the declaration was surplusage. *Bank vs. Clark*, 2 *Ark.* 375.

The question whether the writ can run to Jefferson county, depends upon the simple question whether the Legislature has the power to authorize any process of the Circuit Court to run beyond its territorial jurisdiction. This Court has often decided that it could, where there were defendants residing in different counties.

This is not a question of *jurisdiction.* It is not a question of jurisdiction as to the subject matter, because the constitution gives *that.* It is not a question of jurisdiction as to the person, because it is simply whether a writ can run beyond the county, and not be powerless.

If the Legislature could not authorize this writ to run beyond the county, they could not authorize any process to do so.

By the Court, Ringo, C. J. The record and assignment of errors present two questions, upon which the plaintiffs in error mainly rely to reverse the judgment against them, to wit: 1st, Did the original summons, issued to a county other than that in which the Court was held, and there executed upon all the parties sued, impose upon them a legal obligation to respond to the action, or subject them to the consequences of a judgment by default, upon their failure to do so? 2d, Does the contract, as set forth in the pleadings, warrant the judgment

for interest, at the rate of ten per cent. per annum, as pronounced in this case.

The first question involves an inquiry into the power of the Legislature to authorize the running of process from the Circuit Court of one county into a different county or circuit, and the execution thereof in the latter. If the Legislature possesses this power, the answer to the first question must be in the affirmative; otherwise, in the negative. The Legislature, by statute, approved March 3d, 1838, entitled "an act supplemental to the act incorporating the Bank of the State of Arkansas," enacted, that "all suits brought by the Bank, or any of its branches, on any bonds, notes, or bills, discounted, negotiable, or made payable at or in said Bank, or any of its branches, may be brought and proceeded in to final judgment, in the county in which such Bank or branch may be situated; and the writ or writs may be directed to, and executed in, any county in which the defendant or defendants may be found; and execution may be issued to any county in the State, on any judgment in favor of said Bank, or any of its branches;" and by a subsequent provision of the same statute, declared that "the provisions of the preceding sections shall be construed to include, and extend to, the Real Estate Bank of the State of Arkansas." These enactments, if valid, unquestionably confer upon the Banks an election to sue their debtors in the county in which they or their branches are situated, and to cause process to be issued to, and executed in, any county where the defendants may be found, when the action, as in this case, is founded upon such obligations as those mentioned in the statute. But the plaintiffs in error insist, that these statutory provisions are repugnant to the provisions of the constitution of this State, and therefore void. This objection, as understood by the Court, is based upon the idea that the jurisdiction of the circuits is restricted, by the constitution, to cases where the party sued may be found or served with process, within the territorial limit, or civil division of the State, to which the judicial power of the Court in which the suit is instituted, is limited, and within which it must be exercised. But, in our judgment, no such restriction can be found in the constitution. That instrument, it is true, defines and prescribes the respective jurisdiction of the different judicial tribunals thereby

ordained, so far as it depends upon the subject-matter to be adjudicated, and in some respect prescribes the territorial divisions within which each tribunal shall exercise the jurisdiction with which it is invested. But, in respect to the power of the courts to issue process from one county or circuit, or other civil division of the State, into a different one, as well as the jurisdiction of the different tribunals over the person of any defendant, or any other person whom, in the administration of justice, it may be necessary to call before them, the constitution is silent, and therefore the power of prescribing their respective jurisdiction in this respect, is left with the Legislature. And although the legislative department does not possess the power of divesting the judicial tribunals of any of the respective jurisdiction or powers with which the constitution invests them, (except in cases where such power is especially granted to the Legislature by that instrument), yet that department of the government, as it is not prohibited by the constitution from so doing, must, from the theory and nature of the government, possess the power to make such enactments as the one in question, because it neither infringes nor divests any right vested by the constitution in either the Courts or the people, but simply confers upon the corporations therein named, certain specified privileges, which they could not otherwise enjoy. It is a statute, therefore, by which certain privileges are granted, but inasmuch as the privileges so granted do not divest or infringe any right vested or secured by the constitution, the provisions of the statute in question are not, in our opinion, in conflict with, or repugnant to, any of the provisions of the constitution; and therefore we consider the writ, and the execution thereof, authorized by law, and that the parties therein named as defendants, were bound thereby to answer the action; and, upon their failure to do so, within the time prescribed by law, judgment could be legally pronounced against them.

But, before we dismiss this subject, it may be proper to state, that we do not consider this, or any other question analagous to it in principle, as involved, or having been decided by, this Court, in either of the cases cited in the argument, and relied upon by the plaintiffs in error. In the case of *Dillard vs. Noel*, 2 *Ark. R.* 449, the Legislature was held to be incompetent to divest the county courts of a jurisdiction

conferred upon them by the constitution; and in the case of *The Auditor vs. Davies et al.*, 2 *Ark. Rep.* 494, this Court decided, that, without statutory authority, the circuit courts could not, for the purpose of acquiring jurisdiction of a cause, run original process beyond the limit of their territorial jurisdiction. In the case of *The State vs. Ashley et al.*, 1 *Ark. Rep.* 279, it was held, that a proceeding by information, in the nature of a quo warranto, differed essentially from a proceeding by writ of quo warranto, and that this Court could, under the constitution, exercise original jurisdiction over the latter, but not over the former. In two of these cases, the Legislature had attempted to divest a jurisdiction or right conferred by the constitution. In the other, the Circuit Court, for the purpose of acquiring jurisdiction of a case, caused original process to be run, and executed at a place without the limit of its territorial jurisdiction, without any statutory provision, or other law authorizing it, and expressly in violation of the law conferring jurisdiction of suits against the State, upon the Circuit Court of Pulaski county. From this simple statement of the questions adjudicated by this Court, in the cases cited, so far as they could, by possibility, be supposed to bear any analogy to the question under consideration, it appears manifestly, that they are essentially different from it, and bear a very slight analogy, if any, to it.

There are other objections to the writ, urged by the plaintiffs in error, but they are not, in our opinion, such as invalidate it, or require from us any further notice.

The interest adjudged to the defendant in error, is expressly given by the 3d section of the statute approved March 3d, 1838, referred to above, which declares, that, "if any bond, bill, or note, discounted or negotiated in or by the Bank of the State of Arkansas, or any of its branches, shall not be paid at maturity, or, on being protested, or on suit being brought, interest at the rate of ten per centum per annum, shall, thereafter, be collected and recovered, notwithstanding no rate of interest shall be expressed in such bond, note, or bill." These provisions, by another section of the same statute, are expressly declared to include, and extend to, the Real Estate Bank, and they are, in the opinion of this Court, expressed in the case of *McFarland et al. vs. The Bank of the State of Arkansas*, at the present term, not re-

pealed by the act in the Revised Statutes of this State, relative to interest, or otherwise; and therefore the judgment for interest is authorized by law.

Judgment affirmed, with costs.

W. & E. Cummins, for the plaintiffs in error, filed a petition for re-consideration, which was refused.

Elliott and Redman *vs.* The Bank of the State.

There needs no averment as to the residence of the defendants, in a declaration at the suit of the State Bank, to authorize the writs to run into a county other than that where the suit is brought.

The return of service of a summons is sufficient, although it does not state *in what county* the writ was executed, and although the Christian name of the defendant is abbreviated in the return.

On a note given to the State Bank, judgment for the debt, with interest at ten per cent. from the time the note fell due till paid, is regular.

Where an action is discontinued as to the defendant, he is entitled to a judgment for his costs, if any have been expended by him; but, if he was never served with process, or in Court, no such judgment could be given.

Where a writ, after mentioning *two* counties, requires the defendant to appear *at the Court-house in the county aforesaid*, the word *aforesaid* refers to the county last named.

Womsley vs. Cummins, 1 *Ark.* 125, *explained*, and held erroneous in that it decides that the dismissal as to *Riggs*, operated as a discontinuance as to Womsley, he having afterwards appeared and pleaded in bar.

This was an action of debt, determined in the Pulaski Circuit Court, in September, 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. The Bank sued Elliott, Redman, and James, on a bond, for $560, due at six months from Feb. 13, 1840, without any averment as to their residence. Writ issued to Crittenden county, and was executed on Elliott and Redman. The writ, after naming both counties, first Crittenden, and then Pulaski, required the defendants to be summoned to appear "at the Court-house in the county aforesaid." The sheriff's return did not state *where* the writ

was served. Discontinued as to James, and judgment by default against Elliott and Redman, for $560 debt, and interest thereon at the rate of ten per cent. per annum, from 1st August, 1840, till paid, and *all* the costs of the suit. The defendants sued their writ of error.

Fowler, for the plaintiffs in error. Could the writ be issued to Crittenden county, without an averment in the declaration that the defendants were to be found there?

The writ is uncertain, on its face, as to the place at which defendants are required to appear. It does not disclose to them whether they must appear in Crittenden or Pulaski county. It is erroneous, and precisely within the decision in the case of *Womsley vs. Cummins*, 1 *Ark. Rep.* 125.

The service is utterly defective. It does not appear to have been made by the sheriff of Crittenden county, or in that county, or on the persons named as defendants, in the writ. 1 *Ark. Rep.* 50. *Gilbreath vs. Kuykendall*, 2 *Ark. Rep.* 28. *Rose vs. Ford*, 3 *Ark. Rep.* 505. *Dawson et al. vs. The Bank of the State*, 262. *Clary & Webb vs. Morehouse, Adm'r.*

The judgment as to prospective interest or damages, is erroneous. The Court must cause the amount for which it renders judgment, to be computed up to its date, but cannot adjudge what shall become due thereafter.

The judgment for "all the costs" is wrong, as the suit failed, and was discontinued as to one of the defendants. *Ashley vs. Hyde & Goodrich, ante. Hartley vs. Tunstall et al.*, 3 *Ark.* 120.

Hempstead & Johnson, contra.

By the Court, Lacy, J. The questions made in this case have been heretofore expressly decided, in this Court.

There needs no averment of non-residence to authorize a writ to issue to another county. The service we conceive sufficient, and the interest rightly calculated, according to the decision in the case of *McFarland and others vs. The Bank of the State of Arkansas.*

Fowler, for the plaintiffs in error, filed a petition for re-consideration, which was refused.

By the Court, DICKINSON, J. The defendant, in whose favor there is a discontinuance of the action, is certainly entitled to a judgment for his costs, if any have been expended by him. In the case before us, it appears there was no service upon James. He was never in court, and consequently has been put to no expense in defending the suit. Such being the case, he could have no judgment.

The place at which the Court was to be held, is, in our opinion, set forth with sufficient certainty. The defendants were required to appear "before the Judge of our Circuit Court of Pulaski county, at the Court-house in the county aforesaid," meaning, of course, the Court-house in the county last named.

Although, as a general rule, it would, perhaps, be well to aver the non-residence of the defendant against whom a writ goes to another county, yet this Court has declared that the omission to do so, is no cause of error.

The counsel refers to the case of *Womsley vs. Cummins*, in support of his motion for re-consideration. We have looked into that case; and, as regards the decision upon the writ, as the question was there presented, discover no valid objection to it. The plaintiff himself admitted the error, and it was upon his own motion that the writ was quashed and set aside. So, the general principle, as applicable to discontinuance, is correctly stated. Its application, however, to that particular case, may well be doubted, after Womsley had appeared and craved oyer, and filed his plea to the merits, thereby waiving the effect of the discontinuance, as to him; and so the Court has since, as we think, correctly ruled.

Judgment affirmed.

Pirani & Mitchell *vs.* Allhime.

Where, on an appeal from a justice of the peace, from a judgment rendered in an action on account, the Circuit Court gives final judgment, without a writ of inquiry, the presumption which generally obtains in favor of the regularity of the proceedings of the Court below, is contravened, if the record shows that the judgment was rendered by default, without appearance of the defendant.

This was an appeal from a justice of the peace, determined in the Pulaski Circuit Court, in December, 1841, before the Hon. John J. Clendenin, one of the Circuit Judges. Allhime sued Pirani, by summons, directed to the constable of the city of Little Rock, issued by a justice of Big Rock township, requiring Pirani to appear at his office, in said city, on the 2d of April, 1841, to answer the complaint of Allhime, *on account.* On the 3d of April, which the justice's decree states to be the return day of the summons, the parties appeared and the plaintiff recovered forty-five dollars, *debt*, and his costs, and Pirani appealed. On the calling of the case, in the Circuit Court, Pirani was called; and making default, final judgment was rendered against him and Mitchell, his security in appeal, for $45, debt, and all costs in the justice's court and the Circuit Court. The case came up by writ of error.

The case was argued here by *W. & E. Cummins*, for the plaintiffs in error, and *Hempstead & Johnson*, contra.

By the Court, Dickinson, J. The presumption in favor of the judgment below is contravened, by the record showing that the Court entered it alone by reason of the default.

Judgment reversed.

Buckner and Others *vs.* The Real Estate Bank.

Held, that want of profert of a promissory note, is, under our statute, good cause of general demurrer.

BLEVINS *vs.* BLEVINS.

The action by petition and summons will only lie on instruments for the direct payment of money.

It will not lie on an instrument acknowledging a debt to be due, and stating that it is to be paid out of the proceeds of a particular security, placed in the hands of the creditor.

A note must be for the direct payment of money. The payment must be absolute, and not contingent, either as to the amount, credit, fund, or person.

THIS was a petition in debt, determined in the Hempstead Circuit Court, in April, 1842, before the Hon. WILLIAM CONWAY B., one of the Circuit Judges. Hugh A. Blevins sued on the following instrument of writing:

"Due H. A. Blevins, five hundred and twelve dollars. I have left with him one note on Johnson, for five hundred dollars; one on Gibbins, for two hundred dollars. He is to collect and pay himself, and pay Blackburn fifty dollars, and settle with Trapnall.

DILLON BLEVINS."

D. Blevins appeared, and filed his demurrer to the petition, in which he set out his causes of demurrer. The Court overruled the demurrer, and rendered judgment for the plaintiff. The case came up on error.

Trimble, for the plaintiff in error. A suit by petition and summons, cannot, under the statute, be maintained on the instrument of writing exhibited in the petition. The statute is: "any person, being the owner or holder of any bond, bill, or note," &c. See *Rev. St.* 152. The words *bond, bill, or note*, are technical words, and refer to bonds, bills, or notes, as recognized by the common law, enlarged only in the circumstance that they may be for money or property, but in no other respect. This is not a note. See *Chitty on Bills*, 150. The instrument sued on is an acknowledgment of a debt, with a contract that it should be liquidated in a particular manner, and out of particular

funds; and the plaintiff was bound to aver and prove that the particular fund had failed before he had a right to resort to a different mode of payment than that specified in the contract. See *Chitty on Bills*, 152; 1 *Bibb*, 352. 4 *Bibb*, 252.

This was a debt acknowledged; but the subsequent part shows a contract between the parties that it should be paid in a particular manner, or out of a particular fund. The plaintiff agreed to receive it in that fund; and, until he shows that that fund failed, he has no right of action on the acknowledgment.

By the Court, Dickinson, J. It has been ruled, in this Court, that petition and summons will only lie for the direct payment of money. This is certainly not a note of that character. The whole of the agreement must be taken and construed together, for it is one entire contract. It is simply an acknowledgment of a debt due, to be paid out of a particular fund, placed in the hands of the creditor for that purpose. The legal definition of a note is, "the agreement for the direct payment of money." "The payment," says *Chitty on Bills*, at *page* 152, "must be absolute, and not contingent, either as to the amount, credit, fund, or person." The principle here stated decides the point before this Court. The fund being contingent, out of which the debt was to be paid, the plaintiff had no right of recovery, unless he averred and showed that the fund had failed, or was inadequate to the payment. The demurrer to the declaration was, therefore, improperly overruled; and, for this reason, the judgment must be reversed, with costs.

Brown *vs.* Peevey.

It is not matter in abatement, that the tax, and issuing fees of the writ, were not paid before it issued.

If the clerk suffers the writ to go out without payment of the tax and fees, it is at his own personal risk.

THIS was an action of Replevin, determined in the Yell Circuit Court, in April, 1842, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. Peevey, the defendant, pleaded, in abatement, that the tax, and issuing fees of the writ, were not paid by the plaintiff, when the writ issued. Demurrer to this plea overruled, and final judgment for defendant.

Blackburn, for the plaintiff in error.

By the Court, DICKINSON, J. It is perfectly evident that the Court below erred in overruling the plaintiff's demurrer to the defendant's plea in abatement, and rendering final judgment in the case. Whether the plea in abatement is properly sworn to or not, is wholly immaterial, as the matter set up is no defence to the writ. It is true, the statute authorizes the clerk to withhold the writ, unless the party applying for it pays the tax. But, when it has been once issued, the failure to pay for the writ certainly cannot constitute a ground of defence. If the clerk suffers the writ to go out without payment of the tax and issuing fee, he does so at his own personal risk.

Judgment reversed.

LEWIS AND SPURLOCK *vs.* THE STATE BANK.

A return on a summons, that it was executed on the defendants by their acknowledging service of the same, shows a good service.

THIS was an action of debt, determined in the Pulaski Circuit Court, in September, 1841, before the Hon. JOHN J. CLENDENIN, one of the Circuit Judges. The Bank sued Lewis, Spurlock, and Cherry, on a note for $120, and a writ issued to Crittenden county, on which the sheriff returned, that he executed it on Lewis and Spurlock, by their

acknowledging service of it. Discontinued as to Cherry, and judgment by default against Lewis and Spurlock, for $120 debt, and interest at ten per cent., from maturity of the note till paid.

W. & E. Cummins, for the plaintiffs in error. *Sections* 13 *and* 20, *of Chap.* 116, *Rev. St.*, settle and prescribe the mode of service of process; and there exists no mode except that prescribed by the statute. The question has been so fully discussed by this Court, that no argument is necessary, or even proper. The following cases are referred to: *Dawson et al. vs. State Bank*, 3 *Ark. Rep.* 505; *Desha vs. Baker et al.*, 3 *Ark. Rep.* 509; *Rose vs. Ford*, 2 *Ark. Rep.* 26; *Gilbreath vs. Kuykendall*, 1 *Ark. Rep.* 50; &c. The service cannot be regarded as valid.

Hempstead & Johnson, contra.

By the Court, Dickinson, J. All the errors assigned in this case, with the exception of the one to the service of the writ, have been previously decided by this Court. The return is, "executed the within named writ on the defendants, by their acknowledging service of the same." We deem this a valid service. What is it the parties acknowledge? It is the service of the writ, which is tantamount to the reading or delivering a copy, as prescribed by statute.

Judgment affirmed.

The Bank of the State *vs.* Hinchcliffe.

Filing an affidavit, as required by law, constitutes a condition precedent to the right of a party to appeal to this Court.

A paper in the record, purporting to be an affidavit, signed by the party, but with the attestation not signed by any officer authorized to administer an oath, cannot be construed as an affidavit.

W. Byers, for the appellee. Hinchcliffe moved to dismiss this appeal, for want of a legal affidavit, preliminary to taking the appeal.

By the Court, RINGO, C. J. That the filing of an affidavit, as prescribed by law, constituted a condition precedent to the right of the party to appeal to this Court, in the present case, there can be no doubt; because the statute expressly declares, that, in civil cases, no appeal shall be allowed "from any final judgment or decision of any circuit court," unless the appeal be made during the term at which the judgment or decision complained of was given; and the appellant, or his agent, shall, during the term, file in the Court an affidavit, stating that such appeal is not made for vexation or delay, but because the affiant verily believes that the appellant is aggrieved by the decision or judgment of the Court. *Rev. St. Ark.*, *p.* 638, *sec.* 141, 142. In the transcript before us, the clerk has copied a writing purporting to be the affidavit of the attorney of the appellant, containing all the requisites prescribed by law, except the essential one that the individual purporting to make the affidavit, does not appear to have been sworn, or to have made the affidavit before any authority competent to take it. It is true, that this statement appears immediately under the writing purporting to be an affidavit, "sworn to and subscribed in open Court, Dec. 22d, 1841;" but this attestation is not subscribed or certified, either by the clerk, the judge, or the Court; and therefore it can only be regarded as the mere draft of an affidavit, never sworn to by the person by whom it purports to have been made. And therefore, as the record shows no affidavit, as required by law, the appeal must be considered as having been previously and illegally granted, and, for this cause, be dismissed.

FULCHER *vs.* LYON.

In debt, a variance between the writ and declaration, as to the amount of the *ad damnum*, is immaterial, and no ground of abatement.

On demurrer to plea in abatement sustained, the judgment should be *respondeat ouster*.

Where a note bears interest from maturity, at the rate of ten per centum per annum, and the breach in the declaration does not negative the payment of the interest, judgment for the debt, and six per cent. interest from the date of the note, is erroneous.

THIS was an action of debt, determined in the Jackson Circuit Court, in May, 1842, before the Hon. SAMUEL H. HEMPSTEAD, Special Judge. Lyon sued Fulcher, on the 19th of September, 1840, on a bond, dated Sept. 6, 1840, for $927 61, due at 12 months from date, with interest at ten per cent. per annum, after maturity. The breach was silent as to the interest. Capias issued, to which the defendant pleaded an abatement, for variance between the writ and declaration, as to the amount of the *ad damnum*. Demurrer to the plea sustained, and the defendant failing to plead further, and saying nothing further, &c., judgment final for the debt, and interest at six per cent. per annum from 6th Sept., 1840, till paid, and costs. Fulcher appealed.

Fowler, for the appellant. The suit was instituted nearly twelve months *before the note fell due*. This objection is, of course, fatal, on demurrer, arrest of judgment, or error. *Bell vs. Bullion*, 2 *Yerger*, 479. 1 *Tidd Pr.* 368. *Carth.* 113. *Doug.* 61. 7 *T. R.* 474. 3 *J. R.* 42.

The declaration sets out a contract for *conventional interest*. The breach should have extended to such interest. So repeatedly decided by this Court.

The plea in abatement ought to have been sustained. *Renner vs. Reed*, 3 *Ark.* 339. And, if overruled, the judgment should have been *respondeat ouster*, *ib.* *McLain & Badgett vs. Smith*, *ante*.

By the Court, DICKINSON, J. The plea in abatement renders an inquiry into the previous proceeding unnecessary, except as to the cause of abatement pleaded, viz: variance between the writ and declaration. The latter states the damages at $300; the former at but $70. The demurrer to this plea was unquestionably well sustained; for we consider it wholly immaterial, under our statute, at what amount the damages were stated in the writ. But the judgment, upon its face, is erroneous, for it ought to have been an interlocutory judgment of *respondeat ouster*. It is also erroneous, because the writing obligatory sued on, bears ten per cent. interest per annum, from maturity. There is no breach in the declaration, alleging the

non-payment of interest, yet judgment is rendered for the amount of debt claimed, and six per cent. interest from the date of the writing. The transcript presents another error, fatal to the whole proceedings, and shows that there was no cause of action existing. The suit was instituted on the 19th of September, 1840, upon a writing obligatory, dated on the 6th of September, 1840, payable twelve months after date. Consequently, it was not due until the 6th of Sept., 1841.

Judgment reversed, with leave for the parties to amend the pleadings, if leave be asked.

Caruthers *vs.* The Real Estate Bank.

Where a declaration, in a suit by the Real Estate Bank, states a note, payable at its branch at *Washington*, and the note given on oyer is payable at its branch at *Washing*, this variance is fatal on demurrer.

This was an action of debt, determined in the Clark Circuit Court, in October, 1841, before the Hon. William Conway B., one of the Circuit Judges. The Bank sued Caruthers, on a note, stated, in the declaration, to be payable at its branch at Washington. On oyer craved, a note was filed, payable at its branch at Washing. Demurrer for the variance overruled, and judgment for the plaintiff.

Trapnall & Cocke, for plaintiff in error, cited *Sebree et al. vs. Dorr*, 9 *Wheat.* 558; *Ferguson vs. Harwood*, 7 *Cranch*, 408; *Craig vs. Brown*, *Peters C. C. R.* 139; *Exon vs. Russell*, 4 *M. & S.* 505.

Pike & Baldwin, contra, insisted that the Court judicially knew that there was a branch of the Bank at *Washington*, and none at *Washing*, and cited *Lewis vs. Few*, 5 *J. R.* 1; *Wood vs. Buckley*, 13 *J. R.* 486; *Com. vs. Parmenter*, 5 *Pick.* 279.

By the Court, DICKINSON, J. The principle, in this case, was discussed and decided in the case of *The State Bank vs. Hubbard*, during the present term; and the authorities there referred to, we deem conclusive. The variance, in this instance, is fatal. The note declared on was said to be payable at the office of the Real Estate Bank at *Washington*. On oyer, the one produced was payable at *Washing*, instead of *Washington*. The Court below unquestionably erred in not sustaining the defendant's demurrer to the declaration.

Judgment reversed.

MURPHREE AND OTHERS *vs.* THE BANK OF THE STATE.

Where a note is declared on as payable to *the Bank of the State of Arkansas*, and on oyer it is found to be payable to *the Branch of the Bank of the State of Arkansas at Batesville*, the variance is fatal, on demurrer.

After demurrer to the declaration by one defendant correctly sustained, judgment against all the defendants, without any further steps taken by them, is erroneous.

THIS was an action of debt, determined in the Independence Circuit Court, in December, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. The Bank sued on a bond, stated as payable to "the Bank of the State of Arkansas, or order." On oyer craved by Murphree, one of the defendants, a bond was filed, payable to "the Branch of the Bank of the State of Arkansas at Batesville." He demurred for the variance, and his demurrer was sustained. No leave was asked to amend the declaration, nor was it amended; and judgment was, at the next term, rendered against Murphree, by *nil dicit*, and against the other defendants, by default.

The case was argued by *W. Byers*, for the plaintiffs in error, and *Hempstead & Johnson*, contra.

By the Court, DICKINSON, J. The demurrer was rightly sustained, as the declaration was clearly insufficient, and determined the suit as

to Murphree, until the pleading was amended. And, as the judgment of the Circuit Court is jointly entered against all of the defendants below, and not capable of being severed, it is, for that reason, erroneous.

Judgment reversed.

FULCHER *vs.* LYON.

A capias *ad respondendum*, in a civil case, is not duly executed, under our statute, unless it is read to the defendant, or a copy delivered to him; and, if the return is merely that the body of the defendant was arrested, and he gave bond for his appearance, it should be set aside, on motion.

THIS was an action of debt, determined in the Jackson Circuit Court, in May, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. Lyon was the plaintiff below, and Fulcher appealed. The facts of the case are stated in the opinion of the Court.

The case was argued here by *Fowler*, for the appellant.

By the Court, DICKINSON, J. The transcript in this case shows a degree of irregularity in the proceedings of the Court below, which we deem it proper to notice, as well because it is not only calculated to do injustice to the inferior tribunal, but greatly increase the labor of this Court, in arriving at the question in issue between the parties. The declaration was filed, and the affidavit bears date, the 19th of September, 1840, while the order to hold to bail, and the writ of capias, are dated the day preceding. The writ neither states the amount of debt claimed, nor has it any official seal; and the affidavit claims a subsisting and unsatisfied debt of $1000. The order to hold to bail is for $520 6¼. The writ was not delivered to the sheriff until the 13th of November, (a period of nearly two months), and then returned by him as coming to hand "too late to be executed." It ap-

pears by the transcript, that the summons not being executed, on motion of the plaintiff, an alias summons was ordered. On the 23d of November, 1840, a second capias was issued, upon which the sheriff returned that he had executed it by "arresting the body of Ferdinand C. Fulcher, and taking bail bond of him for his appearance at court." The appellant then moved to set aside this return, upon the ground that the sheriff did not read the writ to him, nor deliver him a copy thereof, as by the statute (*p.* 621, *sec.* 15,) he was bound to do. This motion was overruled by the Court; and, there being no further defence, judgment was entered against him, by default. The transcript states, that leave was given the sheriff to amend his return. We are to presume that it comes to this Court as amended; and there is no objection raised to the correctness of the record. The return is, in our opinion, defective and insufficient, and does not conform to the statute, which expressly requires the sheriff to read the capias, or deliver a copy to the defendant. The Circuit Court unquestionably erred in not setting aside the return, upon the motion of the appellant, and in giving judgment against him by default.

Judgment reversed.

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Day and Others vs. Lafferty.

Where an instrument is signed by a partnership name, with a seal after it, it is properly described in the declaration as the bond of the individual members of the firm.

A signature and sealing, in the name of the firm, with a single seal, is good, and binds all the partners who are present, or assent to the execution. If none but the executing partner assent, it is still good as to him.

In a suit on such a bond, a plea of payment by all the partners, necessarily admits its execution by all.

Pleas stricken out by the Court, form no part of the record, unless made so by bill of exceptions.

If a party covenants to pay in specific articles, he must meet his contract *at the time* and *in the manner* specified.

Tender cannot be made *after the day*, unless the damages are capable of being reduced to certainty, by computation.

Therefore, a plea of tender, after the day, is not good, in case of a note payable in specific articles. The damages cannot be ascertained by computation.

And such is the rule on a note payable in current Arkansas bank notes.

THIS was an action of covenant, determined in the Independence Circuit Court, in December, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. Lafferty was the plaintiff below. The declaration charged that the defendants below, merchants and partners in trade, doing business under the name, style, and firm of Day, Williams & Co., on the 25th day of December, 1840, executed their certain writing obligatory, sealed with their seals, by their partnership name of Day, Williams & Co., promised, by the first day of April then next, to pay said plaintiff $129 50, for value received, payable in current Arkansas Bank notes. Upon oyer, the writing appeared as follows: "$129 50. By the first of April next, we promise to pay Lorenzo D. Lafferty one hundred and twenty-nine dollars and fifty cents, for value received, payable in current Arkansas Bank notes. Witness our hands and seals, this 24th December, 1840;" signed, *Day, Williams & Co.*, with a seal.

The defendants demurred to the declaration, for variance. The demurrer was overruled. Upon which, they pleaded failure of consideration, tender, and payment. The first plea was stricken from the rolls, on motion. A demurrer sustained to the second, because the action sounds in damages, and tender not made, on the day of payment. A second plea of failure of consideration was stricken out, and issue taken upon the plea of payment; upon which, there was a verdict and judgment against the plaintiffs in error.

W. Byers, for the plaintiffs in error, argued, that the pleas stricken out were good.

D. Walker, contra.

By the Court, DICKINSON, J. Although any question which may have arisen upon the demurrer, is waived by the subsequent pleading to the merits, we think it proper to remark, that, in our opinion, the obligation is properly described in the declaration. The plaintiffs in error are charged with having executed it under their joint seal, in the name of the firm, Day, Williams & Co.

It is, as a general rule, true, that one partner cannot bind another

by deed, without his consent; but the authorities fully establish the principle, that a signature and sealing, in the name of the firm, with a single seal, is good, and binds all the partners who are present, or assent to the execution. If none but the executing partner assent, it is still good as to him. 4 *Mason*, 232, and note thereto. The plea of payment necessarily admits the execution of the deed by all the partners.

The case of *Crary vs. Ashley & Beebe*, referred to by the plaintiffs in error, differs essentially from the one now before us, as to the manner in which the question of striking out pleas is presented. In that case, the defendants excepted to the opinion of the Court, and rested upon their bill of exceptions, duly signed, sealed, and set out upon the record. But here the party, by not making the plea stricken out a part of the record by bill of exceptions, acquiesced in the decision of the Court. The plea so stricken out forms no part of the record, and should have been wholly omitted, in the transcript. This objection, therefore, to the striking out of the plea, comes too late, and cannot now be considered.

The only remaining question for our consideration is presented by the demurrer to the plea of tender. We consider the law well settled, that, if a party covenants to pay in specific articles, he must meet his contract at the time and in the manner specified. Tender cannot be made after the day, unless the damages are capable of being reduced to certainty, by computation; nor can it be pretended that it is possible to do so, in this instance, without the intervention of a jury. Even if a party failed to make a defence, a writ of inquiry must issue, to ascertain the damages. It is, therefore, not one of those cases in which the doctrine of tender is applicable.

Judgment affirmed.

THE BANK OF THE STATE *vs.* BAILEY.

If an instrument, executed by several, is declared on as *sealed*, it is no ground of demurrer for variance, that, to the name of one of the signers, no seal is affixed. He may have adopted one of the other seals, and thereby made it his own.

He could only deny his having sealed it, by plea, under oath, denying the execution.

Where there are several writs, all defective, and liable to be quashed, although one defendant moves to quash, and the motion is overruled, yet, if *he* is not a party plaintiff in this Court, and the defendant, who is plaintiff here, afterwards demurred to the declaration, he can have no advantage of the defect of the writ.

THIS was an action of debt, determined in the Independence Circuit Court, in December, 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. The Bank sued Bailey, and four others, on a bond. Oyer being granted of the bond, it appeared that a seal was affixed to each name but one. Bailey demurred for variance, on this ground, and the demurrer was sustained, and final judgment rendered in favor of Bailey. Before he filed his demurrer, two other of the defendants moved to quash the writs in the case, (all being bad), which motion was overruled. The Bank appealed.

The case was argued here, for the appellants, by *Fowler*, who cited *Hatch vs. Crawford*, 2 *Porter*, 54; *Moore's Executors vs. Russell*, 2 *Bibb*, 443; 1 *Saund.* 291, *n.* 4; 3 *Mon.* 378; *Mapes et al. vs. Newman et al.*, 2 *Ark.* 471; and by *Hempstead & Johnson*, on points not involved in the decision.

W. Byers, contra.

By the Court, DICKINSON, J. We think the Court erred in sustaining the demurrer, for Martin may have adopted one of the other seals, and thereby made it his own. He does not deny the execution and sealing of the instrument; nor would he, under our statute, be permitted to do so, except by plea, supported by affidavit.

It is as well to remark, that the same objection lies to the writs in this, as in many other cases decided by this Court. Several writs

were issued to different counties, including, in each one, the names of all the defendants; and the objection was made by McPherson, one of the defendants, and overruled. But, as he is not a party to the case in this Court, his objection cannot be so considered as authorizing us to adjudicate as between him and the appellant.

Judgment reversed.

Hay & Trice *vs.* President and Directors, &c.

Held, that, if a suit is brought in the name of the President and Directors of the Branch of the Bank of the State at Batesville, process cannot issue into counties other than that where the suit is brought, unless one of the defendants reside in the latter.

Blackmore and Others *vs.* President, Directors, &c.

If a plea is stricken from the files, and no exception is taken, it forms no part of the record.

Pleas ought not to be stricken out, unless the Court perceives that they are wholly frivolous.

If the President and Directors of the Branch of the Bank of the State of Arkansas at Batesville, sue on a note executed to them, they are only entitled to recover six per cent. interest, unless a greater rate is expressed in the contract.

This was an action of debt, determined in the Independence Circuit Court, in December, 1841, before the Hon. Thomas Johnson, one of the Circuit Judges. The President and Directors of the Branch of the Bank of the State of Arkansas at Batesville, sued Blackmore, Greer, and Hay, on a note executed to *the Branch* aforesaid, with no rate of interest specified. Hay craved oyer, which was

granted. Green filed a plea in abatement, which the Court struck out, on motion of plaintiffs. This plea was not placed on the record, by bill of exceptions. Defendants saying nothing further, judgment against them for $1000, debt, $288 50, damages, and interest on debt and damages from date of judgment till paid, at ten per cent. per annum. The defendants brought error.

W. Byers, for plaintiffs in error. The Court should not have stricken out the plea of Greer. 1 *Saund. Pl. & Ev.* 11. 1 *Ch. Pl.* 486. 3 *Ch. Pl.* 486. *Story's Pl.* 91. *Graham's Pr.* 249. 2 *Ch. Rep.* 239. 1 *T. R.* 462. 1 *Ch. Rep.* 715. 3 *D. & R.* 621. 2 *Str.* 1234. 10 *East.* 237. 2 *New. Rep.* 188. 4 *Cowen*, 142. *Crary vs. Ashley & Beebe.*

The declaration does not show any legal interest, in the defendants, to the writing obligatory described therein. The promise to pay is to the Branch of the Bank of the State of Arkansas at Batesville, and not to the President and Directors, &c. The party bringing suit must have a legal interest in the subject matter thereof. 1 *Ch. Pl.*, *p.* 2 *to* 9.

We think the rule incontrovertible, that a corporation must sue in its proper name. 2 *Kent's Com.* 277, 283. 2 *Stark. Ev.* 243.

Hempstead & Johnson, contra, cited *Wilcock on Corp.* 14; *Law Library*, 35; *Cambridge vs. York*, 1 *Kyd*, 256; *Rex vs. Croke*, *Cowp.* 26, 30; 8 *East.* 492; 2 *Ld. Raym.* 1239; 10 *Co.* 125; 13 *John. Rep.* 38; *Kyd on Corp.* 287; *Bank Charter*, *sec.* 7.

By the Court, Dickinson, J. As to the plea in abatement, it is improper for this Court to make any remark upon it, as it was stricken from the files, and no exception taken, and consequently it forms no part of the record. We have already, in a previous case decided at this term, expressed our disapprobation of this striking out pleas, unless the Court perceive they are wholly frivolous. The case now stands simply upon the judgment rendered below. That is given upon a note calling for no particular rate of interest upon its face; yet the interest is calculated at ten per cent. per annum, by way of

damages, and the same rate of interest allowed upon both debt and damages, until paid. We know of no law that authorizes a party to recover a greater rate of interest than six per cent., unless so expressed upon the face of the contract; and then it cannot exceed ten per cent. The Court, then, in giving judgment for interest on the judgment at the rate of ten per centum per annum, has clearly erred. It may be proper here to remark, that there is no public corporation in this State, of the name and style adopted by the plaintiffs; but, as there is no proper plea now remaining upon the record, calling in question her right to sue, we are not at liberty to express any opinion upon that point.

Judgment reversed.

Prather *vs.* Palmer.

An obligation for costs, under our statute, must be *sealed.*

It being proven that a person was, *seventeen years ago*, a resident of another State, the law presumes that residence still to continue, until the presumption is overthrown by other testimony.

This was an action of debt, determined in the Jefferson Circuit Court, in April, 1841, before the Hon. Isaac Baker, one of the Circuit Judges. Prather sued Palmer. An instrument was filed, purporting to be an obltgation for costs, but *unsealed.* The defendant moved to dismiss the suit, for want of a bond for costs. To establish the non-residence of Prather, the defendant proved that he was a citizen of Indiana seventeen years before. There being no other evidence of the fact of non-residence, the suit was dismissed; and Prather brought error.

Jas. Yell, for the plaintiff in error.

Hempstead & Johnson, contra. The record shows that the plaintiff was a citizen of the State of Indiana, seventeen years ago. This

made a *prima facie* case of non-residence, liable to be rebutted, but good until explained away by counter proof. *State vs. Baker*, as to presumption, January term, 1842. *Smith vs. Dudley*, 2 *Ark.* 68. *Clark vs. Gibson*, 2 *Ark.* 109. 2 *Stark. Ev., title* "*Presumptions*," 179.

By the Court, DICKINSON, J. The declaration in this suit is signed by Bocage, as the attorney for the plaintiff; but, in the subsequent proceedings of the cause, it appears that James Yell is also an attorney for the same party. The paper, purporting to secure the costs which may accrue, is not sealed, and consequently cannot be considered such an obligation as is required by statute. The only question is as to the residence of the plaintiff, and whether the Court below is sustained in its judgment by the testimony adduced. James Yell, one of the plaintiff's attorneys, disclaims all knowledge of his place of residence, while Henry Allen, who knew him, declared that, seventeen years ago, the plaintiff was then a citizen of Indiana, and he had never heard of his removal from that State. This is all the evidence having any bearing upon the case.

It is sometimes a matter of some difficulty to ascertain and decide in what place a person has his residence; and, in this instance, the question is not free from difficulty. One of the witnesses, however, has fixed and determined the residence of the party, at a period, it is true, long anterior to the instititution of this suit, but sufficient to raise a presumption, which, however slight, when once fixed, must remain until it is overthrown by other testimony. And, in this conclusion, we are sustained by Judge STORY, in his *Commentaries on the Conflict of Laws*, *p.* 39, and by other authorities. The question is one of fact, and, from the evidence set out in the bill of exceptions, we should not feel warranted in declaring the Court had erred.

Judgment affirmed.

DARDENNE *vs.* BENNETT ET AL.

The clause of *in cujus rei*, &c., is not necessary to constitute a sealed instrument, under our statute.

Craving oyer of the instrument sued on, does not entitle the party to oyer of the assignments on it, nor place *them* on the record.

THIS was an action of debt, determined in the Jefferson Circuit Court, in April, 1842, before the Hon. ISAAC BAKER, one of the Circuit Judges. Bennett, Morrill & Co. sued Dardenne on two bonds, each executed to a third person, and assigned to the plaintiffs. One of the bonds contained the words "witness my hand and seal." The other did not. The defendant craved oyer, and the original bonds, but not the assignments, were placed upon the record. He then demurred, because one instrument was not a bond, and the declaration did not allege that the words "witness my hand and seal" were in the other. Demurrer overruled, and final judgment. Dardenne brought error.

Jas. Yell, for plaintiffs in error, cited *Rev. St. pp.* 107 *and* 187.

Hempstead & Johnson, contra, referred to *Bertrand vs. Byrd, ante, p.* 195; *Gould on Pl.* 461; 1 *East.* 636; 1 *Saund.* 338, *n.* 3; *Co. Lit.* 72, *a.*; *Yelv.* 195; *Hob.* 233; *Com. Dig. Pleader*, 271; *McLain et al. vs. Onstott*, 3 *Ark.* 478.

By the Court, DICKINSON, J. The Court, in the case of *Bertrand vs. Byrd*, decided at the last term, held, that the clause "*in cujus rei*" is not essential to a deed or bond, and that our present Revised Code does not change the law in that particular. The demurrer was, therefore, properly overruled.

It is too late to question the assignments. The defendant below should have craved oyer of them, as well as of the original obligations, if he wished to bring the fact of the assignments to the notice of the

Court. He simply craved oyer of the originals. This was granted. The assignments are wholly distinct matters, and so it has been ruled in this Court, in the case of *McLain et al. vs. Onstott*, 3 *Ark.* 483. See, also, 1 *Saund.* 9, and 2 *Salk.* 498.

Judgment affirmed.

NEAL *vs.* NEWLAND.

If a third party would interplead in a suit by attachment, and claim the property attached, his interpleader must be in writing, and embody sufficient matter to make up an issue upon it, if necessary, and to support a verdict and judgment. | 4 459 | 58 450 |

If this is not done, there is no action in court, as between the interpleader and the original plaintiff.

THIS was a proceeding by interpleader in attachment, determined in the Randolph Circuit Court, in April, 1842, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. Newland had sued Meeks Neal, and by writ of attachment taken certain property. The record states that Benjamin B. Neal came, by attorney, and claimed the property attached, and moved the Court to be permitted to interplead. That leave was granted, and the case continued. At the next term, a jury was sworn, *to try* the right of property claimed by Benjamin B. Neal. The jury found for Newland. Judgment for Newland, against B. B. Neal, for costs of the trial of the right of property. This is all that the record shows, except a bill of exceptions, detailing the evidence, and the judge's decisions in regard to it. Neal appealed to this Court.

The case was argued here by *Fowler*, for the appellant, and *W. Byers*, contra.

By the Court, DICKINSON, J. We have not considered the instructions of the Court upon the trial, because the transcript (and its truth is not controverted,) shows nothing to try. Although leave was

granted to interplead, it never was done. This proceeding by way of interpleader partakes of an equitable character. Its object is to save unnecessary litigation, because the title can be tried and determined with the same facility as if a new action was instituted. But such interpleader must be in writing, and embody sufficient matter to make up an issue upon, if necessary, and support a verdict and judgment. This was not done. There was no action in Court. Judgment reversed, and the case remanded, with instructions to permit the interpleader to be filed, if leave be asked to do so; otherwise, that the case be dismissed.

Bennett & Young *vs.* Brickey.

Held, that where a bail bond is adjudged insufficient, there must be entered of record a *rule* upon the defendant, or *notice*, to perfect the bond; and that, until this is done, the sheriff cannot be joined as a co-defendant.

Knox and Others *vs.* Beirne & Byrnside.

That provision in the constitution of this State, which provides that the judges of the circuit courts may temporarily exchange circuits, or hold courts for each other, under such regulations as may be pointed out by law, confers upon the Legislature power to require the judges temporarily to exchange ridings, and to hold courts for each other, in contradistinction to any constant or permanent alternation or rotation of circuits.

Upon the interchange of ridings, the judges for the time being are, *quo ad hoc*, the lawful incumbents of the circuits in which they may be summoned to preside; and, during the temporary interchange, their official functions are superseded in their own respective circuits.

The Legislature may point out the mode in which this *temporary* exchange shall take place, and what shall constitute notice of its direction upon the subject. The law, in such case, may be a general one, but the interchange must be *temporary*, and not *permanent* or *lasting*, looking to a definite period when it shall terminate.

Temporarily, a judge may be directed by the Legislature to pass out of his own territorial jurisdiction, and be required to perform the duties of another circuit, for a given space of time, but not for one-half or two-thirds of the time for which he is elected; and that time to be constantly fixed as a permanent rule of policy in the system.

The act approved 25th December, 1840, providing for the interchange of circuits, provides for a *permanent*, and not a *temporary* interchange, and is, therefore, unconstitutional.

Where there is no appeal, but a mere agreement of the parties to refer the matters in dispute to the judgment of this Court, this confers no power on the Court to give judgment.

THIS case was determined in the Crawford Circuit Court, in August, 1841, before the Hon. RICHARD C. S. BROWN, one of the Circuit Judges. By the act of 25th December, 1840, it devolved on the Hon. JOSEPH M. HOGE, Judge of the 4th judicial circuit, to hold the August term, 1841, of the Crawford Circuit Court, in the seventh circuit, of which the Hon. R. C. S. BROWN was Judge. Both judges were present; and the regular judge declining to obey the law, holding it unconstitutional, proceeded to hold the Court. The present case was decided immediately, and brought before this Court, upon the agreement that it should be referred to this Court, upon the issue, whether the act aforesaid was constitutional.

The question as to the constitutionality of the act was argued here by *W. & E. Cummins*, for, and *Gilchrist*, *Evans*, and *Paschal*, against it.

By the Court, LACY, J. There has been a point raised and discussed at the bar, which we think it our duty to express an opinion upon, although it may not be absolutely necessary to do so, in the present aspect of this case. The question relates to the constitutionality of an act of the Legislature, approved December 25th, A. D. 1840, authorizing the circuit judges to interchange ridings, and to hold courts for each other. There is no time fixed when the operation of the act is to cease, and therefore it must be regarded as fixing a permanent interchange, by alternation and rotation of office between the several respective judges of the State; and, upon the interchange taking place, each judge is vested with as ample and as full authority to do and

perform every thing appertaining to his office, out of his own circuit, as, by the constitution and laws of the State, he has in its prescribed territorial boundary or jurisdiction.

The constitution declares that the "circuit court shall have exclusive original jurisdiction of all cases amounting to felony at common law," and "original jurisdiction of all matters of contract, when the sum in controversy is over one hundred dollars;" that "the State shall be divided into convenient circuits, each to consist of not less than five, nor more than seven counties, contiguous to each other, for each of which a judge shall be elected, who, during his continuance in office, shall reside and be a conservator of the peace in the circuit for which he shall have been elected;" "that the circuit courts shall exercise a superintending control of the county courts, and over justices of the peace, in each county of their respective circuits, and shall have power to issue all necessary writs to carry into effect their general and specific powers;" and, that the "judges of the circuit court may temporarily exchange circuits, or hold courts for each other, under such regulations as may be prescribed by law." *Sec.* 3, 4, 5, 12, *Art.* 6, *Constitution.* This Court has said, in the case of *The Auditor vs. Davies*, 2 *Ark.*, *p.* 502, "that the principle of a separate and distinct jurisdiction pervades and runs through our whole judicial system, and that the constitution has preserved one unbroken and entire chain of action throughout the entire plan. Each separate tribunal is left free in the exercise of its lawful and constitutional authority, and its subordinate parts are only restrained, by a superior jurisdiction, when they transcend the limits of the grant which created them." To assume for any one of these tribunals a jurisdiction greater or less than is conferred by the constitution, is not only virtually to abolish all the distinction and divisions of separate constitutional jurisdictions between the several respective courts, but it is, in effect, to ordain and establish a wholly different will or rule of action from the one laid down by the constitution. This principle, which seems to us wholly undeniable, proves that the Legislature has no right to alter or abolish the constitutional jurisdictions of the judicial tribunals of the State. It can neither enlarge nor diminish the grant of their creation or powers. It is certainly not competent for that body, to pass an act declaring the

circuit courts should not have jurisdiction in cases of felony at common law, or that of contract in civil actions, where the sum in controversy exceeds one hundred dollars. The reason is to be found in the constitution itself, which gives to the circuit courts this express jurisdiction. Again, the Legislature is wholly incompetent, in creating the several circuit courts for the State, to enlarge or diminish them beyond their constitutional jurisdiction. They have unquestionably the authority to create as many circuits as they deem proper and convenient, but then each circuit must consist of not less than five, nor more than seven contiguous counties. That instrument requires a judge to be elected and commissioned for each circuit, and his residence is confined to his territorial district. The Legislature has no power to pass a law requiring a judge to reside out of his circuit, and to perform the duties of an adjacent circuit. The language of the constitution is explicit and imperative upon this point; for each judge is elected for a particular circuit, is required to reside within it, and his commission is the evidence of his authority within its prescribed limits. It gives him no power or authority to do any judicial act out of his own circuit, but it embraces the circumference of his district, and within that circle his powers are adequate and plenary, and he has a superintending control over the county courts and the justices of the peace, in each county within his circuit. The Legislature cannot, either directly or indirectly, interfere with his constitutional jurisdiction, either in regard to the subject matter of it, or to its territorial boundaries; both of which must concur and unite to invest the court with the exercise of a complete jurisdiction to hear and determine the causes that may be brought before it; for, to allow a Legislature to diminish or increase the constitutional jurisdiction of these tribunals, would be to place their own will above that of the constitution, in derogation of its authority; for the State would then have a different system of circuit courts from the one ordained and established by the people, in convention.

The inquiry now is, what is the true meaning of the constitution, when it adds this qualification to the general grant of the circuit court powers: " that the judges may temporarily exchange circuits, or hold courts for each other, under such regulations as may be pointed out

by law." These terms have not in them any very precise or definite meaning. Taking them, however, in connection with other portions of the constitution, and construing them in reference to the territorial jurisdiction of the circuit courts, they are, nevertheless, capable of being defined with sufficient accuracy to arrive at the true meaning of the convention. They confer upon the Legislature power to require the judges *temporarily* to exchange ridings, and to hold courts for each other, in contradistinction to any constant or permanent alternation or rotation of circuits. Upon the interchange of ridings, the judges for the time being are, *quo ad hoc*, the lawful incumbents of the circuits in which they may be summoned to preside; and, during the temporary interchange, the official functions are superseded or suspended in their own respective circuits. The Legislature may point out the mode in which this temporary exchange of riding shall take place, and what shall constitute notice of its direction upon the subject. The law, in such cases, may be a general one, but it must be so guarded and worded, that the interchange itself must be *temporary or local, and not permanent or lasting*. The interchange of circuits is given upon the express condition, in the constitution, that the judges may hold courts temporarily for each other, in contradistinction from a fixed and settled rotation or alternation of ridings. During the time of the interchange, the respective judges are clothed with full power and authority to hear and determine all the causes in each other's respective circuits; but that interchange the constitution required to be temporary in its objects and purposes, looking to a definite period of time when it shall terminate; and each judge then to be recalled to preside in his own particular circuit for which he was elected and commissioned. His residence is fixed to his own circuit, and all his general duties appertain to, and are confined within, its boundaries. Temporarily he may be directed by the Legislature to pass out of his own territorial jurisdiction, and be required to perform the duties of another circuit, different from his own, for a given space of time. He cannot, however, be required to perform those duties for one-half or two-thirds of the period of time for which he is elected, and that time to be constantly fixed as a permanent rule of policy in the system; for, if the Legislature possesses the power to do this, then

they would have the power to break down and destroy the division and separation of the respective circuits, and to obliterate these landmarks of the constitution. And thus, by rotation and alternation in the riding of the respective judges, the whole system of territorial jurisdiction would be virtually abolished and wholly changed. Instead of having then a system of circuit courts, as marked out and defined by the constitution, each judge restricted (except temporarily) to the discharge of the duties of his own prescribed circuit, his election and commission would then be made to extend his power and authority over the territorial limits of other circuits; which was never intended to be embraced or included in the grant of its creation.

It is no answer to this position to say, that inconvenience may result to the public from confining the judges permanently to their own particular circuits. The constitution has ordained it, and the Legislature has no authority to order it otherwise. Besides, if a judge, in any particular circuit, is connected with either of the parties upon record, or disqualified by interest, relationship, or being counsel in the cause, upon his certifying that fact to the Governor, the Executive is bound by the constitution to issue a special commission to some competent person, to hear and determine the cause; so that, in no possible event can the State receive any detriment from these disqualifications. The law now under consideration does not authorize a temporary or local interchange of riding, but it declares that the judges, by rotation or alternation in office, shall constantly perform the duties of the respective circuits for each other, *for all time to come*, and that, too, over territorial boundaries for which they were never elected or commissioned. The act in question is, then, a *permanent*, and not a *temporary* interchanging of riding, and consequently not authorized by the constitution.

In this case there is no appeal prayed or granted. There is a mere agreement by the parties to refer the matters in dispute to the judgment of this Court. Such an order certainly confers no power upon us to give judgment in the premises. The case must, therefore, be dismissed, for want of jurisdiction.

W. & E. Cummins filed a petition for re-consideration, which was refused.

By the Court, DICKINSON, J. The language in this case, as used in the opinion, must, of course, be construed with reference to the facts before the Court—with reference to the matter under consideration. Any other rule, in the language of an eminent jurist, "would misrepresent one judge, and mislead another." Where the Court remarks that the judicial powers of the respective judges must be confined to the limits of their circuit, of course it must be taken in a qualified sense. The exception to the principle is contained in the constitution, which is, unless the Legislature shall authorize a temporary interchange of ridings. The argument upon the re-hearing of the case, although ingenious and forcible, has not been sufficient to satisfy the minds of the Court that the opionion previously expressed is erroneous. The definition of the term "temporary," although, in its literal acceptation, it may signify any portion of time less than the full period spoken of, still does not warrant the conclusion that it is to be taken with such an unqualified meaning, and applied to the grant of the constitution. The word, as it stands in that instrument, must be governed by the meaning and objects of the grant, and its signification restricted by other parts and provisions of the constitution. A law that would authorize a judge to remain all but a small fraction of time out of the circuit for which he was elected, and to hold but one court during the term of his service within his own district, would, to our minds, be a clear and palpable violation of the constitution. To hold such a law constitutional, would, in effect, break down all separate and distinct jurisdiction, which was the main and leading object of the convention to establish; and it would virtually abrogate and destroy both the election and commission which constitute the judicial warrants of the judge for the exercise of his authority. And the law now before the court, is, in our estimation, subject to the like objection. There is a constant and uniform alternation and rotation of riding between the respective judges, which may last for all time to come, and therefore cannot be termed, in the constitutional meaning of the word, a temporary interchange of circuits.

SUMNER *vs.* GRAY.

The vendee of personal property, while he remains in possession, and has not been evicted by paramount title, or, after the property has died, cannot defend against an action for the purchase money, on the ground that the vendor had no title.

The rule of the civil law is the correct one, which is, that if one, *in good faith*, sells and puts another in possession of property, of which he is not the true owner, and his want of title is afterwards discovered, the vendee is not entitled to an action against him, so long as he remains undisturbed in his possession.

This holds good when the seller parts with the property *in good faith*, believing it to be his, which the law presumes, until the contrary is proved; but, if he knew, at the time of sale, that he had no title, an action of *deceit* would necessarily lie for bad faith.

If a purchaser would rescind a contract of sale, and so entitle himself to a return of the money paid, he must put the vendor in the same situation that he was in before the delivery of the article.

To bar a recovery upon the ground of a failure of consideration, the defendant must allege that he obtained no [illegible] interest whatever under the conveyance.

If a vendor fraudulently represents the goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies, to recover damages therefor, though the real owner has not recovered the possession, nor the vendee suffered any actual damage.

The same matter may be admissible by way of defence, for the purpose of reducing or extinguishing the claim to the purchase money.

But where the vendee relies on a warranty of title, express or implied, there must be a *recovery* by the real owner, before an action can be maintained. This is in the nature of an eviction, and the only competent evidence of a breach of the contract.

THIS was an action of assumpsit, tried in the Chicot Circuit Court, in May, 1841, before the Hon. WILLIAM K. SEBASTIAN, one of the Circuit Judges. Gray sued Sumner in assumpsit, on the common counts, for the price of two negro children, sold by the former to the latter. Upon issue on the plea of non-assumpsit, the plaintiff proved that the defendant had stated, some time after June, 1835, that he had purchased of him two negro children, for which he was to give four hundred dollars; that he had taken the negroes home, and had them in his possession; that, early in the year 1836, one of the negroes died, at Sumner's house; that he then said that he had lost a little negro girl, for whom he would not have taken five hundred dollars; and that both the negroes died in his possession, in June or July, 1836.

The defendant then offered to read in evidence an authenticated copy of the will of Benjamin P. Gray, of Missouri, which was exhibited; and the Court refused to allow any evidence that Gray never

had any title to the negroes, other than some record of the recovery of them by title paramount. The defendant excepted.

The will purported to have been executed on the 17th of January, A. D. 1834. By it, the testator bequeathed to his son Martin a girl, named Letta, and to his daughter a girl, named Sophia, and provided that, when his son James (the plaintiff) came of age, he should have the management of the testator's estate.

The jury found for the plaintiff, and the defendant sued his writ of error.

Trapnall & Cocke, for the plaintiff in error. An action may be maintained against the vendor of personal property in possession, who had no title thereto at the time of the sale, without showing a recovery at the suit of another. In the sale of personal property, the principle of *caveat emptor* does not apply, so far as it relates to the title, but the law raises an implied warranty on the part of the vendor, that he has title to that which he sells. *Payne vs. Rodden*, 4 *Bibb*, 304. *Scott vs. Scott's Ex'r.* 2 *Marsh.* 317.

There is a broad distinction in this respect between real and personal estate. Upon a covenant, on the sale of lands, to warrant and defend the title against the claims of others, an eviction is necessary to show a cause of action; because there is no breach of covenant until an eviction has actually taken place; but, on the sale of personal property, the law raises an implied warranty of title; and, if the vendor has, in fact, no title, the warranty is broken as soon as made, and the right of action instantly accrues. In this respect, the sale of personal estate is analogous to the case of a covenant by the vendor of real estate, that he has title: in which, if the vendor, in fact, has no title, there is an immediate breach of his covenant, and an eviction is not necessary to enable the vendor to maintain an action upon the covenant. *Scott vs. Scott's Ex'r.* 2 *Marsh.* 317. *Medina vs. Stoughton*, 1 *Ld. Raym.* 593. 3 *Mod.* 261. 1 *Show.* 68. *Cro. Jac.* 474. 3 *T. R.* 57. 1 *Bac. Abr.* 78, *title* (*D*).

Pike & Baldwin, contra. A purchaser, with knowledge that the goods purchased were claimed by a third person, if he voluntarily

pays the price to such third person, cannot afterwards, in a suit brought against him by the vendor for the price, set up the want of title in the vendor, and that he had paid the price to the true owner, as a defence. It is not competent for the vendee to dispute the title of the vendor, unless he has been charged at the suit of another person, who has, after contestation, shown a better title. *Vibbard vs. Johnson*, 19 *J. R.* 78.

Want of title in the vendor of personal property, is no defence to an action brought for the recovery of the purchase money, when there has been no recovery by the owner against the purchaser. *Case vs. Hall & Van Elten*, 24 *Wend.* 102.

The meaning of the axiom of the common law, that, in every sale of personal property, there is an implied warranty of title, is, that when I sell to another, I agree to deliver and defend the possession; and, so long as he enjoys the undisturbed possession, my contract is fulfilled, unless there is ground for an action on the case for deceit.

This is the civil law doctrine. That code holds that the seller is not bound, in strictness, to transfer the *property*, but only to put the buyer in possession, and defend him against all persons. This doctrine is held to be founded in the nature of the contract of sale. *Dig.* 19, 1, 30, § 1. *Pothier, Contr. du vente, by Cushing*, 27, 28, 91, 218.

And this is the only doctrine on which the English cases can be explained, for they only admit an action on the case for want of title, where there was *bad faith*, or *deceit*. *Medina vs. Stoughton*, 1 *Ld. Raym.* 593. *Cross vs. Gardiner*, 3 *Mod.* 261. 1 *Show.* 68. *Furnis vs. Leicester*, *Cro. Jac.* 474. *Roswell vs. Vaughan*, *Cro. Jac.* 196. *Pasley vs. Freeman*, 3 *T. R.* 51. *Bailey vs. Merrell*, 3 *Buls.* 95. *Harvey vs. Young*, *Yelv.* 21, *a.*

In fact, there is no foundation in these cases, or any where else in the English cases, for the *dictum* so often repeated, that, on a sale of goods, there is an implied warranty of title. The cases only go so far as this, that a direct *affirmation* of title, when the seller *is in possession*, amounts to a warranty; and there is not the slightest hint that this affirmation is a warranty, any further than this, that the vendor will deliver and defend the *possession*.

That an action of *deceit* could be maintained on a *false* and *fraudu-*

lent affirmation of title, does not prove that want of title is a good defence to an action for the consideration money.

If it were a good defence, it would be good ground for rescinding the contract. A contract cannot be rescinded, unless the parties can be put in the same situation in which they stood at the time when the contract was entered into; and, if circumstances have been so altered as to prevent their being put in *statu quo*, the party, who might otherwise have rescinded the contract, will not be allowed to do so. *Hunt vs. Silk*, 5 *East*. 449. *Beed vs. Blanford*, 2 *Y. & J.* 234. *Rand's Long*. 242, 244, 245. *Kimball vs. Cunningham*, 4 *Mass*. 502.

If the party chooses to *rescind*, he must return the property. If he retains it, he may bring an action for deceit, and *this affirms the contract*. *Connor vs. Henderson*, 15 *Mass*. 320. *Curtis vs. Hannay*, 3 *Esp*. 82. *Burton vs. Stewart*, 3 *Wend*. 236. *Miner vs. Bradley*, 22 *Pick*. 457.

If he has received any benefit from the contract, though less than he expected, he cannot rescind, but the law leaves him to his action. *Boone vs. Eyre*, 1 *H. Bla*. 273, *n. a*. *Campbell vs. Jones*, 6 *T. R.* 570. *Whitney vs. Lewis*, 21 *Wend*. 131.

The cases quoted from Kentucky are not in point. They were actions by the purchaser against the seller.

By the Court, Dickinson, J. We have looked into the cases upon this subject with much attention, and can find none precisely in point. The principles, however, which will guide us in this decision, will be found fully sustained in the adjudged common law cases, and expressly decided by the civil law. The vendor has suffered no eviction in this case. He enjoyed the use and possession of the property, until its destruction. His title had never been disturbed, nor did he claim any indemnity for want of title in the vendor, by action for a deceit. Upon what principle, then, either of equity or justice, can he be permitted to question his vendor's title, after a providential contingency has happened, and deprived him, at once, of the enjoyment and possession of the property? The value of his contract depended upon the happening of this contingency; and both he and the vendor took it into consideration, when the one purchased, and the other sold and

delivered, the property. It is too late for him, now, to turn round and say to his vendor, "you had no title." A bill in equity would not lie to rescind the contract, for want of title in the vendor, because it would be wholly impossible to place him in the condition he was when he parted with his property. Why, then, shall the vendee not pay the purchase money, when he has enjoyed all the fruits and benefits arising from the sale? We apprehend the like consequence would follow, if they had remained in his possession, when they should have become useless from service, and he, in the mean time, derived no inconsiderable advantage from their labor. The contract of sale could only last during the lives of the slaves; and this contract he enjoyed to the fullest extent, for that time. We are aware that, in many of the English cases, there is said to be an implied warranty in the sale of a personal chattel. Still that principle, when correctly understood, has no application to the question now before us. We hold the true doctrine in this case, to be the rule laid down by *Pothier*, which is: if one, in good faith, sells, and puts another in possession of, an estate, of which he is not the true owner, and his want of title is afterwards discovered, the vendee is not entitled to an action against the vendor, so long as he remains undisturbed in his possession. This holds good, when the seller parts with the property in good faith, believing it to be his, which the law presumes until the contrary is proved. But if he knew, at the time of the sale, that he had no title, an action of deceit would necessarily lie for bad faith. *Pothier on Contracts*, 27, 28. This principle of the civil law is certainly in accordance with strict justice and moral right; and it is peculiarly applicable to the purchase of slaves, whose value may be increased or lessened by providential circumstances, over which neither party can have any control. If a purchaser would rescind a contract of sale, and so entitle himself to a return of the money paid, he must put the vendor in the same situation that he was in before the delivery of the article. *Kimball vs. Cunningham*, 4 *Mass.* 502. In *Carr vs. Henderson*, 15 *Mass.* 320, it is said that if the vendee does not return the property, or cannot put the party in the same situation, he elects to consider the contract as existing; and, in that case, if he is entitled to any redress, it is by way of damages for its breach. Now it cannot be pretended, that, because

an action will lie for deceit, for want of title, that a vendee, having undisturbed possession, can defend himself against the payment of the purchase money, and at the same time retain the property, and enjoy all the benefits of the sale. If that were the case, the vendor would not only lose the property, but be compelled to pay the price of it to the true owner. The doctrine, therefore, of *Benton vs. Stewart*, 3 *Wend.* 236, and *Minor vs. Bradley*, 22 *Pick.* 457, fully sustains the principle that a purchaser cannot treat the contract as void, if he retain the property. How, then, if he cannot restore the property, can he be exonerated from the purchase money? In *Tallmadge vs. Wallis*, 25 *Wend.* 107, the court held that a plea of want of seizin in the vendor, who had conveyed real estate, with a covenant of seizin, is no bar to an action of debt on a bond given for the purchase money. To bar a recovery, upon the ground of a failure of consideration, the defendant must allege that he obtained no estate or interest whatever under the conveyance. Now if this is true as to personal actions, and as to the sufficiency of a plea questioning the consideration of the contract, it is undeniable that the same principle must govern in regard to the proof of a failure of consideration as to personal property. Does the vendee, in this instance, pretend to prove that he received no estate or interest in the property? Unquestionably not. His own evidence shows that he had an interest, and enjoyed the estate, during its whole continuance. The law will, therefore, hold him bound to pay the purchase money.

If a vendor fraudulently represents the goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the possession, nor the vendee suffered any actual damage. 1 *Show.* 68. *Sell. N. P.* 482. The same matter may be admissible, by way of defence, for the purpose of reducing or extinguishing the claim to the purchase money. See 15 *J. R.* 250. 24 *Wend.* 102. Where, however, the vendee relies on the warranty of title, express or implied, there must be a recovery by the real owner, before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach of the contract, in analogy to the case of covenant real, and is so expressly ruled in *Case vs. Hall*, 24

Wend. 102. It would be unjust to permit the vendee to retain possession, and enjoy the use of the property, and put his vendor at defiance. Possibly his title and possession may never be disturbed, or the seller might perhaps quiet it. The breach implies no bad faith, and is, therefore, compatible with perfect fair dealing between the parties.

Judgment affirmed.

County of Pulaski *vs.* Irvin.

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The provision in the constitution of this State, that the county courts shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other purpose that may be necessary to the internal improvement and local concerns of their respective counties, does not confer on those tribunals the power of *taxation* and *disbursement*, without legislative action.

And section 205, of the chapter on Criminal Proceedings, in the Revised Statutes, providing that each county shall pay the costs of criminal proceedings had within it, is imperative on the county courts, and they have no discretion but to obey it.

The county in which a prosecution is commenced, though a change of venue is afterwards obtained, is liable for all the costs.

On certiorari to the county court, the circuit court can only quash or affirm.*

This was a case brought into the Pulaski Circuit Court, by certiorari, and there determined, in March, 1840, before the Hon. Charles Caldwell, one of the circuit judges. *Miller Irvin* exhibited, in the county court of the county of Pulaski, a demand for the sum of

**Judge* Dickinson held, that the great principle, in reference to which the constitution must be construed, is the *separation* and *division* of the powers of the government among the different departments: that the clause giving jurisdiction to the county courts, must be considered by, and in reference to, this leading principle; and the authority given that court must yield to, and be restricted by, this principle, unless its exercise is in accordance with the true object of the convention, and even if the clauses in the constitution were in direct contradiction to each other: that under our system of government, the power of *taxation* naturally belongs to the *legislative* department of the State, not to be exerted partially, or in local districts, but through the agency and sovereignty of the State, by uniform and impartial laws: that it is to be presumed that the State has not delegated the power of taxation to any other department than the Legislature, unless the grant in the constitution is so express and imperative as to forbid the idea that she intended to reserve this privilege solely to herself: that the grant of power to the county courts is not so express as to compel any such conclusion, for upon a proper construction of the grant, even standing alone, the Legislature must first define the objects on which the jurisdiction of the county courts is to be exercised,

$459 04, for compensation and fees for services rendered by him, as sheriff of Phillips county, in the case of the State of Arkansas against *David F. Douglass*, prosecuted for murder, upon an indictment returned into the circuit court of the county of Pulaski, in which the offence was alleged to have been committed, but which was removed for trial, by change of venue, to the circuit court of Phillips county.

The evidence adduced before the county court, in support of the demand, consisted of a duly certified transcript of the following order of the circuit court of Phillips county: "This day comes Miller Irvin, sheriff of the county of Phillips, and presents his account for moneys due, as sheriff, in the case of *The State vs. David F. Douglass*, in which

draw the line of distinction between general and local concerns, point out the internal improvements of the county, as contradistinguished from those of the State, and determine for what purposes county taxes may be assessed, the *amount*, *mode*, and *manner*, of taxation, and the purposes for which the moneys raised may be disbursed.

He held further, that the county courts could not act on the subjects of taxation or disbursement, without previous legislative action, for that it would be an exercise of legislative power: that the constitution gives them no legislative power, but regards them as *courts:* that they are political and corporate bodies, to be controlled and regulated in their discretion by the acts of the General Assembly, and not as independent of, and superior to it.

Judge LACY held, that to the fundamental provision in the constitution, as to the division of power, and its distribution among the departments, all the minor parts of the constitution must yield: that the whole structure of our political fabric was reared upon the principle, and rests upon the foundation, that the power of taxation belongs peculiarly and exclusively to the representatives of the people: that it is, in its essence and character, a *legislative* and not a *judicial* power, and cannot, in the nature of things, appertain or be assigned to judicial functions, with reason or justice: that this principle constitutes a governing rule in construing the constitution; and that, if there is any doubt or difficulty in ascertaining the precise boundaries of the departments, the design and objects of the separate jurisdictions must be inquired into, and the authority assigned to each, which the general scope and design of the system warrants: that a constitution is not to be construed, or its meaning ascertained, like an ordinary grant or deed, but it is a charter of great political rights and powers, and its spirit and meaning to be sought for and found, in the *principles* it ordains and establishes: that as the power of taxation belongs, as matter of right and principle, to the legislative department, it must remain there, unless the constitution has given a part of it to another department, by express grant or imperative implication: that no part of it could be, or is, conferred on the county courts, by mere ambiguous and uncertain terms, nor is conferred by the constitution: that the county courts are made *judicial* tribunals by the constitution, and a part of the judiciary department; and that when the constitution, in regard to them, uses the word *jurisdiction*, it must be restricted to the kind and quantum of jurisdiction that belongs to them *as courts*. He held, further, that the meaning of a legal or judicial jurisdiction, appertaining to a particular class of *cases*, means that the sovereign power of the State may prescribe a rule of action for that jurisdiction, and that the county courts must act in conformity to its authority: that the language of the constitution is too loose and vague to be taken as a grant of legislative power, or as conferring any other powers on the county courts than such as they can exercise as *judicial* tribunals: that construed by this rule, the terms become sufficiently certain, as far as their judicial powers and jurisdiction are concerned, and indicate to the Legislature what powers may be exercised by the county courts, and the necessity that would devolve on the General Assembly, of creating laws and regulations by which that jurisdiction might be exercised: that all inferior magistrates and corporate

there was a change of venue from the county of Pulaski to the county of Phillips, amounting to the sum of four hundred and fifty-nine dollars and four cents; which account, being proven to the satisfaction of the court, is audited, allowed, and ordered to be certified to the county court of Pulaski county; and the said court is hereby directed to pay the same."

Upon the hearing of the case, the county court decided, that the county of Pulaski was under no legal obligation to pay the expenses of that prosecution, accruing after the change of venue; refused any order for the payment of the demand; and adjudged "that the said Miller Irvin take nothing by his motion, or suit, and that the county

bodies, must, as a fundamental axiom in the science of government, be subject to the sovereign will, and subordinate to the welfare of the whole, whereof they form a part: that there is in the Legislature a necessary and indispensable power to provide for the common defence, the common welfare, and the common benefit and improvement, of the State, as one great whole, and, consequently, to provide for an ample exercise of public justice throughout the State, in the exercise of which powers, the constituent parts of the body cannot interfere; and that if its exercise imposes charges on a county, or creates the necessity for county taxes, this is a mere *result* that flows from the exercise of an indisputable power: that if the Legislature cannot interfere with county charges, or create county taxes, they cannot legislate for the common good, compel each county to keep and maintain good roads, or erect suitable buildings for purposes of justice.

The Chief Justice held, that that clause in the constitution confides to the county courts the direction and control *of all matters* affecting only, or principally, the interests of those residing in the county, in regard to which they possess the power of adjudicating every question that may arise: that for this purpose, they are the authorized agents of the inhabitants of the county, and the only organ by or through which their will, upon such subjects, can be legitimately made known, and their common interests provided for; and that their powers, in these respects, are plenary, and only subject to control by the circuit and supreme courts. He held, further, that *county* taxes could only be collected and disbursed for *county* purposes: that the county courts *alone* have the power of appropriating or disbursing the moneys so collected: that the *county court*, and not the Legislature, has the power to determine whether any particular object, the prosecution of which requires an expenditure of money, belongs to the class of objects which are local to the county: that if the county court has this power, the Legislature *cannot* have it: that the county court *alone* has the power to designate the objects for which county moneys are to be disbursed; and that there is no repugnancy between the grant of power to them, so construed, and any other part of the constitution. He further held, that the expenses of criminal prosecutions are not local to any county, or matters of county concern, and therefore, as to paying such expenses, no county court could have any jurisdiction: that the object of the constitution was, as appears from its language, to confer upon the officers of one department, *in more than one instance*, the exercise of powers, which, by the general distribution of power, would belong to another department: that unless the county courts have some *legislative* powers, this has not been done, because the only other instance is the power of the Senate to try impeachments: that the constitutional provisions in regard to *revenue*, apply exclusively to the *State* revenue, and have no relation or application to the levying of county taxes, or the appropriation or disbursement of money for county purposes: that the word *jurisdiction*, used in the constitution in regard to the county courts, has merely its ordinary meaning of *a power to determine or decide*, and is not confined to *judicial* jurisdiction. He also held, that his construction conferred on the county courts no legislative power, though, if it did, it might be exercised.

of Pulaski have and recover of the said Miller Irvin all the costs herein expended." To be relieved in the premises, Irvin then caused the proceedings of the county court to be brought before the circuit court of Pulaski county, by writ of certiorari; the return to which exhibited the facts, as above stated. Upon the matter being thus brought before the circuit court, it was agreed, between the parties, and their agreement, by leave of the court, entered of record, "that all manner of exception to the writ of certiorari, in this case, be, and the same are hereby, waived, and it is admitted, by both the parties, and ordered to be made a part of the record, that the indictment, in the name of the *State vs. David F. Douglass*, for the murder of William C. Howell, was found in the county of Pulaski, and removed, by change of venue, to the county of Phillips, for trial, and disposed of, in that court, by nolle prosequi." The circuit court, on the hearing of the case thus presented, decided that the county of Pulaski was legally bound to pay the cost and expenses incident to the prosecution, and adjudged, "that the county court of the county of Pulaski do allow, and order to be paid, to the said Miller Irvin, sheriff of the county of Phillips, the said sum of four hundred and fifty-nine dollars and four cents, certified by the circuit court of Phillips county to be due him, as sheriff, in the case in which there was a change of venue from the county of Pulaski to the county of Phillips; and that this case be, and it is hereby, remanded to the said county court; and the said county court is hereby instructed to allow and pay said claim, together with all the costs in and about this claim in this court expended." To reverse this adjudication, the county of Pulaski brought the matter before this court, by writ of error.

Trapnall & Cocke, for the plaintiff in error. The original application was made to the county of Pulaski, under the 205*th section* of the statute of Criminal Proceedings, which provides, that "in all penal or criminal cases, if the defendant shall be acquitted, (except in cases where the prosecutor shall be adjudged to pay costs), or, if convicted, shall not have property to pay the costs, the same shall be paid by the county;" referring, as may be fairly inferred, from a comparison

of the 204th, '5th, and '6th, sections, to the county in which the indictment was found.

The paramount objection to this claim, is, that the law, under which it is prosecuted, is in violation of the *9th section* of the *6th article* of the *constitution*, and appropriates, for public purposes, and divests the county, without its consent, of a fund, over which this section and article of the constitution has given it the exclusive control. It provides, that "there shall be established, in each county in the State, a court, to be holden by the justices of the peace, and called the county court, which shall have jurisdiction in all matters relating to county taxes, disbursement 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."

This section constitutes the county court a local legislature, for each county, and gives it sole and exclusive authority to regulate county taxation, and to expend and appropriate the fund, when collected; and, in addition, directs the expenditure of the fund for county, and not for State, purposes; and, therefore, the act, so far as it invades the exclusive jurisdiction of the county court, and appropriates a fund for the public, that was designed, by the constitution, for the county, is unconstitutional and void.

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Ashley & Watkins, contra. The question involved in this cause, is, has the General Assembly power to prescribe, by law, that the respective counties, in which State prosecutions originate, shall, in any event, pay the costs of these prosecutions? This resolves itself into the grave and serious question, whether the General Assembly has the power to control, by legislative enactment, the exercise of the jurisdiction vested by the constitution in county courts, "in all matters relating to county taxes, disbursements of money for county purposes, and in every other case, that may be necessary for the internal improvement and local concerns of the respective counties." *Cons. Ark. Art.* 6, *Sec.* 9.

In considering this question, I lay down the following propositions, as well settled: that the Federal Government can exercise no power, which is not clearly expressed in the constitution, or which is not ne-

cessarily implied, because it was created by the delegation of certain attributes of sovereignty, belonging to independent States: that, in construing the constitution of a State, a different rule is observed, for the Legislature of a State has the power to pass all laws, unless prohibited expressly, or by necessary implication, by the constitution, because the people possess all sovereign power, which may be expressed through their Legislature, unless restrained by the organic law.

By the constitution of this State, the powers of the government are divided into three distinct departments, each confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another; and no person, or collection of persons, belonging to any one of these departments, shall exercise the powers belonging to either of the others, except in the instances thereinafter expressly directed, or permitted. *Cons. Ark. Art.* 3. The only such instance, which the constitution directs or permits, is in regard to impeachments. Under this clause in the constitution, it was held, in the case of the *State vs. Hutt*, on *quo warranto*, that the same person could not hold the office of State treasurer and justice of the peace, at the same time.

By the *9th sec.* of the *6th art.*, under the head of the Judicial Department, it is provided, that there shall be established, in each county of the State, a court, to be holden by the justices of the peace, and called the county court; which shall have jurisdiction 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. This confers upon the county court the right to exercise a purely judicial function, and not any legislative power whatever. But if they possess the powers claimed for them in this instance, then are they legislative bodies, capable of passing all laws, general or special, "relating to county taxes, and disbursements of money for county purposes," independent of the General Assembly, and beyond the control of this court, which is invested by the constitution with a general superintending control over all inferior courts of law and equity. Instead of being judicial tribunals, they would be sovereignties. And what would it avail to sue the county, for any debt, if the county court pos-

sess the right to determine whether it shall be paid out of the funds of the county? Nothing. All demands against the county, would lay *in entreaty*, and not in suit, even for their liquidation.

It is believed that the principle involved in this case has already been decided in this court, in the case of *Woodruff, adm'r Gunn, ex parte*, in which a mandamus was ordered to be issued, to compel the county court to adjudicate a claim which it had once rejected. This court decided, that the only discretion vested in the county court, was, as to the *amount to be allowed on the claim of Gunn*, not as to whether the county was responsible for a claim of the character then presented. If a law, passed by the General Assembly, fixed the responsibility of the county, notwithstanding the decision of the county court, in that case, surely it has equal force in this.

If the question be doubtful, a construction ought not to be made of the constitution, which would lead to dangerous and absurd consequences, if not unhinge the operations of the government, while it admits of another safe, uniform, and practical construction.

After advisement, the following opinions were delivered:

By Dickinson, J. This is a question which, both in its principle and in its consequences, involves the construction of our constitution, in regard to the powers that belong to the State, in her sovereign capacity; and, also, the constitutional jurisdiction of the county courts.

The matter in controversy is not easily determined, because the questions involved in its discussion possess inherent difficulty, in themselves; and this is greatly increased by the vagueness and uncertainty of the terms used in the constitution.

In the construction of grants of constitutional power, there is no rule which should be more closely adhered to, than the one laid down by Justice Story, who declares, "that we should regard the constitution as a frame of laws, and not as ordinary statutes, and that the great end and object of all just interpretation are, to ascertain and determine the sovereign will of the people who formed the constitution; that the whole instrument must be taken together; and that its true intent and meaning can only be ascertained and defined from the great objects and purposes for which the government was instituted;

that any other construction will abridge great fundamental principles, which are supreme, and enlarge those which are restricted, beyond their true and just meaning."

I deem it proper to make this preliminary remark, before entering into a minute examination of the powers that belong to the State, as a sovereign, and those that appertain to the county courts.

The great axiom in the American form of government, is the separation and division of all political power among the three equal and co-ordinate departments of government; and that true and beneficial problem in the science of government was revealed by our revolution, and worked out and put in harmonious operation by the adoption of our federal and State constitutions. To deny this self-evident proposition, is to impeach the right of self-government, and to destroy the great preservative and constitutional principle that runs through our entire system of free states. This axiom is declared inviolate by our constitution, by which it is also declared, that the powers of the government of the State shall be divided into three distinct departments, each to be confided to a separate body of magistracy. Those which are legislative to one, those which are executive to another, and those which are judicial to a third; and, "that no person, or collection of persons, being of one of these departments, shall exercise any powers belonging to either of the others." It is clear, from this provision, that this was the great and important object that the convention had in view, in the formation of the constitution, and therefore the instrument must be construed in reference to it. They well knew that they could not be separated, or made independent of each other; for the action of the government depends upon the joint agency of them all. But, within the constitutional jurisdiction, each was supreme, except in cases expressly permitted or directed. Now, it is perfectly clear, that the clause in the constitution which confers jurisdiction upon the county courts "in all matters relating to county taxes, disbursement of money for county purposes, and in all other cases that might be necessary for their internal improvements or local concerns," must be considered by, and in reference to, the leading and governing principle of the constitution; and that the authority given to the justices of the peace, as a county court, must yield to, and be restricted by, this

principle, unless its exercise is in accordance with the true object and design of the convention. Again, it cannot be denied, that, if these clauses in the constitution were in direct contradiction to each other, the latter must give way to the former, because an inferior principle is intended to be engrafted upon the constitution, in opposition to a higher and more commanding provision, and one which constitutes the ingredients of civil liberty, and furnishes the only means and security by which the liberty of the country can be preserved or continued. This is the plain dictate of common sense, founded on experience and the nature of things, and strictly in accordance with all just rules of constitutional interpretation. There is a wide difference between the constitution of the United States and those of the State governments. The one is a delegation and enumeration of powers for national purposes and objects, and hence, its provisions are not to be extended beyond the true construction of the terms used, and their necessary implication with reference to the objects granted and intended to be secured. The constitution of a State government is wholly different. It is true, whatever it forbids, either to the State or to the people, cannot be done; and, thus far, it is like the constitution of the United States. Here the similitude stops; for, whatever is not forbidden by the constitution of the United States, or by the laws of Congress in pursuance of its authority, is retained as a residuary power to the State, as a matter of sovereign right, which she has the unquestionable authority to exercise in any manner she pleases, subject to the restrictions and limitations before stated. This results from the nature and character of civil government.

It would be impossible to make an enumeration of all the political rights that belong to sovereign States, or the natural privileges that belong to the people, or to give a definition that would include the whole extent of their power. Besides, it would be impeaching the will of the sovereign to do whatever she might think proper, within her constitutional orbit; and it would strip her of all her attributes of usefulness and improvement. The constitution of a State is, therefore, a mere declaration or bill of rights, imposed alike upon the different departments of government, and upon the citizens, and organizing its powers and franchises in such form as the sovereign will of

the people, in convention, deemed proper to impose. These premises, being established, will, I think, lead to just and proper conclusions.

The most distinguishing characteristic in the federal and State governments, is the power that belongs to the legislative department to impose taxation upon the people. There is a sensibility and a jealousy upon this subject, that may be regarded as furnishing the most effectual barrier against oppression and injustice. Representation and taxation, in their proper meaning, belong exclusively to the principles of a free, constitutional, and limited government; and this power, checked and controlled by the elective franchise, is not exerted partially or in local districts, but through the agency and sovereignty of the States, by uniform and impartial laws, and was the power that the people regarded, above all others, as constituting the shield of their protection. Liberty, they well knew, was in far more danger from attacks upon private property, than from any other cause; and hence, they guarded it upon that side with more solicitude and concern than any other.

These principles being established, it would seem to me to follow, that the State has certainly not entrusted her resources or her powers, on the subject of taxation, to any other department than the General Assembly, unless the grant in the constitution is so express and imperative as to forbid the idea that she ever intended to reserve this privilege solely to herself. And if it is doubtful how the power of taxation is distributed, then, as a governing principle of constitutional freedom, it necessarily belongs to the State, and she is authorized to exert it through the agency and instrumentality of her political or corporate communities. By keeping in view these principles, we shall be able to define the true constitutional jurisdiction of the several departments, and confine each to its appropriate sphere. The power of taxation, as has been justly said, is the greatest power that can be entrusted to a sovereign. In its exercise, all the great interests of society are involved, and the government is put into operation and supported by its resources or influence. As a general principle, the right of taxation is given, and belongs exclusively, to the legislative department. And there is great propriety and necessity in thus lodging it; for, as it is to be exercised for the benefit and security of the State, so the whole people of the State, through the means of the elective fran-

chise, should have the power of regulating and controlling its action. Is our constitution an exception to this universal rule? How is the power of taxation given, in the instrument? The county courts "shall have jurisdiction in all matters relating to county taxes, and disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concern of their respective counties." *Sec.* 9, *Art.* 6, *Cons.* These words must be all construed together, keeping in view the great object and purposes of the government. Admit that the term, jurisdiction over all matters relating to taxes for county purposes, if taken disconnected from the other portions of the constitution and the clauses of the sentence that follow it, might convey to the mind the idea that the power of taxation was given to that court; but, even then, I should deem that doubtful; for they are certainly neither appropriate nor sufficiently explicit terms to confer such a power. Their meaning is restrained by the latter part of the paragraph, which shows the object for which the jurisdiction was conferred; for that proves that the county court was intrusted with the mere collection and disbursement of the revenues of the county, and in *all other cases* in which she was concerned, by the appointment and prescription of the Legislature. Such is the extent of their powers. That they are to have and exercise jurisdiction *in all cases* coming within the provisions from which they derive their authority, is not controverted; and it is the duty of this Court to sustain and protect them in it. But the objects upon which that jurisdiction is to be exercised, must first be defined, and the line of distinction drawn by the General Assembly, between what shall be considered local or general concerns, and the internal improvements of the counties pointed out, as contradistinguished from those of the State; for what purposes county taxes may be assessed; the amount, mode, and manner of taxation; and the purposes for which such moneys may be disbursed. When this shall have been done, and a case is properly presented, in the form prescribed by law, then the jurisdiction attaches.

To assert the broad and naked proposition, that the county courts can act upon the subject either of taxation or disbursement, without any legislative control upon the subject, is, virtually and in effect, to

give to the most inferior tribunals in the State, powers expressly belonging to the General Assembly; and that, too, in a class of cases in which they might cause the most serious embarrassment to the State, by cutting off her revenue. As judges, they possess no such right, because it is the exercise of legislative authority. Where, I ask, is the grant giving them legislative power? Does the constitution regard them as a court, or as a legislature? or do they partake of a double character compounded of both, possessing the attributes of both judging and legislating. Is it to be presumed that so novel and extraordinary a power would have been conferred on an inferior tribunal of justice, without an express declaration of the constitution to that effect? To say that they, as judges alone, may declare what constitute county purposes, is to make the corporate and political bodies of the State uncontrollable upon the subject of county taxation, as well as disbursements, and all their incidents; for it cannot be contended that this, or any other court, could control them upon a mere question of fact, and that, too, upon a subject of which they have an exclusive, absolute jurisdiction. Suppose the General Assembly had passed no act whatever upon the subject, could the county court, upon its own mere will, have gone on and imposed burthens upon the property of her citizens? If it can arbitrarily declare the class of cases which shall be deemed local, or upon which the county funds shall be disbursed, regardless of the expression of the legislative will, it may, with equal propriety, levy and collect whatever tax it pleases, and upon such species of property as it may think proper to designate. If it can do all this, by what rule of uniformity are the county courts governed? for that bench, consisting of numerous judges, continually changing, at the will of the people by whom they are elected, must, then, having no rule for its government, be controlled in its judgment by the many circumstances acting upon the immediate interests of those who preside upon it. With a power undefined, unlimited, and unregulated, that which in one county would be deemed local, in another would be adjudged very differently. If the county court can, independent of the legislative will, levy taxes, and select all objects of expenditure, why can it not, as an incident of these powers, create an assessor, a treasurer, and collector? Such a power, I presume

would hardly be claimed for them. Grant, then, these uncontrolled powers of levying taxes, and they can, if they wish it, indirectly exclude the State from coming into the counties for her revenue, or at least so cripple her resources as to render them valueless. What right has a county to purchase property of any kind without the authority of law? If she can do this, she may erect court-houses and jails, and call them county property, and exclude the State from the use or occupation of them, and thereby paralyze the arm of justice. It is no answer to this proposition, to say there can be no motive to do such a thing. A failure to do so may be mere policy, while it can exercise the power at any time, to the great detriment of the general interests of the State and the citizens. I admit that, if the courts were given this power, absolutely and unquestionably, by the constitution, however dangerous such an arbitrary jurisdiction might be, no valid objection could be made to its exercise; but, as there is no such express grant in the instrument, according to my view of it, we are not warranted in clothing them with such unlicensed discretion. Had the convention intended to confer it upon them, would they not have declared, in express terms, that the county court should have authority to levy taxes upon the citizens of their counties, for county purposes, and disburse the same, without being subject to the control of the General Assembly? As they have not done so, is it not fair and reasonable to presume that no such power was ever intended to be conferred? Assume the position that an uncontrolled power is explicitly given to the county courts over county disbursements, and it must, of course, extend to the power of taxation. I cannot consider the grant as standing separate and alone, but as in reference only to other and higher objects of government. The question that I am considering, is one of power, and not of policy. Therefore, I am unable to bring my mind to the conviction that the convention ever intended to confer upon the most inferior part of the judiciary system the power of taxation and of disbursement, without reference to any legislative action. Admit the power, and all that the county courts have to do is, to declare any object local, and a fit subject for county taxation, and then they can, of course, (if the position the county court has assumed be correct), raise the levy to meet the expense; or, they may

refuse to make any improvements whatever, to the injury of other parts of the State. If this be true, how could taxation be uniform throughout the State, or a standard of equal valuation fixed upon the same species of property? And yet, this is one of the main and leading provisions of the constitution, upon the subject of taxation.

The members of the convention who framed the constitution, are supposed to have known the wants of the State, and to have provided adequate and sufficient means for the security and maintenance of the government. They, according to my opinion, proceeded upon the principle that the people were willing to intrust the General Assembly with the power of taxation; and, through the representatives of the whole State, have agreed that their property might be taxed for State purposes and county objects. They have provided the means for these two things, by intrusting the power to the Legislature, in the first instance, and requiring it to lay down a rule upon the subject, that should govern county courts. The constitution regards the county courts as political and corporate bodies, that are to be controlled and regulated in their discretion by the acts of the General Assembly, and not as independent of, and superior to, it. As political and corporate bodies, they are required to conform their action to the rule of the Legislature, and, in the exercise of their jurisdiction, to proceed in the mode and manner prescribed by law. That the State has the right to require them to defray the expenses of criminal prosecutions, originating in their respective districts, I have no doubt. As the sovereign, she may defray them out of any portion of her revenue that she may think proper. Whether the law she has passed in regard to the subject be ill advised or not, it does not belong to this Court to determine. Much may depend upon the vigilance of the police of a county, in preserving peace, good order, and quietness, and in suppressing vice and crime. And while, on the other hand, she is induced to exercise all her energies in preventing the commission of crime, she is warned that unnecessary and unwarrantable prosecutions may cause the expenditure of her public moneys, and increase the burthen of her citizens. The General Assembly having, under any state of case, authority to pass the laws, they must, in my opinion, remain in force until changed or modified by subsequent legislation.

Under the view I have taken of this case, it is not necessary for me to say, that I consider the acts of the General Assembly, regulating the disbursement of county funds, as imperative upon the county courts, and that they have no discretion but to obey them. In the present case, it cannot be contended but that the sheriff of Phillips county has acted in conformity with law, and that his account for official services, rendered in the case of the State *vs.* Douglass, is properly certified. It is equally clear, in my opinion, that the county of Pulaski, in which the prosecution was instituted, is bound to pay the costs. The judgment of the circuit court, however, must be reversed, as that court, upon certiorari, could take no other action upon the proceedings of the county court, than to quash or affirm them. The case must therefore be remanded, with instructions that the judgment of the county court be quashed.

By Lacy, J. I fully concur in opinion with my brother associate judge, that the act of the Legislature, prescribing the manner by which the costs in criminal prosecutions may be levied and collected, is strictly constitutional. Without attempting any thing like a regular or systematic argument in support of the proposition, I shall state, with as much brevity and explicitness as possible, some of the principal reasons that have led my mind to this conclusion.

The constitution enacts and ordains three distinct departments of power—legislative, judicial, and executive; and it declares that no person, or collection of persons, belonging to any one of these departments, shall exercise any powers belonging to another. This division and separation of all the powers of government, is the chief excellence and grand characteristic of our whole American system. It constitutes the very basis of the General and State Governments, and may be said to be the key-stone of the arch of constitutional liberty. To this fundamental provision in our system of government, all minor parts of the plan must yield. The whole structure of our political fabric was reared upon the principles, and rest upon the foundation, that the power of taxation belongs peculiarly and exclusively to the representatives of the people. It is, in its essence and character, emphatically a legislative power, and cannot, in the nature of things, appertain or

be assigned to judicial functions, with propriety or justice. It is the exercise of legislative will or discretion, and not the determination of judicial reason or judgment. This, then, being a primary principle in the formation and organization of our system, of course it must constitute a general and governing rule in the construction and interpretation of these instruments. And should there be any doubt or difficulty in ascertaining the precise boundaries of the three departments of power, in order to place the matter right, we should examine into the origin and objects of those separate jurisdictions, and assign to each the authority which the general scope and design of the system warrants. It is upon this principle, that it has been repeatedly held by the Supreme Court of the United States, that a constitution is not to be construed, or its meaning ascertained, like an ordinary grant or deed. Being the sovereign will of the people, in their highest legislative capacity, it becomes a charter of great political rights and powers, whose spirit and meaning are alone to be sought for and found in the principles it ordains and establishes. As the power of taxation belongs, as a matter of right and principle, to the legislative department, of course it must remain there, fixed and permanent, unless the constitution has given a portion of it to one of the other departments, by express grant or imperative implication. In the present instance, I do not think the construction of the constitution fair or just, that says the convention has conferred a large portion of the taxing power on the county courts, by the use of ambiguous or uncertain words. These courts, it is declared, "shall have jurisdiction in all matters relating to county taxes, the disbursement of money for county purposes, and in every case that may be necessary for the internal improvement and local concerns of their respective counties." Does a jurisdiction, conferred in matters relating to county taxes, and the disbursement of money for county purposes, necessarily grant, by a direct affirmation, or unavoidably imply, a legislative power in the county courts to determine the amount of taxes to be paid, and upon what articles to be raised, and in what manner they are to be levied? If this was the true intention and design of the constitution, why has it not declared it in express terms? Why did it not say that the county courts shall have the power of taxing the people for county purposes, both as to

the amount of charges and the articles assessed? The words used do not, then, by express grant, affirm any such power, nor do they, by intendment, imply any such meaning. To give to them any such construction, seems to me to pervert the literal and obvious meaning, and to put upon them an unauthorized and unwarrantable sense. The county courts are made judicial tribunals by the constitution, and when the term "*jurisdiction*" is used, it must be restricted to the kind and quantum of jurisdiction that belongs to them as courts. And this construction is strengthened and confirmed by the latter clause of the sentence which declares their jurisdiction shall extend to every case that may be necessary for the internal improvement and local concerns of the county. Now, what is the meaning of a legal or judicial jurisdiction, appertaining to a particular class of cases, if it is any thing more or less than that the sovereign power of the State may prescribe a rule of action for that jurisdiction, and that the county courts must act in conformity to that authority? To allow them to make a rule for their own government, and to disregard that of the supreme power, would be to invest them with legislative functions, while they were judicial officers, and acting in a judicial capacity. The language of the constitution is too loose and vague, to be taken as a grant of legislative power, or as conveying any other powers, other than those that these tribunals can exercise under the general and governing provisions of the instrument which makes them a constituent and integral portion of the judicial department. Construed by this rule, the terms become sufficiently certain, as far as their judicial powers or jurisdiction are concerned. One of the weightiest objections that can be urged against our constitution, is, that it is a code of laws in detail, rather than a bill of rights, or cardinal or general principles. The clause in question has indicated to the Legislature what powers might be exercised by the county courts, and the necessity that would devolve on them of creating laws and regulations, by which that jurisdiction might be exercised. Each county in the State is a mere public corporation; and such corporation is always subjected to the legislative power, where that power is not controlled by the constitution. They can have no vested rights of political power, except what may be conferred on them by the constitution. These inferior

magistrates (the aggregate of which make up the whole of this kind of corporate bodies of the State) must, as a fundamental axiom in the science of government, be subject to the sovereign will, and subordinate to the welfare of the whole, of which they form a part. This arises from the fact that our constitution was intended to effect certain distinct purposes, declared on its face; to accomplish which there is, and must be, in the Legislature, a necessary and indispensable power to provide for the common defence, the common welfare, and the common benefit and improvement of the State, as one great whole. Thus, to the Legislature is confided a power of providing for an ample exercise of public justice throughout the State, while it would be absurd to suppose that this power was denied to them by the constitution. In the exercise of this indispensable power in the administration of remedial justice, the constituent parts of the body cannot interfere. If its exercise imposes charges on the county, or creates the necessity for county taxes, this is a mere result that flows from the exercise of an indisputable power; for the Legislature have an inherent power to provide for the common welfare and defence. To say they cannot interfere with county charges, or create county taxes, or provide that particular expenses should be paid in the counties, is, in effect, to deny them the power of legislating for the common good: it is to deny that they can compel each county to keep and maintain good roads within its limits, for the common good: it is to deny that they can compel each county to erect suitable buildings for the current of justice to flow in: it is to deny that they can compel the counties to elect, and pay the salaries of, their probate and county judges, and thereby to give to each county the power of lopping off these branches of public justice. If the Legislature cannot compel the counties to pay the cost of criminal prosecutions, they cannot compel them to furnish records and office books, or to do any solitary act by which public justice can be enforced within the limits of these corporations. These consequences, in doubtful cases, go far to prove that it never could have been the intention or design of the convention to give the county courts such a power over the subject of taxation—a power of extreme delicacy, and of the most sovereign attributes, and one upon whose skilful exercise mainly depends our prosperity and happiness. And

besides, if the power exist in this case, it is an anomaly in the whole structure of our system of government, and its improper exercise would defeat, to a ruinous extent, the sovereign will of the State; for all the county courts would have to do, would be first to designate the objects that they deemed county objects, and then assess, without legislative regulation, any amount of taxes, for county purposes or local concerns. The quantum of taxes would be a mere question of discretion, on their part, which no other power could limit or control. Now, if the county courts possess the power contended for, then they are not amenable, according to the view I take of the case, to any other department of the government, under the constitution; for the power given to the supreme court to supervise and control the acts and proceedings of all inferior courts of law and equity, is strictly a judicial power, and cannot be made to embrace, either in terms or spirit, the supervision or control of any legislative power. Now, unless we admit that the Legislature may tax the counties, for the administration of justice, although costs may thereby accrue to the people within these corporate districts, how can a county be made to maintain her own paupers, or pay her own officers or jurors, or what authority has the Legislature to enact laws on these subjects, when, in so doing, they cut off a branch of the county revenue? And if no legislative power is conferred on the county court, and all its powers are subordinate to the general power of the Legislature, as far as the general welfare and public good are concerned in the administration of municipal justice, then it necessarily follows, according to my conception of the merits of this question, that the Legislature possesses the power to compel the counties to pay the costs of criminal prosecutions; and the act, therefore, upon that subject, I hold to be valid and constitutional.

By Ringo, C. J. No question as to the jurisdiction of either this court, or the circuit court, over the case as presented by the record, has been made or argued at the bar; nor has any objection whatever been made as to the form of the proceeding; the parties having discussed the single question, whether the county of Pulaski is or is not legally bound to pay the demand, as exhibited by the defendant in error. I shall, therefore, proceed at once to the consideration of this

question, and notice, in conclusion, such other questions only, presented by the record, as shall be deemed essential to a correct understanding of the case, or necessary to the making a legal disposition of it.

The solution of this question, if it involves nothing more than a just construction of the statutory provisions relating to the subject, would be comparatively simple and easy. I cannot, however, so regard it; because, according to the view which I take of the subject, it necessarily involves, to a certain extent, not only an exposition of the powers vested by the constitution in the county court, but also the authority of the Legislature to impose upon any county a legal obligation to pay the expenses and costs of legal prosecutions.

The *Constitution, Art.* 6, *sec.* 9, declares that "there shall be established, in each county in the State, a court, to be holden by the justices of the peace, and called the county court, which shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and every other case that may be necessary to the internal improvements and local concerns of the respective counties." This language is both explicit and comprehensive; and the object appears to me to have been to create, in each county, a court, designate the officers by whom it should be holden, give to it a name, and define its powers. And, from the jurisdictioh conferred, it is equally apparent, that it was the design of the convention to confide to the county court of the respective counties, the direction and control of all matters affecting only or principally the interests of those residing in the county, in regard to which it possesses the power of adjudicating every question which may arise. It is for this purpose the authorized agent of the inhabitants of the county, and the only organ by and through which their will, upon such subjects, can be legitimately made known, and their common interests provided for; that is, such objects as are strictly local, and intended only to benefit the inhabitants of the county, or in some manner promote their common interests. Over every subject of this character, the powers of the county court are plenary, and, in my opinion, only subject to such control as may be exercised over that tribunal by the Circuit and Supreme Courts. If such be the objects for which the county court was established, and such the powers with which it is invested by the con-

stitution, as to which, in my opinion, there can be no question, because they are within the express language of the provisions above quoted; and there is nothing in the constitution from which I could feel authorized to infer that such was not the design of those who framed that instrument; nor is there any thing in the nature or subject matters of the grant to warrant such conclusion. For what objects, then, are county taxes to be collected, and for what purposes may they legally be disbursed? I answer, for county objects and county purposes only. And, in respect to this conclusion, no doubt can, in my opinion, be reasonably indulged, because every provision contained in the section above quoted, refers exclusively to such matters as affect county interests only. Nor can there exist any doubt as to what tribunal is invested with the power of appropriating or disbursing the money collected on account of the county taxes, or in any manner raised for county purposes, because the constitution expressly provides, that the county court shall have jurisdiction in all matters relating to disbursements of money for county purposes. But here the question arises as to the power of the Court to determine whether any specific or stated object, the prosecution of which requires an expenditure of money, belongs to that class which are only designed to benefit, or in some manner affect the inhabitants of the county, or advance their local interests.

If the constitution has invested the county courts with this power, the Legislature cannot, according to any principle or rule of interpretation applicable to such instrument, possess or exercise it; not only upon the ground that the affirmative grant to the county court implies a limitation or negation of the power of the Legislature, in this respect, or because its existence, in any two departments of the government, would be incompatible with the provisions contained in the 3d article of the constitution, which distribute the powers of government into three distinct departments, and declares that each department shall "be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; those which are judicial, to another;" and, that "no person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances

hereinafter expressly directed or permitted;" but, also, because its exercise concurrently by two co-ordinate departments of the government, would be utterly impracticable, on account of the conflict of authority; each designating a different class of objects, to the prosecution or attainment of which, according to their respective views of policy or judgment of law, they would require the same money to be disbursed. And thus, in the absence of any tribunal clothed with power to control both, adjust the difference between them, and enforce its decision, nothing could be done in execution of the design of either.

And, if the county court has jurisdiction in all matters relating to disbursements of money for county purposes, as the constitution expressly declares it shall have, how can such jurisdiction be exercised, unless that tribunal possesses, also, the power of designating the objects for which the money shall be disbursed? I answer, that, without this power, its complete exercise would be impracticable. Suppose a proposition to disburse money belonging to the county, be submitted to that court; what is its first duty in adjudicating it? Surely it must be to determine whether it is demanded for any county purpose, because, it is upon the decision of this question that its jurisdiction or power to disburse the money is, by the constitution, made to depend. If this be decided in the affirmative, the power of directing the disbursement is vested in the court; but, if it be determined otherwise, the court has no jurisdiction of the matter; its jurisdiction being limited by the express terms of the grant, to matters of that character, as I conceive has been already shown. Now, for the purpose of testing this question more fully, suppose the Legislature to be possessed of the power of prescribing and designating by law, the objects and purposes to which, and to which only, the county funds shall be appropriated and disbursed, but divested, as it unquestionably is, of the power of disbursing the county funds; how could that power be exercised? Admit, for instance, that the Legislature determines that all prosecutions for criminal or penal offences against the State, instituted in a particular county, are matters of local concern to such county, and declares by law, that all costs and expenses incident thereto, shall be paid out of the county funds; but the county court, entertaining a different opinion in regard to the objects of such prosecutions, determines,

by its adjudications, that such prosecutions are not matters of local concern to the inhabitants of that county, but concern equally every member of the whole community, and thereupon refuses to disburse the county funds in payment of such demands: or, again, suppose the Legislature should determine that the erection of a bridge over any particular water course, or other specified place within the limits of any county particularly mentioned, shall be necessary to the internal improvement of such county, and shall be deemed a matter of local concern to it, and declare by law, that the county court shall cause such bridge to be erected, and the expenses incident thereto to be paid out of the county treasury, but, on the contrary, the county court determines and adjudges that the erection of such bridge is wholly unnecessary to her internal improvement, and of no benefit or advantage to the inhabitants of such county, and thereupon refuses to cause it to be erected, or disburse the county funds for that purpose; can the court, in either case, be compelled to disburse the county funds for such purpose? If so, their disbursement depends not upon the will or judgment of the county court, but upon that of the Legislature. And the court, in such case, can exercise no jurisdiction, either in regard to their disbursement, or the objects and purposes to which they shall be applied. In such cases, every thing is determined by the Legislature; and the court, being divested of all judgment in respect thereto, becomes simply the instrument by and through which the will and judgment of the Legislature is to be carried into execution. This, I apprehend, was not the design of the convention; nor is such a limitation of the powers of the county court at all compatible with the language used in defining its jurisdiction. In that language there is nothing obscure or ambiguous, either as to the extent of the powers conferred by it, or the objects it was designed to embrace. It defines both, in terms too perspicuous to admit of any serious question or doubt. And, as there is no repugnancy or conflict whatever between this and any other provision contained in the constitution, or the powers thereby conferred upon the county court, and those confided to any other tribunal or department of the government, by any provision contained in that instrument, I am unable to discover any ground upon which the power of the Legislature to appropriate the county funds,

or designate the particular objects to which they shall be applied, can be based. It will be remembered, also, that the constitution, *Art.* 6, *sec.* 15, has provided that there shall be two justices of the peace elected by the people themselves, for each township in the county, and, when the number of voters in any township exceeds one hundred, another justice of the peace may be elected for every fifty voters in addition thereto; and that these officers, so elected, shall constitute and hold the county court; thus forming a tribunal necessarily composed of men from every township in the county, who are presumed to have been elected for their capacity and fitness, not only to administer justice, but also to superintend and direct the common interest of the inhabitants of the county, as well as the local or particular interests of those residing in every part of it, who are supposed to understand their wants, and to know what will most effectually relieve them, and promote their common welfare and prosperity. Considerations of this character may have had, and probably did have, some influence upon the framers of the constitution, in inducing them to withhold from the Legislature the power to appropriate or make any disposition of the county taxes, and to confer it upon the county court. But, whether influenced by these or other motives, it appears to me, from a most careful and attentive consideration of the whole instrument and all its parts, to have been the design of the convention to confer upon the county courts the entire control and disposition of the county funds, as well as the control of all other matters of local concern to the respective counties; and of this power it cannot be divested by the Legislature, though the manner of its exercise may, in many respects, be regulated by law.

To determine whether a matter be within the jurisdiction of the county court, or otherwise, it is only necessary to ascertain whether the object to be accomplished is designed to operate principally, or altogether, upon the inhabitants of a single county, and will so operate, or, in other words, whether it is a matter of local concern or county purpose, in regard to which neither the State, or the great mass of the population of other counties, or other portions of the State, have any particular direct interest. If such be its operation, it is within the jurisdiction of the county court, and the county funds may, in the

discretion of that tribunal, be legally disbursed to accomplish it. But if such be not the effect and operation of the measure, the county court has no jurisdiction of it, and the money of the county cannot legally be appropriated or disbursed for the purpose of discharging any expenditure or charge which it may involve.

By applying these principles to the case under consideration, it will be readily perceived that the county of Pulaski is under no legal obligation to pay the demand in question. The prosecution of Douglass, like most other criminal prosecutions, was instituted and conducted by those acting exclusively under State authority. The crime, for which he was prosecuted, was an offence against the State, her dignity, and peace. It was a matter in which every member of the community is presumed, by law, to have an equal inerest. The injury complained of was not local, because it did not operate upon a majority of the inhabitants of Pulaski county, any more than it did upon those residing in every other part of the State. The penal laws of the State were supposed to have been disregarded and violated, the public peace and good order of society disturbed, the honor and dignity of the State assailed, and the supremacy of her laws derided, by an individual whose acts and example, if not repressed, would be likely to endanger society. And it was for the purpose of preventing the commission of other acts of similar character, by some other individuals, and to avoid their mischievous effects upon the interests of society generally, that the prosecution was instituted and carried on in the name and by the authority of the State.

If this be true—and that it is, I think cannot be questioned—it is manifest, beyond all controversy, that the proceeding was not instituted or prosecuted for any county purpose whatever; nor was it any matter of local interest or concern to the county of Pulaski, or any other single county in the State; and therefore, as no county court possessed any jurisdiction in the matter, or control over it, the funds raised for county purposes could not legally be disbursed in payment of the fees and expenses incident to its prosecution; and hence, there was no error in the judgment of the county court refusing to direct the payment of the demand in question, out of the county funds; but the circuit court erred in adjudicating it to be a legal demand against

the county of Pulaski, and that the county court was bound to allow and pay it out of the county funds. The reasons assigned by the county court may be, and in my judgment are, insufficient to justify the judgment therein rendered; yet, as the judgment itself is right, it cannot, on that account, be quashed or set aside. But the judgment of the circuit court, if it was right in substance, could not be maintained in the form in which it appears to have been rendered. The case was before that court, on and by virtue of a writ of certiorari; and, in such case, the law is believed to be well settled, that the circuit court could only adjudge that the judgment of the inferior court be quashed or affirmed. It possessed no power to remand the case to the inferior court for further proceedings, to be there had, nor to instruct the inferior court how to proceed in it, when it should be returned, as the circuit court, in this case, assumed to do. I am, therefore, after mature deliberation upon the whole case, satisfied that the judgment of the circuit court ought to be reversed, annulled, and set aside.

Such is my opinion in regard to the case, and upon every question, as I conceive, legitimately presented by the record, for adjudication; but the opinion of the Court covers more ground, and is made to involve and determine other questions of the first magnitude, which, notwithstanding I cannot regard them as proper subjects of adjudication in the present case, I consider it my duty to notice.

The opinion of the Court, as I understand it, assumes that there are certain great leading principles of government, vital to civil liberty, which pervade not only the organic structure of the government of the United States, but also of all the States in this Union, to which other provisions, of less importance, although inserted in the constitution, must yield, if they stand in opposition to, or in conflict with, each other. To the first class, the Court attaches the provision separating the powers of government into distinct departments, and confiding each to a separate body of magistrates or officers, and prohibiting such as are invested with any of the powers belonging to one department from exercising any of the powers belonging to either of the others. The power of taxation is also considered by the Court not only as of this class, but also as necessarily appertaining to the legislative department; but the jurisdiction and powers of the county

court, though granted by the constitution, are considered by the Court as being of the second class. These positions, as assumed by the Court, may be, and probably are, true in general, according to the theory and principles of American governments, and, if not contravened by any express provisions of the constitution, would form the governing rule, wherever the exertion of the minor powers granted by the constitution would conflict with the exercise of more important and commanding powers, vested, by the same instrument, in a different and distinct department of government. But the chief error, as I conceive, in this part of the opinion of the Court, consists, not in the principles asserted, but in their application; for the opinion of the Court, throughout, as it seems to me, proceeds upon the supposition that there is a conflict in the provisions of the constitution prescribing the jurisdiction and powers of the county court, and those relating to the separation of the powers of government and the powers of taxation, when, according to my understanding, there is no conflict whatever between them.

The *Constitution*, *Article* 3, ordains as follows: "*Sec.* 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. *Sec.* 2. No person nor collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter directed or permitted."

Is it not manifest, from the language here used in the conclusion of the second section, that the convention contemplated directing or permitting the exercise of some of the powers of government, belonging to one department, by persons or officers of another department, in more instances than one? To my mind it appears perfectly manifest. If such was not the design, why were the terms "instances hereinafter mentioned or permitted," used? Or if it was designed to prohibit every person, and every body of persons, entrusted with the exercise of powers belonging to one department, from exercising any of those belonging to a different department, for what purpose was the exception introduced? I can perceive none; and, therefore, I conclude that

it was the intention of the constitution to confer upon the officers of one department, in more than one instance, the exercise of powers which would naturally or appropriately belong to another. Has this been done? In my opinion it has, if any of the powers conferred upon the county court, would appropriately belong either to the executive or legislative departments of the government; otherwise it has not. The authority to try impeachments is vested in the Senate, by the *27th sec.* of the *IV. Art.* of the constitution, and in that instance a body of persons belonging to the legislative department, is directed or permitted to exercise a certain specified portion of judicial power. And so far as I can understand the constitution, this is is the only instance in which it either permits or directs the exercise, by persons of one department, of any of the powers belonging to a different department, if such is not the case in regard to the county court. The opinion of the court, as I understand it, assumes that the power to levy taxes, and appropriate and disburse the money raised by taxation, is, in its nature, indivisible, and, according to the fundamental principles of all free republican governments, belongs exclusively to the legislative department. This is generally true in regard to the revenue of the State, and, unless restricted by the constitution, it is a power which the Legislature could doubtless exercise, without regard to the object for which the tax is to be levied, or the money raised there by disbursed. But this power, like all others, was subject to the will of the convention, and, according to that will, could have been divided, restricted, regulated, or left entire in the Legislature. The proper inquiry, therefore, according to my view of the subject, is as to what was the will of the convention on the subject, as evidenced by the constitution. Is the power left entire in the Legislature? or is it regulated, restricted, or divested, in whole or in part, by the constitution? That its exercise is both regulated and restricted by that instrument, cannot, as I conceive, be questioned, because it expressly ordains, *Art. VII. sec.* 1, *title* "Revenue," that "all revenue shall be raised by taxation, to be fixed by law. *Sec.* 2. All property *subject to* taxation, shall be taxed according to its value; that value to be ascertained in such manner as the General Assembly shall direct; making the same equal and uniform throughout the State. No one species of property,

from which a tax may be collected, shall be taxed higher than another species of property of equal value: *Provided*, the General Assembly shall have power to tax merchants, hawkers, pedlers, and privileges, in such manner as may, from time to time, be prescribed by law: *And provided further*, that no other or greater amount of revenue shall at any time be levied, than required for the necessary expenses of the government, unless by a concurrence of both houses of the General Assembly. *Sec.* 3. No poll tax shall be assessed for other than county purposes. *Sec.* 4. No other or greater tax shall be levied on the productions or labor of the country, than may be required for expenses of inspection." Can the Legislature, consistently with the provisions here quoted, levy a higher or greater amount of State revenue on any one species of property, from which a tax may be collected, than on another species of property of equal value? Can they levy any tax on the productions or labor of the country, for any other object, or to any greater amount, than may be required to pay the expenses of inspection? These questions are sufficiently answered by the language of the constitution, just quoted. Again, the constitution, *Art. VII. sec.* 4, ordains, that "no money shall be drawn from the treasury, but in consequence of an appropriation by law, nor shall any appropriation of money for the support of an army, be made for a longer term than two years; and a regular statement and account of the receipts and expenditures of all public money, shall be published with the promulgation of the laws." What treasury is here spoken of? Is it the State treasury, or the county treasury? Unquestionably the former; and from that treasury no money can be drawn, without an appropriation thereof by law. Is such the case in regard to the county treasury? There is no provision in the constitution, inhibiting the county court from disbursing any money in the county treasury, in its discretion, or requiring it to be disbursed in pursuance of law. Nor is there any provision, requiring the publication of an account of the receipts and expenditures of the county, as it requires in regard to the receipts and expenditures "of all public moneys." Is it not, therefore, perfectly manifest, that the convention designed to make, and did expressly make and establish, a marked and unequivocal line of separation, in respect to the power of levying taxes, and disbursing

money for county purposes, and the power of raising and appropriating the revenues of the State? To my mind it is. And it seems to me equally clear, that the first and second sections of Art. VII. of the constitution, under the title "Revenue," above quoted, as well as section 4 of the same article, were designed to apply, and do apply exclusively, to the revenues of the State, and have no relation or application, in any respect whatever, to the levying of county taxes, or the appropriation or disbursement of money for county purposes. If it was the design of the convention, that the Legislature should possess the same power over both the State revenue and county taxes, is it reasonable to suppose that the disbursement of the former, without the authority of law, that is, without an act of the Legislature directing it, would have been expressly inhibited, and the publication of the receipts and expenditures thereof imperatively enjoined, and no similar provisions have been made in regard to the latter? In my opinion, it is not; and therefore, it appears to me, in considering the whole frame of government, as modeled by the constitution, and comparing every part thereof one with another, to have been obviously the design and object of the convention, that the Legislature should control the whole subject of the revenue of the State, subject only to the regulations, restrictions, and limitations, provided by the constitution, but shall possess no control whatever over the subject of county taxes, in respect to the amount thereof to be raised, or the objects for which it should be expended or disbursed; this power being, as I conceive, expressly granted to the county court. But the terms of the grant, it is said, do not necessarily confer this power upon the county court, or restrict its exercise by the Legislature. The solution of this question depends upon the import or signification of the term "jurisdiction," as used in the grant. In the ordinary or common signification of the term, it signifies "the power to determine or decide," in regard to the matter or subject specified; and I can perceive nothing in the constitution, to justify the conclusion that the convention attributed to it any other or different meaning, or intended to express, by its use here, any thing other than this, or different from it. And if I am not mistaken in this, there can be no doubt, I think, as to the design of the convention to invest the county court with this power. But again, it is said this

would be a grant of legislative power, and it is not to be presumed that the convention intended to invest a tribunal so inferior as the court, with the power of legislation over a subject so important as the imposition of taxes, and the appropriation of the money thereby raised, which, as it is said, might be so exercised as to embarrass the operations of the government, and disturb its harmonious action. Are these positions true? What act of legislation must the court exercise in the execution of any power claimed for it? Does the act of determining what amount of money is needed, or shall be raised, for county purposes, partake of the character of a legislative act? So, in regard to deciding what improvements, confined to the limits of the county, are necessary, or most conducive to the convenience and general welfare of its inhabitants. In neither case does the act, as I conceive, even savor of the exercise of legislative power. It prescribes no rule of conduct for any one; in itself it neither commands nor forbids any thing to be done, but decides simply what internal improvement shall be made, or matters of local concern accomplished, the sum of money necessary to be raised and expended in their execution, and then levies a tax commensurate to these objects. In determining these questions, the county court exercises both judgment and discretion, but it partakes, as I conceive, more of the judicial than the legislative character; but if the converse was true, the power might, nevertheless, be exercised; according to my view of the subject, being expressly conferred by the constitution. And as it is strictly a question of power, it could be no objection to its exercise, if it included the power also of even determining as to the subjects of taxation; that is, whether it should be a direct or poll tax, or tax upon property. The constitution imperatively forbids a poll tax being levied for other than county purposes. This implies a power somewhere existing, to levy such tax for county purposes. May it not have been the design of the convention, that the county taxes should be assessed upon the polls, exclusively? Upon this point, I express no opinion; yet if such was the design, it would, I think, free the subject of much seeming difficulty, and remove many of the objections, urged in the opinion of the court, against the exercise of the power by the county court.

Another principle asserted by the court, as it seems to me, is that

the Legislature can, by law, make local, things not so in their nature, and county purposes of things not so in their nature, but upon which the constitution itself has stamped a different character. This last remark is intended to apply, especially, to the act of the Legislature imposing upon the county the payment of costs, in certain criminal and penal prosecutions, which the opinion of this court sustains as valid, and binding upon the counties. The nature and character of such prosecutions have, I trust, been sufficiently shown in a former part of this opinion, and I will only remark, in addition, that the constitution itself confides the whole subject of their prosecution to State officers, and State authority, in no way subject to the jurisdiction or control of the counties in which they are carried on. In regard to the general principle, I will simply state a case or two, in illustration, the application of which will, as I conceive, be readily seen. Suppose an insurrection of slaves in the county of Chicot, to suppress which the militia are called out, and organized into a regular military force, and continued in service until the expenses for their maintenances and pay amount to $20,000, and the Legislature should pass a law, declaring that these expenses should be borne and paid by the county of Chicot, could that county be coerced to levy a tax, and pay the demand out of the treasury? Again, suppose the Legislature, in consideration of the advantages derived by the inhabitants of Pulaski county, from the location of the seat of government therein, should consider it just and reasonable that this county alone should pay the expenses of erecting and keeping in repair a State-house, or other buildings, for the use and accommodation of the General Assembly, and pass a law requiring the expenses thereof to be paid by the county of Pulaski, could such a law be enforced, and the county coerced to pay such demands? In my opinion, such legislation, if not repugnant to the express letter of the constitution, is contrary to the whole spirit and design thereof, and void. And in principle I can perceive no difference between the instances here put, and the act of the Legislature, sustained by the opinion of the court in this case. Now the court, if I understand its opinion, admits that county taxes can only be disbursed for county purposes, and in this we all agree; but the court holds that the power of determining what shall be deemed and adjudged to be county pur-

poses, within the meaning of the constitution, belongs exclusively to the Legislature, while, on the contrary, I consider it as belonging to the county court, subject only to the supervision or revision of the circuit and supreme courts, in like manner as all other adjudications of the county court. And the question of jurisdiction, or power, is to be determined not from any act of the Legislature, but from the nature of the thing in question, and its purpose. If it relates to county taxes, and the disbursement of money for county purposes, and is local in its character, the county court, under the grant in the constitution, possesses power to adjudicate it; if it has not these characteristics, that court has no power over it, and none can be conferred by the Legislature. It is competent, however, for that department to prescribe, by law, the form, order, and manner of proceeding, in the business of that court, as well as all other courts in the State.

This tribunal (the county court) is characterized, in the opinion of the court, as novel and extraordinary, if, indeed, it is invested with such powers as I have supposed; and from this consideration the conclusion is deduced, that it never was designed to grant such powers to it; such grant being, as it is argued, inconsistent with the principles of the government, which deny the power to levy taxes, without the consent of the taxed. However true this may be, as an abstract principle, I deem it unnecessary to inquire, as it can have no application here, for two reasons: first, because the people, from whom the tax is to be raised, have, through their representatives in the convention, assented to the grant investing the court with such powers; and second, because those upon whom the burthen must rest, have, under the provisions of the constitution itself, a much more full and immediate representation in the county court, than they have in the Legislature. To illustrate this question, as to the representation of the people in the two bodies, take the county of Pulaski. In the General Assembly, this county has three representatives and one senator. In the county court, she must have twelve at least, for there are six townships in the county, and each township must have two justices of the peace, who are elected by the same persons, and for the same term of time, as the members of the General Assembly, and each of whom has a constitutional right to sit in the county court. Is it to be presumed that these

representatives are less intelligent, less honest, less patriotic, or less informed as to the general welfare and local interests and necessities of the inhabitants of the county, than their representatives in the Legislature? Such presumption, it seems to me, would be alike strained and unauthorized. And this very fact, that the people, chargeable with the payment of the taxes, are all so fully and directly represented in the county court, by persons necessarily residing in every township in the county, taken in connection with the plain, unambiguous, and comprehensive language of the grant, furnishes to my mind a most potent evidence, that it was the design of the convention to confer on the court the power in question.

I agree with the opinion of the court, that it was the design of the statute to charge the county, where the prosecution was instituted, with the payment of the costs.

Judgment reversed.

Neale *vs.* Newland.

Where a surety in a note takes it up, after it is due, and cancels it by giving his own note, which is accepted by the creditor, this is equivalent to payment of the first note, and will support a count for money paid, laid out, and expended.

This was an action of debt, determined in the Randolph Circuit Court, in April, 1842, before the Hon. Thomas Johnson, one of the circuit judges. Newland commenced his action, by writ of attachment. The first count in the declaration, was on a promissory note. The second count was for $500, for so much money by Newland laid out and expended for the use of Neale. Neale demurred to the declaration. Demurrer was sustained as to the first count, and overruled as to the second. Issue was then joined, upon the plea of *nil debet*, and jury came, verdict and judgment against Neale, for $425 debt, and $38 25 damages. On the trial, it was proved that Newland was security for Neale, in a note to the State Bank, payable at the

Branch at Batesville, for $425, and that after the note fell due, Newland voluntarily went to the bank, and either gave his own note for the whole, or paid the bank a part, and gave his own note for the balance; which new note and payment the bank received as full payment of the first note, and canceled it. There was no proof that Neale requested Newland to pay it. Neale then moved the court, for the following instructions: 1st, That to enable plaintiff to recover on the second count, he must prove the actual payment of money. 2d, That giving a note, will not support a count for money paid, laid out, and expended, for the use of Neale. 3d, The jury must find a request, to enable the plaintiff to recover; which instructions the court refused to give. The court then proceeded to instruct the jury, that if the jury found that Newland had paid any thing that was equivalent to money, it was so much money paid to the use of Neale; that if Newland was security for Neale, and, after the note fell due, and was protested by the bank, Newland voluntarily paid it, by giving another note, which was received in full payment of the first note, it would sustain the declaration. All of which was duly excepted to, and spread upon the record, and Neale appealed.

Fowler for the appellant. It is indispensable, in order to sustain the allegation of money paid, that proof of *actual payment of money* should be proved. The payment of bank notes, bills, or of promissory notes, which are property, will not sustain the allegation. It should have been a special count upon the particular advance made, setting out the liability, the request to pay, and the actual settlement and satisfaction by note, &c. *Lucket vs. Buchannon*, 3 *Bibb Rep.* 378. *Dana vs. Barrett*, 3 *J. J. Marsh. Rep.* 6. *Sparks et Ux. vs. Simpson's Adm'r*, *ib.* 110. *Buford vs. Barton*, *ib.* 431. *Owings vs. Owings*, *ib.* 590. *Phelps vs. Hart*, 1 *J. J. Marsh. Rep.* 505. *Pritchard vs. Ford*, *ib.* 544. *Wickliffe vs. Davis*, 2 *J. J. Marsh. Rep.* 69. *Nightingale et al. vs. Devisme*, 5 *Burr. Rep.* 2592. *Utterson vs. Vernon*, 3 *Durn. & E.* 543.

Bank notes are not money; they are property. *A fortiori*, promissory notes are property, and not money. *Dana vs. Barrett*, 3 *J. J. Marsh.* 6. *Boswell vs. Clarksons*, 1 *J. J. Marsh. Rep.* 49. *Fleming*

vs. Campbell, ib. 499. *Wickliffe vs. Davis*, 2 *J. J. Marsh. Rep.* 70. 4 *Monroe's Rep.* 108.

A money count cannot be sustained, by evidence that "money and a promissory note" were received, &c. *Wickliffe vs. Davis*, 1 *J. J. Marsh.* 544...2 *J. J. Marsh. Rep.* 69.

It was absolutely necessary that the note should be produced on the trial, or its loss established. This failing, there was no sufficient evidence before the jury, upon which to base the verdict. Oral testimony of its contents, was inadmissible. *Morgan vs. Reintzel*, 7 *Cond. Rep.* 304. 2 *Cond. Rep.* 486. *Williams vs. Brummell, ante.*

In a suit against the maker of a promissory note, by an endorser, who had been obliged to take it up, the plaintiff must produce the note on the trial. 2 *Cond. Rep.* 486.

The statute does not at all change these principles. *New Code, p.* 723, *sec.* 5.

W. Byers, contra. The court proceeded properly upon the second count. A demurrer, by our practice, is joint and several; and if one count is good, and another bad, it should be sustained as to the one, and overruled as to the other. *Sumner vs. Ford & Co.* 3 *Ark.* 389. The court correctly overruled the demurrer to the second count. 1 *Saund. on Pl. & Ev.* 409.

The evidence was sufficient to support the count, and the instructions given by the court were correct. *Norris vs. Napper*, 2 *Lord Raym.* 1007. *Barclay vs. Gooch*, 3 *Esp. N. P. Cases*, 571. *Floyd vs. Day*, 3 *Mass. Rep.* 403. 11 *J. R.* 469. 9 *J. R.* 96. 2 *Saund.* 643. *Lord Raym.* 1072. 3 *Stark. Ev.* 54, 58, (*note e.*) 58, *and note* 1. 1 *Leigh's Nisi Prius*, 69, 70, & 71.

After the demurrer to the second count, the appellant interposed a plea in bar, by which he waived all rights claimed by the demurrer to the second count, as has been repeatedly ruled by this court.

By the Court, Dickinson, J. There are several questions attempted to be raised by the assignment of errors, but the whole case is reduced within a narrow compass. The doctrine is now too well established to need further illustration, that, after a party pleads in chief,

he cannot again resort to his demurrer. The case, therefore, stands upon the count alone for money paid, laid out, and expended.

The only point to be decided, turns upon the correctness of these instructions. It is objected, that the giving of a negotiable note of hand for a prior debt, is not equivalent to payment so as to warrant a recovery upon the money count. This point has been differently ruled, but the law upon it may now be considered settled. The objection cannot prevail. The doctrine was laid down in *Cornwall vs. Gold*, 4 *Pick. R.* 44, and the cases are all there cited and analysed; and the Court settled, that the giving of a new note was equivalent to the payment of the first, and would support an action upon the money count. The principle upon which the case proceeds is, that the execution of the second note is equivalent to an actual payment of so much money paid, laid out, and expended, for his benefit. The same principle was settled in *Withby vs. Mann*, 11 *J. R.* 518, and in *Douglass vs. Moody and another*, 9 *Mass. R.* 553. The whole of them rest upon the case of *Barclay and another vs. Good*, 2 *Esp.* 571. The rule is in accordance with justice and reason; for, if a party's note has been paid up and canceled, there can certainly be no good reason shown why it is not, in every respect, equivalent to so much money paid; and should there be any hardship in the rule, it must be remembered that it was in the power of the defendant to have shown how much was actually paid; and, having failed to do so, it is to be presumed it was paid to the full extent. The court, therefore, properly overruled the first instruction, and rightly gave the last.

Whether the finding of the jury was warranted by the evidence or not, we have no right to consider, as there was no motion for a new trial.

Judgment affirmed.

Frazier et al. *vs.* The Bank of the State.

Although, under our statute, any person, having cause of action *ex contractu*, against several persons, may sue one, any, or all of them, at his election, yet, if he sue more than one, he elects to treat it as a *joint* contract, and a discontinuance as to one defendant, *who has been* served with process, is a discontinuance as to all.

THIS was an action of debt, determined in the Pulaski Circuit Court, in September, 1841, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. The Bank sued Frazier, Elliott, and Fletcher, and obtained service of process on all. She then *discontinued* as to Fletcher, and took judgment against the others by default, who brought error.

Fowler, for the plaintiffs in error, argued points in the case which are decided and reported in other cases of the present term.

Hempstead & Johnson, contra. In actions which, in their nature, are joint and several, whether *ex delicto* or *ex contractu*, the plaintiff may, after verdict, enter a *nolle prosequi* as to some of the defendants, and take his judgment against the rest. *Coux vs. Lowther*, 1 *Ld. Raym.* 597. *Salmon vs. Smith*, 1 *Saund.* 206, (*n.* 2). *Dale vs. Eyre*, 1 *Wil.* 306. 1 *Salk.* 457. *Mitchell vs. Milbank*, 6 *T. R.* 199.

The reason is, because these actions being in their nature joint and several, the plaintiff therefore might have originally commenced his action against one only, and proceeded to judgment and execution against him alone. So he may, after verdict against several, elect to take his damages against either of them. 1 *Ch. Pl.* 49. *Bac. Abr. Obligation*, *D.* 4. *Eccleston vs. Clipham*, 1 *Saund.* 153, *n.* (1). *Carth*, 20. 1 *Saund.* 206, *n.* (2).

A *nolle prosequi* and a discontinuance are one and the same thing; for, in both, the party may afterwards commence an action for the same cause. *Cooper vs. Tiffin*, 3 *T. R.* 511.

By the statute law, all obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had, in like manner. *Rev. St.*, *Chap.* 82, *sec.* 3.

By the Court, DICKINSON, J. From the innovation made by our statute upon the common law, in relation to the institution and prosecution of actions upon a joint or several note or obligation, we have had some difficulty in ascertaining the rules by which plaintiffs must be governed in like cases, and the effect of a discontinuance as to one or more of the defendants, after suit brought. By the *Rev. St.*, *sec.*

64, *p.* 628, "every person, who may have cause of action against several persons, and entitled, by law, to but one satisfaction therefor, may bring suit jointly against all, or as many of them as he may think proper;" and, by *sec.* 47, *p.* 646, if he thinks proper to bring suit against several, and some are served with process in time for trial at the return term, and others not served in time, the plaintiff may discontinue as to those upon whom the process has not been served at all, and not served in time, and proceed against the others; or he may continue his suit generally, as to all, and take new process against those not served; but, at the next term, unless for good cause shown, he shall be bound to proceed against such of the defendants as have been served with process." This latter provision is made for the benefit of defendants whom the law will not permit to be harassed, from time to time, without having any opportunity of making defence to the action, merely because the other defendants cannot be, or are not, brought into court. If, previous to the second term, the process has not been served upon the other defendants, the plaintiff must proceed with his action against such as are in court; but the discontinuance as to those not served with process, or not served in time, will not exonerate the absent defendants from any liability in such suit, but they may be proceeded against at any future period, as if no prior suit had been brought against them. *Sec.* 48. And it is right and proper that it should be so; for the plaintiff, being entitled to but one satisfaction, may obtain it from those served with process, and therefore render a new suit unnecessary.

It makes no difference whether the suit is joint, or joint and several. He may elect to bring his action against all, any number, or but one, if he chooses. He must, however, be held to his election. If it is instituted against more than one, he treats it as a joint contract as to those sued, and a plea by one to the action of the writ, enures to the benefit of all the defendants. In the present case, the plaintiff having elected to bring her joint action against all of the obligors, the demand must be treated as such; and he cannot, after service of process upon all the defendants, be permitted, under our statute, to discontinue as to one, and take judgment by default against the others. *Noke vs. Ingram*, 1 *Wilson*, 89. *Hartness vs. Thompson et al.*, 5 *J. R.* 160. 1

Ch. Pl. 546. *Tidd*, 632. *Hall vs. Rochester et al.*, 3 *Cow.* 374. *Day vs. Rice*, 19 *Wend.* 643.

The plaintiff having elected to bring a joint action upon the bond, there cannot be a several judgment against any of the obligors, but it must be against all or for all. This is the general rule, though there are exceptions. The nature and extent of those exceptions are not involved in the present inquiry, as they arise alone upon plea, or upon some special statutory provision, and therefore will not be considered. *U. S. vs. Leffler*, 11 *Pet.* 96. We can see no good reason why a discontinuance or *nolle prosequi* may not be entered as well after a service of the writ as before. It would certainly subserve public convenience, and answer all the purposes of justice. From the best lights now before us—and we have given the subject the most patient investigation—we are reluctantly led to the conclusion, that the plaintiff had no alternative but to proceed to final judgment against all of the defendants she had elected to sue, and upon whom process had been served in time, or dismiss the suit, and re-commence a new action against such of the obligors as she may choose to charge: that the discontinuance as to Fletcher, operated as a discontinuance of the whole action; and that, consequently, the court erred in giving judgment against Frazier and Elliott.

We say we have come to this conclusion with reluctance. It is because we cannot discover that it answers any purposes of substantial justice. But, until the Legislature shall see fit to modify or change the law upon this subject, we are bound to sustain and enforce it.

Hempstead & Johnson presented a petition for re-consideration, which was refused; Judge LACY remarking, that he did not concur in the opinion, and should take an opportunity, in some case hereafter, to declare the reasons of his dissent.

Judgment reversed.

MITCHELL *vs.* THE REAL ESTATE BANK.

It is more regular to *demur* to a plea, when it is bad, than to move to strike it out; but, if stricken out, this Court will not reverse the cause, to the end that a demurrer may be filed to a bad plea.

THIS was an action of debt, commenced by attachment, and determined in Phillips Circuit Court, in June, 1842, before the Hon. JOHN C. P. TOLLESON, one of the circuit judges. The Bank sued Mitchell, and took order of publication, in November, 1841. In May, 1842, after publication made, the defendant moved to dissolve the attachment, for want of a sufficient bond. This motion was not directly decided, but the court quashed the *bond*, and gave leave to file a new bond, which was filed, and approved by the court. On the 30th of May, the defendant filed and immediately withdrew a new motion to dissolve the attachment; and, on the 31st, he pleaded in abatement, that no such bond as required by law had been filed, before the writ issued, nor was then filed. The court, on motion of the plaintiff, struck out this plea, on the ground that the defendant had already appeared to the merits. No further defence being made, judgment went for the plaintiff, and defendant appealed.

W. & E. Cummins, for the appellant. The proceedings by attachment are in derogation of the common law, and are to be in strict conformity with the statute authorizing them. *Hughes vs. Martin*, 1 *Ark.* 386. *Didier et al. vs. Galloway*, 3 *Ark.* 501. And any defect in the bond, or a want of a bond in attachment, is good ground to vacate the writ. The plea in this case shows that no bond had been filed, begins and concludes in abatement, and is properly sworn to. We are at a loss to know upon what ground the plea was stricken out. The motion to quash was a mere informal attempt to abate the writs. The party never did and never intended to appear to the merits. He simply insisted that the writs were void, and that he was under no

legal obligation to appear to the action. What constitutes an appearance? *Murphey vs. Williams*, 1 *Ark.* 376.

The court erred in permitting the plaintiff below to file a new bond in attachment, after quashing the original bond. The court had a right to quash the bond, on motion, the same being a mere nullity. It was not voidable, but void, for the purpose for which it was designed. The proceedings were irregular, and the party had a right to set them aside, on motion. 1 *Tidd's Pr.* 440.

There is no such service of process in said cause as would warrant the court below in taking jurisdiction over the defendant below, or the subject matter of the suit. *Desha vs. Baker et al.* 3 *Ark.* 509. There is no appearance of the party, to do away with the necessity of service.

The writs issued in said cause were unwarranted by law, inasmuch as no sufficient affidavit of the cause of action was filed before the writs issued. *Sec.* 3, *Chap.* 13, *Rev. St. Ark.* The affidavit does not verify the demand set out in the declaration, and recovered by the final judgment. The writ in said cause, directed to St. Francis county, was absolutely void. The writ could only issue to that county upon the supposition that defendant had property therein. *Sec.* 5, *Chap.* 116, *Rev. St.* There was no allegation of property, and the return shows that there was none.

The judgment for costs is erroneous. The plaintiff had no right to recover the cost of the writ to St. Francis. And the judgment for costs, at all events, should have been for a specific sum, taxed as costs. In all cases not provided for by statute, the common law governs; and, by the common law, judgment was always for a specific sum, as costs.

Pike & Baldwin, contra. Whether upon the proper ground or not, the plea was properly stricken out. It attempted to quash the writ, on two grounds: First, that no sufficient bond was filed when the suit was commenced. Second, that no sufficient bond had yet been filed.

The first ground had already been determined by the court, in defendant's favor, and a new bond filed.

The second ground could not operate backward, so as to quash the

writ. If the second bond was not a good one, the point should have been reserved when it was filed and *approved.* The plea came too late, on this ground; and it came too late under the statute.

The plea was manifestly false, and therefore properly stricken out. *Oakley vs. Devoe et al.*, 12 *Wend.* 196. *Steward vs. Hotchkiss*, 2 *Cowen*, 634. *Tucker vs. Ladd*, 4 *Cowen*, 47. *Young vs. Gadderer*, 1 *Bing.* 380. *Richley vs. Proone*, 2 *B. & C.* 286. 5 *B. & A.* 750, *and note. Belden vs. Devoe et al.*, 12 *Wend.* 223. *Graham's Pr.* 250, 251.

So, a palpably frivolous plea will be stricken out, on motion. *Heaton vs. Bartlett & Chace*, 13 *Wend.* 672. The plea was bad for duplicity, and therefore properly stricken out.

Further, the reason assigned was a good one. The defendant had moved to dissolve the attachment. This was an appearance. The motion prevailed, and improperly too, (*Didier vs. Galloway*, 3 *Ark.* 501), and then he wished to have further advantage of the same matter.

The court decided properly, in permitting a new bond to be substituted. *Alford vs. Johnson*, 9 *Porter*, 320. *Jackson vs. Stanley*, 2 *Ala. N. S.* 329.

It was wholly unnecessary for the bank itself to be an obligor in the bond. Though a statute *expressly* requires (which ours only does by implication,) the party *himself* to enter into recognizance, with sufficient sureties, he need not himself enter into recognizance, but may find sureties who will do it for him. Such is the construction under the *express* language of the *Statute of Maine*, and of *Stat.* 3 *Jac.* 1. *Cap.* 8. *Vallance vs. Sawyer*, 4 *Greenl.* 62. *Goodtitle vs. Bennington*, *Barnes*, 75. *Lushington vs. Doe*, *ib.* 78. *Barnes vs. Bulwar*, *Carth.* 121. *Keene vs. Deardon*, 8 *East.* 298. *Dixon vs. Dixon*, 2 *B. & P.* 443.

By the Court, Dickinson, J. The question turns upon a rule of practice—the striking out of the plea. It is certainly more regular to demur, when the plea is not good, (as in this case), and let it be adjudged bad, on demurrer; but, if it is rejected, on the application of the plaintiff, the court will not reverse the cause, that a demurrer may

be filed to a bad plea; and it was so ruled, as we think, correctly, in the case of *Depen et al. vs. Bank of Limestone*, 1 *J. J. Marsh.* 380. The judgment must be affirmed.

W. & E. Cummins, for the appellant, presented a petition for reconsideration, which was refused, and the judgment affirmed.

Ashley *vs.* Dunn.

That part of the Revised Statutes under the head of *attachments*, which requires the plaintiff to file his allegations and interrogatories as to the garnishee, *during* the return term of the writ, is merely a rule of practice, to be controlled by sound legal discretion.

The time may be extended in the same manner as time to plead may be enlarged. If, in enlarging the time, the rights of the garnishee were seriously affected, he might move to strike the allegations and interrogatories from the files. But, so long as they remain on the files, he cannot be discharged.

This was a proceeding against a garnishee, in attachment, determined in the Pulaski Circuit Court, in May, 1842, before the Hon. John J. Clendenin, one of the circuit judges. Ashley sued James Swishelm, in debt, by writ of attachment, and caused his property to be levied on, and caused Dunn to be summoned as a garnishee. The plaintiff not having filed allegations and interrogatories during the return term of the writ, Dunn was, on his motion, discharged, and had judgment for costs. Ashley brought error.

The case was argued here by *Watkins*, for plaintiff in error, and by *Fowler*, contra, who cited *Desha vs. Baker et al.*, 3 *Ark.* 519. *Walker et al. vs. Wynne et al.*, 3 *Yerger*, 62.

By the Court, Dickinson, J. The garnishee moved the court to be discharged, because the plaintiff had failed to file allegations and interrogatories within the time prescribed by the statute. The statute lays down the rule upon the subject; but that part of it which relates

to the present case is merely a rule of practice, to be controlled by sound legal discretion. The time for filing allegations and interrogations, like time for pleading, in ordinary cases, might doubtless be enlarged, upon a proper showing by the party. The enlarging of time to plead, is an every day's practice; and the fact that they were permitted to be filed after the time had expired, creates the presumption that the court deemed it proper to grant the indulgence. If, in enlarging the time, the rights of the garnishee were seriously affected, of course he could not be without remedy, or he would be allowed to come in and move to strike them from the files of the court, provided he made it appear that the indulgence ought not to be allowed. But here he rests, until the allegations and interrogatories are actually filed, and he asks to be discharged from the writ of garnishment; and he was discharged accordingly. It was improper to do this so long as the allegations and interrogatories were upon the file. The judgment of the circuit court is nothing more than discharging him from answering a legal process, which that court itself had put upon the record for the benefit of the plaintiff. The exception to the discharge was, therefore, well taken.

Judgment reversed.

HUTCHINGS ET AL. *vs.* THE REAL ESTATE BANK.

HELD, that, in an action *ex contractu* against two or more, all being served with process, the plaintiff cannot take judgment against *part*, by default, omitting the others.

BANK OF LOUISIANA *vs.* WATSON.

In declaring on a judgment for several sums of money, each of which sums the judgment adjudges shall bear interest from a date prior to the rendering of the judgment, and some at a higher rate than six per cent. per annum, the non-payment of the interest accruing must be specially negatived in the breach.

It is not sufficient, after demanding a certain sum in the commencement, and after setting out the judgment, alleging that it remains in full force, strength, and effect, not in any wise reversed, annulled, vacated, paid off, or satisfied, and no execution obtained on it, whereby an action has accrued to demand and have the sum demanded, then, for a breach, to allege simply the non-payment of the sum demanded, or any part thereof.

THIS case was determined in Chicot Circuit Court, in May, 1842, before the Hon. ISAAC BAKER, one of the circuit judges. The bank sued *Watson*, in debt. The declaration demanded the sum of $20,000. It set out the acts of incorporation of the plaintiff, and of the Grand Gulf Bank, for which it sued. It then stated a judgment, recovered in Louisiana, by the plaintiff, against the defendant, for $16,700, the amount of certain bills of exchange, upon $6000 of which it was adjudged that interest should accrue, at eight per cent., from the 4th day of April, A. D. 1836; on $6000, the like interest, from the 18th of January, A. D. 1837; and on $4,700, the like interest, from the 29th of April, A. D. 1836, until each should be paid; also, for $1670, damages, and $9, cost of protest; and costs, amounting to $30 75; which judgment was rendered on the 27th of June, 1837. The declaration then alleged, *that the judgment remained in full force, strength, and effect, not in any wise reversed, annulled, vacated, paid off, or satisfied; and that no execution had been obtained of or upon the judgment, whereby an action had accrued to the plaintiffs, for the use, &c. to demand and have of the defendant, "the sum above demanded;"* concluding, that the defendant had not paid "*the sum above demanded, or any part thereof.*"

Demurrer to declaration sustained, because the breach was too narrow, and did not notice the interest adjudged. Judgment against the plaintiff, and writ of error.

Pike & Baldwin, for plaintiff in error. The decisions of this court, relied upon in this case, do not apply. Here is no *contract* for interest, and the declaration expressly avers that the judgment, of which the interest is a part, is *unsatisfied*, whereby the action accrues. The interest here does not accrue *on* the judgment; it is *an integral part* of the judgment.

W. & T. N. Byers, contra. It has been repeatedly ruled by this court, that where a contract calls for more than six per cent. interest, where the money is payable on a future day, with interest from the date of the contract, that the breach must negative the payment of interest, or the breach was ill, and a demurrer would be sustained. *Clary & Webb vs. Morehouse, Adm.* 3 *Ark.* 261. *Sumner vs. Ford & Co. ib.* 389, and cases since decided.

This action being founded on a foreign judgment, does not change the rule. The judgment is a contract, and subject to the same rules of pleading as other contracts; and this is even a stronger case than any of the cases cited, because the cause of action, as shown on the face of the declaration, claims interest on various sums, stipulated in the contracts, at the rate of eight per cent., and accruing from different dates; and in each case, the interest commences running before the consummation of the contract sued on, and composes a material part of the cause of action, set forth in the body of the declaration. This being the case, payment or satisfaction might be pleaded to the interest alone, and the breach failing to negative the payment of part of the cause of action stated, is certainly within the rule laid down in the causes above cited.

By the Court, Dickinson, J. The court below decided right, in sustaining the demurrer to the declaration. The suit was instituted upon a foreign judgment, which is composed of sundry items. The amount of them is set out, with the interest and cost accruing thereon. The interest, in more instances than one, exceeds six per cent. per annum, and the breach in the declaration is, that the judgment demanded remains wholly unsatisfied.

The inquiry now is, can the plaintiff, under such a breach, recover

more interest than six per cent. per annum? It has been repeatedly ruled in this court, that a party plaintiff cannot recover more than six per cent. per annum, unless he avers the non-payment of the interest, when the contract is for a greater rate. Here it is certain that there is no such averment. It is the amount of the judgment demanded, which it is averred has not been paid. Now, the non-payment of the interest that arises upon this judgment, is not negatived in the breach. The setting out of the interest, in the declaration, for more than six per cent. per annum, is precisely similar to showing the same thing, by profert of a note, where the rate exceeds that amount. This being the case, the question falls within the principle before stated.

Judgment affirmed.

Buford *vs.* The Real Estate Bank.

A summons, by which the sheriff is commanded to summon the defendant to appear, "on the third Monday of our next March term, A. D. 1841, at a court, to be holden on the 15th day of March next," that day being the third Monday of March, and the the day on which, by law, the court is required to be held, and the court, by law, sitting only one week, is good.

The Real Estate Bank is entitled to interest, at the rate of ten per cent. per annum, on all notes, &c., due her, after maturity, and it is not necessary to demand it in the declaration.

This was an action of debt, determined in the Poinsett Circuit Court, in March, 1842, before the Hon. John C. P. Tolleson, one of the circuit judges. Buford and others were sued in debt, on a note, payable to the bank, for $320. A summons issued, commanding the defendant to be summoned to appear, "on the third Monday of our next March term, A. D. 1841, at a court, to be holden on the 15th day of March next." The summons was served on Buford, alone. The case was continued to March term, 1842, at which time the case was discontinued as to the other defendants, and judgment, by default, against Buford, for the debt, and interest at ten per cent., from the time the note fell due. The case came up by writ of error.

W. Byers, for plaintiff in error. The writ is void, for uncertainty. The law requires the writ to command the party to appear on the first day of the term. *Rev. Stat. title "Practice of Law," p.* 619, *sec.* 3, 7.

The service of the writ is not good. The return of the sheriff does not state where it was executed. *Gilbreath vs. Kuykendall*, 1 *Ark.* 50. *Rose vs. Ford*, 2 *ib.* 26. *Webb vs. Morehouse, Adm.* 3 *ib.* 261. *Dawson et al. vs. State Bank*, 3 *ib.* 505. *Johnson et al. vs. State Bank, ib.* 522.

Judgment is given for 10 per cent. interest per annum, when it is not claimed by the declaration, and there is no law of the land authorizing such judgment. The 6th section of the act of the Legislature, passed and approved 3d March, 1838, which extends the right, in certain cases, to the State Bank, (*Acts of Assembly, of* 1838, *p.* 137), does not confer this right upon the defendant. The powers conferred upon the Real Estate Bank, by this act, are those enumerated in the 5th section thereof, only. The printed statute shall be received as evidence of the law. *Rev. Stat. p.* 370.

Pike & Baldwin, contra. The mistake is a mere clerical misprision, and it is evident that the meaning was to summon the defendants to appear at the next March term, to be holden on the third Monday, or 15th day, of March. There could be no third Monday of the term. It could be holden but one week. No favor ought to be shown here, to such objections. In fact, a writ of error ought not to lie to a judgment by default. The party should be put to his writ of error, *coram nobis*. The jurisdiction of this court is as strictly appellate, as that of the Court of Errors, of New-York. *Campbell vs. Stokes*, 2 *Wend.* 145. *Houghton vs. Staw*, 4 *Wend.* 179, 181. *Kane vs. Whittick*, 8 *Wend.* 227. *Sands vs. Hildreth*, 14 *J. R.* 493. *Gelston vs. Hoyt*, 13 *J. R.* 361. *Henry vs. Cuyler*, 17 *J. R.* 469. *Colden vs. Knickerbocker*, 2 *Cowen*, 31.

The judgment for 10 per cent. interest, was correct. *Bank of State vs. Clark*, 2 *Ark.* 375.

By the Court, Dickinson, J. The objection to the writ is not well taken. The process states, with sufficient certainty, at what time the

party is required to appear, and it shows the term of the court, by fixing the day upon which, by law, the term was to commence. The question of interest has already been decided, in other cases.

Judgment affirmed.

Neely et al. *vs.* The Bank of the State.

In order to bring before the court, the question, whether the Bank of the State has the right to sue on a bond, it must be raised by a proper plea. There is one state of the case, in which the bank has unquestionable right to take bonds.

This was an action of debt, determined in the Pulaski Circuit Court, in September, 1841, before the Hon. John J. Clendenin, one of the circuit judges. The bank sued Neely and others, on a bond. The only writ issued was sent to Crittenden county, and there executed. There was no allegation, in the declaration, as to the residence of the defendants. The sheriff, in his return, named the defendants by the initials of their Christian names. Judgment by default, for the debt, interest at 10 per cent., and costs. The defendants brought error.

W. & E. Cummins, for plaintiffs in error. The writ is void, and is not served on the persons named in the writ and declaration; and, consequently, the service is void, and conferred no jurisdiction on the court below.

The judgment for costs, is erroneous. It should have been for a specific sum, and only for the costs expended by plaintiff below. *Hartley vs. Tunstall et al.* 3 *Ark.* 119.

Hempstead & Johnson, contra.

By the Court, Dickinson, J. The objections taken to the issuing the writ to a county different from the one in which the suit was

brought, and the rate of interest, have both been expressly ruled, by this court, against the plaintiffs in error. The question, as to the right to sue on a writing obligatory, cannot properly come before the court, in this case, as decided in the case of *McFarland and others vs. The Bank of the State of Arkansas*, at the last January term of this court. The party having failed to raise it by a proper plea, and there being one state of case, in which the bank has unquestionable authority to take writings obligatory, and as the inference is in favor of the court below, the judgment must be affirmed.

McDonald *vs.* Simpson.

Where a person represents himself as a workman, that very representation raises an implied covenant that he will use his best skill in the work which he is employed to do. It is not necessary that he should covenant, expressly, to use such skill.

If a person holds himself out to the world as a workman, the law binds him to do his work in a workmanlike, *i. e.* a *skilful* manner.

This was an action of assumpsit, determined in the Clark Circuit Court, in October, 1841, before the Hon. William Conway B., one of the circuit judges. It is the same case, which is reported as *Simpson vs. McDonald*, 2 *Ark.* 370, in which case, the bill of exceptions having, by mistake, stated that the *plaintiff*, instead of the *defendant*, had employed other mill-wrights to rebuild the mill, the judgment was reversed, and a new trial awarded. Simpson sued McDonald, for compensation for labor done for him. He proved that he worked for him, for a considerable time, in building a mill. McDonald, in defence, proved that the mill, when built, was valueless, and that he, himself, had to rebuild it, almost entirely. The jury found for Simpson, $200, and McDonald appealed. Only two questions were presented to this court. On the trial, the court refused to allow McDonald to ask a witness, who was not a mechanic, what was the value of the mills, *as mills;* and instructed the jury, "that if they believe, from the evidence, that the plaintiff told defendant that he was skilful,

and that the plaintiff did not engage to use his skill for defendant, that defendant would be bound to pay him the worth of his labor."

Trapnall, Cocke, & Pike, for appellant. Where the nature of the subject is such, that professional skill is absolutely necessary to form a true and correct judgment, an appeal should be made to the judgment of professional men. But where the nature of the subject is such, that any man of sound mind and practical sense can form a correct judgment upon it, there is no necessity for resorting to professional skill.

It is not necessary, in order to hold a mechanic to the skilful and faithful performance of his work, that he should profess to be skilled in his trade. His undertaking to do a piece of work, requiring mechanical skill, is, of itself, a profession that he has the requisite skill, and the law will hold him responsible for its proper performance. *Manuel vs. Campbell*, 3 *Ark.* 324.

Trimble, contra.

By the Court, Dickinson, J. There is a good deal of contrariety in the testimony, and not a little ambiguity in many portions of it. There are several instructions given by the court, to which no exception can be taken. There is one, however, where the law is stated too broadly, and as there is much confusion and contradiction in the testimony, the court cannot determine what influence or effect the instruction might have had in determining the jury to decide for the plaintiff. The instruction is, that if they believed, from the evidence, that the plaintiff represented himself as a skilful workman, but did not covenant to use his skill, that the defendant would be bound to pay him the worth of his labor. This is not the true doctrine upon the point. Where a party represents himself as a workman, that very representation raises an implied covenant, that he will use his skill in the work which he is employed to do. It is not necessary that he should covenant, expressly, to use such skill. When he holds himself out to the world, that he is a workman, the law binds him to do the work in a workmanlike manner; and that expression is tantamount

that it shall be done in a skilful manner. Any other rule would produce great injustice and hardship. It would enable those who profess to be mechanics, to engage to do work as such mechanics, and then wholly to excuse themselves, on a failure or breach of contract, by alleging that they had not covenanted to do it in a skilful manner.

Judgment reversed.

Goodrich *vs.* Fritz.

After the defendant introduces evidence to support a plea in replevin, he cannot move the court to instruct the jury to find as in case of a nonsuit.
But still, if the final judgment is right upon the whole, it will not be reversed.
Replevin cannot be maintained against an officer, who has the custody and possession of property, under a valid execution.

This was an action of replevin, tried in the Johnson Circuit Court, in September, 1841, before the Hon. Richard C. S. Brown, one of the circuit judges. Goodrich sued for a wagon, which was replevied, and delivered over. Fritz pleaded *non cepit*, and *non detinet*, to each of which issue was joined, and gave notice that he would give special matter in justification. After the plaintiff's evidence, the defendant read, in evidence, an execution from a justice of the peace, against a third person, by virtue of which he, as constable, had levied on the wagon. The execution was admitted to be a regular and legal one, and to be legal evidence. The defendant then moved the court to instruct the jury to find as in the case of a nonsuit, which was done. Damages were then assessed, by writ of inquiry, and judgment for Fritz, for damages and costs. Goodrich brought error.

The case was argued here, by *Blackburn*, for the plaintiff in error.

By the Court, Dickinson, J. In instructing the jury to find as in case of nonsuit, there is error; but we do not regard it of such character as authorizes us to reverse the judgment, if the record shows, as it does in this instance, that the final judgment is right.

That replevin cannot be maintained against an officer, who has the custody and possession of property, under a valid execution, is clear. In such case, the property is already in custody of the law, and cannot be replevied out of it. If the party desired to try the right, the statute prescribes the mode. If the officer was a trespasser, he could be sued, or the party could follow the property into the hands of a purchaser. Replevin was certainly not the proper remedy to obtain possession of the property, or damages for its loss or detention. We can discover no error in the proceedings of the court.

Judgment affirmed.

Blackburn, for the plaintiff in error, presented a petition for re-consideration, which was overruled.

Hicks *vs.* Vann.

A count in assumpsit against the *endorser* of a bond, is defective, unless it alleges *demand* on the obligor, and *notice* to the endorser, or shows some sufficient legal excuse to supersede the necessity of the averment.

There can be no valid judgment by *nil dicit*, while an issue, either of law or fact, remains undisposed of.

This was an action of assumpsit, tried in the Phillips Circuit Court, in June, 1842, before the Hon. John C. P. Tolleson, one of the circuit judges. The declaration contained three counts. In the first and second, Vann sued Hicks, as the endorser of a bond by a third person, payable to *Hicks or order*. The first count averred no demand of payment on the obligor, or notice, nor any excuse therefor. The second averred a waiver, at the time of assignment, by the defendant, of the necessity of demand and notice. The third count was for money had and received. The bond given on oyer was payable to *Hicks or bearer*. The defendant demurred to the two first counts, for variance, and pleaded the general issue to the third. Joinder in demurrer, demurrer overruled, and leave to plead over. Judgment by *nil dicit*, and writ of error.

The case was argued here by *W. & E. Cummins*, for the plaintiff, and *Pike & Baldwin*, contra.

By the Court, DICKINSON, J. It is clear, that the first count is defective, because it does not aver demand and notice, which are necessary to fix the assignor's liability, unless he shows a sufficient legal excuse to supersede the necessity of this averment. This is not done. The judgment overruling the demurrer to this count is, therefore, wrong.

The issue of non-assumpsit was not disposed of, and in this there is also error. If there is a question of law presented, or an issue of fact, in both cases it is the duty of the court to have these points disposed of. If it is purely a question of law, it should be decided by the court: if of fact, by a jury, if required. The court ought not to proceed with the case, until all the issues raised upon the record are determined.

Judgment reversed.

WOODRUFF *vs.* LAFLIN AND OTHERS.

Notice of taking depositions must be served *by copy*. Reading is not sufficient.

In assumpsit, the defendant cannot set off unliquidated damages, caused by the negligence of the plaintiff in keeping a slave, placed in his hands by defendant, to be sold.

If depositions are improperly admitted in evidence, the judgment will be reversed, although the bill of exceptions does not state that it contains all the testimony offered, if the depositions so read contain material testimony, directly applicable to the issue.

THIS was an action of assumpsit, determined in the Pulaski Circuit Court, in March, 1841, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. Laflin, Stevens & Co. sued Woodruff for goods, wares, and merchandise, and for money lent and advanced to, and paid, laid out, and expended for, Woodruff. Woodruff pleaded *non assumpsit*, to which issue was joined. He also filed a plea of set-off, for moneys lent and advanced to, and paid &c. for, Laflin, Stevens

& Co.; for money had and received; for money due as interest, upon an account stated; and also, for $1000, for that, on the 17th of October, A. D. 1837, at New-Orleans, the said Woodruff, at the special instance of said plaintiffs, had delivered to them a mulatto slave, named John, of the value of $1000, to be sold by them for said Woodruff, for reasonable reward; and that they undertook "to endeavor to sell" said slave, and to render an account of the proceeds of such sale, on request, &c.; and that they "did not well and truly endeavor to sell and dispose of" said slave, or to render an account, &c., but, by their *negligence*, *carelessness*, and *improper conduct*, said slave ran away, and was wholly lost. And, also, that they were indebted to said Woodruff $500, for the use and hire of divers mulatto slaves, &c. To this second plea, Laflin, Stevens & Co. demurred, as far as any defence was attempted to be set up therein, for damages, as to the slave; which demurrer was sustained. Whereupon, Laflin, Stevens & Co. entered their replication to the residue of the plea, not demurred to, and Woodruff his joinder. A jury came, found for the plaintiffs $958 93 cts., and judgment was rendered against Woodruff therefor, who brought error.

At the trial, the plaintiff offered in evidence a paper, purporting to be the depositions of witnesses, in the case, which was objected to, the notice of taking the same having only been served by reading, but the objection overruled, and the depositions read. The bill of exceptions, detailing the evidence, did not state it to be all the evidence which was given.

Ashley & Watkins, for the plaintiff in error. Under the statute, title "Set-off," the plea of offset, in this case, is good. The policy of the law is, to prevent circuity of action, and expensive litigation. All debts are allowed to be set-off, though of a different nature. In all actions of assumpsit, where set-off is allowed, the gist of the action, and the cross action of set-off, is for unliquidated damages for a supposed breach of contract. The defendant below brought himself within the rule. His plea of set-off, which was demurred to, so far as it related to the negro boy John, was not in case, or for the tortious misfeasance of the plaintiff below. It was indebitatus assumpsit, as for

the breach of a contract of bailment, waiving the total. There is no reason why the law should not be construed to embrace one species of contract as well as another. The proceeding is equitable in its nature. It was originally considered an innovation upon the common law, and slowly introduced; and the intention of the statute is, to extend the nature of the demands which may be set off by way of cross actions.

The other point in this case, as to the error of the court in admitting the depositions offered by the plaintiff below, is settled by this court in the case of *Williams vs. Brummell.*

Fowler, contra. The plea of set off contained several distinct matters of defence, as several counts in a declaration; and a demurrer may, with the utmost propriety, extend to, and be sustained to, any part of the plea, in the same manner as to a declaration. Even at common law, a plaintiff might enter a *nolle prosequi* as to one count, or *even to part of a count*, in his declaration. See 1 *Saund. Rep.* 207, *in note* 2; *Douglass*, 190. Upon the same principle, a demurrer might extend to a *part* of a *count*, or to a count. Besides, our statutes are broad, and clearly authorize a demurrer to be sustained to a *part* of the pleadings only. *New Code, p.* 628, *sec.* 62, and other sections, title "Practice at law."

Not only in form was the demurrer well sustained to that part of the plea of set off, but in *substance*, also. The defence set up as to the slave John, sounded in damages merely, and was not a legitimate subject of set off. See *Cond. Rep. Sup. Court U. S., by Cranch, p.* 538; *U. S. vs. Robeson, Hayw. Rep.* 195; *Ragsdale vs. Buford's Ex'r*, 2 *Dall.* 265; 2 *Bl. Rep.* 394; *Cowp. Eq. Pl.* 125; 6 *Ves.* 136; 4 *Hen. & Mun.* 499; 2 *J. R.* 155; *Montague on Set off*, 18, 19; 1 *Esp. Cas.* 378; *Cowp. Rep.* 56; *Howlett et al. vs. Strickland*, 6 *Durnf. & E.* 488; *Weigall vs. Waters.*

It is unnecessary to combat technical points, raised upon the depositions, note, &c., as the verdict and judgment must stand, if the depositions were excluded. The bill of exceptions does not purport to contain *all the evidence* given on the trial; and the doctrine has long been well settled, that, if the bill of exceptions does not state that the

evidence detailed therein *is all that was given*, the Supreme Court must presume that other and sufficient evidence was given to justify the verdict and judgment below. See 2 *Littell's Rep.* 181; *Frazier, vs. Harvie*, 4 *Mon. Rep.* 126; *Cravins vs. Grant*, 2 *Ark.* 42, *et seq.; Burris vs. Wise & Hand, ib.* 59; *Bullard et al. vs. Noaks, ib.* 22; *Lenox vs. Pike, ib.* 442; *Jones et al. vs. Buzzard & Herndon, ib.; Mason vs. McCampbell*, 1 *J. J. Marsh. Rep.* 504; *Hodges vs. Crutcher*, 2 *J. J. Marsh. Rep.* 123; *Sanders vs. Crawley.*

Every thing must be presumed in favor of the verdict, but what is affirmatively shown against it; and Woodruff has made no showing whatever.

By the Court, Dickinson, J. The exceptions are well taken to the depositions. There was no notice given the defendant, according to the requisitions of the statute. The sheriff returned, that he read to him a notice of the time and place of taking depositions. That this is not sufficient, has been decided in the case of *Williams vs. Brummell.* The party is entitled to a copy of the notice. The judgment of the court, in sustaining the demurrer to the defendant's plea of set-off, we hold to be right. The plea of set-off contains an averment that the defendant placed in the hands of the plaintiffs a certain negro slave, to be sold, and that they violated a trust, by so negligently keeping the slave that he absconded, and his value was wholly lost to the defendant. Now, it is perfectly apparent, that this constitutes no defence by way of set off. The injury complained of is of a character for which damages can only be recovered as in tort. The doctrine upon the subject is too well established to require argument or authority to support the position, that unliquidated damages of this character are too indeterminate and uncertain to admit of set off. And the want of proper notice to take depositions is, of itself, sufficient to warrant us in reversing the judgment below.

Fowler, for defendants in error, filed the following petition for reconsideration:

The defendants insist, that the defect of giving sufficient notice is not material, in the question before this court. Admit it to be abso-

lutely defective, still the bill of exceptions does not *purport to, and does not, set out all the evidence given in the case.* Therefore, it must be presumed that other and sufficient evidence was given. This court has, in a dozen cases, perhaps, referred to in the defendant's brief, settled this principle on questions of new trial, &c.

In 1 *J. J. Marsh. Rep.* 504, *Hodges vs. Crutcher*, the same question precisely as is presented in this case, was settled in affirmance of the judgment. That was an action of ejectment, and the whole evidence was not spread upon the record. All that appeared was, that a copy of the deed was offered in evidence, by the plaintiff, and objected to, but the objection was overruled, and the deed admitted. The court, in that case, declared that the introduction of the copy, whether right or wrong, could produce no effect in the decision of the revising court; because, unless the whole evidence was before them, it was impossible for them to say that the plaintiff ought not to have recovered. If that judgment was correct, the judgment in this case should also be affirmed. And, for a stronger reason, because, in this, Woodruff, in his answer to the petition for the production of a paper, virtually, if not conclusively, admits the justice of the demand of Laflin, Stevens & Co., except as to that which this court, as well as the court below, declare, is no subject of defence for him: which is respectfully submitted.

By the Court, Dickinson, J. It is true, the bill of exceptions does not state that all the evidence is set out. But we do not conceive that it was one of those cases in which the presumptions of law are in favor of the verdict, upon the ground that there may have been other sufficient evidence to support it. The depositions were read. We are ignorant of the influence they may have had upon the finding of the jury; and it is presumed they had some influence, or the plaintiff below would not have introduced them. We have declared they were not proper testimony. Upon the same principle, this court will set aside a judgment, where the judge, before whom the cause is tried, has erred in giving or refusing instructions. If a party applies for new trial, and, upon its refusal, appeals, he must then set out all the evidence, to enable the revising tribunal to see if there is any

error in the proceedings of the court below, otherwise the judgment will be affirmed. This case does not come within the rule. It is enough to show the materiality of the testimony, and its direct application to the issue between the parties. Instructions abstract in principle, and testimony immaterial in the issue tried, would not authorize a court to reverse the finding. But such is not the case, in the present instance; and we can see no sufficient cause for opening the judgment of this court.

Petition refused, and judgment reversed.

Bradley *vs.* Farrington.

Where a contract is made for the payment of *corn* or other *farm produce*, no time or place of payment being fixed by the contract, a *demand* is necessary before suit.

This was an appeal from a justice of the peace, tried in the Crawford Circuit Court, in March, 1842, before the Hon. Richard C. S. Brown, one of the circuit judges. Farrington originally sued Bradley, by summons, "*in an action on assumpsit.*" Bradley pleaded non-assumpsit and set off, and Farrington obtained judgment for $27 21 cents. Bradley appealed. In the circuit court, the account filed by Farrington was simply for 90 bushels of corn, $45. All the evidence offered by Farrington, was in regard to corn, agreed to be paid him by Bradley, for the rent of a piece of land. The defendant objected, that evidence concerning a contract for rent, and the non-payment of it, could not be admitted to sustain the account; but the objection was overruled. There being no evidence that the contract fixed the time or place for the delivery of the corn, the court instructed the jury, that they were the sole judges from the evidence, whether the parties had agreed upon the time and place of delivery of the corn; and, if they did, it was equal to a demand, and no demand was necessary. That, when Farrington proves the contract, Bradley must show that he paid

the corn, or the jury will be bound to find for Farrington. That, in actions for rent, where it is proved that the tenant promised to pay the contract in corn, or other specific article, before the landlord can recover money, he must prove a demand of the rent, telling the tenant the amount actually due; and this must be proved at the trial. And that, in an action for goods, or other things sold, a delivery must be proved. The jury found for Farrington $35, for which judgment was rendered, and Bradley brought error.

The case was argued here by *Paschal*, for the plaintiff in error.

By the Court, Dickinson, J. During the trial, Farrington moved the court for instructions to the jury, which, though very general in terms and language, we understand to be, that, if they were satisfied, from the evidence, that the time and place of delivery had been specified and agreed upon by the parties, no demand of the corn, by Farrington, was necessary to entitle him to a recovery, but, that Bradley must prove the payment of it. We have not deemed it necessary to state the testimony introduced, nor the other instructions given to the court, as neither can have any bearing upon the decision of the case.

The only question is, was a demand necessary before action brought? The evidence did not determine as to the time or place of payment. Consequently, they remain to be fixed by the election of one party or the other, and the rights of each must be considered, with a due regard to the nature of the case. The creditor would be required to make the demand in the season to pay in farm produce, as such contracts are presumed to be in favor of the debtor. 5 *Cow. Rep.* 516. A contract payable in *portable* specific articles, at a day certain, not at any specific place, are payable at the creditor's residence. But "not so as to specific articles which cannot attend the person of the debtor." They are supposed to be at the debtor's place of residence, and the creditor, therefore, must demand the payment. Farm produce is presumptively on a farm, and has locality attached to it. The court, in our opinion, clearly erred in the instruction that Farrington was not bound to prove a demand of the corn, before a right of action accrued to him.

Judgment reversed.

McKiel *vs.* Porter.

Where two are sued, as having executed a bond, although a seal is only attached to *one name*, this is no objection, on demurrer. The other may have adopted the seal.
In covenant, on an instrument payable in current bank notes of the State of Arkansas, it is error, on default, to give judgment for the nominal amount of the note. There must be a writ of inquiry, to ascertain their value. The plaintiff is only entitled to recover their value at the time they were to have been paid.

This was an action of covenant, determined in the Phillips Circuit Court, in November, 1841, before the Hon. Isaac Baker, one of the circuit judges. Porter sued Josiah S. and William B. McKiel, on a bond, for the payment of $1,500, in current bank notes of the State of Arkansas. On oyer, it appeared that a seal was attached to the name of one of the defendants only. Demurrer for variance overruled, and judgment *nil dicit* against the defendants, for $1,560, debt, with interest and costs. The defendants appealed.

The case was argued here by *W. & E. Cummins*, for the appellants.

By the Court, Dickinson, J. The demurrer was correctly overruled; for the defendants may have adopted the seal as the seal of both. If not, under our statute, the party could not deny it, except by plea, supported by affidavit.

The court, however, clearly erred in giving judgment upon the motion of the plaintiff below, for the amount of the bank notes, as specified in the covenant. Nor does it appear that the defendants waived their right to a jury to assess the damages. On the contrary, they specially except to the court so rendering judgment on the demurrer The action of covenant is for the recovery of damages, for a breach of contract; and the extent of such damages must depend upon the evidence introduced. Current bank notes are not money, and the plaintiff was only entitled to recover the value of the notes at the time they were to have been paid. And so this court decided in the case of *Mitchell vs. Walker*, and *Payne and another vs. Rogers and another.*

Judgment reversed.

PURDY *vs.* BROWN & TAYLOR.

Where a note is assigned, all the legal interest vests in the assignee, and he alone is entitled to sue, unless the assignor is again invested with the legal interest by a new assignment, or otherwise.

As long as the assignment remains upon the note, no proof is competent to show legal interest in another.

To a plea that the note had been assigned, a replication that it was assigned without any consideration, and for purposes of collection merely, and that the assignees received it merely as an agent, and did not thereby become the owner of it, or take any interest in it, or entitled to any part of the proceeds, is not a good replication.

THIS was assumpsit, determined in the Phillips Circuit Court, in December, 1841, before the Hon. WILLIAM K. SEBASTIAN, one of the circuit judges. Purdy, as surviving partner of McLaughlin, sued Brown & Taylor on a note, executed by them to Purdy & McLaughlin. Taylor not being served with process, Brown pleaded in bar, that, after his making of the note, and before the commencement of the suit, Purdy & McLaughlin assigned, transferred, and endorsed, all their right, title, interest, and claim, in the note, to one Charles W. Adams or order, and delivered the note to him; and the defendant became liable to pay to him; and that the plaintiff had no interest in the note.

To this plea, the plaintiff replied, that the note was so endorsed without any consideration whatever, and for purposes of collection merely, and was endorsed and delivered to Adams, as the agent of Purdy & McLaughlin; and that he received it as such agent, and for the mere purpose of collection, and did not, thereby, become the owner of the note, or take any interest whatever in it, or become entitled to the proceeds, or any part thereof, traversing the allegation that the plaintiff and McLaughlin assigned all or any part of their right, title ,claim, or interest, to Adams, and that the plaintiff had no interest in the note at the time of pleading, or at the commencement of the suit, concluding with a verification. Demurrer to replication sustained, and judgment. The case came up by writ of error.

Pike & Baldwin, for plaintiff in error. It is true, that, in an action by an *endorsee* or *payee*, a plea that, before suit brought, the plaintiff transferred the note to a third person, who, since then had been, and continued to be, the true and lawful owner of the note, is a good bar. But a replication that the suit is prosecuted in the name of the plaintiff, by or for the benefit of the true holder of the note, is good. *Waggoner vs. Colvin*, 11 *Wend.* 27. *Mauran vs. Lamb*, 7 *Cowen*, 176.

Where a note is merely endorsed to an agent, for collection, the endorser can sue without a re-assignment. The simple question is on the legal ownership. The possession of the note is *prima facie* evidence of this ownership, and must be rebutted by plea, stating, explicitly, such an assignment for consideration, as in law transfers the ownership to the endorsee, and gives him the exclusive right to control the proceeds. These facts are expressly denied by the replication, and of course it was good. The decisions of this court do not, in the slightest degree, conflict with these principles. *Dugan vs. The U. S.*, 3 *Wheat.* 172. *Piquet vs. Curtis*, 1 *Sumn.* 479. *Arnold vs. Bureau*, 7 *Mart.* 287. *Hill vs. Holmes*, 12 *Louis.* 96. *Perry vs. Gerbeau*, 5 *Mart.*, *N. S.* 14.

W. & E. Cummins, contra, cited *Black vs. Walker*, 2 *Ark.* 4.

By the Court, Dickinson, J. The principle has already been decided by this court, in the case of *Block vs. Walker*, 2 *Ark.* 4, that, when an assignor assigns a note, all the legal interest vests in the assignee, and that he alone is entitled to sue, unless the assignor s againi invested with the legal interest by a new assignment or otherwise. As long as the assignment remains upon the note, no proof is competent to show legal interest in another, because under our statute, it is vested in the assignee.

Judgment affirmed.

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WILLIAMS, *Ex Parte.*

The province of a writ of prohibition, and the method of proceeding upon it, defined. The proceeding by prohibition, is a *qui tam* action, and a bond for costs is not necessary, before the filing of the declaration, which is the commencement of the action. On final judgment, in such a case, a writ of error will lie, as in common cases.*

This case came up by petition for a writ of certiorari, to be directed to the Washington Circuit Court, where it was determined in May, 1842, before the Hon. JOSEPH M. HOGE, one of the circuit judges. Philemon Williams having obtained judgment, before a justice of the peace, against "The Branch of the Bank of the State of Arkansas, at Fayetteville," on one of the notes issued at that branch, the Bank of the State presented her petition to the circuit court, praying a writ of prohibition, directed to the justice, prohibiting and enjoining him from

* It may be useful to the profession, to be furnished with the forms necessary in this proceeding; and they are, therefore, here subjoined.

FORM OF SUGGESTION.

Be it remembered, that on the tenth day of August, anno domini one thousand eight hundred and forty-two, in the Circuit Court of the State of Arkansas, within and for the county of Pulaski, comes A. B., by P., his attorney, and gives the said court now here to understand and be informed, that whereas all and all manner of actions upon contracts, except actions of covenant, where the sum in controversy amounts to above and upwards of one hundred dollars, within this State of Arkansas arising and happening, to the Circuit Court of this State, according to the constitution and laws of this State, do belong and appertain: nevertheless the said A. B. having heretofore become indebted to the Real Estate Bank of the State of Arkansas, a corporation established by law in this State, by and upon his certain promissory note, executed by him with V. and T. as his securities, bearing date the first day of January, A. D. 1841, and payable at six months after date, for five hundred dollars, which note remains wholly unpaid; and the said C. D. having on the third day of June, A. D. 1842, before J. D. F., an acting and commissioned justice of the county of Pulaski, by the consideration and judgment of said justice, recovered against said bank, in an action on note, the sum of fifty dollars, with interest at the rate of ten per centum per annum from the fourth day of May, A. D. 1842, until paid, and costs of suit: nevertheless the said C. D., not ignorant of the premises, but continuing him the said A. B. wrongfully to aggrieve and oppress, on the first day of August, A. D. 1842, his said judgment then still remaining in full force and effect, against the due form of the constitution and laws of this State, unjustly sued out from before said justice a certain writ of garnishment upon said judgment, whereby the said A. B. was commanded to be summoned to appear before said justice on the fifth day of August, 1842, at his office in Little Rock, then there to answer what goods, chattels, moneys, credits or effects of said bank, might be in his hands, possession or keeping, to satisfy said judgment: and the said C. D. him the said A. B., in the said justice's court, before the said justice, of and upon the premises aforesaid to appear hath wrongfully obliged, and the same A. B. thereupon thereto to

further proceedings against the branch bank. The court ordered that such writ issue, upon the mere presentation of the petition. No other or further steps were taken in that court.

The case was argued here, by *D. Walker*, for the petitioner, and by *Hempstead & Johnson*, contra.

By the Court, DICKINSON, J. Writs of prohibition were granted in England, both in the common pleas and king's bench. *Burke's case*, *Vaugh.* 157, 209; *Langdale's case*, 12 *Co.* 58, 109. It lay where

answer; whereupon the said A. B. hath there answered and responded that he doth owe and is indebted to said bank in the amount due by and upon his note aforesaid, and in no other sum or manner whatever, and that he hath in his hands or possession no goods, chattels, moneys, credits or effects of said bank whatever; and hath thereupon pleaded and objected that said justice's court hath and can have no jurisdiction to render judgment against him the said A. B. in the premises, by the constitution and laws of this State; which plea the said justice hath overruled and refused; and the said C. D. the said A. B. in the premises to cause to be condemned, with all his power endeavors and daily contrives in contempt of the said State, and against the constitution and laws thereof, and to the manifest damage, prejudice and grievance of him the said A. B.; and this he is ready to verify: wherefore the same A. B. the aid of the said circuit court now here most humbly imploring, prays remedy by the writ of the State of prohibition, to the said justice in form of law to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid any wise concerning farther before him.

DECLARATION.

PULASKI, *set:*

A. B. of the county aforesaid, who sues in this behalf as well for the State of Arkansas as for himself, complains of C. D. being in custody, &c. of a plea, wherefore he prosecuted a plea in the justice's court of said State, before J. D. F., Esq , one of the justices of the peace of said county, after said State's prohibition to the contrary thereof first directed and delivered to him; for this, to wit: that whereas all and all manner of actions upon contracts, except actions of covenant, where the sum in controversy amounts to above and upwards of one hundred dollars, within this State of Arkansas arising and happening, to the circuit courts of this State, according to the constitution and laws of this State, do belong and appertain: and whereas also the said A. B. heretofore became indebted to the Real Estate Bank of the State of Arkansas, a corporation established by law, by and upon his certain promissory note, executed by him with V. and T. as his securities, bearing date the first day of January, A. D. 1841, whereby he and his said securities jointly and severally promised to pay, six months after the date thereof, to the said bank or her order, five hundred dollars, which note remains wholly unpaid: and whereas also the said C. D. did, on the third day of June, A. D. 1842, at the county aforesaid, before the said J. D. F., Esq., as such justice of the peace, by the consideration and judgment of said justice, recover against said bank, in an action on note, as well the sum of fifty dollars, and interest thereon at the rate of ten per centum per annum, from the fourth day of May, A. D. 1842, until paid, as also all the costs in that suit in that behalf expended: nevertheless the said C. D. of the premises not ignorant, but combining and intending him the said A. B. unjustly and wrongfully to oppress, and with very great expenses to fatigue, and from the constitution and laws of this State of Arkansas to derogate, on the first day of August, A. D. 1842, his said judgment then still remaining in full force and effect, against the due form of the con-

an inferior court was proceeding without jurisdiction. *Pringe vs. Child*, *Moore* 780; *Martin vs. Archbishop of Canterbury*, *And.* 258; or where the jurisdiction belonged, properly, to another court; *Edwards' case*, 13 *Co.* 9; *Case of Prohibition*, 12 *Co.* 76; or when the inferior court transcended its jurisdiction, by holding plea for too large an amount; *Coats vs. Suckerman*, 1 *Ro.* 252; or where a plaintiff had one demand, and split it into several actions, so as to give an inferior court jurisdiction; *Catchmade's case*, 6 *Mod.* 91. So, where the judges proceeded in cases, where they were prohibited by act of parliament. *Porter vs. Rochester*, 13 *Co.* 4. The writ would not

stitution and laws of this State, and to draw the conusance of a matter of controversy, exceeding the sum of one hundred dollars, and of a plea which belongeth to the said circuit courts, and not to any justice of the peace, to an examination before said justice, unjustly sued out from before said justice a certain writ of garnishment upon said judgment, whereby the said A. B. was commanded to be summoned to appear before said justice on the fifth day of August, A. D. 1842, at his office in Little Rock, then there to answer what goods, chattels, moneys, credits or effects of said bank, might be in his hands, possession or keeping, to satisfy said judgment; and the said C. D. on that occasion unjustly compelled him the said A. B. to appear before the said justice, and to make answer to the said C. D. of and upon the premises; and although the said A. B. doth and then did owe and was indebted to said bank, upon and by the note aforesaid, in and to the amount thereof, and in no other sum or manner whatever, and hath in his hands or possession no goods, chattels, credits or effects of said bank, whatever: and although the said A. B. did answer before said justice in due time, to said writ of garnishment, and did respond, plead and allege the said matters in his discharge in the premises there, and did thereupon object that said justice had and could have no jurisdiction to render judgment against him the said A. B. in the premises, yet the said justice did altogether refuse to admit the said plea and allegation; and the said C. D. doth with all his might endeavor and daily contrive to procure him the said A. B. to be condemned in the premises in said justice's court, and by a definitive judgment of said justice's court to compel him to pay the whole amount of said judgment so obtained by said C. D. against said bank, in manner aforesaid, in contempt of said State; and although the writ of said State of prohibition in this behalf to the contrary thereof, on the eighth day of August, A. D. 1842, in the seventh year of the State, at the county aforesaid, was directed and delivered to said justice, yet the said C. D. after said State's prohibition to the contrary thereof first directed and delivered in form aforesaid, to wit: on said eighth day of August, in the seventh year aforesaid, at said county, proceeded further in prosecuting the said plea against the said A. B. notwithstanding said State writ of prohibition first directed and delivered to him to the contrary; in contempt of said State, and to the damage, prejudice, impoverishment and manifest grievance of the said A. B. and contrary to the constitution and laws of said State: wherefore the said A. B. who sues as well for said State as for himself, as aforesaid, saith that he is injured and hath sustained damage to the value of five hundred dollars, and therefore, as well for said State as for himself, he brings this suit, &c.

PLEA AND DEMURRER.

And the said C. D. comes, &c., and defends the wrong and injury, when, &c., and all contempt, &c., and whatever, &c., and saith that he did not prosecute the said A. B. who sues as well for said State as for himself, in the said justice's court, contrary to the State's prohibition to him for that purpose directed, as the said A. B. who sues as well, &c., by his said declaration doth above suppose; and of this he puts himself upon the country.

lie to a court having cognizance of the cause, or jurisdiction of the subject, on a suggestion of erroneous proceeding. *March.* 92, *Pl.* 152. The remedy, in such cases, was by appeal. *Smith vs. Mayor of London*, 6 *Mod.* 78; *Guillan vs. Gill*, 1 *Lev.* 164. The rule was, at common law, that no prohibition lay to an inferior court, in a cause arising out of their jurisdiction, until that matter had been pleaded in the inferior court, and the plea refused. *Cook vs. Liceuse*, 1 *Lord Raym.* 346; *Wayman vs. Smith*, 1 *Sid.* 464; 1 *Mod.* 64, *S. C.*; 1 *Mod.* 81; *Marriott vs. Shaw*, *Com.* 278; *Mendyke vs. Stint*, 2 *Mod.* 272. It must appear, in the suggestion, that the plea was verified, and ten-

But in order to have a consultation, in this behalf, the said C. D. says, that the said declaration, in manner and form aforesaid declared, and the matter in the same contained, are not sufficient in law to bar him the said C. D. from recovering the amount of his said judgment, demanded against the said A. B. in said justice's court; and that he has no necessity, nor is he bound by the law of the land, in any manner to answer the said declaration, in manner and form aforesaid made and declared; and this he is ready to verify: wherefore, for want of a sufficient declaration of the said A. B. who as well, &c., in this behalf, the said C. D. prays judgment, and the State's writ of consultation to be granted to him in this behalf, &c.

PLEAS FOR CONSULTATION.

Commence with a traverse as to the contempt, as in the last form. Then follows any plea which the party desires to put in, commencing like the demurrer, and concluding with a prayer of judgment, and for a writ of consultation. Replications commence with a *precudi non*, and that the writ of consultation ought not to be granted; and the other pleadings are brought to an issue, as in other actions.

JUDGMENT BY DEFAULT.

And the said C. D., by W., his attorney, comes and defends the force and injury, when, &c., and nothing in bar or preclusion of the said action of the said A. B., who, as well &c., saith; whereby the said A. B., who, as well &c., his damages, by reason that he, the said C. D., as aforesaid, prosecuted in said justice's court, after the prohibition aforesaid to them to the contrary directed and delivered, against the said C. D., ought to recover. But, because it is unknown what damages the said A. B., who, as well &c., hath sustained on that account, [order for writ of inquiry]; or, after the words "ought to recover;" and the said A. B. not demanding a writ of inquiry in this behalf, but being satisfied to recover nominal damages merely, it is therefore considered [judgment for damages and costs.] And it is further considered, that a writ of prohibition issue, according to the prayer of said suggestion.

Judgment for defendant, on demurrer to declaration.

And now, at this day, came the said parties, to me, the said A. B., who, as well &c., by his attorney, P., and the said C. D. by his attorney, W.; and the court here being now sufficiently advised of the matters of law arising on the demurrer of the defendant to the declaration of the plaintiff, above made and declared, is of opinion that said declaration, and the matter therein contained, are not sufficient, in law, to bar him, the said C. D., from recovering the amount of his said judgment demanded against the said A. B., in the said justice's court; and that he has no necessity, nor is he bound by the law of the land, in any manner, to answer the said declaration in manner and form aforesaid made and declared: Wherefore, the said justice is commanded, by writ of said State, of consultation, that, in the cause aforesaid, between the parties aforesaid, with all the speed he can, according to law, he may proceed, the said State writ of pro-

dered in person, during the sitting of the inferior court. *Sparks vs. Wood*, 6 *Mod.* 146; *Clerk vs. Andrews*, 1 *Show.* 12. And there is no precedent of a prohibition, *quia timet.* The writ was obtained on a suggestion, without which no prohibition lies to an inferior court. *Bishop vs. Corbet*, 1 *Lev.* 253; *Blaxton vs. Honore*, 12 *Mod.* 435.

The suggestion stated the nature of the case, the proceedings in the court below, and concluded with a prayer for prohibition. If the motion was founded on matter of suggestion only, an affidavit of the truth of the matter suggested, was necessary; 10 *Mod.* 387; *Burdett vs.*

hibition to him in form aforesaid before to the contrary directed in anywise notwithstanding. And it is further considered—[judgment for costs.]

WRIT OF PROHIBITION.

Pulaski sct.:

The State of Arkansas, to J. D. F., Esquire, an acting and commissioned justice of the peace, within and for the county aforesaid—*Greeting:*

It is shown to us, in our Circuit Court in and for the county of Pulaski, by A. B., that whereas, all and all manner of actions upon contracts, except actions of covenant, where the sum in controversy amounts to above and upwards of one hundred dollars, within this State of Arkansas arising and happening, to the circuit courts of this State, according to the constitution and laws of this State, do belong and appertain: And whereas, also, the said A. B. heretofore became indebted to the Real Estate Bank of the State of Arkansas, a corporation established by law, in this State, by and upon his certain promissory, executed by him, with V. and T., as his securities, for the sum of five hundred dollars, which note remains wholly unpaid, and is not indebted to said Bank in any other sum or manner, nor has nor had in his hands or possession, any goods, chattels, moneys, credits, or effects of said Bank: And whereas, also, one C. D., on the 3d day of June, A. D. 1842, at the county aforesaid, before you, as such justice, by your consideration and judgment, recovered against said Bank, in an action on note, as well the sum of fifty dollars, and interest thereon at the rate of ten per centum per annum, from the fourth day of May, A. D. 1842, until paid, as also all the costs of suit. Nevertheless, the said C. D., of the premises not ignorant, but contriving and intending him, the said A. B., unjustly and wrongfully to oppress, contrary to the constitution and laws of this State, has unjustly sued out before you, a certain writ of garnishment on said judgment against said A. B., whereby the said A. B. has been commanded before you to appear, and answer what goods, chattels, moneys, credits, or effects of said Bank, he may have in his hands or possession, to satisfy said judgment. And the said C. D., him the said A. B., before you in your justices's court, of and upon the premises to appear, hath unjustly obliged, and thereupon to answer, and him in the premises to cause to be condemned, with all his power, endeavors, and daily contrives, in contempt of said State, and against the constitution and laws of said State, and to the manifest damage, prejudice, and grievance of him the said A. B. Wherefore, the said A. B., most humbly imploring the aid of our Circuit Court in and for the county of Pulaski, hath prayed relief, and our writ of prohibition to you to be directed. We, therefore, being willing that the constitution and laws should be observed, and our citizens in nowise oppressed, do firmly prohibit and enjoin you that you no further hold the plea aforesaid, the premises aforesaid in anywise touching, before you, nor any thing in your justice's court attempt or procure to be done, which may be in anywise to the prejudice of said A. B., or in contempt of our constitution and laws, lest you should incur the punishment of the violators of our law; and also, the sentence or judgment, if any against the said A. B., on that account, you have given or pronounced, then do you release the said A. B. therefrom, and him from hence wholly absolve, at your peril. Witness, &c.

Newell, 2 *Ld. Raym.* 1211; *Salk.* 549; but it was otherwise, where the truth of the suggestion appeared on the face of the proceedings below, though after judgment. *Godfrey vs. Liewellin*, *Salk.* 549; *Selby vs. York*, *C. T. Hard.* 392. Upon the suggestion being filed, the court granted a rule to show cause why the writ should not issue, which was afterwards made absolute, or discharged, according to the circumstances of the case. If it was a nice or doubtful case, the court made the rule absolute, and directed the party applying to declare, which he did, by serving the other side with the rule, without taking out a

WRIT OF CONSULTATION.

The State of Arkansas to J. D. F., Esquire, one of the justices of the peace in and for the county of Pulaski—*Greeting:*

C. D. hath shown to us, that whereas he has lately, in our justice's court, before you, sued out a certain writ of garnishment against A. B., upon a certain judgment theretofore by said C. D. before you obtained, against the Real Estate Bank of the State of Arkansas, for fifty dollars, with interest thereon at the rate of ten per centum per annum from the fourth day of May, A. D. 1842, until paid, with costs; by which writ of garnishment the said A. B. before you was commanded to appear, and answer what goods, chattels, moneys, credits, or effects of said Bank he might have in his hands or possession, to satisfy said judgment. And whereas, thereupon the said A. B., by his certain suggestion before us, in our circuit court in and for the county of Pulaski, filed and exhibited, alleged and showed, that all and all manner of actions upon contracts, except actions of covenant, where the sum in controversy amounts to above and upwards of one hundred dollars, within this State of Arkansas, arising and happening to the circuit court of this State, according to the constitution and laws of this State, do belong and appertain: That the said A. B. therefore became indebted to said Bank, by and upon a certain note of five hundred dollars, which was then wholly unpaid, and was not indebted to said Bank in any other sum or manner whatever, nor had in his hands or possession any goods, chattels, moneys, credits, or effects of said Bank: That, although the said A. B. all and singular the premises above mentioned before you in his answer, response, and defence against any other proceedings on the writ of garnishment aforesaid, hath pleaded and alleged, nevertheless, the same C. D., him the said A. B., by color of the premises to aggrieve and oppress, your defective judgment and condemnation of and upon the premises did endeavor to obtain, in contempt of said State, and against the constitution and laws thereof, and to the damage and prejudice of him the said A. B. We, believing and giving credit to the suggestion of the said A. B., in this behalf, did, on the petition of him the said A. B., grant our prohibition, and cause it to be directed to you, to prohibit you that you should not attempt to hold or prosecute the plea aforesaid, in our said justice's court before you, against him the said A. B., by virtue of which, our said prohibition in the plea aforesaid before you, against the said A. B., you have from thence desisted, and do desist further to proceed, as by the report of the said C. D. we have lately, in our Circuit Court for the county of Pulaski, understood. Wherefore, the same C. D. hath, in our said circuit court, humbly besought us to grant him the aid and assistance in this behalf; and we, favorably consenting to the petition of him the said C. D., and being unwilling that the cognizance which to our said justice's court in this behalf belongs, should be further delayed by such false and subtle assertions, because in our said circuit court it is in such manner proceeded, that it is considered by the same court that the said C. D. may have our writ of consultation to the justice's court aforesaid, our writ of prohibition aforesaid to the contrary notwithstanding; whereof the said A. B. is convict, as it appears to us on record: We, therefore, being unwilling that the said C. D. should be in anywise injured in this behalf, signify to you, and command, that you may in that cause lawfully proceed, and further do what you shall know to belong to such justice's court, our said writ of prohibition to the contrary thereof before to you directed, in anywise notwithstanding. Witness, &c.

writ, and then delivering his declaration. If the defendant then submitted, he might refuse the declaration, and the court would then, on his application, stay the proceedings, without costs, because he acknowledged that the rule ought to go, and declined relying on the proceedings below; 1 *Saund.* 136, *n.* 1; *Bull. N. P.* 218; *Gegge, vs. Jones*, 2 *Str.* 1149; or the defendant might insist upon a declaration. But if the court was of opinion against a prohibition, the party applying had no right to declare. *Rex vs. Bishop of Ely*, 1 *W. Black.* 81; *S. C.* 1 *Burr.* 198.

The inferior court was bound to desist immediately, on the application for a prohibition, and the court above took notice of their practice to do so; and would take care there should be no further proceedings, by attaching the judge of the inferior court, for his contempt in going on. 1 *Saund.* 136, *n.* 2. By the declaration, the party who applied for the prohibition, suing *qui tam*, complained of the party proceeding against him in the inferior court, of a plea, wherefore he prosecuted a plea in the court below, &c., after a prohibition to the contrary thereof, directed and delivered to him, for this, to wit: that whereas, &c., setting forth all the facts, the objection to the jurisdiction made in the court below, and the refusal of the court to admit the plea and allegation, concluding that the defendant is endeavoring and contriving to obtain, or has judgment and condemnation, though the writ of prohibition had been directed delivered to him on, &c., to the contrary, in contempt of the State, and to the damage of the plaintiff, &c., concluding with the common *ad damnum.* *Crouch vs. Collins*, 1 *Saund.* 136; *Lilly's Entries*, 316, 328.

This declaration commenced an action, which was, in notion of law, founded upon attachment against the defendant, for a contempt, in proceeding after a writ of prohibition had been served upon him. But it was a mere fiction, used for the purpose of trying, with greater certainty, whether the inferior court ought to proceed further in the suit. The defendant was not, in fact, served with any writ of prohibition, and, therefore, had not, in truth, incurred any contempt for a disobedience of it, but this matter was alleged for form's sake, to entitle the plaintiff to demand damages of the defendant, and thereby to give the action the requisites of a suit. Notice was necessary to be given

to the defendant, before his appearance. *State vs. Allen*, 2 *Iredell* 183. He then either demurred or pleaded to the declaration, but, in either event, he traversed the proceeding, after prohibition served, and the contempt, and commenced his plea or demurrer to the material points, in order to have a consultation in this behalf, and prayed judgment and a writ of consultation. 1 *Saund.* 136.

Whether the defendant pleaded or demurred, no verdict was taken on the traverse, as to the further proceeding and the contempt. It was immaterial, like the finding as to the *vi et armis*, in trespass. *Stratford vs. Neale*, 1 *Str.* 482; *S. C.* 8 *Mod.* 1. If there was a verdict for the plaintiff, and if, upon demurrer, the court were of opinion that there was not sufficient ground for a prohibition, judgment was given for the plaintiff, and both the defendant and the inferior court were prohibited from going any further. It was then, and not till then, that the writ of prohibition actually issued. 1 *Saund.* 136. The writ was directed to both the court and the party, and commanded the one not to hold, and the other not to follow the plea. 1 *N. Hill*, 200.

If, on the other hand, the verdict was for the defendant, or the court, upon demurrer, was of opinion that there was no ground for a prohibition, then a writ of consultation was awarded; and where this writ was awarded on the merits, there could never be another prohibition upon the same suggestion. This writ was called the writ of consultation, because, upon consultation had, the judges found the prohibition to be ill founded, and therefore, by this writ, they returned the cause to its original jurisdiction, to be there determined, and commanded the inferior court to proceed and determine it, the prohibition to the contrary notwithstanding. 1 *Saund.* 136, *n.* 5; *Lilly's Entries*, 562; 1 *Keb.* 286; 8 *Mod.* 3; 2 *Keb.* 404, *pl.* 17. If the declaration varied from the suggestion, it was bad. *Harrows' Case*, 7 *Mod.* 114; *Gomersall vs. Bishopp*, 1 *Lecon*, 128. Both parties in prohibition being actors, there might be traverse upon traverse. *Fort.* 350. No traverse, however, could be taken on an allegation that the court below refused the plea. *Moore*, 425; *Stratford vs. Neale*, *Str.* 483.

If there was no plea or demurrer in due time, judgment went by *nihil dicit*. *Turner vs. Rainier*, 12 *Mod.* 447.

Such we have ascertained, after considerable research, to have been the common law doctrine and mode of proceeding. And as we have no statute upon the subject, the common law, with all its incidents, is, of course, as far as applicable, in force here, and it only becomes necessary so to mould the remedy, as to render it available under our system of jurisprudence, preserving, as far as practicable, all its common law attributes.

We understand, then, that a party wishing to avail himself of this writ, in our courts, must, if the facts are not presented by the record of the inferior court, make the proper suggestion to the inferior tribunal, setting forth all the material facts upon which he relies, with the proper allegations, and if the facts do not appear on the record, verify the truth of them by affidavit. Upon the presentation of the suggestion, a rule should be entered upon the opposite party, requiring him to show cause, upon a given day, in court, why the writ should not issue; which rule, when so entered and served upon the inferior court and the party, shall stay all further proceedings in the case; and the court will then, in their discretion, make it absolute, or discharge it, and, if the former, direct the party to declare, without issuing the writ. If the defendant, upon the suggestion being presented, admits the facts, the rule will go, and the writ issue. But if he insists upon a declaration, the case then takes its ordinary course, and must be decided upon demurrer, or plea to the merits, and the writ be granted, or the cause remanded to its original jurisdiction, to be there proceeded in and determined.

As it is a *qui tam* action, under our statute a bond for costs must be filed, before or upon the filing of the declaration, which is the commencement of the action.

In the case now before us, and in which the party asks a writ of certiorari to bring up the proceedings of the circuit court, it is evident there has been a total disregard of all the principles which govern the mode of proceeding upon prohibition, and that until there has been a final disposition of it by the circuit court, the appellate jurisdiction of this court does not attach. Upon final judgment, a writ of error will lie, as in ordinary cases.

The application for the writ of certiorari must, therefore, be refused.

Beebe *vs.* The Real Estate Bank.

Where there are several parties to a bill, the legal consequence of the holder endorsing it to the acceptor, is, that no action can thereafter be maintained against any party to the bill, unless the declaration shows the assent of the other parties to the subsequent endorsement thereof by the acceptor to the plaintiff, so as to avoid the legal presumption that it had been taken up and extinguished by the acceptor.

The acceptor would still be liable, but not in his character of acceptor.

In a suit, under our statute, against several parties to a bill, a discontinuance as to one defendant served with process, is a discontinuance as to all.

This was an action of assumpsit, determined in the Pulaski Circuit Court, in November, 1840, before the Hon. John J. Clendenin, one of the circuit judges. The Bank sued Roswell Beebe, William E. Woodruff, and Peter T. Crutchfield, on a bill of exchange, and the common counts.

The cause of action, as set forth in the first count of the declaration, is a bill of exchange, drawn by Woodruff in favor of Crutchfield, upon Beebe, and accepted by the latter, to whom it was subsequently endorsed by Crutchfield, and by whom it was endorsed to the Bank; and, being unpaid at maturity, payment was duly demanded, at the place specified, and the bill duly protested for non-payment, and notice thereof given to the several parties. The count then concludes in the usual form. To this action, the defendants pleaded, jointly, several pleas, as follows: First, to the whole action, non-assumpsit; secondly, to the first count, that the bill was not duly protested for non-payment; thirdly, that they had not due notice of the protest; and, fourthly, that the bill was, after the making, acceptance, and endorsements, as alleged in the declaration, by the finance committee, composed of Anthony H. Davies, President of said Real Estate Bank, and Thomas T. Williamson, President of the Branch of said Bank, at Washington, and Henry L. Biscoe, President of the Branch of said Bank, at Helena, acting for, and on behalf of, said Bank, under and by virtue of the authority of the central board thereof, transferred and delivered to the Branch of said Bank, at Helena, and, on the same day, assigned by the Branch of said Bank, at Helena, by an endorsement,

made by the cashier thereof to one Frederick Fray, concluding with a verification. The plaintiff below joined issue to the plea of non-assumpsit, but demurred to the other pleas; all of which were adjudged by the court insufficient; and the plaintiff having, thereupon, by leave of the court, entered a *nolle prosequi* as to the defendants, Woodruff and Crutchfield, they, together with their co-defendant, Beebe, filed a motion, in writing, to discontinue the suit as to the defendant, Beebe, which motion the court overruled; and the defendants, having excepted to the opinion of the court admitting the *nolle prosequi* to be entered, as well as that overruling their motion to discontinue as to the remaining defendant, filed their bill of exceptions, which was duly signed and made part of the record. The issue upon the first plea was then tried by a jury, who returned a verdict for the plaintiff; upon which, judgment was given against the defendant, Beebe, from which he appealed.

Ashley & Watkins, for the appellant. The motion by the appellee to enter a *nolle prosequi* as to Woodruff and Crutchfield, was made after the defendants had appeared and pleaded; and they, as well as the appellant, objected. The rule of the law as to the right of the plaintiff to enter a *nolle prosequi* as to one or more defendants, in a joint action against several, on a contract, is too clear to admit of a doubt. Although, in actions of *tort*, one defendant may be found guilty, and the other acquitted; yet, in actions for the breach of a contract, whether it be framed in assumpsit, covenant, debt, or case, a verdict or judgment cannot, in general, be given in a joint action against one defendant, without the other. 1 *Ch. Pl.*, *Ed.* 1837, *p.* 50. *ib.* 599. *Gould's Pl.* 280, *sec.* 116. *Greenleaf's overruled cases*, 158, *sec.* 1084. *Chandler vs. Danks*, 3 *Esp.*, 76. *Burgess vs. Merrill*, 4 *Taunt.* 468. *Jaffray vs. Freebain*, 5 *Taunt.* 47. *Marshall vs. Lowry*, 6 *Serg. & R.* 82. *Gazzam et al. vs. Beebe & Co.*, 8 *Pet. Rep.* 49. *Sadler vs. Houston & Gillaspie*, 5 *Stew. & Por.* 205.

The cases of *Fuller vs. Van Schaick et al.*, 18 *Wend.* 547; *Toby vs. Claflin et. al.*, 3 *Sumn. Rep.* 279; *Lyons & Gillmore vs. Jackson*, 1 *Howard's Rep.* 474; *Minor and others vs. Mechanics' Bank of Alexandria*, 1 *Pet.* 46; and *The United States vs. Lefler*, 11 *Pet.* 86, differ

from the one now before the court, in several respects. They were either governed by special statutes, or the defendants had severed in their pleading, nor did not object to the entry of *nolle prosequi.*

Pike & Baldwin, contra. Though it is the general rule, that, in actions *ex contractu*, a discontinuance as to one defendant operates as a discontinuance as to all; yet such is not the rule in actions *ex delicto*, where the plaintiff might originally might have sued one, two, or all; and on the same principle, in this action, which is in form a joint one, though founded on distinct and several liabilities, it is like an action *ex delicto*. *Fuller vs. Van Schaick.*, 18 *Wend.* 547. See also, *Toby vs. Claflin*, 3 *Sumn.* 379.

The reason given why, in actions *ex contractu*, the joinder of a party who should be defendant is only pleadable in abatement, is, that the obligation of the party is *his* act, though not his *sole* act; and the promise is *his*, though not his *solè* promise; and the reason why a *nol. pros.* cannot be entered as to a part of the defendants is, that, to allow it, would be to enable the plaintiff, by his own act, to defeat a good defence upon the merits; that is, to prevent the remaining defendants from having advantage of the mis-joinder, under the general issue, and also, virtually to substitute one action for another. *Gould's Pl.* 278, 279, 280, 281.

Another reason given is, that the contract being joint, the plaintiff is compellable to bring his action against *all* the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants, against whom a recovery is had, from calling upon the other defendants for a ratable contribution. *Salmons vs. Smith*, 1 *Saund.* 207, *n.* 2.

In this case, the contract was not joint, but *several*, and the law of contribution has no place. The contract being several, the discontinuance was allowable. *Minor vs. Mech. Bank*, 1 *Pet.* 73. *Lyons vs. Jackson*, 1 *Howard*, 474.

A *nol. pros.* can be entered as to some of the defendants, whenever the contract is *joint or several.* It is, then, like an action for a tort. *Nokes vs. Ingraham*, 1 *Wils.* 89.

That Beebe is both acceptor and endorser, is no objection to a recovery against him, even if it were as to the others. If the acceptor

were to *take up* and pay a bill, and then put it into circulation again, this might release the *endorsers*, but certainly *he* would be liable. And besides, this is an objection which could only come up on the trial. The fact which would release the endorsers is, that the bill has once been *paid*. *Beck vs. Robley*, 1 *H. Bla.* 89, *n*. Presumption of payment does not arise, unless, after acceptance, *the bill has been in circulation*, and has *then* returned to the acceptor. As far as the pleadings here show, the making, acceptance, and all endorsements, were simultaneous. See *Callow vs. Lawrence*, 3 *M. & S.* 94; *Gomez Serra vs. Berkley*, 1 *Wils.* 46; *Blake vs. Sewall*, 3 *Mass.* 556; *Boylston vs. Greene*, 8 *Mass.* 465; *Guild vs. Eager et al.*, 17 *Mass.* 615; *Havens vs. Huntington*, 1 *Cowen*, 387.

The presumption of law is, that every endorsement is contemporaneous with the making of the note or bill. *Webster vs. Lee*, 5 *Mass.* 339. *Pinkerton vs. Bailey*, 8 *Wend.* 600.

If Beebe had drawn on *himself*, in his own favor, and had himself endorsed the bill, his endorsee would have treated it either as a bill or note, and have sued him. *Pitcher vs. Barrows*, 17 *Pick.* 363.

The principle of law is simply this, that, if a bill has once been taken up *and paid*, it cannot be put into circulation again *so as to hold* the endorsers responsible, who merely guarantied its payment. *Nothing but payment will destroy its negotiability*. 2 *Greenl.* 207.

By the Court, Ringo, C. J. Several questions are presented by the record and assignment of errors; the most important of which, as we conceive, arises out of the adjudication upon the demurrers of the plaintiff to the pleading of the defendants below, which, according to the well settled rules of law, imposes upon us the necessity of considering not only the validity of the pleas, but also the sufficiency of the declaration, and pronouncing judgment against the party whose pleading exhibits the first fatal defect. We shall, therefore, in the first place, confine our inquiries to the first count in the declaration; because, if that shows no cause of action, it is useless to inquire whether the pleading in response to it be good or bad, as the legal result would, in either event, be the same.

The count of the declaration is, in form, sufficient, but it presents,

broadly, this question: What is the legal consequence of the holder of a bill of exchange endorsing it to the acceptor, where there are several parties to the bill? In the present case, the bill of exchange mentioned in the first count, is stated to have been drawn by Woodruff, in favor of Crutchfield, and accepted by him, and then to have been endorsed by the payee to the acceptor, and by him to the Bank. Under these circumstances, the rights of the Bank in respect to the bill and the transaction, whatever they may be, are such only as she acquired under, and by virtue of, the endorsement of the bill to her by the acceptor, who is, by this suit, sought to be charged, not as an endorser, but as the acceptor of the bill. Now, it is understood to be well settled, that the law regards the acceptor of a bill of exchange as the principal debtor, and not only primarily liable to the holder, but also ultimately responsible to every other party to the bill, by whom it may have been *bona fide* taken up or paid, unless his acceptance was made for the accommodation of either the payee or drawee, and that fact be made distinctly to appear. In the case before us, such is not shown to be the fact, and the law does not presume it. What, then, was the legal obligation of the parties to the bill, respectively, after it was endorsed by the payee to the acceptor, while it remained in the hands of the latter? Could any action be maintained upon the bill, either by or against any party to it? In our opinion, the answer must be in the negative. And, if this be true, is it not a necessary consequence, that every party to the bill was thereby discharged from all legal liability upon it? Such, we think, is the legal conclusion upon the facts, as stated in the first count of the declaration. And, *if these positions be true, as we consider them to* be, the instrument, when the acceptor became the proprietor and legal holder thereof, was divested of all obligation, and the parties to it were, of course, discharged from all responsibility thereon. And we consider it equally clear, that the simple endorsement of the bill, by Beebe, could not revive its obligation, or in any manner bind the other parties to the transaction, notwithstanding he might thereby charge himself, as we have no doubt he did, though not as the acceptor of the bill, because, as before shown, its legal obligation was previously extinguished, and it had ceased to be a negotiable security.

The Bank, therefore, if she sought to charge the parties to the bill, as the acceptor, drawer, and endorser thereof, as she has attempted to do, should have shown at least their assent to the transfer thereof to her by Beebe, so as to avoid the legal presumption that it had been paid, taken up, and extinguished by the acceptor, which, as we conceive, necessarily results from the union, in him, of both the legal title and possession of the instrument. This she has not attempted to do, as there is nothing in the record to warrant the conclusion that such was the fact. The legal presumption, therefore, that the bill had been *bona fide* satisfied and extinguished by the acceptor, previous to his endorsement thereof to the Bank, must be indulged; and, upon this ground, the first count in the declaration is fatally defective, the allegations therein showing no legal cause of action whatever, against either of the defendants below. In this opinion, we are fully sustained, as we conceive, by the judgment of the court of appeals of Kentucky, in the case of *Long & Robertson vs. The Bank of Cynthiana*, reported in *Littell*, 290, which is the only adjudication expressly in point, of which we have any knowledge. We have carefully considered all of the cases cited by the appellee, but none of them, in our opinion, warrants the conclusion sought to be deduced from them. The facts in them were essentially different from those appearing in this case, and they establish no principle adverse to the one above stated. The controverted question, in the cases cited, was, whether a negotiable note or bill of exchange, after it had been paid to the holder, and taken up by some party to it other than the principal debtor, was negotiable; and in such case, they have been held to be negotiable, notwithstanding the payment. Such is the case where the transfer will not subject any party thereto, whose liability thereon was discharged by the payment, to an action at the suit of the endorsee or holder. But when the effect of the transfer would be to subject any party to the instrument, whose liability was extinguished by the payment, to a suit by, or in the name of, the assignee, endorsee, or holder, they have uniformly been considered and held to be not negotiable. In our opinion, therefore, the demurrer to the pleas to the first count of the declaration ought to have been overruled, and that count of the declaration adjudged insufficient, in law, to support the action; and the

court, in sustaining the demurrer to said pleas, in our judgment, unquestionably erred.

The only remaining question which we deem it proper to notice, is as to what is the legal effect of the nolle prosequi, or discontinuance of the cause, by the plaintiff below, as to two of the defendants, Woodruff and Crutchfield, upon the case as to their co-defendant, Beebe. This court has decided at the present term, that where a plaintiff enters a *nolle prosequi* or discontinuance as to a part of the defendants, upon whom process has been duly served, and who are then bound to appear in the case, whether the action be founded upon a joint or joint and several contract, it is, in law, a discontinuance of the action as to all of the defendants, and the case is thereby out of court. And that such is the general rule on the subject, we think there can be no doubt; but, on the part of the appellant, it is urged, that this case forms an exception to the general rule, and some cases are cited in the brief as establishing this proposition.

The first that we shall notice is the case of *Fuller vs. Van Schaick et al.*, 18 *Wend.* 547, which was a joint action against the maker and endorsers of a promissory note, in which the plaintiff discontinued as to the endorsers, and took a verdict against the maker alone, which the Supreme Court of New-York refused to set aside. In deciding this case, that court expressly admits the general rule to be, as we have stated, but deny its applicability to the case, on the ground, as we understand it, that the statute of that state, allowing the plaintiffs to include all the parties to a bill or note in one action, does not turn distinct liabilities into a joint contract, but only gives a joint action to enforce the several liabilities of the different parties. But this decision, as we apprehend, was influenced more by the statutory provisions contained in the statutes of 1832 and 1835, cited by the court, a portion of one of which, as quoted in the opinion, declares, that judgment may be rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants, against the plaintiff, than by any other consideration. Besides, the opinion states, expressly, that the 2d section of the act of 1835, carries this severance of the action still further. And in the case of *The Bank of Tennessee vs. Field et al.*, 19 *Wend.* 643, the same statutes of 1832

and 1835, are again cited by the court, and the judgment is, we think, evidently based upon their provisions. There are no such statutory provisions in force here. Consequently, these adjudications are not applicable to the present case, and can have no influence upon it.

In the cases of *Minor et al. vs. The Mechanics' Bank of Alexandria*, 1 *Pet.* 46, and *The United States vs. Lafler*, 11 *Pet.* 86, the Supreme Court of the United States appears to have proceeded upon the ground that, inasmuch as the cause of action was several as well as joint, and the defendants had severed in their pleading, a *nolle prosequi* as to such of the defendants as had severed in their defence, could be entered, and, in such case, would not operate as a discontinuance of the action as to the other defendants, as to whom, notwithstanding the *nolle prosequi*, the plaintiff might proceed to judgment; and the judgment would not, for that cause, be reversed; at least it would not, when, as in these cases, no objection was made to the *nolle prosequi*, or subsequent proceedings, at the time, or in the inferior court.

This we understand to be the extent of the rule established; and, although it may be extended beyond the limit prescribed to it by the common law, as it is understood in England and many of the State courts, still, it is not sufficiently enlarged to embrace the case before us; for, notwithstanding the cause of action is, in this case, only several, and the liabilities of the parties distinct and entirely independent, the action against them is joint; and, as the defendants all joined in one defence, the case is, on this account, clearly not within the extension of the rule, as established by the Supreme Court, but falls expressly within the operation of the principle asserted by this court; which is, that, in all actions of contract, notwithstanding the contract is several as well as joint, and the plaintiff may sue each separately, or all, or as many of the parties to the contract jointly, as he may think proper, when he has made his election by instituting a joint action against all or any number of the parties, he must be held to his election, and prosecute and conduct the suit as he would be bound to do if the contract was merely joint. The law making all contracts several as well as joint, and giving the plaintiff this election in the first instance, is not more liberal than just, and was made exclusively for his benefit;

but it is equally regardful of the rights of defendants, and, for their benefit, it binds him to abide his election, when once made, until the suit is determined, except in cases where the process is not served, or not served in time to bind the defendant to appear at the term to which it is returnable; in which case, the plaintiff, by virtue of the statute, may discontinue as to those not served or not served in time, and proceed against those who are bound to appear; or, he may continue the suit until the next term of the court, and take new process against those not served; but, at the second term, the suit shall proceed against all the defendants who may have been served with process in due time. *Rev. St. Ark.* 626, *sec.* 45, 46, 47. We are, therefore, clearly of the opinion, that neither the common law nor statute authorized the plaintiff to proceed, in this case, against Beebe, after it was discontinued as to Woodruff and Crutchfield, without his consent, the suit thereupon, by the mere operation of law, being immediately out of court, and discontinued as to all of the defendants.

Judgment reversed.*

*Upon the question of *discontinuance*, in this case, LACY, J., did not assent to the opinion, as he subsequently declared.

CAIL *vs.* BROOKFIELD.

In petition and summons, on a note bearing ten per cent. interest, it is only necessary to set out the note, and to aver that the debt remains unpaid, and to demand judgment for the debt, damages, and costs. It is not necessary specially to negative the payment of the interest.

THIS was debt by petition, determined in the Phillips Circuit Court, in November, 1841, before the Hon. ISAAC BAKER, one of the circuit judges. The petition set out a bond, executed by Cail, bearing ten per cent. interest, and followed the statute, by alleging that the *debt*

remained unpaid, and demanding debt, damages, and costs. After oyer craved and granted, judgment by *nil dicit.* Cail brought error.

Ashley & Watkins, for the plaintiffs in error. The declaration or petition does not negative the payment of the interest, and the judgment is not warranted by the prayer of the petition or the breach. This court has decided the same point, in several cases. We apprehend the statute which authorizes the action of debt by petition and summons, meant to confine the operation of it to simple cases of debt, where the damages followed, as a legal consequence of the detention. At any rate, the statute does not mean to dispense with that reasonable degree of certainty which the law requires in all pleadings. It would be singular, if a party, by declaring in petition and summons, could defeat another statutory provision, which, in effect, makes the rate of interest, when specified, a *part of the contract;* and, in construing that statute, this court has decided that the party who seeks to recover such stipulated rate of interest, must declare for it, and negative its non-payment, according to the terms of the contract. This objection, if fatal on general demurrer, is equally so in arrest of judgment, or on error.

By the Court, Dickinson, J. The petition sets forth the writing obligatory in the manner prescribed by the statute, and the judgment for interest conforms to the contract.

Judgment affirmed.

McNabb *vs.* The Bank of the State.

Held, that it is not necessary, in the return on a writ, to state *where* it was executed.

WATKINS *vs.* WEAVER.

Though there is a mistake in the declaration, as to the *place* where a note was executed, this is immaterial. It is an averment as to *place* alone, and not a description of the writing sued on.

It is no variance, that the declaration states a note, due at one day, with interest at eight per cent. till paid, and then alleges that the defendant became liable to pay such interest *from the time the note fell due till paid.*

Nor is it material that the note is stated to be for $646 89 cents, and the breach alleges the non-payment of "said sum of $649 98 cents.

THIS was an action of debt, determined in the Pulaski Circuit Court, in May, 1842, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. Weaver sued Watkins on a bond, executed to Pitcher & Walters, and assigned. The declaration stated the bond to have been executed at *the county of Pulaski*, for $646 89 cents, due one day after date, with eight per cent. interest until paid; alleged that, by it and the assignment, the defendant became liable to pay that sum, with interest at eight per cent. *from due* till paid; and, in the breach, negatived the payment of "said sum of $646 98 cents," to the plaintiff, and of "said sum in said obligation specified," to Pitcher & Walters; and also negatived payment of the interest. The bond given on oyer was dated *at Little Rock*, and otherwise agreed with the description in the declaration. Demurrer overruled, and judgment for Weaver. Watkins brought error.

Ashley & Watkins, for the plaintiff in error. If either of the objections specially assigned in the demurrer be well founded, the demurrer ought to have been sustained; and the court could not, by any legal intendment, consider them as amended. *Rev. St.* 627, *sections* 60, 61.

The declaration describes the note as being made at the county of Pulaski. The note given on oyer bears date at Little Rock. That this variance is fatal. *Sumner vs. Ford*, 3 *Ark.* 404. *Covington vs. Comstock*, 14 *Pet.* 43.

The note declared on is described as bearing interest *from due.*

A note, payable at a *future day*, with interest, bears interest from date. *Inglish et al. vs. Watkins, Adm'r, ante.* The note should, at least, be so described that judgment on it would be a bar to a future recovery.

The breach assigned in the declaration is broader than the contract declared on, and avers the non-payment of a sum of money different from that demanded in the declaration. If the breach vary from the contract—be either more limited or larger—it will be insufficient, on general demurrer. *Clary & Webb vs. Morehouse, Adm'r*, 3 *Ark.* 264. 1 *Ch. Pl.* 291, 292, 293.

The maxim, *de minimis non curat lex*, cannot apply, in this case, where the defect is specially expressed in the demurrer.

Hempstead & Johnson, contra. Actions *ex contractu* are of a transitory nature, and may be declared on as accruing in any county. 1 *Ch. Pl.* 298. 1 *Saund.* 74, *n.* 2. *Gilb. C. P.* 84. 1 *Tidd's Practice*, 369.

If the matter which is the cause of a transitory action, arise within the realm, it may be laid in any county, the place not being material. *Fabrigas vs. Mostyn, Cowp.* 176, 177. 1 *Tidd*, 370.

When a transitory matter has occurred abroad, it may, in general, be stated to have taken place in any English county, without noticing the place where it really happened. *Cowp.* 117, 178. 1 *Chit. Pl.* 307.

If matter, unnecessarily stated, be wholly foreign or irrelevant to the cause, so that no allegation on the subject was necessary, it will be rejected as surplusage, it being a maxim that, *utile per inutile non vitiatur.* It will not vitiate even on special demurer. 1 *Ch. Pl.* 263. Any allegation may be stricken out as surplusage, which would leave a good cause of action. *King vs. Pippet*, 1 *T. R.* 235. *Wigley vs. Jones*, 5 *East.* 444.

Though a superfluous or irrelevant allegation be repugnant to what was before alleged, it is void, and will be rejected; and whatever is redundant and contradictory of what was before alleged, and which need not have been embraced in the sentence, will not, in general, vitiate the pleading. *Co. Lit.* 303. *Buckley vs. Kenyon*, 10 *East.*

139, 1 *Salk.* 324, 325. 1 *Ch. Pl.* 265. *Byrd vs. Tucker*, 3 *Ark. Rep.* 451.

By the Court, DICKINSON, J. The suit is instituted upon a writing obligatory, dated at Little Rock. The defendant below craved oyer, and demurred, upon the ground of misdescription in the declaration. It states that it was executed at the county of Pulaski. This, we deem sufficient; for it is an averment as to the place alone, not a description of the writing sued on. The obligation is payable one day after date, with interest at the rate of eight per cent. per annum. The breach conforms to the stipulations of the contract; and, in our opinion, there is no error in the judgment of the court below, in overruling the demurrer.

Judgment affirmed.

McPHERSON AND OTHERS *vs.* THE BANK OF THE STATE.

Where the writ states that one of the defendants is sheriff of the county, it is properly directed to the coroner, without any affidavit that such defendant is sheriff.

A return, that the writ was executed by reading it *in the presence and hearing* of a defendant, is good. It is tantamount to reading it *to him.*

THIS was an action of debt, determined in the Phillips Circuit Court, in November, 1841, before the Hon. ISAAC BAKER, one of the circuit judges. Several questions, decided in this case, have been already reported, in other cases. The Bank sued McPherson, Costar, and others, in Phillips county, and sent out several writs; one of which, to Monroe county, stated that Costar was sheriff of that county, and was directed to the coroner. This writ was returned executed on Costar and another, "by reading the same, in their presence and hearing." Judgment by default for the plaintiff, and writ of error.

The case was argued here, by *W. & E. Cummins*, for the plaintiff in error, and by *Hempstead & Johnson*, contra, who cited 1 *Bla. Rep.* 506; *Backus on Sheriffs*, 60.

By the Court, DICKINSON, J. The only questions raised by the assignment of errors, which we have not heretofore decided, and which we deem it necessary to notice, are the exception to the writ and the service of it. There is certainly no valid objection to the direction of the writ to the coroner of the county of Monroe, as the writ itself states that Costar, one of the defendants to the suit, was sheriff, and therefore prohibited by law from executing it. The service states that it was executed by reading the same in the presence and hearing of Albert G. Evans. This is surely tantamount to reading it to him. Nor was there any objection made, in the court below, to the truth of the statement in the writ. The *8th sec. of Chap.* 32 *of the Revised Code*, requiring an affidavit showing the cause of disqualification to authorize the clerk to issue and direct the writ to the coroner, does not apply to a case where the record shows that the sheriff is a party to the suit.

Judgment affirmed.

OLDHAM *vs.* WALLACE.

In a suit on an assigned note, by *assignee* against *maker*, the maker may set off any demand due him, by the *assignor*, before and at the time of the assignment.

THIS was an action of debt, determined in the Washington Circuit Court, in May, 1842, before the Hon. JOSEPH M. HOGE, one of the circuit judges. Leonard W. Wallace sued Oldham, on a bond, executed by him, October 7, 1840, to Willis S. Wallace, payable one day after date, for $264 80, with interest at ten per cent. from due until paid, and endorsed by the obligee to the plaintiff. The decla-

ration negatived the payment of any part of principal or interest, to the assignee, before assignment, or to the plaintiff, thereafter.

The defendant pleaded, in set-off, that Willis S. Wallace was indebted to him, before and at the time of the endorsement of the bond, and before and at the commencement of the suit, to wit: on the 7th of October, 1840, for money lent, &c., interest and account stated. Demurrer to this plea was sustained, and judgment for the plaintiff, on the demurrer.

There is a bill of exceptions copied, stating certain evidence given *at the trial*, and that a motion for a new trial was overruled. The bill is no part of the record. The defendant appealed.

Trapnall & Cocke, for the appellant.

Pike & Baldwin, contra. The statute of set-off allows it only where the plaintiff and defendant are mutually indebted; and gives the defendant right to a judgment, where any balance is found due from the plaintiff to him. *Rev. Stat.* 726.

The statute of assignments provides that "nothing in this act contained shall change the nature of the defence, or prevent the allowance of discounts, or off-sets, either in law or equity, that any defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment." *Rev. St.* 107.

The chapter on set-off was passed *subsequently* to the chapter on assignments.

The provision quoted from the chapter on assignments, is merely *negative*. It does not *extend* the defence of set-off, but leaves it as it existed before.

It is clear that without some express statutory provision, a demand against the payee of a negotiable note or bond, transferred before maturity, for valuable consideration, could not be set-off. *Smith vs. Van Loan*, 16 *Wend.* 659; *Prior vs. Jacocks*, 1 *J. Cas.* 169; *Holland vs. Makepiece*, 8 *Mass.* 418; *Wake vs. Tinkler*, 16 *East.* 36; *Wheeler vs. Raymond*, 5 *Cowen*, 281; *Bridge vs. Johnson*, 5 *Wend.* 342.

When a note has been assigned, when *overdue*, such a set-off might be allowed; though that seems doubtful. The declaration in this case

shows that the bond was assigned on the day of its date. In such case, at common law, and independent of any statute, no such off-set was allowable. *Wheeler vs. Raymond*, 5 *Cowen*, 231; 18 *Maine*, 179; *Raymond vs. Wheeler*, 9 *Cowen*, 295; *Sargent vs. Southgate*, 5 *Pick.* 312; *Clark vs. Leach*, 10 *Mass.* 51; *Humphreys vs. Blight's Assignees*, 4 *Dal.* 370; *Stedman vs. Gibson*, 10 *Conn.* 55; *Robinson vs. Lyman*, 10 *Conn.* 30.

The only effect of our statute is, therefore, to allow the defendant to set off the same matters which he might have set off before the passage of these statutes. The law stands, in this respect, as it did heretofore. *Small vs. Strong*, 2 *Ark.* 198.

The plea in this case also shows that the indebtedness set up in the plea of set-off, existed *when the bond was executed.* It would open a wide door for fraud, to admit such a defence in case of negotiable paper.

By the Court, Dickinson, J. The statute (*sec.* 3, *ch.* 11) of assignments expressly declares, that nothing in the act authorizing assignments, "shall change the nature of the defence, or prevent the allowance of discounts or off-sets, either in law or equity, that any defendant may have against the original assignor, previous to the assignment, or against the plaintiff or assignee after the assignment.

The defendant below, in his plea of off-set, expressly avers the indebtedness of the assignor to him, "before and at the time of the endorsement of the said writing obligatory," and certainly brings himself within both the letter and spirit of the statute. The plea is in all respects sufficiently formal, and, in our opinion, the court erred in sustaining the demurrer to this plea.

Judgment reversed.

HANLY *vs.* CAMPBELL.

In a suit against *Thomas B. Hanley*, a bond for costs, executed to *Thomas B. Han*, is insufficient; and if the bond states that the plaintiff is a non-resident, the suit should be dismissed, on motion.

THIS was an action of assumpsit, determined in the Phillips Circuit Court, in May, 1842, before the Hon. JOHN C. P. TOLLESON, one of the circuit judges. Campbell sued Thomas B. Hanly, and a bond for costs was filed by John Preston, Jr., stating Campbell to be a non-resident. The bond was made to Thomas B. Han, but the condition stated that Campbell was about to institute a suit against "the said Thomas B. Hanly." Motion to dismiss, for want of a bond for costs, overruled, and judgment for the plaintiff. Hanly appealed.

W. & E. Cummins, for the appellant. The fact of non-residence was not denied in any way; on the contrary, it was expressly admitted by the plaintiff, in the bond filed. This was at least prima facie evidence of the fact. The bond is not given to the defendant, nor, so far as appears, to any person connected with the suit, or who, by possibility, could have any interest in the bond. A bond given to a stranger, could not accomplish the objects of the law, because the party actually interested could not control the bond, or recover thereon, in case he should become entitled to costs. For this reason, the bond was clearly defective, and as no dispute arose as to the facts, the suit should have been dismissed. Previous decisions of this court settle the question involved in this case.

By the Court, DICKINSON, J. No argument, we presume, is necessary to show that there must not only be an obligor and an obligee, but that the obligee ought to be the defendant in the suit. The bond is, in this case, made payable to Thomas B. Han, who is no party to the proceedings. We are clearly of opinion, that the circuit court erred in overruling the motion of the defendant, to set aside the bond for costs, and dismiss the case.

Judgment reversed.

PYEATT *vs.* SPENCER.

Whether the evidence given in this case, established insanity, considered and discussed.

THIS was an action of covenant, tried in the Washington Circuit Court, in May, 1842, before the Hon. JOSEPH M. HOGE, one of the circuit judges. Spencer, by his declaration, alleged that Pyeatt, on the 15th of June, 1839, by his covenant, under seal, for the consideration of $650, bargained, sold, and delivered to Spencer, a certain negro woman, slave for life, named Sophia, and warranted her to be sound and healthy, as far as he knew, and bound himself, his heirs, &c., to warrant and defend the right and title of the negro to Spencer, his heirs, &c., for ever; and alleging, as a breach, that the slave was not sound or healthy, when sold, but unsound, unhealthy, and mentally deranged, and that *Pyeatt well knew her to be so*, at the time of sale and delivery; so that the plaintiff had lost the money paid for her, and she had become of no value. The second count stated, in addition, that he had lost her services, and had paid out large sums of money for her board and keep, and in trying to have her cured.

The defendant demurred to the declaration, and his demurrer being overruled, he pleaded that the slave, when sold, was sound and healthy, as far as he knew, and that he did not well know her to be unsound and unhealthy. The plaintiff demurred to the plea, and his demurrer being overruled, he joined issue to it, and the case was tried by a jury. The jury found that the negro was unsound, when sold, and that Pyeatt knew it, and assessed the plaintiff's damages to the sum of $716; for which, and costs, judgment was rendered.

The evidence given on the trial, which is brought up by exceptions to the decision of the court, refusing a new trial, was, in substance, this: the bill of sale was correctly described in the declaration. A few days after Spencer bought the slave, he was found whipping her. He had her *stripped*, and *staked down* on the ground; her feet and hands extended, and fastened to stakes; and her face downwards.

He appeared calm and deliberate, and was whipping her at intervals, using a cowhide, with a plaited buckskin lash about fifteen inches long. He asked her what made her do so, and she said that Bedford and Buchanan told her, that if she staid there, she would be whipped to death. The witness examined the negro, *and found her to look wild.* Spencer had drawn some blood, but not a great deal. *He took salt and a cob, and salted her back.* This witness stated that he thought her deranged. He had never seen her before, but has often seen her since, and she is deranged and valueless.

Another witness lived and worked at Pyeatt's, when he bought the slave, and while he kept her. He kept her about two months. She was a negro of vicious, bad disposition, but not deranged as far as the witness could know. He did not know why Pyeatt sold her. She was sent to the field, soon after Pyeatt got her, and worked in the field with witness. She frequently talked to herself, and would laugh without any one speaking to her, or being near her. Some time after Pyeatt sold the slave to Spencer, witness heard Pyeatt say, that if justice was to take place, Buchanan (of whom he bought the negro) ought to lose her.

Another witness, who knew the slave when she was a girl, stated that she was sound in mind, as far as he knew; and was considered an obedient, good house-servant. Witness never saw her but twice, after Pyeatt bought her. At one of the times, she had run away from Pyeatt, and witness found her in the wood, and took her home. She seemed obstinate, walked very slow, and when he threatened to whip her, or she feared she would be ridden against, she walked faster, and looked wild, as negroes usually do, when threatened. She said that she had run away because she wanted to go to her children. She was raised by witness' brother, who was a kind, indulgent master. She was at all times sound of mind, as far as witness could ascertain.

Another witness had seen the negro twice. She was obstinate and disagreeable, because she wanted to go to her children. She seemed much devoted to her children, and when her mistress gave her time, would make clothes, and knit for them. Witness staid a day at Pyeatt's, and she prepared and set the dinner. She was of sound mind, as far as he knew.

Another witness stated, that shortly before Buchanan sold the slave to Pyeatt, he brought her to witness' house, to sell her, and left her there, where she staid a week. She was sound of mind, as far as he could ascertain, but while she was there he went away, and did not return until she was gone. He saw her again, after Spencer had bought her, when she ran away, and came to witness' house. Spen- caught her, and chained her. Witness then, for the first time, discovered that she was deranged. He again met her, in the fall of 1839, when she had run away from a person to whom Spencer had sold her. He afterwards saw her at another place, cutting wood. She told him she had started to go to her children.

Another witness stated, that in the summer or fall of 1841, he examined her, and believed her to be deranged. Derangement is produced from various causes. It might have been produced by severe whipping; but such whipping as was described in this case, would not produce it in one case in a thousand. Strong attachment for her children, and grief at being separated from them, with severe chastisement, would be more likely to produce it.

In the spring of 1840, Spencer tendered the slave to Pyeatt, who refused to take her back.

The defendant moved for a new trial, on the ground that the verdict was contrary to the evidence, and the instructions of the court; and also, on an affidavit, that he was surprised by the testimony of one witness, who would, on a new trial, modify his testimony so as to give it an aspect entirely different.

The motion being overruled, he embodied the testimony, excepted, and appealed.

Pike & Baldwin, for the appellant. There was not the slightest evidence that Pyeatt knew the negro to be insane, when he sold her, even if such were the case. He could not be made liable, unless he *knew* the defect; and, therefore, the issue was properly framed.

With respect to express warranties, all that can be reasonably required of the seller, is, that he be guilty of no deception, or unfairness, in the representations which he makes to the buyer. If the representation is *positive*, he is bound by it; but if he state that which he *be-*

lieves to be true, giving the purchaser at the same time to understand that he has no absolute knowledge on the subject, he is not bound, unless he knew of the defect. *Rand's Long*, 211; *Dunlap vs. Waugh*, *Peake's Rep.* 123; *Wood vs. Smith*, 5 *M. & R.* 124; *S. C.* 4 *C. & P.* 45.

If a seller of a horse says, "I never warrant, but he is sound, as far as I know," he is liable if he *knew* the unsoundness, but not otherwise. *Wood vs. Smith*, *ub. sup.*

A party may give either a general warranty, or a qualified warranty. By a general warranty, he warrants at all events. But it is qualified warranty, if he only warrants the animal sound, for all he knows. *Wood vs. Smith*, 4 *C. & P.* 45; *Case vs. Boughton*, 11 *Wend.* 106; *Whitney vs. Sutton*, 10 *Wend.* 441; *Cook vs. Mosely*, 13 *Wend.* 278.

To constitute a warranty, the representation must be one which the vendee relies on, *and which is understood by the parties as an absolute assertion*, and not the expression of an opinion. *Duffee vs. Mason*, 8 *Cowen*, 25; *Chapman vs. Murich*, 19 *J. R.* 290; *Swett vs. Colgate*, 20 *J. R.* 203; *Roberts vs. Morgan*, 2 *Cowen*, 138; *Oneida Man. Co. vs. Lawrence*, 4 *Cowen*, 442.

There was a total failure to prove that the slave was unsound, when Pyeatt sold and delivered her. The testimony is very strong that she was then sound; and it is very doubtful whether the inhuman punishment inflicted on her by Spencer, with other circumstances, did not cause the insanity, after she was bought by him.

In an action on a warranty, the plaintiff must prove, *clearly* and positively, the breach of it at the time of such warranty. The unsoundness must be proved to have existed *at the time of sale;* and it will not be enough to show that there was an *opinion*, merely, of unsoundness. If the evidence merely leaves it doubtful whether the property was unsound or not, at the time of sale, the plaintiff cannot recover. *Eaves vs. Dixon*, 2 *Taunt.* 343; *Myers vs. McFarlane*, 2 *Tr. Const. Rep.* 686; *Rouple vs. McCarty*, 1 *Bay.* 480.

Insanity is essentially a bodily disease, and moral causes operate in producing it, as they do in producing other complaints. Injuries to the head, fever, suppressed discharges and secretions, misfortunes,

gusts of violent passion, and the protracted indulgence of grief, terror, and sudden fright, may produce it. *Shelford*, 59, 60.

There was no sufficient evidence that the negro was insane, at all. No professional man was examined, nor were any facts stated to prove her insanity. The evidence simply amounted to a general statement, that she was insane. To what extent, or what way the disease developed itself, is not stated.

There are some states of the mind, which, though they resemble insanity, cannot be properly so called. Such are extreme absence and abstraction of thought, great peculiarity of actions or opinions, ungovernable impetuosity of temper, and unreasonable fears and timidity. *Shelford* 48.

There is no evidence as to what form the insanity assumed—whether it was melancholy, monomania, demency, or idiocy. Nor is there any evidence whether it was curable or not. For insanity is as curable as any other disease to which mankind are subject. It arises from deranged bodily functions, not mental affections; and may be removed by *kindness* and proper attention, though not by whipping and salting. *Shelford*, 73, 74, 75, *to* 83, *introduction*.

Insanity must be proved, by clear and unexceptionable evidence. *Particular acts of madness* must be given in evidence, and not general evidence that the party is insane. *Shelford*, 35, 36; *Clarke vs. Periam*, 2 *Atk.* 340; *People vs. Tripler*, *Wheeler Cr. Cas.* 49; *People vs. De Graff*, *id.* 203; *Dickinson vs. Barber*, 9 *Mass.* 225.

And its existence must be proved, not by one instance of unreasonable conduct, but by reiterated acts, and a multiplicity of actions; by the testimony of persons who have been attentive observers of them; for it is an *habitual* state or disposition, and a permanent affection of the mind. *Shelford*, 36.

There may be a partial insanity, as where the patient is merely under a delusion; or a total insanity, as where he is raving mad. *Shelford*, 40, 41, 42. There is no evidence as to the nature of the *derangement*, in this case.

The rule of evidence, in regard to insanity, is the same as in other cases. *Facts* must be stated to the jury, from which they may determine the question of insanity. The facts cannot be stated to medical

men, and their opinion taken as to whether they constitute insanity, or not. *Shelford*, 62; 1 *Dow. P. C.* 179; *Rex vs. Wright*, 1 *Russ. & Ry.* 456; *Dew vs. Clark*, 3 *Addams*, 79.

The medical man's evidence, in order to impress and satisfy the tribunal before which his testimony is given, *should not merely pronounce the party to be insane*, but ought to adduce sufficient reasons as the foundation of his opinion. He should have investigated, accurately, the collateral circumstances. *Shelford*, 71; *Haslam Med. Jur.* 48 *to* 51.

And if opinions as to insanity are stated, they must be given in connection with the facts on which they were formed. *Grant vs. Thompson*, 4 *Conn.* 203, 208. *Corlis vs. Little*, 1 *Green*, 232; *Crowell vs. Kirk*, 3 *Der.* 357.

Fowler, contra. An affidavit appears to have been marked filed, by the clerk, and is copied into the transcript, but the record neither shows that it was filed, or in any manner before the court; and the bill of exceptions precludes the inference that it was presented to the court below, for adjudication. It is but a loose memorandum of the clerk, or attorney, or party, and cannot be noticed by this court. *Lenox vs. Pike*, 2 *Ark.* 16, and authorities there referred to. *Coolidge vs. Inglee*, 13 *Mass.* 50; *Storer vs. White*, 7 *Mass.* 448; *Pierce vs. Adams*, 8 *Mass.* 383; *Goldbury vs. May*, 1 *Litt. Rep.* 254; *ib.* 166; 3 *Marsh.* 389; 1 *Hen. & Mun.* 376; 2 *Brock.* 75; *Col vs. Driskell*, 1 *Blackf.* 16; *Gist vs. Higgins*, 1 *Bibb R.* 304; 6 *Mass.* 323; *Bunis vs. Wise & Hand*, 2 *Ark.* 43; *Ballard et al, vs. Noaks*, *ib.* 57.

Although the evidence, as set out in the bill of exceptions, may not appear upon its face to be positively conclusive that the verdict is right, yet there being evidence tending to induce a verdict either way, the jury are the proper judges, and their verdict should not be disturbed. They are the constitutional and exclusive judges of the *manner* of testifying, the *language* of the witness, and of the *credibility*, *preponderance*, and *effect* of the evidence; and unless their verdict be *palpably* and *outrageously wrong*, the judge should never interfere, to set it aside, even though very clear, in his opinion, that he would not have found such a verdict. See *De Fonclear vs. Shottenkirk*, 3 *J.*

R. 170. *Ward vs. Center, ib.* 281. *Long vs. Perry, Hardin R.* 317. *Taylor vs. Giger, ib.* 587. 3 *Bibb Rep.* 313. *Douglass vs. Tousey,* 2 *Wend.* 352. 4 *Hayw. Rep.* 204. *Gist vs. Higgins,* 1 *Bibb,* 304.

This court will not set aside a verdict, and award a new trial, merely on the ground that the jury found "contrary to the preponderance of testimony." *Howell vs. Webb,* 2 *Ark.* 364. *Casky vs. January, Hard. Rep.* 539. 2 *Wend.* 352. *Daniel vs. Prather, &c.* 1 *Bibb,* 480. 14 *Petersd. C. L.* 169.

To authorize a new trial, the verdict must not only be against the weight of evidence, but "so much so, that, on the first blush of it, it should shock our sense of justice and right." *ib. Hard. Rep.* 539. *Weisiger vs. Graham,* 3 *Bibb,* 313.

The power of granting a new trial, by the appellate court, "after it has been refused by the court before whom the cause was tried, ought to be very cautiously and circumspectly exercised." The revising court "cannot see the evidence in all its *minutiæ,* as it has appeared before that court." *Casky vs. January, Hard. Rep.* 539. *U. S. vs. Daniel,* 6 *Wheat.* 542. *Murray vs. Ruble,* 4 *Hayw. R.* 204. 1 *Bibb,* 304.

In *Wilkinson vs. Payne,* 4 *Durnf. & E.* 469, Lord *Kenyon* declared, and it was so determined, that "where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial, where the objection does not lie in point of law."

The manner of giving testimony is important, and it is difficult, if not impossible, to transfer it into any written statement; and the refusal of an inferior court to grant a new trial, is entitled to weight, from the superior opportunity it has had of judging of the evidence. *Gist vs. Higgins,* 1 *Bibb,* 304. 4 *Hayw.* 204.

This court will not grant a new trial, where it has been refused by the inferior court, unless it clearly appears that they have erred in refusing it; "especially where it is moved for upon the suggestion that the verdict was contrary to evidence." *McKinney vs. McConnell,* 1 *Bibb,* 241.

If there be a contrariety of evidence, the court will not set aside the verdict, and grant a new trial, although the verdict may be against

the opinion and direction of the judge who tried it, unless it clearly appears that the jury have drawn an erroneous conclusion. 1 *Petersdorff*, C. L. 169. *Ward vs. Center*, 3 J. R. 281.

By the Court, DICKINSON, J. We have given the question the most deliberate investigation; and though, as a general rule, we are not disposed to interfere with the province of the jury, where there is contradictory evidence, yet, in the case before us, we are of opinion that the proof fails to establish the facts of insanity in regard to the slave, and therefore there is no liability resting upon the defendant. It is with pain and sensibility, that the court feels itself constrained to remark, that whatever seeming wildness and aberration of mind might be perceived in the slave, it is but reasonable to suppose, was caused by grief, and the excessive cruelty of her owner.

Judgment reversed, and a trial *de novo* awarded.

FOWLER *vs.* MORE.

A writ or other process, lost or destroyed, may be supplied by parol evidence of its contents, if no better evidence thereof can be produced.

THIS was a proceeding by petition in debt, in the Pulaski Circuit Court, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. Judgment by default was rendered against Fowler, on the 14th of November, 1840. On the 11th of September, after notice given to Fowler, More moved the circuit court to supply the loss of the writ of summons alleged to have been issued, and to have been served in the case. The clerk stated that a writ of summons issued on the 27th of July, 1840, which, to the best of his recollection, knowledge, and belief, was in substance the one annexed to his affidavit: that it was returned, and in court, and among the papers, when judgment was rendered, with a return thereon very much in substance like the one on the writ so annexed: that it had been lost or mislaid, after judgment,

and had not been found after diligent search. The deputy sheriff stated that a writ came to his hands, and was served a day or two after it was issued, but on what precise day he did not recollect; and that the copy so annexed, was, to the best of his recollection and belief, a true copy. The record was supplied by the paper so annexed.

Pike & Baldwin, for the plaintiff in error. This court has touched this question, in *Smith vs. Dudley*, 2 *Ark.* 60, where the authorities were considered; and the court said, that without some provision or authority given by the Legislature, they would be exceedingly unwilling to take upon themselves to decide that a lost judicial record, which constituted the sole foundation of the proceeding, or cause of action, could be proved or verified by parol; and that such a proposition could derive no support or countenance from the principles of the common law, and that surely there was no statutory regulation in regard to the matter.

Where a record has been lost, a copy may, in some instances, be read, without proof, upon oath that it is a true copy. But to warrant such evidence, the document must be, according to the rule of the civil law, *velustate temporis aut judiciaria cognitione roborata.* 1 *Stark. Ev.* 194.

Green vs. Proude, 1 *Mod.* 117, only decides that where the court rolls had been burned, an exemplification of a recovery could be read, though not proved to be a true copy, because, said Lord HALE, as it was *ancient*, the court would not be so strict upon the evidence of it.

Thurston vs. Slatford, 1 *Salk.* 285, only shows that where a record of a conviction for recusancy had been lost, and came collaterally in question, *other* evidence might be given of it.

Knight vs. Dauler, *Hard.* 323, is very far from showing that a record can be supplied by parol evidence.

Warren vs. Greenville, 2 *Str.* 1129, was a case of presumption from length of time.

Barry vs. Bebbington, 4 *T. R.* 514, has nothing to do with the records. The point was, whether entries made by a steward, should be evidence after his death.

Dillingham vs. Snow, 5 *Mass.* 547, was a case of presumption from

length of time. So was *Stockbridge vs. West Stockbridge*, 12 *Mass.* 400.

The rule laid down in Plowden, is that "whatever the jury may take cognizance of, themselves, may be given in evidence by parol, or by copies, or by other arguments of truth." *Newis vs. Lark*, *Plow.* 411.

It was held, in *Leighton vs. Leighton*, *Str.* 210, that parol evidence could be given of the condition of records, and the manner of keeping them, *but not of the matter of them.*

Cook vs. Wood, 1 *McCord*, 139, only proves that where the records are lost, the journals of the court may be evidence. So with *Lyon vs. Gregory*, 3 *Hen. & Mun.* 237.

But if parol evidence is admissible in such a case, still the testimony of the witnesses does not show that the writ was sealed with the seal of the court. That is a fact as to which there should have been positive evidence; for, as far as appears from the record, the writ may only have borne the private seal of the clerk.

Trapnall & Cocke, contra. The same question occurred, and the principle was adjudicated by the Supreme Court of Kentucky, in the case of *Gentry and others vs. Hochcraft*, 7 *Monroe*, 242, and in the case of *Craig vs. Horine*, 1 *Bibb* 8.

The correctness of the decision pronounced in these cases is vindicated by the close analogy, in point of principle and circumstances, to the cases of *Knight vs. Dauler*, *Hardress* 323. *Sir Paul Pendar's case*, 1 *Vent.* 296. *Dillingham vs. Snow*, 5 *Mass.* 521. *Stockbridge vs. West Stockbridge*, 12 *Mass.* 414. *Thruston vs. Slatford*, 1 *Salk.* 285. In the last case, it was determined that a mis-entry on the record might be corrected and *supplied* by other evidence; and the record of conviction of the Earl of Shrewsbury, for recusancy, having been lost, the University of Oxford could be and were permitted to prove the fact, and the effect of the record, by other testimony. See the case of *White vs. Lovejoy*, 3 *Johns.* 448. *Hitts vs. Colver*, 14 *John.* 182. *Swift, in his Treatise on Evidence, p.* 3. 1 *Starkie*, 155. *Buller's N. P.* 228. 1 *Starkie*, 157-9. It is unquestionably a well settled general principle, that a matter of record cannot be proven except by the re-

cord itself, or a legal exemplification of it; but the necessity which, in many of the cases above cited, justified a relaxation of the rigor of the general principle, so as to admit secondary evidence, would authorize the admission of the sworn statements of the clerk and sheriff, in supplying the loss of the summons in this case, in the absence of the high, if not conclusive, authority of the cases of *Gentry et. al. vs. Hochcraft*, and *Craig vs. Horine*.

The same principle which would authorize the admission of inferior testimony to establish the existence, loss, contents, and effect of a record, would at least, with as much reason and fitness, justify the substitution of such evidence, and make it supply, upon the record, the chasm occasioned by the loss.

By the Court, LACY, J. This is an application to the court below to supply, by parol, a lost process. The plaintiff in error had notice of the motion, but did not appear. The clerk of the circuit court proved the issuing of the process, and the sheriff its service and return, more than thirty days prior to the first Monday of September, 1841, the time fixed by law for the holding of the circuit court to which such writ was returnable, and at which time judgment was rendered. The clerk testified that the form of the writ furnished, is, to the best of his knowledge and belief, a true copy of the original, which is lost; and although he does not state that the writ was attested by the seal of his court, yet he affixes a seal to the copy furnished, making the evidence complete as to his attestation. The sheriff also proves that he believes the copy to be a true one. Upon this proof, the court below allowed the writ to be supplied. Upon the issuing of the writ of error, the plaintiff below gave notice of the motion. The record, thus amended, has been brought into this court.

The inquiry now is, did the court below err in permitting the lost process to be thus supplied? This point is not wholly free of difficulty; but in looking into the adjudications upon the subject, we find several precedents where a lost process, or exhibit in chancery, may be proved by parol, and in the like manner as was allowed by the court in this instance. It has been considered and treated as a mere question of practice, in which the motives and temptations of official im-

propriety have been weighed against the evidence of the lost rights of suitors; and, therefore, as a matter of necessity, and to prevent a failure of justice, the rule has been established that such portions of lost records as process, and the like, may be amended by substituting, upon sufficient evidence, a copy in lieu of the original. The principle here stated does not conflict with the doctrine laid down by the court, in the case of *Smith vs. Dudley*, 2 *Ark.* 63. Where the record exists, if denied, it can only be tried by inspection. Its production is certainly indispensable, so long as it is supposed to be in existence. But if lost or destroyed, it is then competent to prove its existence by a sworn or an authenticated copy. This point is expressly decided, in *Gentry vs. Hockcraft*, 7 *Monroe*, 242; and in *Craig vs. Horine*, 1 *Bibb*, 8. And the like principle was established, in the case of *Stockbridge vs. West Stockbridge*, 12 *Mass.* 421; and *White vs. Lovejoy*, 3 *J. R.* 438; and *Hills vs. Calvin*, 14 *J. R.* 182.

Judgment affirmed.

Taylor et al. *vs.* The Auditor.

In debt by the Auditor, on a sheriff's bond, breaches assigned, that the defendant did not execute the duties of his office according to law, and that he collected and failed to pay over a given amount of money, which was due the State, are well assigned, and the plaintiff is bound to prove that the defendant *collected* the money.

A plea putting in issue such collection, is a good answer to the declaration, and should not be stricken out.

The Auditor's certificate of the indebtedness of the defendant, was not the best evidence the nature of the case admitted, and was inadmissible.

Secondary evidence will not be admitted, unless a proper shewing is made of the loss or destruction of the best testimony.

The proper evidence would have been the sheriff's receipt on the tax book, or list transmitted to the Auditor.

Although, in an action at common law on a penal bond, a default admitted the truth of the breaches assigned, yet such is not the case, under our statute. The jury must still be sworn to inquire into the truth of the breaches, and the plaintiff must prove them, as alleged.

This was an action of debt, on a penal bond, determined in the Pulaski Circuit Court, in May, 1842, before the Hon. William Gil-

CHRIST, Special Judge. Elias N. Conway, as Auditor of Public Accounts, sued Taylor, and Cook, Clemens, Roland, and Cummins, as his securities, on the bond of Taylor, as sheriff of Pulaski county. After once obtaining a judgment, which was reversed in this court, (2 *Ark.* 174), the declaration was amended, and, as amended, set out the execution of the bond by Taylor and his securities, on the 8th of October, 1833, in the penalty of fifteen thousand dollars, and conditioned in the ordinary form of a sheriff's bond, and alleged as a breach, that he *collected*, in 1834, of territorial revenue, $522 33 cents, and, in 1835, $69 49 cents, all of which he failed to pay over to any person authorized to receive it.

Cook and Roland were never served with process, nor did they ever appear. Taylor and Cummins took no step, nor appeared, before judgment, after the case returned to the circuit court. On the amended declaration being filed, Clemens filed a plea, to which the plaintiff demurred, and his demurrer was sustained, and he then amended, and pleaded that Taylor did perform all his duties as sheriff, and pay over all the revenue that came to his hands; that he did not collect, nor was there due from him, either of the amounts mentioned in the declaration, or any part of either, and so did not fail to pay over, as alleged. This plea was stricken out, on motion of the plaintiff, discontinuance as to Cook and Roland, default as to Taylor and Cummins, judgment *nil dic.* as to Clemens, and a jury sworn to inquire into the truth of the breaches, and assess the damages. The jury found the breaches true, and assessed the damages to the sum of $948 64 cents. Judgment for $15,000, debt, and the costs, and that execution go for the damages. Clemens appeared, on the inquiry of damages, and objected to the reading of the bond offered, because it was executed by other securities besides those sued, of whom no mention was made in the declaration. The objection was overruled, and the plaintiff then offered two certificates, signed by the Auditor, one certifying that, from the books of his office, it appeared that Taylor, as sheriff, was indebted to the treasury, for revenue of 1834, $522 33, and the other, that it likewise appeared that he was indebted, for the revenue of 1835, $69 49, each accompanied with an account stated, and each under his seal of office. Clemens objected to the reading

of these papers, but his objection was overruled. This was all the evidence. The court refused to instruct the jury, as asked by Clemens; that, if they believed, from the evidence, that Taylor received money in respect of revenue due the territory, and failed to pay over, as alleged in the breaches, they might find the breach or breaches true, but otherwise, not; and instructed them, on plaintiff's motion, that, by the state of the pleadings, the truth of the breaches was admitted; that the certificates of the Auditor sustained the breaches, if the jury believed them; and, that the plaintiff, if the jury believed the evidence, was entitled to 25 per cent. damages, and also legal interest from the time the moneys became due. Clemens embodied the evidence and instructions in a bill of exceptions, and the defendant brought error.

The case was argued here by *Cummins* and *Blackburn*, for the plaintiffs in error, and *R. W. Johnson*, Atto. Gen., contra.

By the Court, LACY, J. Whether the bond produced supported the allegation or not, we do not deem it necessary to inquire.

The plaintiff below, in assigning his breaches, has taken upon himself to allege, that the defendant has collected the money sued for, and he, of course, is bound to prove the averment, as he made it, by his election, material. And that fact has been directly put in issue by the plea of Clemens, which it was error to strike out, as it was a good answer to the declaration.

The admission of the Auditor's certificate of indebtedness is, certainly, not competent evidence to charge the defendant, or his securities. We have no statutory provision making the certificate evidence, and it is certainly no proof, according to the principles of the common law. It is not the best evidence the nature of the case admits of; which is a universal rule, without exception. Secondary evidence is never resorted to, unless the higher grade cannot be produced; and, even then, it cannot be introduced, unless a proper ground be laid for its admission, showing the destruction or loss of the best testimony. The evidence, to have substantiated his indebtedness, should have been Taylor's receipt, on the tax-book, or list transmitted

to the Auditor, and for which he stands charged, after deducting the credits of delinquencies, lands stricken off to the territory, commissions, and the like. The instruction of the court was evidently wrong, in deciding that the truth of the breaches was admitted to be proven by the state of pleadings in the cause.

This is unquestionably true, according to the principles of the common law, but our statute has changed the rule upon the subject. Clemens' plea, as before remarked, was improperly stricken out, which would have put in issue the truth of the breaches; and the plaintiff had no right to recover, unless he proved the collection, as charged. The seventh section of the act (*Rev. St.*, *Chap.* 112,) declares, that, where an action is prosecuted, upon a penal bond, for the non-performance of any covenant, the plaintiff shall assign breaches; and, if judgment is obtained upon the demurrer, by confession or default, the court shall thereupon make an order, that the truth of the breaches shall be inquired into, and the damages assessed at the same, or the next succeeding term. This section clearly shows that it was necessary to prove the breaches, as laid.

Judgment reversed.

HAWK *vs.* WALWORTH.

Where A. makes a written contract with B. to build a gin for him, on certain terms, he cannot sue him for work and labor done; nor, if such suit is brought, can he show, by oral testimony, that the work was or was not executed and completed according to the contract.

THIS was an action of assumpsit, tried in the Chicot Circuit Court, in May, 1842, before the Hon. ISAAC BAKER, one of the circuit judges. Hawk sued Walworth, in assumpsit, on a single count, for work and labor. The case was tried by a jury, on the general issue.

On the trial, a witness, refreshing his memory by a written contract, under seal, made between Hawk and Walworth, by his agent,

Aaron Register, testified that he was present when the contract was made between Hawk and Register, then the overseer and agent of Walworth, and detailed all the stipulations of the contract. The contract itself was not read in evidence. It was agreed, by the contract, that Hawk should build a gin-house for Walworth, of certain dimensions and description; that Hawk was to get out certain timbers, and Walworth was to haul them, and a mill was to be attached to the gin; that the work was to be done in substantial and workman-like manner, by the 1st of June, 1841 ,and Walworth was to pay him $600 for it, so soon as it was done; and, that Walworth was to furnish board, lodging, and washing, for Hawk, while the work was doing.

After this evidence was introduced, the plaintiff proposed to ask the witness whether Hawk had executed and completed the work according to contract. The court refused to permit this question to be put, or any other evidence to be introduced, and so nonsuited the plaintiff, who sued his writ of error.

Pike & Baldwin, for the plaintiff in error. The court below wholly mistook the law. The question proposed to be asked was a proper one, and, if answered in the affirmative, would have shown a clear right in the plaintiff to have maintained his present action.

It is now incontrovertibly settled, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract, whether under seal or not, *where the contract has been completely executed;* and that it is not necessary, in such case, to declare on the special contract. *Poole et al. vs. Tuttle*, 2 *Fairf.* 467. *Alcorn vs. Westbrook*, 1 *Wils.* 117. *Harris vs. Oke, cited Doug.* 651. *Payne vs. Bacomb, Doug.* 651. *Reyes vs. Stone*, 5 *Mass.* 561. *Felton vs. Dickerson*, 10 *Mass.* 287. *Gordon vs. Martin, Fitz.* 302. *Meles vs. Moody*, 3 *Serg. & R.* 211. *Porter vs. Talcot*, 1 *Cowen*, 359. *Bank of Columbia vs. Patterson's Heirs*, 7 *Cranch*, 299. *Mussen vs. Price*, 4 *East*, 147. *Cook vs. Munstor*, 4 *B. & P.* 351. *Clark vs. Gray*, 6 *East.* 564, 569. 2 *Saund.* 350, *n.* 2. *Ches. and Ohio Can. Co. vs. Knapp*, 9 *Pet.* 541. *Perkins vs. Hart*, 11 *Wheat.* 237. *Sewell vs. Schræppel*, 4 *Cowen*, 566. *Feeter vs. Heath*, 11 *Wend.* 477. *Dubois vs. Del. and Hud. Can. Co.*, 4 *Wend.* 285. *Kelly vs. Foster*, 2 *Binn.* 4. *Sykes vs.*

Summerel, 2 *Browne*, 227. *Snyder vs. Castor*, 4 *Yeates*, 353. *Moorman vs. Graffenreid*, 1 *M. Const. Rep. So. Car.* 195. *Rye vs. Stubos*, 1 *Hill*, *So. Car.* 384. *Streeter vs. Horleck*, 1 *Bing.* 37. *Studdy vs. Sanders*, 5 *B. & C.* 633. *Neal vs. Viney*, 1 *Camp.* 471.

There are old cases sustaining the judgment of the court below. *Weaver vs. Boroughs*, 1 *Str.* 648.

But this was when it was the fashion to lay hold of a nonsuit, whenever it could be done. It is far from being law, now. In order to preclude the party from recovering on the common count, the special contract must be *open*, *unexecuted*, and *unrescinded*. *Russell vs. South Britain Soc.*, 9 *Conn.* 508. *Hayward vs. Kain*, *Mood. & Malk.* 311.

By the Court, Dickinson, J. The principle, that the best evidence the nature of the case will admit of must be produced, is so familiar that it may now be regarded as a universal maxim, subject only to such exceptions as show the rule can be dispensed with, when there is a loss or destruction of the higher grade of evidence; and, when that is the case, secondary testimony may be introduced. The court unquestionably decided correctly, in admitting the written evidence offered, and excluding the secondary, which was oral, from the jury. The proof shows, that the action was misconceived, and that the party must resort to his higher security.

Judgment affirmed.

Patton & Stewart *vs.* Walcott.

By repealing a portion of the Revised Code, concerning *delivery bonds*, the Legislature totally destroyed the summary mode of proceeding on them, when forfeited.

The plaintiff must either bring an ordinary suit upon the bond, or pursue his statutory remedy against the property.

But he may file his declaration at the term when the bond is returned, and the obligors will be bound to appear without process, they being held to have the same notice as though process was served.

THIS was a judgment obtained by mere motion, on a delivery bond, in the Chicot Circuit Court, in December, 1841, before the Hon. WILLIAM K. SEBASTIAN, one of the circuit judges. The bond was given for the delivery of negroes.

Ashley & Watkins, for plaintiff in error. The judgment in this case was rendered, on summary motion, on a forfeited delivery bond, under the 40*th* and 41*st sections of the Revised Statutes, title "Execution,"* *p.* 380. The 39th, 41st, 42d, and 45th sections of the law of executions, were repealed by the act of 3d December, 1840. The repeal of the 41st section virtually took away the power of the court to act or render judgment upon the summary motion, but left the plaintiff to his remedy, by ordinary suit upon the bond. Could the defendant or his security be considered, in court, so as to authorize judgment to be rendered against them, on motion, without process or notice? The remedy, being given by statute, and in derogation of the common law, must be strictly pursued; and, the sections regulating the proceedings on summary motion being repealed, the court had no power to adjudicate.

The law requires a reasonable certainty in the statement of the plaintiff's ground of complaint. 1 *Chit. Pl.* 267, 268. The motion should have been in writing.

The delivery bond misdescribes the execution and judgment.

The statute permits a delivery bond to be given for *personal property*, and prescribed the mode of ascertaining the value. By an act of the General Assembly, approved 28th December, 1840, slaves are in terms declared to be *real estate*. Was not the bond, in this case, void, being given for the delivery of a negro slave, for life?

Though the bond may be good, as a common-law obligation, it is not good as a statutory obligation, upon which a summary motion could be sustained.

Trapnall & Cocke, on the same side. The 37*th section of the* 60*th Chap. of the Revised Code*, authorizes the sheriff to take a delivery bond from the defendant, in an execution, after a levy of an execution on "*personal property.*" The 8th section of the act of 1840, entitled

"an act defining the judicial circuits of this State, and prescribing the time of holding the courts therein, and for other purposes," declares that slaves are, and shall hereafter descend and be holden as, *real estate*, and thereby necessarily excludes slaves from the operation of the section in the Revised Code, above referred to, and withdraws all statutory authority from the sheriff to take a bond for the delivery of slaves, upon the day of sale.

Admitting that the bond might, at common law, be obligatory, and that the obligor would be responsible for the failure to deliver. The remedy by motion, given by the statute, could not apply to such a case, but the party must resort, for relief, to the ordinary common-law remedy of an action of debt or covenant.

The judgment is for so much debt, so much damages, and so much costs and interest on the debt amd damages, from a date long before the bond was given. The sum mentioned in the bond is in gross, and without any obligation to pay preceding or accruing interest. There is no correspondence between the two, although one is the foundation of the other.

By the Court, Dickinson, J. The statute (*Rev. Code, sec.* 37, 38, *Chap.* 60,) authorizes the defendant, when a levy is made upon his property by execution, to "retain possession until the day of sale, by giving bond, in favor of the plaintiff, with sufficient security, to be approved by the officer, in double the value of such property, conditioned for the delivering of the property to the officer at the time and place of sale, to be named in such condition; and that, if the property be not delivered according to the condition of the bond, the levy shall remain a lien upon the property taken for the satisfaction of the judgment, into whose possession soever the same may have passed." The 40th section of the same act provides, that, "if the condition of the bond be broken, and the execution be returned unsatisfied, the plaintiff may, at his option, bring an ordinary suit on the bond." The 39*th*, 41*st*, 42*d*, *and* 45*th sections of Chap.* 60, *of the Revised Code*, upon the subject of executions, are expressly repealed, by name, by an act of the General Assembly, passed at Nov. session, 1840, which takes away the remedy, by motion, when the condition of the delivery

bond is broken, and changes the rate of damages and the mode of appraisement of the property levied upon. By repealing the 41st section, the Legislature totally destroyed the summary mode of proceeding upon a delivery bond, when the condition of it was broken; and that express declaration, by the Legislature, necessarily repeals that portion of the 40th section which has reference to judgments being taken in this summary mode; thus leaving the party to his common-law remedy, by bringing an ordinary suit upon the bond, or to pursue the property as provided for in the 38th section of the act, which declares that the levy shall remain a lien upon the property taken for the satisfaction of the judgment, into whose possession soever the same may have passed; or to prepare his declaration upon the bond, and file the same on the return-day of the execution, or on any subsequent day of the term at which the execution is returned; and the defendant and his security shall be deemed to have notice of the facts, that the condition of the bond has been broken, and the execution returned unsatisfied, thereby rendering the issuing and service of process unnecessary, as he is presumed to have notice of the facts to the same extent as if process was served. The proceedings, in this case appear to have been summary, on motion, without the form of pleading, and therefore clearly erroneous.

Judgment reversed.

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RIVES *vs.* PETTIT, ET AL.

Where one circuit judge interchanged courts with another, under authority of an act of the Legislature, invalid, because it prescribed a *permanent*, and not a *temporary* interchange of courts, the parties having voluntarily submitted to his jurisdiction, and not attempted to question his authority, HELD that his acts were *valid*.

Upon general principles, the acts of a judge, exercising his power by virtue of an act of the Legislature, would be valid as to the public and third persons, though the law were afterwards decided to be constitutional.

THIS was a case determined in the Chicot Circuit Court, in December, 1841, before the Hon. WILLIAM K. SEBASTIAN, one of the circuit

judges. Only one question was presented in this, and many other cases, decided at the present term. Under the act of the Legislature, declared unconstitutional in *Knox vs. Bierne & Byrnside, ante p.* 460, the Hon. ISAAC BAKER, Judge of the Second Judicial Circuit, which includes the county of Chicot, changed with the Hon. WILLIAM K. SEBASTIAN, Judge of the First Judicial Circuit. The record, in this particular case, stated the proceedings to have been had before "the Hon. WILLIAM K. SEBASTIAN, *Judge of the Chicot Circuit Court.*" The questions arising in the cases were argued in the several cases by different attorneys of the court, and the Reporter presents all the arguments, in this case, which can be printed under the rule of the court.

Ashley & Watkins, for the plaintiff in error. The only question arising, is, whether this court will, *ex officio*, take notice of the fact, that at the time this judgment was rendered, Isaac Baker was Judge of the Second Judicial Circuit, of which the county of Chicot is one, and that William K. Sebastian was Judge of the Second Judicial Circuit.

There is no question but that a court is bound to know all public laws and customs, and matters of general notoriety.

The rule laid down by the court of King's Bench, in *Hook vs. Shipp*, 2 *Str.* 1080, that they are not obliged to take notice, judicially, who are the judges of Westminster Hall, except those of their own court, has been modified to some extent, in the case of *Ripley vs. Warren*, 2 *Pick.* 592.

The courts take notice of the civil divisions of the State; *People vs. Reese*, 7 *Cowen*, 429. 2 *Ins.* 557. *Comb.* 460. of its officers, *Ogle vs. Norcliffe*, *Ld. Raym.* 869. 6 *Mod.* 74. of its own attorneys, *ex parte Hore*, 3 *Dowl.* 600. 1 *Chit.* 240. 1 *Stark.* 444. This court is then bound, judicially, to know the several circuits into which the State is divided. Would it also know whom the Legislature had elected for each circuit?

The constitution invests the Supreme Court with a superintending control over the circuit courts. A circuit court refuses to obey the

mandate of this court, then dies or resigns, would this court attach the successor for his contempt, or take notice of the vacancy?

But how is this disqualification to be made to appear upon the record? If by plea, then the judge claiming the right to sit as such, would be called upon to decide as to his own disability. No objection to his presiding was necessary, because the consent of the parties could not invest him with judicial power and authority. No objection was made in the case of *Blackmore et al. vs. State Bank*, 3 *Ark.* 309, in which the judgment was pronounced a nullity, and the proceedings *coram non judice.*

But another grave question is thought to be raised by the record; that is, that Sebastian, being Judge of the Chicot Circuit Court, though under an unconstitutional and void act, yet held that office under *color of right*, and being the judge, *de facto*, though not *de jure*, his judgments are valid as respects third persons. A circuit judge has no power or authority to do any act out of his own circuit. *Auditor vs. Davis et al.* 2 *Ark.* 502. See *The People vs. White*, 24 *Wend.* 539, 540, 541. Opinion of Chancellor WALWORTH, *J. J. Marshall*, 205, 206.

If Sebastian held that court voluntarily, and without reference to the law, he was the officer, *de facto*, of an unconstitutionally organized court; and if he held it by virtue of the law, he was the officer, *de jure*, of an illegally organized court. In either view, his acts are utterly void, because he was not an officer, *de facto*, who comes into a legal and constitutional office, *by color* of a legal appointment or election to that office, as in the case of a judge or officer informally elected, or whose commission is informal, or who has not been properly qualified; in which case all his acts would be valid as to third persons, until ousted by *quo warranto.*

Hempstead & Johnson, also for the plaintiff in error. The first important question is, of what the courts are bound to take notice, which cannot be better ascertained than by referring to authorities, and drawing the analogy from them.

In *Creighton vs. Bilbo*, 1 *Monroe* 138, it is said the court will judicially notice geography and history; in *Evans vs. Benton*, 3 *Monroe*

387, that the court will take judicial notice that certain persons are officers of government, even when the name of office is not inserted in their official acts.

The court will judicially take notice of the general course of business and transactions of human life. *Duncan vs. Littell*, 2 *Bibb* 426. 1 *J. J. Marsh.* 290.

If gold and silver have ceased to be the circulating medium, the court will judicially know the fact. So the character of the circulating medium, and popular language in relation to it; and any change in the popular meaning of words, the court will judicially know in construing contracts made at different times. *Lampton vs. Hazzard*, 3 *Monroe* 149.

The court will, *ex officio*, take notice of mutations in language. 1 *J. J. Marsh.* 287.

The courts take judicial notice of the civil divisions of the State, by statute. *People vs. Bruges*, 7 *Cowen* 449.

The courts at Westminster will take judicial notice of the proceedings of the courts of the counties palatine, as well as of the courts of great sessions. *Peacock vs. Bell*, 1 *Saund.* 74.

This court took judicial notice of the process of the great sessions. *Ibidem.*

Our courts can take notice, *ex officio*, of the laws of a sister State. *Foster vs. Taylor*, 2 *Tenn.* 191.

The courts are bound, *ex officio*, to know the *officers* of government appointed by the Legislature. *Bennett vs. The State*, *Martin & Yerger's Rep.* 133.

The courts are presumed to know their own laws, and officers appointed under those laws. *Stinson's Lessee vs. Russell*, 2 *Tenn.* 40.

This court is bound judicially to know that the Auditor of Public Accounts keeps his office at the seat of government, in the city of Little Rock. *Auditor vs. Davies*, 2 *Ark.* 494.

Courts will take judicial notice of *public laws*, without pleading. *Packard vs. Hill*, 2 *Wend.* 411. 1 *Stark. Ev.* 170. 2 *Salk.* 566. 1 *Stra.* 498. *Bca. Abr. Ev. F.* 1 *John. C.* 132. *State vs. Ashley*, 1 *Ark.* 513.

In Louisiana, the courts recognize the signatures of judicial officers

appointed by the Governor, by and with the advice and consent of the Senate. *Despan vs. Swindler*, 3 *Martin* 705.

The signatures and official characters of the ancient Governors of Louisiana, are matters of public notoriety; and evidence of the genuineness of the former is not required. *Jones vs. Gale*, 4 *Martin* 635.

The signature of an officer to a bond which he is bound to take, proves itself. *Wood vs. Fitz*, 10 *Martin* 635.

We think it must be conceded, on reason and authority, that the courts are bound, *ex officio*, to notice all the judicial officers in the State.

The only question, therefore, is, are the acts of Baker or Sebastian good out of their respective circuits, as being officers, *de facto?*

Let us see how and where the distinction between officers, *de jure*, and *de facto*, originated.

During the reign of Henry the 6th, in 1422, the House of York asserted their dominant title; and after embruing the country in blood for seven years together, at last established, in the person of Edward the 4th. At his accession to the throne, after a breach in the succession that continued for three descents, and above three score years, the distinction of a king, *de jure*, and a king, *de facto*, began to be first taken, in order to indemnify such as had submitted to the late establishment; and to provide for the peace of the kingdom, by confirming all honors conferred, and all acts done by those who were now called the usurpers, not leading to disherison of the rightful heir. In *statute* 1, *Edward* 4, *c.* 1, the three Henrys are styled "late kings of England, successively, *in dede*, and *not of right*."

This is Blackstone's account of the origin of the distinction. 1 *Bl. Com.* 204.

In the case of *The King vs. The Corporation of Bedford Levee*, 6 *East.* 368, *an officer, de facto, is defined to be one who has the* REPUTATION *of being the officer he assumes to be, and yet is not a good officer in point of law. Parker vs. Kett*, 1 *Ld. Raym.* 660, 661.

The principle for which we contend in this case, is, that the mere *possession* of an office, and *acting therein*, can never constitute an officer, *de facto*. There must be some *form of election*, otherwise it is clear *usurpation*. *King vs. Lyle*, 2 *Str.* 1090. 16 *Vin. Abr.* 144.

In *The People vs. Collins*, 7 *J. R.* 551, it is manifest there was an election, and also a swearing into office.

Such was also the case, in *Parker vs. Kett*, 1 *Ld. Raym.* 658.

Even in the case of an election, *merely colorable, without right, and clearly void*, the court ought to grant a mandamus, and not inquire into it by *quo warranto*. *Rex vs. Banks*, 3 *Burr.* 1454. *Rex vs. Cambridge Mayor*, 4 *Burr.* 2008.

Sebastian had no color of right, by virtue of any previous election, to hold any court in the *Second* Judicial Circuit; and his acts therein, as judge, were arbitrary and voluntary, because the Legislature have made no regulations respecting the judges of the circuit courts temporarily exchanging circuits, or holding courts for each other. *Const. sec.* 6, *art.* 12.

The provisions, therefore, that a judge shall be elected *for each circuit*, and who, during his continuance in office, shall reside and be a conservator of the peace within the circuit *for which he shall have been elected*, stand in full force, and entirely independent of the clause authorizing an exchange, inasmuch as the Legislature have never prescribed the regulations alluded to in that clause of the constitution. *Const. sec.* 4, 5, *art.* 6.

If it is admitted that reasons of public policy require that the acts of *de facto* ministerial officers should be held good, it by no means follows that the same principle should extend to *de facto* judicial officers.

The reason is obvious; the mere ministerial officer executes what the law commands, and he has no discretion. If he is too hasty or too negligent, he is responsible. If he is guilty of official misfesance, malfeasance, or nonfeasance, whereby the rights of third persons are affected, he is not only amenable to the aggrieved party, in a pecuniary point of view, but may be removed from office. In fine, his acts constitute no precedent for his successors.

With a judge, it is far different. He is invested with an ample discretion; for his judgments he is not amenable to the parties themselves; and, in short, few things short of absolute corruption, can put the tardy and unwieldy machinery of impeachment in motion against him. More than all, his judgments, orders, and decisions, form a pre-

cedent for after times; for to the records of our courts we must look for what the law is.

Trapnall & Cocke, contra. Although the act of the last Legislature, requiring the judges to interchange circuits, has been declared unconstitutional, still it cannot affect the valididity of the judgment in this case, for two reasons: 1st, Because the objection is not presented by the record. So far as it appears before this court, William K. Sebastian was the Judge of the Chicot Circuit Court, at the time of the trial of this cause. This court will not look to any thing dehors the record, impeaching the authority of Judge Sebastian to preside in the Chicot Circuit Court. Nor can this court judicially know the individual judges who preside over the respective circuit courts of this State. 1 *Chit. Pl.* 252. *Str.* 1226. *People vs. White*, 24 *Wend.* 540, 567, 568. And 2d, Because the acts of Judge Sebastian, while presiding in the Chicot Court, were the acts of a judge *de facto;* and, as such, will be valid. He exercised the functions of that office, under an act of the Legislature, conferring upon him authority to hold that court. He cannot, therefore, be considered an intruder into the office. He came in under color of legal right and public policy; and the security and permanency of individual rights alike require, in such cases, that the acts of the court should be held valid, and that the rights acquired under its adjudications should be protected and secured. *People vs. White*, 24 *Wend.* 520. *Wilcox vs. Smith*, 5 *Wend.* 231. *McInstry vs. Tanner*, 9 *J. R.* 125.

Pike & Baldwin, also contra. The principle that the acts of officers, *de facto*, are valid, applies as well to judges as to other officers. *The People vs. White*, 24 *Wend.* 520, 564. *Browning vs. Wheeler*, 24 *Wend.* 558. *Wilcox vs. Smith*, 5 *Wend.* 231. *The People vs. Collins*, 7 *J. R.* 549. *McInstry vs. Tanner*, 9 *J. R.* 125. *Potter vs. Luther*, 3 *J. R.* 486. *Reed vs. Gillett*, 12 *J. R.* 296. *King vs. Lisle*, *And.* 163. *Keyser vs. McKissam*, 2 *Rawle*, 139. *McKim vs. Somers*, 1 *Penns.* 297. *Mayo et al. vs. Stoneum*, 2 *Ala. N. S.* 390.

The principle of law in regard to all officers, judicial as well as ministerial, wise, salutary, and necessary, is this, that the acts of all pub-

lic officers, having the *presumptive* evidence of title by law, commission, election, or otherwise, and the actual possession of office, are valid, as far as they affect the interest of the public or third parties, and that they cannot be impeached collaterally; that the validity of acts of public officers shall not be impeached collaterally, on the ground that though they are in possession of office, and have entered upon it without usurpation, and under presumptive evidence of title, they are rightfully so in possession. *The People vs. White*, 24 *Wend.* 564. *Fowler vs. Beebe*, 9 *Mass.* 234. *Bucknam vs. Ruggles*, 15 *Mass.* 180. *Taylor vs. Skrine*, *Tr. Const. Rep.* 696.

An officer, *de facto*, is one who comes into a legal and constitutional office, by *color* of a legal appointment or election. 24 *Wend.* 539.

By the Court, Dickinson, J. The record in this case states that the proceedings were had before a particular judge, by name, and it is contended that this court is bound to know that he was not commissioned for the circuit in which he presided, and, therefore, his acts were *coram non judice*, and utterly void. This case is peculiarly situated, and bears but little analogy to any one that has been previously decided by the Supreme Court of the United States, or any of the several courts of the Union. It must, therefore, be investigated and determined upon its own particular state of facts. The officer who presided, was acting in obedience to the authority of the Legislature, which this court has declared to be invalid, not because the General Assembly had not ample and plenary power over the subject upon which they legislated, but because in attempting to prescribe an interchange of circuits, they exceeded that power, in making the rule permanent and not temporary. The circuit court, in this instance, is a constitutional court, and always *in esse*. The judge who presided, was ineligible to the exercise of the office, for the time being. The inquiry now is, were his acts nullities, and absolutely void, as to third persons and the public, on this account, and that, too, in a case where the parties voluntarily submitted to his jurisdiction, never attempting to question his power? Do his acts bind until his power is vacated by a regular judicial process and trial? or is it lawful for each citizen, individually, or the community, in its aggregate capacity, to resist and

annul his authority? To whom belongs the power of rightly investigating, and finally settling, the constitutionality or unconstitutionality of an act of the Legislature? to the people or the judiciary? The inquiry solves the question. If to the people this power appertains, then the authority of the government, while its acts are in the progress of execution, is subject to the dominion of arms, and not to the rules of law. This view of the case is strengthened by the consideration that should the Legislature proceed to elect a person to fill the office of judge, who, by the constitution, was disqualified to hold it, and should the Governor commission him under this illegal election, and he take possession of the office and administer justice, and afterwards his commission should be vacated, would his acts in the mean time not bind third parties and the public? They unquestionably would. Now, in the case supposed, the officer would be unconstitutionally elected and commissioned, but how could that affect his acts and proceedings, until his authority and commission were regularly and properly abrogated? His acts for the time being must be binding, because he was inducted into the office under the appearance of right, and by authority of law, and an executive commission. And each department of government is bound to show that kind of deference and respect to the acts of the others that are clothed with regular authority, although it may turn out, upon future inquiry, that authority was improperly and unconstitutionally exercised. The case at bar stands upon a like principle and parity of reason. And if the acts of the officer in the case put, would be good against third persons or the public, the proceedings of the judge, in the present instance, cannot be absolute nullities. If this is true as a general proposition, it must be especially so when applied to the peculiar facts of this case. Here the suitors submitted themselves to the jurisdiction of the judge, and never caused any statement to be made, by which it expressly appears that the interchange of riding took place under the regulations attempted to be prescribed by the Legislature; nor was his authority in any manner impeached or called in question. If any hardship or injustice were about to be perpetrated, it was not only competent, but perfectly lawful, upon such suggestions, for the party to have proceeded in a proper manner to have caused his legislative authority to have been set

aside. It is too late now to take advantage of this defect or omission; for if such indulgence was allowable, the constitution and the laws, instead of providing a shield for the protection of private right, might be converted into a weapon of offence against the peaceful and successful operations of the government. Such a state of things would never be permitted or allowed by a court of justice, entertaining proper respect for the other two departments of the government; especially by the judiciary department, of which this court is the last arbiter and expounder of the constitution and laws themselves, under which life, liberty, and property, are preserved, not only to be protected, but rendered inviolably secure.

Judgment affirmed.

Levy *vs.* English.

Held, that, where there was an omission, in this court, to enter a judgment for costs, where such judgment was proper, it will be entered at a subsequent term.

Bailey *vs.* Ralph.

Held, that if, in replevin, there is judgment for the defendant, *de retorno habendo*, and an order for a writ of enquiry to assess damages, there is no final judgment from which an appeal lies to this court.

McKiel et al. *vs.* The Real Estate Bank.

The act of March 3d, 1838, authorizes the Real Estate Bank to charge the same rate of interest as the State Bank, and is not repealed, as to the Real Estate Bank, by the act of December 10, 1838.

In a suit by the Real Estate Bank, it is not necessary to prove her corporate existence, on the general issue. The court judicially knows it.

In a suit against the maker of a note payable at a particular place, it is not necessary to prove a demand at the place.

This was an action of debt, tried in the Phillips Circuit Court, in December, 1841, before the Hon. Isaac Baker, one of the circuit judges. The Bank sued Josiah S. McKiel and his securities on two notes, one for $1800, due at six months from the 19th of December, 1839, and one for $2000, due at six months from the 21st day of November, 1839.

The defendants pleaded usury and the general issue of *nil debet*, not sworn to. Each plea of usury stated, that the note was given to the Bank to obtain a loan, and each amounted to this: that the notes had six months and the days of grace to run, and were discounted for that length of time, the Bank reserving interest in advance, at the rate of seven per centum per annum, instead of six per centum per annum, which the plea alleges was all she was, by law, entitled to receive.

The plaintiff demurred to the plea of usury, and joined issue to the plea of *nil debet*. The demurrer was sustained, and the case tried by the court on the general issue.

On the trial, the plaintiff read the notes in evidence, and rested the case. The defendants moved for a non-suit, on three grounds: *First*, that there was no evidence of presentment and demand, at the Bank at Helena, where the note was payable, such presentment and demand being averred in the declaration. *Second*, that no protest and notice were proven, no protest being alleged in the declaration. *Third*, because the Bank had not proved she was a corporation.

Motion denied, and judgment for the plaintiff. The defendant appealed.

W. & E. Cummins and *Ashley & Watkins*, for the plaintiff in error, argued the case at length, in writing. There were also several cases pending upon the same points, and others, which were decided at the same time. One point was, that one defendant was not served with process, but the pleas were filed by "the defendants," not naming them, and that it was to be taken that they had all pleaded; so that the the plaintiff could not, after plea, discontinue as to the defendant not served. To this point, counsel cited *Robbins vs. Fowler*, 2 *Ark.* 143. *Tippet vs. May*, 1 *B. & P.* 411. 1 *Saund. Rep.* 207, *a.* 5 *J. R.* 160. *Lewis vs. Davis*, 2 *Bibb*, 570. *Chandler vs. Parkes*, 3 *Esp.* 76. *Jaffray vs. Freebain*, 5 *Esp.* 47. *Shields vs. Perkins*, 2 *Bibb*, 229. *Hardwick vs. McKee*, 2 *Bibb*, 596. *Ashley vs. Hyde & Goodrich*, *ante.*

It was also objected, that the damages claimed were $400, and that the judgment was rendered for a larger amount of interest than that sum; and counsel cited, to this point, 1 *Tidd's Pr.* 653. 2 *Tidd's Pr.* 806. 1 *Ch. Pl.* 130. *Watkins vs. Morgan*, 6 *C. & P.* 661. 1 *Ch. Pl.* 372, 408.

Pike & Baldwin, contra. It was not usury to take the interest in advance; thus charging it on the whole note, and not on the sum actually loaned; nor to take it for the days of grace. *Thornton vs. The Ban kof Washington*, 3 *Pet.* 40. *Fleckner vs. Bank of U. S.*, 8 *Wheat.* 338. *Utica Ins. Co. vs. Bloodgood*, 4 *Wend.* 652. *N. Y. Firemen's Ins. Co. vs. Sturges*, 2 *Cowen*, 664, 678, 793. *Manhattan Co. vs. Osgood*, 15 *J. R.* 162. *Lloyd, qui tam, vs. Williams*, 2 *W. Bla.* 292. *Renner vs. The Bank of Columbia*, 9 *Wheat*, 581.

The plea, when not sworn to, was properly stricken out. It was a plea impeaching the consideration. *Rev. St.* 629.

It was not necessary, under the general issue, to prove that the plaintiff was a corporation. 5 *Shepley*, 34. 16 *Maine*, 224. *Society, &c., vs. Pawlett*, 4 *Pet.* 480. *Trustees, &c., vs. Kendrick*, 3 *Fairf.* 381. *Proprietors, &c., vs. Rogers*, 1 *Mass.* 159. *Proprietors &c., vs.*

Call., 1 *Mass.* 483. *First Parish vs. Cole*, 3 *Pick.* 232. 3 *Pet.* 407. *Boston Type Foundry vs. Spooner*, 2 *Verm.* 93. *President and Directors vs. Garrett, MS. decisions of Judge Brevard*, 1 *Rice's Dig.* 167. *Conard vs. Atlantic Ins. Co.*, 1 *Pet.* 386, 450. *Com. Dig.* "*Franchise*," *F.* 6, 10, 11, 15. "*Capacity*," *A.* 2. 10 *Co.* 30, *b.* *Mayor, &c., vs. Bolton*, 1 *B. & P.* 40.

It was not necessary to aver or prove presentment and demand. *Sumner vs. Ford*, 3 *Ark.* 389.

It was unnecessary to prove protest and notice. No protest is necessary in the case of a promissory note. *Cummings vs. Fisher*, *Anth. N. P.* 1. *Rayner vs. Winn*, 2 *Bay.* 374. *Rahm vs. Phil. Bank*, 1 *Rawle*, 335. *Bank of N. A. vs. McKnight*, 1 *Yeates*, 147.

Of course, if no *demand* was necessary, no *protest* was.

The charter allows the Bank to take *six* per cent. in advance, on notes payable in *four* months, and seven per cent. in advance on notes payable in *eight* months. The act of March 3d, 1838, allowed her to take, on notes having less than four months to run, *six* per cent., and, on notes having four months, and less than eight months to run, seven per cent. The act of 10th Dec., 1838, changed the rate of interest to be charged by the State Bank, to *six* per cent., on notes payable four months after date and under, and seven per cent. on all payable over four months, and after eight from date, and repealed the first section of the act of March 3d, 1838.

The act of 10th Dec., 1838, *could* not affect the Real Estate Bank. The act of March 3d, 1838, was as much a contract with the Bank, as her charter. The privilege granted thereby, as to the rate of interest, could not, afterwards, be taken away. *New-Jersey vs. Wilson*, 7 *Cranch*, 164. *Terrett vs. Taylor*, 9 *Cranch*, 43. *Dartmouth College vs. Woodward*, 4 *Wheat.* 518. *Allen vs. McKeen*, 1 *Sumn.* 276.

No consideration was necessary for this grant of privilege. An executed gift or grant is a valid contract. *Dart. Col. vs. Woodward*, 4 *Cond. Rep.* 571.

It was a valid contract with an existing corporation. *ib.* 174.

The *implied* powers of a corporation are as much beyond legislative control as those expressly given. *People vs. Manhattan Co.*, 9 *Wend.* 393.

It *did not* affect the Real Estate Bank. It was not intended to apply to her. She claims under the 6th section of the act of March, which refers to the *first*, and makes it a part of itself. The repeal of the *first* did not repeal the *sixth*. The first still existed, for purposes of reference. Besides, the act of December was only passed in reference to the State Bank. *Expressio unius, exclusio est alterius.* On every act professing to repeal or interfere with the provisions of a former law, it is a question of construction whether it operates as a total, or partial, or temporary repeal. The word "repeal" is not to be taken in an absolute, if it appear upon the whole act to be used in a limited sense. *Rex vs. Rogers*, 10 *East.* 573.

The objection that the damages exceed the amount laid in the declaration, is futile. The cause of action is a legal liability, certain and defined; and the damages, being the statute rate of interest, cannot be exceeded. It is utterly unimportant whether the damages are omitted altogether or laid too low: just as much so as the omission of John Doe and Richard Roe, pledges to prosecute. The declaration was amendable below, and will be considered as amended here. It is mere matter of form, and not reachable either on general demurrer or on error. *Ellitt vs. Smith*, 1 *Ala. N. S.* 84. *Boddie vs. Ely*, 3 *Stewart*, 182. *McWhorter vs. Standifer*, 2 *Porter*, 519.

By the Court, Dickinson, J. In regard to the plea of usury, it constitutes no defence, in this instance, as the act of 3d March, 1838, authorizes the defendant in error to charge the same rate of interest as the Bank of the State; and the interest, in this case, was calculated according to the provisions of that act. The judgment upon the demurrer was, therefore, right. The Bank, being a public corporation, was not required to be proved, as the court was bound judicially to take notice of it. It was not necessary to prove demand at the place of payment, as has been ruled by the court, in the case of *Summer vs. Ford.*

Judgment affirmed.

TAYLOR AND OTHERS *vs.* THE COUNTY OF PULASKI.

Although a sheriff becomes liable, on receiving a tax list, for the whole amount of tax charged therein, less the credits to which he may, by law, be entitled, and there is no necessity, in a suit against him, to charge him with having *collected* the money; yet, if the breach in the declaration against him on his bond is, that he did collect the money, and *fail to pay it over*, the *collection* of the money must be proved. Merely producing the tax list, receipted by him, is not sufficient to charge him, on such a state of proceeding.

THIS was an action of debt, determined in the Pulaski Circuit Court, in November, 1841, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. The county of Pulaski sued Taylor and his securities on his bond, as sheriff. The declaration charged the officer with having received a certain amount of money, which *came to his hands, as sheriff*, and which he failed to pay over according to law. There was a demurrer to the declaration, which was overruled, and to which an exception was taken. Judgment was thereupon entered against the sheriff and one of his securities, by *nil dicit*, and by default against all the others. A writ of inquiry, to assess the damages, was ordered, in which the sheriff appeared in mitigation.

To support the charge, the plaintiff produced a transcript of the sheriff's receipt on the original list of taxable property, that was transmitted to the territorial auditor, the one which should have remained on file in the clerk's office having been proved, by the clerk, to be lost or destroyed. This evidence was objected to, and the objection overruled. The official bond of the sheriff was then read, as evidence, which was also objected to. Upon this state of case, the court was asked to charge the jury, that the sheriff was only liable for the amount he had collected and failed to pay over, and that, if the proof showed that he had failed to make any collections, then he was only answerable for nominal damages. These instructions the court refused, but charged the jury that the sheriff was responsible for the amount charged against him by the tax list. To the refusing and

granting of these instructions, exceptions were taken, and error brought.

The case was argued here by *Blackburn* and *Cummins*, for plaintiffs in error, and by *R. W. Johnson*, Atto. Gen., contra.

By the Court, LACY, J. We have looked into the declaration in this case, and consider it good; the breaches are properly assigned; the sheriff is charged with collecting a certain amount of money, which he failed to pay over. The truth of this breach the plaintiff was bound to prove. It was not necessary to allege the collection of the money, and failure to pay it over. He was answerable, upon the reception of the tax book. That fixed the amount of his responsibility, which he, in his defence, could lessen, by striking off the credits to which he might, by law, be entitled. In this case, however, by the breaches, the sheriff's liability is made to depend exclusively upon the collection and failure to pay over. The transcript offered in evidence was, certainly, not sufficient to establish his indebtedness upon this charge. It certainly did not prove that the sheriff had made any collections, or had any moneys in his hands belonging to the county. It would have been proper evidence, if he had been simply charged, upon his reception of the tax book, with the failure to pay over the amount with which he stood charged, a proper ground being laid for the introduction of this secondary grade of evidence, by establishing the fact that the best evidence had been lost or destroyed. It is clear, that the instructions given and refused are manifestly erroneous. The court seems to have proceeded upon the mistaken opinion that, under the state of pleadings, the sheriff and his securities were liable upon the reception of the tax book. The defendants only asked the court to instruct the jury that, if he had collected any money, as sheriff, and had failed to pay it over, then he was answerable for that amount, and nothing more. This was only requiring the plaintiff to prove her cause of action, as laid, which she was unquestionably bound to do, before she could be entitled to a recovery. The instructions given and those refused, were clearly wrong.

Judgment reversed.

HANLY *vs.* THE REAL ESTATE BANK.

Although a discontinuance as to one defendant is a discontinuance as to all, yet, if the remaining defendant, after the discontinuance, appears, and demurs or pleads, he waives the discontinuance, and can have no advantage of it.

If a note is described in the declaration as bearing date a certain day, and the note filed on oyer has no date, this is a variance fatal on demurrer, although it is a note given to a bank, payable at a certain time after a certain day, and though the cashier is authorized by the note to insert the date.

Where oyer is granted of an instrument by filing it, it becomes a part of the record, without being set out in any pleading.

THIS was an action of debt, determined in the Phillips Circuit Court, in June, 1842, before the Hon. JOHN C. P. TOLLESON, one of the circuit judges. The declaration stated that Hanly, with two others, on the 11th day of March, 1841, made his certain promissory note, "bearing date of the same day and year aforesaid, whereby," &c. The defendant craved oyer, which being granted, he demurred, without setting out the note in his demurrer, for variance, on the ground that the note in fact bore no date. A note is copied in the record, in these words:

"$175. —— county, —— day ——, 18—.

"Six months after 11th day of March, 1841, we, Gervais Brodnax, as principal, and Thomas B. Hanly and Isaac Bledsoe, as securities, promise, jointly and severally, to pay the Real Estate Bank of the State of Arkansas, &c. (The cashier of said Bank is hereby authorized to insert the time of payment from the day of discount hereof.") Demurrer overruled, discontinuance as to the securities who had been served with process, and judgment for plaintiff. Hanly appealed.

W. & E. Cummins, for the appellant. The variance between the instrument described in the declaration and that given on oyer, was fatal: and the court therefore clearly erred in overruling the demurrer. *Vail vs. Lewis & Livingston*, 4 *J. R.* 450. *Rease et al. vs. Morgan*, 7 *J. R.* 468. 1 *Ch. Pl.* 307. *Anon.*, 2 *Camp.* 308. *Rocke vs. Campbell*, 3

Camp. 247. *Exon vs. Russell*, 4 *M. & S.* 505. *Kearney vs. King*, 2 *B. & A.* 301. *S. C.* 1, *Ch.* 28. *Cook vs. Graham's Adm.* 3 *Cranch*, 235. *Little vs. Weston*, 1 *Mass.* 156.

Pike & Baldwin, contra. The note, in this case, has become no part of the record. An instrument filed on oyer does not become part of the record, unless incorporated in some pleading. If settled rules of practice are a part of the *law*, which this court will rigidly adhere to, as was held in *Obaugh vs. Finn*, *ante*, then there is no rule of law better settled than this. *Stephen*, 70, 71. 2 *Saund. Pl. & Ev.* 740. 1 *Ch. Pl.* 417, 418. *Ld. Raym.* 1135. *Garrard vs. Early*, 2 *Wils.* 413. 2 *Saund.* 366, *n.* *Browning vs. Wright*, 2 *B. & P.* 13.

In contemplation of law, the deed, unless denied, is only in court during the term in which it is pleaded, and is afterwards in the custody of the party to whom it belongs. Oyer cannot be demanded at a subsequent term. *Wymark's case*, 5 *Co.* 74, *b.*

Letters of administration are not supposed to continue in court at all. 1 *Ch. Pl.* 419. *Young vs. Pennington*, *Hard.* 156. 1 *T. R.* 139. *Anon.*, 1 *Mod.* 69.

If the note were a part of the record, still there is no variance. If the allegation is, that the defendant drew a bill on such a day, and the date of the bill is different, it is no ground of demurrer, but, if it is alleged that the bill *bore date* a certain day, and it bears a *different* date, it is fatal. *Jones vs. Mars*, 2 *Camp.* 207, *n.* *Church vs. Feterow*, 2 *Penn. R.* 301. *Stephens vs. Graham*, 7 *Serg. & R.* 507.

Where a bill or note is stated as having been *made* or *drawn* on such a day, without any statement as to its *date*, the court hold it to be intended, that the date of the bill was the day of drawing. *De La Courtier vs. Bellamy*, 2 *Show.* 422. *Hogue vs. French*, 2 *B. & P.* 273. *Giles vs. Bourne*, 6 *M. & S.* 73.

If an instrument bears no date, you may declare on it, as made on a day certain, and proving, upon the trial, that it was made then, is sufficient. *Grannis vs. Clark*, 2 *Cowen*, 39.

The note, in this case, does bear date as alleged. "Six months after the 11th day of March, 1841," should be considered as expressing the date, and the omission of the word "this" is of no importance. The

makers left it to the cashier to insert the date from the day of discount. He did so, and the note was made, *in law*, on the 11th of March, and in fact bears that date.

By the Court, Ringo, C. J. In respect to the discontinuance, it has been repeatedly decided by this court, that a discontinuance as to one defendant, who was duly served with process in time to bind him to appear and answer the action, or subject him to the legal consequences of a judgment by default, upon his failure to do so, would operate as a discontinuance of the whole action; and such, we consider, would have been the legal effect, in this case, if the plaintiff in error had relied upon it, and done no act, subsequently, amounting to a waiver of this objection. This he did not do; but, after the discontinuance as to his co-defendant, came voluntarily into court, and entered his appearance to, and defended the action, by praying oyer of the writing sued on, and demurring to the declaration, as he had an unquestionable legal right to do, though he was under no legal obligation whatever, to appear, and no valid judgment could have been given against him, if he had made default. Under these circumstances, he must be regarded as having expressly waived on the record, all objections to the discontinuance, and assented to its proceeding against him alone; and therefore the case, as to him, must be considered as though he had been separately sued, and had voluntarily appeared to the action, without process. Consequently, the court below did not err in proceeding in the cause against him, notwithstanding the discontinuance as to his co-defendant.

The judgment upon the demurrer was, in our opinion, manifestly wrong. The declaration set out, as the foundation of the action, a promissory note, in writing, bearing date on the 11th day of March, 1841. The note given on oyer bears no date whatever, and therefore does not support the action, but shows a distinct cause of action, different from the one sued on; and, as the plaintiff was bound to show, on oyer, the instrument sued on, or one corresponding with the allegations in her declaration, and the variance between the two, that is, between the rate described in the declaration and that of which oyer was given, being speedily assigned as a ground of demurrer. The

law consideres the failure to do so as a fatal defect in the pleading; or, in other words, as a failure, on the part of the plaintiff, to show, legally, any cause of action whatever, against the defendant. And the objection, that it forms no part of the record, because it is not set out in the defendant's pleading, is untenable; because, when the instrument, or a copy of it, is filed, on the granting of oyer, it becomes as much a part of the record as if copied into the pleading; and the party so filing it loses his control over it, and can never afterwards take it from the files without the leave of the court.

Judgment reversed.

SMITH, *Ex Parte.*

HELD, that, on an application for a supersedeas to an execution issued by a justice of the peace, if the transcript does not exhibit the execution, or a copy of it, but simply states that an execution was issued, this court, in the absence of affirmative evidence to the contrary, must presume that the justice acted in conformity to law, and refuse the supersedeas.

But, if the execution is produced, and it appears that a *ca. sa.* issued, on an affidavit that the defendant, *as the plaintiff believes*, "is secret his property, or is putting it out of his hands, for the purpose of defrauding his just creditors," and that the plaintiff verily believes that the debt will be lost or greatly delayed, unless an execution issue forthwith, this court will issue a supersedeas, without recognizance, the execution having improvidently issued, and without a sufficient legal affidavit.

TRAMMELL *vs.* HARRELL.

By the common law, in England and America, where two or more payees or obligees have a joint interest in a note or bond, and one dies, *the right of action* survives to the other.

And this is not charged by our statute, by which all survivorships of real and personal estate are abolished.

A debt or demand, to be set off, must be due from the sole plaintiff, or all the plaintiffs, to the sole defendant, or all the defendants. This is the law under our statute, as well as elsewhere.

A defendant or defendants cannot set off a claim due to him or them by only one or a part of several plaintiffs; nor can one defendant, of several, set off a claim due to him alone, from the plaintiff or plaintiffs; and whether the claim sued on, or that attempted to be set off, or both, are joint, or joint and several, makes no difference.*

THIS was an action of covenant, tried in the Crawford Circuit Court, in September, 1841, before the Hon. R. C. S. BROWN, one of the circuit judges. Dennis Trammell sued Isham Harrell upon a bond, executed 7th April, 1839, for the payment, on the 1st of October, 1839, of $130, in corn, at cash prices. The defendant pleaded set-off, "the sum of $150, upon, and by virtue of, a certain writing, now in the hands of the said plaintiff," and full performance: to both which pleas, says the record, the plaintiff joined issue, all, in short, on the record. Trial before the court, without a jury. The evidence adduced was as follows: One witness stated, that, in the spring of 1840, he heard the plaintiff and defendant in conversation, about two notes; one, the note sued on; the other, a note executed by the plaintiff to the defendant and Isaac Harrell, deceased, dated some time in 1838, for $144, agree, that one note should *butt* against the other. He did not know who had possession of the latter note.

The plaintiff's attorney, sworn for defendant, stated that, soon after the death of Isaac Harrell, who died two years or more before the trial, his widow, who was his administratrix, placed the latter note in his hands, with other notes, belonging to the estate. After the com-

* The CHIEF JUSTICE dissents, and differs *toto cœlo* from the majority of the court, in the construction of our statutes, as to both points.

mencement of this suit, she gave witness an order to deliver up the note to the defendant.

Another witness stated, that he heard the plaintiff, in the fall of 1840, apply to the defendant for his note to the Harrells, when the defendant said that the note was not in his possession. About the same time, he heard the plaintiff apply to the administratrix for the same note; but she refused to give it up, saying that she wished to use it for a different purpose, in case another suit went against her.

Upon this evidence, the court found, for the defendant, $16.75, and gave judgment accordingly. The plaintiff moved for a new trial, which being refused, he excepted, and embodied the evidence.

Turner and *Pike*, for plaintiff in error, referred to the brief in *Hamilton vs. Myrick & Williamson, ante.*

Mr. Justice Dickinson delivered the following opinion: There are two points raised, in this cause. The first is a question of set-off, and the second, whether, under our statute, the right of action survives. Both of these questions depend upon the proper construction to be put upon our statutes prescribing the rule in such cases. We will first dispose of the question of survivorship.

According to the principles of municipal justice, both in England and in this country, as the law now stands, where two or more payees or obligees have a joint interest in a bond or note, and one of them dies, the right of action survives to the other. This principle, it is believed, pervades the whole system of modern jurisprudence, and it is, certainly, one every way consonant to justice and equity, affording freedom to commerce, and increased facilities in the remedies on choses in action. To fetter or to confine it would certainly be to retrograde in the science of law, and to deprive ourselves of the benefit of the general improvement of the age. We deem these remarks strictly applicable, because they go to qualify and explain general terms in our statute, which seem to indicate a different doctrine. The *6th sec. of Ch.* 58, *of the Revised Code, p.* 476, declares, that "all survivorships of real and personal estate are forever abolished." Now, the inquiry is as to the meaning of this sentence. Was it intended to

abolish the right of action surviving to a joint payee or obligee, and confine us to comparatively encumbered remedies? or, was it to prevent this very state of things that the whole sentence was inserted?

In order to ascertain the true meaning of the act, we will first inquire what was the old law, the mischief and remedy upon this subject. The territorial law declared, that the doctrine of survivorship, in cases of joint tenancy, should never be allowed. Now, it is apparent, that the Revised Statutes only re-affirm and re-assert that principle. All the States in the Union have similar provisions, and they are all upheld by alike high and patriotic considerations. The doctrine of entails and primogeniture, and the *jus accrescendi*, and the abolition of all patents of nobility, were the feudal badges which the American governments intended to sweep away, and thus break down all hereditary family succession, by unfettering property, and distributing it equally and justly among all the members of society. What is the meaning of "all survivorships of real and personal estate?" It means that kind of an estate that springs out of a joint tenancy. To constitute a joint tenancy, there must be a unity of interest, of title, of time, and possession, and this usually relates to realty, although it is sometimes true in regard to personal estate. The destruction of any one of these unities will terminate the joint tenancy. 2 *Black. Com.* 185. *Co. Lit.* 193. Joint tenancies are now regarded with so little favor, both in courts of law and equity, that, whenever the expression will admit of it, the estate shall always be regarded as held in common. *Fisher vs. Wigg*, 1 *P. W.* 14, *n.* 1 *Ld. Raym.* 622. And Lord Cowper says, that a joint tenancy, in equity, is an odious thing. Things personal may be held in joint tenancy; as, if a personal chattel be given to two or more, absolutely, they are joint tenants thereof, and, unless the jointure be severed, the same doctrine of survivorship will take place as in lands and tenements. 2 *Black. Com.* 399. 1 *Vernon*, 488. Between partners in trade or farming, generally speaking, there can legally be no survivorship, as to personal property, in possession; for each of their respective shares goes to their personal representatives, and they become tenants in common with the survivor, the maxim being *inter mercatores jus accrescendi locum non habet.* *Co. Lit.* 3, 282, 182, *a.* A court of equity

will bar survivorship, although the deceased wished the stock to survive. And if two persons take a farm, the lease will survive, but, if they lay out money in the way of trade, that shall not survive. Although there is no survivorship as to partnership property, in possession, yet, according to the principles of the common law, there is, as to choses in action; for, when one or more partners, having a joint and legal interest in a contract, die, an action against the parties must be brought in the name of the survivor; and the executor or administrator of the deceased cannot join; neither can he sue, separately, but must resort to a court of equity to obtain from the survivor the testator's estate. 1 *East.* 497. 2 *Salk.* 441.

These principles clearly show, that the kind of survivorship that the Legislature instituted to abolish, as to personal estate, related alone to a joint tenancy in such estate, and to the rents and profits issuing out of the realty. It was where the whole interest in an estate passed, and where the survivor took all that the act abolished, and not the mere right of action, which would always pass or survive to a co-obligee. Now, as to choses in action, as notes, bonds, and the like, there never was any survivorship, if they were given in any way of trade. And this shows, that the survivorship in relation to personal estate, which the Legislature abolished, was never intended to include such a case. And the general words of the act must be taken in a qualified sense; for, unless that be done, they will defeat the very object and intention of the statute. Instead of remedying the evil, it would produce the very mischief intended to be cured. It would operate to the prejudice of trade and commerce, by encumbering the remedies by which rights would be asserted. Such a construction put upon the act, would be in direct derogation of all the principles of commerce, which are now so firmly and beneficially established among all civilized nations. And men, instead of being encouraged to join their means and efforts together, for important objects and ends, for trade and other purposes, would stand aloof from each other, if, upon the decease of one partner, the other had not the sole right to wind up the business. We think this principle, so completely and intimately blended as it is in our commercial relations, too plain to require further illustration or argument.

We apprehend there can be but little difficulty in putting a right construction upon our act of set-off, which declares, that "where two or more persons are mutually indebted to each other, by judgments, bonds, bills, notes, bargains, promises, accounts, or the like, and one of them commences an action against the other, one debt may be set off against the other, although they may be of different natures." This is the first section of the act. The fifth and sixth sections provide, "that, if the amount set off be equal to the plaintiff's demand, he shall recover nothing by his action; if less, he shall have judgment for the residue; and, if there be a balance due from the plaintiff to the defendant, judgment for that amount shall be rendered in his favor." The very language of the first section of the act clearly shows what kind of debts might be set off one against the other. They may be of different grades, but the persons themselves must be mutually indebted to each other, for so the act declares. What is the meaning of the term, "when two or more persons are mutually indebted to each other?" The mutual indebtedness of the parties is precisely the same as if they were respectively or jointly indebted; and the one expression is precisely tantamount to the other. And this principle is not varied because our act makes a joint contract a separate one. In that case, the parties cannot be said to be mutually indebted, but they are jointly or separately indebted, as they elect to treat the contract. Again, our act declares, if one of them commence an action against the other, one debt may be set off against the other: the latter clause of the sentence still affirming and re-asserting, that the parties to the suit can alone set off mutual debts or demands. The mutuality of the persons being thus clearly established, it expressly negatives the idea that a joint note may be set off against a separate, or *e converso*. This mutuality of indebtedness may have existed when the right accrued, or it may have arisen by the assignment of a demand, by another, or by operation of law. If a plaintiff's demand exceed the set-off, he is entitled to judgment for the residue. Now, will you give him a judgment upon a joint demand, when there can be no mutuality of indebtedness, and against a party who never owed him any thing, and who, of course, cannot be said to be indebted to him? If such had been the intention of the act, would it not have expressed

it so? If the defendant's demand exceed that of the plaintiff, he is entitled to judgment for the residue. How shall he take judgment over? Shall his co-defendant, as well as himself, be entitled to a judgment upon a separate demand? Unquestionably not. All the States of the Union have statutes upon the subject of set-off, and most of them are very similar to our own. The language of some is, doubtless, more exact and certain than that of others, but we are not aware that, in any State, joint demands have ever been set off against several demands, or *e converso.* Most of these statutes, too, convert joint liabilities into several obligations. The New-York statute declares, that, if there be several defendants, the set-off must be due to them all, jointly. Here the statute is express; and, although the language is more accurate than the terms used in our act, still, we hold the words mutually indebted to each other, and where one commences suit against the other, that these debts are matters of set-off, are fully as clear and certain as the New-York act. *Babington on Set-off*, 37. *Ex parte Hanson*, 12 *Ves.* 446. 1 *Leigh, N. P.* 157. *Chit. on Con.* 329. *Parker vs. Nicholas*, 4 *Rand.* 359. The language of the Kentucky and Tennessee statutes is very similar to ours, and the courts, we think, have put a similar construction upon them.

And therefore, we are of opinion a joint demand is not allowed to be set off against a separate one, or a separate against a joint demand. In this case, however, the act of survivorship showed the whole right of action in the defendant below; and the demands, by operation of law, being mutual, and subsisting at the time of the institution of the suit, one claim was properly allowed to be set off against the other.

Mr. Justice LACY concurred.

RINGO, C. J., dissenting. In this case, two questions only have been discussed and decided by the court: First, whether, upon the death of a co-obligee, the whole legal interest in a chose in action survives to, and is by law vested in, the survivor. This question I understand to be decided by the court, in the affirmative; and, if I correctly understand the opinion of the court, it rests upon the conclusion, that the common-law rule on this subject, as respects personal property

or choses in action, is not affected or abrogated by any of the statutory provisions in force here, which apply alone, as it is said, to real estate, and as to that, abolish or destroy the common-law rule. And this is said to be manifest, upon a consideration of the old law, the mischief designed to be remedied by the statute, and the remedy provided. Now, I have applied this rule of interpretation to the statutory provisions on the subject of survivorships, without being able to discover any principle or ground upon which they can be restricted, or held to include or abrogate the right, as regards real estate only. The common law, as I understand it, extended the rule to personal as well as real property, and went so far even as to charge the survivor, upon a joint contract, with the whole demand; so that, upon the death of a joint co-obligor, his executors, administrators, and heirs, were discharged from the obligation; and, upon the death of a joint owner of real or personal estate, or joint co-obligee, the whole legal estate or interest vested immediately in the survivor, who took it, discharged from all claim on the part of the legal representatives of the deceased joint owner, with this exception only, which is said to have been made for the encouragement of husbandry and trade, "that a stock, on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property, and there shall be no survivorship in them." And, although there was no survivorship as to partnership property, in possession, yet, at law, there was, as to choses in action; and, when one or more partners, having a joint legal interest in a contract, died, an action against the parties to it could be brought in the name of the survivor only, and the executor or administrator of the deceased could neither join in the suit nor bring a separate action on the contract, but was compelled to resort to a court of equity to obtain, from the survivor, the testator or intestate's share of the sum thereon recovered. 2 *Blackstone's Com.*, 182 *to* 185, 595. 2 *Saund. R.* 51, *n.* 4.

Now, it will be remembered, that the common law, not only in relation to joint tenants, but also in relation to joint obligors, was entirely abrogated, by statutes, passed in 1806, by the Legislature of the Territory of Missouri, before the late Territory of Arkansas was established,

which was continued in force, in the latter territory, and also in the State of Arkansas, until they were superseded and repealed by the statute of this State, approved February 14, 1838; (see *Ark. Dig.* 131, 312, and *Rev. St. Ark., Ch.* 82, *pp.* 475, 476); which latter statute, after providing "that all joint debts or obligations shall survive against the heirs, executors, and administrators of such joint debtor or obligor as may die before the discharge of any such joint debt or obligation;" and, that "joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon, in like manner; that "suits may be brought against the surviving obligor, and the heir, executor, or administrator of the deceased obligor, at the same time;" and, that "no creditor, on any joint or joint and several obligation, shall have more than one satisfaction and costs, in one suit:" further expressly declares, that "all survivorships in real and personal estate, are forever abolished." These provisions, as it seems to me, are so plain and unambiguous as to leave nothing to construction, and no doubt as to the intention of the Legislature. The language used certainly comprehends every case of survivorship, and, by necessary implication, as I conceive, repeals all laws establishing any such right, as well in respect to personal property and choses in action, as to real estate, without any reservation whatever. And I know of no rule or principle which warrants any restriction of, or exception to, its general operation; for, I think it has been sufficiently shown, that the injustice, the hardship, and the inconvenience of the old law, was not confined to real estate, but also extended to personal property and even choses in action; because, in respect to the latter, it could scarcely be considered just, that a surviving obligor, simply from the accidental circumstance of the death of his co-obligor, should be bound to answer the whole demand, and be deprived of all right to call upon the legal representative of his deceased co-obligor for a ratable contribution, or that the legal representative of a deceased co-obligee should be obliged to wait until the joint demand was collected by the survivor, and then be compelled to sue him, in a court of equity, and there recover of him the share or portion of the deceased co-obligee, before he could obtain the possession and enjoyment thereof. And it was, as I conceive, to

remedy these evils, and provide against every other hardship and inconvenience incident to the law of survivorship, that the act in question was passed; and therefore it ought not, and in my opinion cannot, consistently with any known and admitted rule of interpretation, be restricted in its operation, to any class of cases, but should be held to comprehend and repeal all laws pre-existing on the subject, and to take away or divest every right thereby conferred. Some inconvenience, I admit, might be expected from so radical a change in the law, but that consideration furnishes no authority to disregard, or by construction qualify a law where, as in the present instance, it is expressed in terms plain and unambiguous, and without any qualification or restriction whatever. In such case there is no room for construction, and the law must be understood literally; that is, according to its literal import, without any addition, qualification, or restriction, whatever; and the courts are bound so to adjudicate it, and leave the remedy for such inconvenience, when discovered, to the Legislature.

The second question decided by the court, according to my understanding of the opinion of the court, is, that no demand can be, legally, the subject of a set-off, under our statutory provisions in relation to that subject, except such as are due from all of the plaintiffs to all of the defendants in the suit in which the set-off is claimed. In this opinion, I cannot agree with the majority of the court. It is well understood, that no set-off was allowed by the common law; and, that the whole right of set-off, in actions at law, had its origin in certain statutes of England, the first of which gave it only in respect to a single class of demands; but it has been considerably enlarged and extended by subsequent acts of Parliament, so as to embrace, generally, all liquidated damages or demands upon which an action of debt or indebitatus assumpsit would lie, but only where the demand to be set off is due in the same right, from all of the plaintiffs to all of the defendants. And this I understand to be one of the most prominent and distinct features in all of the acts of Parliament upon the subject, and it is one which appears to have been introduced into the statutes of set-off of a majority of the States in the United States, and in such States there can be no doubt that a demand, not due from all of the plaintiffs to all of the defendants, cannot be admitted as a set-off,

because it is not within the provisions of law allowing such defence to be made. The statute of New-York, for instance, *Rev. St. N. Y.*, 2*d vol.*, 454, *sec.* 18, § 6, provides that, "if there be several defendants, the demand set off must be due to all of them, jointly." This provision is perfectly plain, and in that state there can be no doubt, that a demand, not due to all of the defendants, jointly, cannot be admitted as a set-off, because the law not only fails to give the right, in respect to other demands, which of itself would be sufficient to exclude them, but the statute, in terms the most explicit, expressly prescribes, that the demand to be set off must be due to all of the defendants, jointly. But no such provision is contained, in our statute, on the subject of set-off, and it is, as I conceive, only necessary to refer to the first and seventh sections of the statute, to show that there is a wide and marked difference, in this particular, between the provisions of our statute, and that above quoted from the statute of New-York. The first section of our statute of set-off, *Rev. St. Ark.* 726, *Ch.* 139, declares that, "if two or more persons are mutually indebted to each other, by judgments, bonds, bills, notes, bargains, promises, or the like, and one of them commence an action against the other, one debt may be set off against the other, although such debts may be of a different nature;" and the seventh section provides, that, "when any plaintiff shall be indebted to a defendant in any bond, bill, note, contract, book account, or other liquidated demand, and the defendant shall fail to set off such debt against the plaintiff's demand, such defendant shall be forever barred from recovering costs in any suit which he may thereafter institute upon any such bond, bill, note, contract, book account, or other liquidated demand." The language here quoted, it will be perceived, does not, in any way, make the right of set-off to depend upon the number of the defendants, as in the statute of New-York, but makes it depend solely upon the existence of a mutual indebtedness between one or more of the persons suing and one or more of the persons sued. To illustrate my view of the statute, suppose A., B., and C., indebted to E. in $1000, and E., at the same time, indebted to A. in the like sum of 1000. A. sues E. for the debt: can E. set off the debt due to him from A., B., and C.? Certainly. Why? Because there exists between him and the plaintiff a mutual indebted-

ness. Each owes the other a debt, and the law having made the debt of A., B. and C., several as well as joint, E. has an election to treat it as the individual debt of A.; and so regarding it, there is, certainly, in the most strict understanding of the term, a mutuality of indebtedness between the parties A. and E. But, suppose the suit brought by E. against A., B., and C., would not the same mutuality of indebtedness exist between A. and E.? I answer, that it would; and that, according to the letter, as well as the spirit of the statute, A. would have a legal right to set off the debt due to him from E., because, as before remarked, the debt of A., B. and C., is, by law, made several as well as joint, and the election of the plaintiff to treat it as joint, could not, surely, be allowed to have the effect of changing the character of the contract, or of destroying any legal right of either of the defendants to interpose such defence as he could have made, if sued separately. Now, if the mutuality of indebtedness, mentioned in the statute, referred to the parties to the suit, and the right of set-off depended upon the mutuality of indebtedness between the plaintiff and all of the defendants, the plaintiff, in almost every instance where there are several obligors, could, at will, exclude any set-off of a demand due from him to all, or any number of them, by suing a greater or less number of them; that is, by omitting to sue a part only of those to whom he is indebted, or by joining, in the suit, some to whom he is not indebted; and thus, the whole object of the statute might be, and I doubt not in many cases would be, defeated. The law is said to abhor a multiplicity of suits; and I understand it to be the principal, if not the sole object, of all laws of set-off, to prevent a multiplicity of actions, by enabling those who hold cross-demands against, or are mutually indebted to, each other, to litigate and finally settle them, in a single suit; besides, it is a remedial statute, and, when necessary to accomplish the object designed to be effected by it, should be liberally construed, so as to repress the evil and advance the remedy. This, I conceive, is most effectually done by admitting a set-off in all cases of mutual indebtedness between any of the parties to the suit, though this, according to my understanding of the provisions of the statute, would be nothing more than barely giving effect to it, according to its legitimate import.

Having thus expressed my opinion as to the points decided by the court, I will simply add, that, in my opinion, the judgment admitting the set-off, in this case, is erroneous, and ought to be reversed.

But the majority of the court being of a different opinion, the judgment was affirmed.

The State *vs.* Smith.

Held, that the ordinance of the city of Little Rock, of 13th July, 1841, entitled, "An ordinance concerning elections," provided only for such elections for city officers as were annual; and that the judges who held the election under that ordinance, had no right to hold an election for justices of the peace, the election of those officers being *biennial.*

Mays & Meeks *vs.* Johnson & Clark.

The certificate of a land-officer cannot, of itself, be evidence of any fact, unless expressly made so by statute of the State, or act of Congress.

To prove the rejection of a donation claim, a copy of the record of the land-office, and the adjudication of the land-officers thereon, properly certified by them as a complete transcript, is necessary.

This was an action of covenant, determined in the Benton Circuit Court, before the Hon. Joseph M. Hoge, one of the circuit judges. Johnson & Clark sued Mays & Meeks, on bond, conditioned to refund six hundred dollars, which they thereby acknowledged to have received from Johnson & Clark, for three Lovely donation claims, if

said claims were not allowed at the Helena Land-office, by a certain day.

The breach assigned is, that the claims were not allowed at the Helena Land-office within the time, but were passed upon by the officers, and adjudged spurious and fraudulent. Plea, denying the adjudication and rejection by the land-officers, of the claims, in the words of the breach; on which issue was joined, and the case was submitted to the court, sitting as a jury. The plaintiffs in the court below, to prove that the claims were not allowed, produced the certificate of the Register of the Helena Land-office, that the claims were rejected and spurious, and also a witness, who swore he heard one of the defendants acknowledge he was satisfied the claim was rejected. The defendants objected to the witness being sworn, which was overruled by the court; and they excepted and appealed.

D. Walker, for appellants. If the claims were rejected at the Helena Land-office, that fact became a matter of of record, and could not be established by parol; and parol evidence is not admissible until the original is accounted for; then its contents may be proven.

It is a universal and well established principle of law, a principle as old as the law itself, that the best evidence must be adduced which the case admits of. 1 *Stark. Ev.* 102, 389.

Land-officers act judicially, and are required by the act of the 24th May, 1828, granting donations to settlers on lands ceded to the Cherokees, to take all the testimony to establish a right to a donation, and on which the *Register* and *Receiver*, both, under their signatures, are to endorse their decision, and be filed and carefully preserved by the Register, whereby it becomes a record. *Pub. Land Laws, Inst. and Opin. part* 2, *p.* 413, 415.

The testimony, with the decision of the Register and Receiver endorsed thereon, so filed and preserved, constitute the only legitimate medium to prove the fact of rejection, if it did exist. 3 *Starkie's Ev.* 1043. Was there possibly any room for doubt on the subject, it would be removed by our statute, which makes *copies of entries* or *papers filed* in any land-office of this State, certified by the Register or Receiver, evidence. *R. S.* 371, *sec.* 6. The Register's certificate, produced

in this case, can prove nothing; he merely certifies to the existence of a certain fact, without a copy of the adjudication by which that fact is established.

The second point is equally well settled. Secondary evidence will not be received, unless it is first shown to the court, that the best or *primary* evidence is unattainable. This was not done, but the court permitted it to be given, without showing the impossibility of procuring a copy of the record in the land-office; and in this the court undoubtedly erred, for which the judgment should be reversed. As to the admissibility of secondary evidence, the following authorities are cited: *Swift's Ev.* 3. *Dillingham vs. Snow*, 5 *Mass.* 547. *Stockbridge vs. W. Stockbridge*, 12 *Mass.* 400.

Hempstead & Johnson, contra. It is certainly true that secondary evidence can never be introduced, while the higher is susceptible of being procured; and this rule rests upon the well known principle that the best evidence must be brought forward of which the case is capable. The application, not the rule, is controverted. The certificate was the best evidence which could be adduced. The question raised on the record was in fact one of fraud; and this may be, and usually is proved by parol evidence. 2 *Stark. Ev.* 555. The testimony of the witness was to be a collateral fact only. But the Register and Receiver are not, by any law of Congress, formed into a court of record. They were not judicial officers; and the most that can be said, is, that a decision made by them, in the absence of fraud, might be conclusive as to the facts presented. *Wilcox vs. Jackson*, 13 *Pet. R.* 511. The acts of May, 1828, of January, 1829, and January, 1830, only authorized the Register and Receiver to take the proper testimony of actual settlement, and subsequent removal, of an applicant, to entitle him to a donation claim, of which kind is the one mentioned in the condition of the bond on which suit is instituted. *White's Land Laws.* They are officers who are required to report periodically, but who keep no records like a court.

The testimony of Paschal was to a collateral fact, and as good as the nature of the case would admit of; not, at least, of so inferior a character as to authorize its exclusion. It was as to an admission

made by the party, merely, independent of which the jury could not have found a different verdict; and it may, therefore, be fairly presumed that it had little or no influence upon them.

By the Court, Dickinson, J. The certificate of a land-officer cannot, of itself, be evidence of any fact, unless expressly made so by statute, or act of Congress. It is not the best evidence which can be produced. A copy of the record of the land-office, and the adjudication of the land-officers thereon, properly certified by them as a complete transcript of all the proceedings had before them upon the claim, would, in our opinion, have been competent evidence, and ought to have been received. The certificate of the Receiver, of the result of the adjudication, ought to have been rejected.

Judgment reversed.

Cummins & Pike *vs.* James & Woolbridge.

A plaintiff, to maintain his action, must be entitled to a legal interest in the suit.

As, by the act of Congress of March 2d, 1838, the Bank of the United States still has a corporate existence, for the special purposes of proceeding to final judgment, execution, satisfaction and settlement of her affairs, the refusal of a court to instruct the jury that if they believe the legal interest in the demand sued for is in that bank, they ought to find for the defendants, is a clear decision by the court, that there is no evidence tending to show that the bank is the legal owner of the demand.

If such suit be against attorneys, to recover moneys collected by them on a judgment in favor of the bank, this raises a presumption that the bank possesses the legal interest; and though there is other testimony rebutting and contradicting this presumption, yet whether it is fully overthrown or dispelled, is a question for the jury; and the instruction in such case is erroneous.

The plaintiffs could recover in such case, in assumpsit, *if legally entitled to the proceeds* of the judgment, by assignment or otherwise. It is not necessary that they should be its legal assignees.

This was an action of assumpsit, determined in the Pulaski Circuit Court, in November, 1841, before the Hon. John J. Clendenin, one of the circuit judges. James & Woolbridge sued Cummins & Pike, as attorneys, for not paying over moneys collected of one John McLain, on a debt due from him to the plaintiffs, and on the common

counts. On the trial, the plaintiffs proved that the defendants were employed by them to collect the amount of a judgment in favor of the United States Bank against John McLain, and recovered from the plaintiffs fifty dollars, as an advance fee. In March, 1839, Cummins received, on that judgment, $900, and the plaintiffs were advised of its receipt. Cummins promised to take the money to Louisville, and deposite it there to the credit of the plaintiffs, or pay it to them there; and afterwards offered to settle it, if the plaintiffs would pay him twenty per cent. for his fee, which he claimed to have been agreed on. All this was after the partnership between the defendants had been dissolved. The plaintiffs refused to allow the fee claimed by Cummins, and demand was made of both the defendants for the money. The usual fee was 10 per cent. on the first $1000 collected, and 5 per cent. on the residue. This being all the evidence, the defendants moved the court for these instructions: "That if the jury believe, from the evidence, that the legal right to the money in controversy is in the Bank of the United States, they must find for the defendants;" and "That unless the jury believe, from the evidence, that the plaintiffs are legally the assignees of the bank, they must find for the defendants." The jury found for the plaintiffs, $995 45; and the defendants moved for a new trial, which motion was overruled, and they excepted, set out the evidence and instructions, and brought error.

W. & E. Cummins, for plaintiffs in error. The instructions are abstractly right, and clearly embody the law arising upon the facts disclosed in the case. When such is the case, the court is bound to instruct, and it is error to refuse. *O'Neal vs. Long*, 4 *Cranch*, 60. *Smith et al. vs. Carington et al.* 4 *Cranch*, 62. *Vasse vs. Smith*, 6 *Cranch*, 226. *Douglass & Mandeville vs. McAllister*, 3 *Cranch*, 300. *Mark vs. Snider*, 1 *Aik.* 104. *Fletcher vs. Howard*, 2 *Aik.* 115. *Campbell vs. Bateman*, 5 *Aik.* 177. *Folly vs. Vantuyl*, 4 *Halst.* 153. *Brooke vs. Young*, 3 *Rand.* 106. *Lewis vs. The State of Ohio*, *Wilcox Con. Rep. of Ohio*, 839. 1 *Cranch*, 309, 318. 6 *Wheat.* 75. *Art. VI. sec.* 12 *Const. Ark.*

Trapnall & Cocke, contra. The proof of the employment of the

plaintiffs in error, of the collection of the money by virtue of that employment, and a subsequent promise to the defendants in error to pay to them the amount collected, closes the door against all cavil as to the propriety of the judgment.

The motion for a new trial, according to the authority of the case of *Cunningham et al. vs. Bell et al.* 5 *Mason*, 173, and *Danly vs. Robbins' Heirs*, 3 *Ark.* 144, supersedes the bill of exceptions taken on the trial, and leaves the legal presumption in favor of the judgment of the circuit court, uncontradicted by any thing contained in the record.

The verdict of the jury is amply supported by uncontradicted testimony; and admitting that the instruction asked for by the defendants, and withheld by the court should have been granted, there is not the least probability that it would have changed the result; and in no view of the case can the defendants have been injured by the refusal. In *Breckenridge vs. Anderson*, 3 *Monroe*, 718, the court will find ample authority for the judgment given by the circuit court, overruling the motion for a new trial.

By the Court, Lacy, J. The money that was collected was admitted to have been received on a judgment in favor of the United States Bank; and the evidence shows that it came into the hands of one of the defendants, (Cummins,) and that he promised to pay the same over upon certain conditions, which were rejected by order of the plaintiffs. It was admitted that fifty dollars had been paid, by the agent of the plaintiffs, who employed the defendants to attend to the collection.

The principle is unquestionably true, that a party, to maintain the action, must be entitled to the legal interest in the suit. If the legal interest is shown to be in the plaintiff, the action will lie; if in another, it cannot be maintained. If there is a contrariety of testimony as to the person in whom the legal interest is vested, and that question is a matter of fact, to be determined by the jury, then of course it will be error in the court to take the question from the jury. There was certainly a conflict of testimony, as to the legal interest.

It is undeniably true, that a corporation can have no legal interest in any suit, after its act of incorporation has expired. This being the

case, it is said that the first instruction was rightly overruled, because the charter of the bank had expired more than two years prior to the institution of the suit, and of course it was divested of all legal interest in the claim. This would certainly be true, if the corporate name and capacity of the bank were not continued in force, by an act of Congress, approved March 2d, 1838, by which she is allowed to proceed to final judgment, execution and satisfaction of her affairs. *Laws U. S. vol.* 9, *p.* 713. This act leaves her corporate name still in existence for these special purposes, and by it she is regarded as being entitled to have the legal interest.

Now, the refusal of the first instruction virtually took from the jury the question of fact as to the right of action. The court, by refusing to instruct the jury, that if they believed the legal interest was in the Bank of the United States, then they ought to find for the defendants, clearly decided the point, that there was no evidence tending to show that the bank was the legal owner of the money. In this they were mistaken; for by admitting the proof that the money was collected upon a judgment rendered in favor of the bank, there was a presumption raised that the bank possessed the legal interest. This presumption was rebutted and contradicted by other testimony in the cause; but whether it was fully overthrown or disproved, was a matter for the jury, and not for the court, to determine, being a question of contested fact. The effect of the instruction is a practical denial to the defendants of a legal presumption in their favor, which the court had no right to deprive them of; and, therefore, there is error upon this point.

The second instruction was correctly refused. The plaintiffs in error were not entitled to recover, without showing in themselves the legal interest in the suit. This they might do, by proving that they were legally entitled to the proceeds of the money arising from the judgment in favor of the bank, by assignment, or otherwise; and Cummins & Pike would then be chargeable in assumpsit, if the money was so collected, upon special contract, as the plaintiff's attorneys, to collect the money for them.

Judgment reversed.

MAHONY ET AL. *vs.* THE BANK OF THE STATE.

Nul tiel corporation is a good plea, in form, in a suit by a bank.
The act creating the State Bank, creates a corporation, by implication.

THIS was an action of debt, determined in the Pulaski Circuit Court, in May, 1842, before the Hon. JOHN J. CLENDENIN, one of the circuit judges. The Bank sued Mahony and his securities, on a promissory note, executed June 18, 1840, due six months after date, for $140. Pike, one of the defendants, pleaded *nul tiel* corporation, and a plea of usury. The latter presented, with all the necessary averments, and in proper form, the simple fact, that the Bank discounted the note, taking interest in advance at the rate of seven per cent. per annum, when, by law, she was only entitled to six. Demurrer to each plea was sustained, and judgment for plaintiff against all the defendants. The case came up by writ of error. The only question open in the case, was as to the plea of *nul tiel corporation.*

Pike & Baldwin, for plaintiffs in error. *Nul tiel* corporation is a a good plea in bar. 5 *Shepley*, 34. 16 *Maine*, 224. *Trustees, &c., vs. Kendrick*, 3 *Fairf.*, 318. *Proprietors, &c., vs. Rogers*, 1 *Mass.* 159. *Proprietors, &c. vs. Call*, 1 *Mass.* 483. *First Parish, &c., vs. Cole*, 3 *Pick.*, 232. *President and Directors, &c. vs. Garrett.* 1 *Rice's Dig.* 167. *Society, &c., vs. Pawlett*, 4 *Pet.* 480. *Boston Type Foundry vs. Spooner*, 5 *Verm.* 93.

It is held, in New-York, to be good matter in bar, but the decisions there are, that, as it can be had advantage of under the general issue, it cannot be brought forward by special plea. *Bank of Auburn vs. Weed*, 19 *J. R.* 300. *Contra, S. C.*, 18 *J. R.* 137. *Wood vs. Jefferson County Bank*, 9 *Cowen*, 194. 8 *J. R.* 378. 10 *J. R.* 154. 14 *J. R.* 238, 416. 13 *J. R.* 137. *Williams vs. Bank of Michigan*, 7 *Wend.* 539.

But all these cases show, that the objection is only ground of *special demurrer.* And this is also determined in *Ward vs. Blunt, Cro.*

Eliz. 147. *Warner vs. Wainsford, Hob.* 127. *Aylesworth vs. Harrison, Winch,* 20. *King vs. Rotham,* 1 *Frem.* 39. *Whittlesey vs. Wolcott,* 2 *Day,* 431. *Yelv.* 174, *b. Kennedy vs. Strong,* 10 *J. R.* 291. *Webb vs. Fox,* 7 *T. R.* 391. 1 *Ch. Pl.* 559. 2 *Saund. Pl. & Ev.* 720. *Crandall vs. Gallup,* 12 *Conn.* 365. And the New-York cases are entirely overruled by the cases above cited.

This plea could not be overruled, on the ground that the court judicially knew that there was such a corporation. The act establishing the State Bank created no corporation. There are no corporators. The State does not incorporate herself, or any body else, but simply declares that *there shall be an institution.*

None of the definitions of a corporation apply to erecting an idea, a mere abstraction, a nothing, into a corporation. All the definitions take it for granted, that there are corporators. There can be no body without members. The distinguishing feature of a corporation is that by which a perpetual succession of different persons is regarded, in law, as one body. 1 *Black. Com.* 123, 467. *Ang. & Ames on Corp.* 23. *Thomas vs. Dakin,* 22 *Wend.* 104. *Warner vs. Beers,* 23 *Wend.* 124, 142. 4 *Wheat.* 637. 1 *Peters,* 46. 23 *Wend.* 143, 155, 173.

Moreover, there is no corporation, because the act is unconstitutional. The constitution gave the right to charter one State Bank, and one other banking institution, and provided that the faith and credit of the State might be pledged to raise the funds necessary to carry into operation *the two Banks, provided,* such security could be given, *by the individual stockholders,* as would guarantee the State against loss or injury. This only authorizes the creation of a State Bank, composed of individual stockholders, *really* owning the stock, and guaranteeing the State. This Bank was established in direct violation of the constitution.

The defendants were not estopped, by giving their note to the Bank, from denying that it was a corporation. The *dictum* in *Dutchess Cotton Man. Co. vs. Davis,* 14 *J. R.* 245, is not, nor ever was, law. It is not true, nor ever was, that the defendant, by entering into a contract with a Bank, under its corporate name, admits it to be a corpo-

ration. *Henriques vs. Dutch W. J. Co.*, 2 *Ld. Raym.*, 1535, *S. C.* 1 *Str.* 608. *Welland Canal Co. vs. Hathaway*, 8 *Wend.* 480.

Hempstead & Johnson, contra. There is no doubt that, anciently, it was admissible to plead *nul tiel corporation*, in bar. *Kyd on Corp.* 284, recognizes that such was the practice, and he refers to 44 *Assizes Pl.* 9, and *Bro. Corp.* 44. *Miller vs. Spateman*, 1 *Saund.* 340, *b. n.* 2. But this rule has been changed by modern decisions; and it may now be considered as settled, that it is not a good plea in bar. *Bank of Auburn vs. Weed*, 19 *J. R.* 300. *Wood vs. The Jefferson County Bank*, 9 *Cow.* 194.

A special plea, alleging new matter, which is, in effect, a *denial* of the truth of the declaration, is, in general, improper and inadmissible. *Gould on Pl.* 435. 1 *Stark.* 294. *Com. Dig. Pleader*, *E.* 14. 3 *Bl. Com.* 309.

The judges whose province it is to decide upon the legal sufficiency of all pleadings, are presumed to know, judicially, what the law is upon any given or alleged state of facts. *Gould on Pl.* 22.

The declaration shows that the defendant, Pike, bound himself to the plaintiff, by her corporate name, viz: "The Bank of the State of Arkansas," and he is, therefore, estopped from pleading *nul tiel corporation*, either in abatement or in bar. 3 *Bl. Com.* 308. *Willes' Rep.* 13. 3 *East.* 346, 355. *Gould on Pl.* 46.

In the *Dutchess Cotton Man. Co. vs. Davis*, 14 *J. R.* 245, THOMPSON, C. J., said: "But the defendant having undertaken to enter into a contract with the plaintiffs, *in their corporate name*, he thereby admits them to be duly constituted a body public and corporate, under such name. The case of *Henriques vs. The Dutch W. I. Co.*, 2 *Ld. Raym.* 1535, is very much in point on this question. It is there laid down by the counsel, and appears adopted by the court, that the plaintiffs in error were estopped, by the recognizance they had entered into with the defendants in error, from saying there was *no such company*.

The court is bound *ex officio*, to take notice of the Bank charter, the same being a public law. They will even notice the Real Estate Bank charter *ex officio*. *State vs. Ashley*, 1 *Ark.* 513. The court, there-

fore, in every State Bank case determined in this forum, have decided against the defendants' plea of "*no such corporation.*"

By the Court, LACY, J. The plaintiffs in error have put in the plea of *nul tiel* corporation; and the inquiry is, does this plea constitute a valid defence to the action? Admitting the plea to be good in form, and we take it to be so, it then properly raises the question whether the Bank of the State be a corporation or not. It is certainly true, that there can be no act of incorporation unless there be corporators. There can be no body without members. The distinguishing feature of a corporation is that by which a perpetual succession of a corporate body may be kept up, so that it may act with the will of a single person. It is contended that the act, in this case, is a mere abstraction and nonentity, as it simply declares a Bank shall be established, designated by name. It is true that there are no express words incorporating any particular persons, still, the fund is placed under the management and control of a given number of directory, who are required to be elected by the Legislature, and the usual powers of banking conferred upon them. The act itself is exceedingly vague and ambiguous; it is, nevertheless, capable of being defined and understood; and, taking all its parts together, and considering it as an entire whole, we think no doubt can be entertained, that it was the intention of the Legislature to incorporate the directory, and that all the affairs of the corporation were put under their government. They are certainly not declared, in express words, to be incorporated, but still, the powers and authority conferred upon them, in regard to banking, cannot exist, unless they are so incorporated.

No particular form of words or mode of expression is necessary to create a corporation. All the authorities show that a corporation may be established by necessary implication as well as by express grant. Here that implication unquestionably arises, or you must abrogate all the powers of the directory which the charter gives them. The whole act must be construed together, and every part made to stand, if possible. This can be readily done, if the directory are considered as incorporated. Although their powers are mentioned subsequent to the name of the Bank and the amount of capital, still, they attached at

one and the same time with this declaration, and must be made to take precedence of it in order to give life and being to the act of incorporation.

The demurrer to the plea was, therefore, rightly sustained.

Judgment affirmed.

McDonald and others *vs.* Watkins, Adm.

Permitting amendments is a power which should be exercised with great caution and delicacy, after the case has been disposed of, and the court has adjourned.

It is difficult to limit the discretion of the courts, as to amendments, within any certain or prescribed bounds.

Where the record of the circuit court expressly states that the parties came, by their attorneys, and the defendants, as well as the plaintiff, entered their waiver, &c., the record will not be so amended in this court, upon affidavits, as to strike out the appearance, nor the decision of the circuit court, refusing the amendment, reversed; especially where the party lay by for a year, without suggesting the error, knowing of the judgment.

This was an action of debt, determined in the Pulaski Circuit Court, in May, 1842, before the Hon. William Gilchrist, special judge. Watkins, as administrator, sued McDonald, Hempstead, and Conway, on a common money bond. The case first came before the Hon. John J. Clendenin, the regular judge of the court; and the record, stating that he was connected with the plaintiff, and incompetent to sit, goes on to state, that the parties came, by their attorneys, and the said defendants, as well as the said plaintiff, entered their waiver of all objections to the judge sitting in the case. Their previous motion to quash the writ, was then overruled; Hempstead formally entered his appearance; and judgment went by default. This was on the 18th of March, 1841. On the 12th of March, 1842, Hempstead, in his proper person, and Conway, by attorney, filed their motion to amend the record; and the case was certified, that a special judge might be appointed. The ground of the motion was stated to be, that the attorneys who filed the motion to quash the writ, and who entered the waiver, did not represent Conway, and that he, neither

in person or by attorney, had appeared in the case. The motion was supported by several affidavits, clearly sufficient to establish, as far as oral testimony could establish, the fact that Conway had never waived, in person, the objections to the judge, nor authorized any attorney to do it. Other affidavits seemed equally as clearly to establish that the counsel had waived it for Conway. On the motion to amend, the plaintiff introduced, as evidence, the defendants' objecting, an execution on the judgment, sheriff's return thereon, delivery bond, executed by Hempstead & Conway, appraisement of property levied on, &c. The motion to amend was overruled, and the defendants brought error; and in this court applied to be permitted to amend the record, by striking out the appearance and waiver by Conway.

Hempstead & Johnson, for plaintiffs in error. The consent of attorneys, supposing such consent to have been given, was not sufficient to waive the disqualification of the judge. The constitution declares that "no judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been of counsel, or have presided in any inferior court, except by consent of all the parties. *Const. Art.* 6, *sec.* 12. *Rev. St.* 233, *sec.* 24.

When this objection is made to a judge, it is in the nature of a plea to the jurisdiction, which must always be pleaded *in propria persona.* 1 *Chit. Plead.* 475. On the same principle, a disqualification in the judge must be waived *in person.*

If any judge has an interest, he or his deputy cannot hear the cause, or sit in court; and if he does, a prohibition goes. *Hard.* 503. *Com. Dig. title Justices, J.* 3.

When the disqualification is once admitted, or established, if he proceeds, what is done is *coram non judice. Blackmore et al. vs. State Bank*, 3 *Ark.* 309. *Brown vs. Fleming*, 3 *Ark.* 284.

It is conceived that in legal parlance, an appearance to an action, so as to warrant judgment by *nil dicit*, is properly filing a plea. If the judgment should not have been by default against all, it should have been so rendered against two of the defendants below. Stand-

ing by *nil dicit* against all, it deprives the plaintiffs in error of rights which they would possess under a judgment by default. *Howell vs. Denniston*, 3 *Caines*, 96.

A judgment is certainly erroneous, when expressed to be for *all the costs;* for the plain meaning of the statute is, that it shall only be for all the plaintiff's or defendant's costs in the suit expended. *Rev. St.* 201, *title Costs. Hartley vs. Tunstall*, 3 *Ark.* 119.

The rule is, that where there is a clear mistake, or where there is fraud, the court will interfere by way of amendment, and do that equity which a party would be entitled to, on application to a court of chancery. *Chamberlain vs. Crane*, 4 *New Hamp.* 115. *Mechanics' Bank vs. Minthorne*, 19 *Johns. R.* 244. *Wardell vs Eden*, 2 *Johns. Cases*, 121. *Lansing vs. Lansing*, 18 *J. R.* 502. 1 *Saund.* 336, *n.* 10. *Lee vs. Curtis*, 17 *J. R.* 86. *Bank of Newburgh vs. Seymour*, 14 *J. R.* 218. *Hart vs. Reynolds*, 3 *Cowen*, 42 *n. Rees vs. Morgan*, 3 *T. R.* 349. 1 *Cowen*, 9. *Short vs. Coffin*, 5 *Burr.* 2730. *Green vs. Rennett*, 1 *T. R.* 656. 10 *Mass.* 251. 1 *Pick.* 353.

Amendments shall or shall not be permitted to be made, as it will best tend to the furtherance of justice; and they are made under the general authority of the court, not under the statute of jeofails. *Phillips vs. Smith*, 1 *Stra.* 136. *Rex vs. Phillips*, 1 *Burr.* 292. *Rex vs. Ellames, Rep. Temp. Hard.* 42. *Richards vs. Brown, Doug.* 114. *The King vs. Mayor of Grampond*, 7 *T. R.* 699. *Mara vs. Quin.* 6 *T. R.* 8.

Where there has been a mistake or omission by one of the attorneys or officers of the court, *e. g.* a clerk, it will be amended. *Hardman vs. Pilkington*, 4 *Burr.* 2449. *Baker vs. Cole*, 2 *Burr.* 1161. *Close vs. Gillespey*, 3 *J. R.* 525. In the case of *Muttit vs. Denny*, 2 *Strange*, 807, an amendment was made after verdict, though there was nothing to amend by, on the authority of *Cro. Jac.* 306, and 1 *Salk.* 4.

In *Foot vs. Colvin*, 2 *J. R.* 481, the omission of a fact, through mistake of counsel, was amended on affidavit.

In *Jason vs. Morgan*, 1 *Lev.* 150, an amendment was made in the record, after a lapse of forty years.

Mistakes and misprisions of the clerk may be amended at any time.

Hanley vs. Dewes, 1 *Mo.* 17. *Mitcheltree vs. Sparks*, 1 *Scam. Rep.* (*Illinois*,) 122.

An appearance by an attorney of the court, without warrant, is good as to the court; and the defendant has an action against the attorney. *Aliter*, if there be any fraud or collusion between the plaintiff's attorney and the attorney for the defendant, or if the attorney for the defendant be not responsible, or perfectly competent to answer his assumed client, the court will relieve against the judgment. 6 *Mod. S. C.* 16. 1 *Salk.* 88. *Denton vs. Noyes*, 6 *Johns. Rep.* 295. *Meacham vs. Dudley*, 6 *Wend.* 514.

Amendments may be made in a verdict, from the memory of the judge. *Cro. Car.* 338. *Gilb. P. C.* 164. 1 *Bac. Abr.* 101. *Bul. N. P.* 326. *Barnes*, 6, 449. Or from the notes of the judge. 2 *Str.* 1197. 1 *Wils.* 33. *Doug.* 376, 673, 722, 745. 3 *T. R.* 659, 749. *Barnes*, 478. 6 *T. R.* 694. Or by the notes of the associate, or clerk of assize. *Cro. Car.* 145. 1 *Salk.* 47-8. 1 *Ld. Raym.* 138. 1 *Salk.* 53. 1 *Ld. Raym.* 335. 1 *Barnard.* 191. 1 *Tidd*, 662.

While the proceedings are in paper, the amendment is at common law, and not within any of the statutes of amendments, which relate only to proceedings of record. 1 *Salk.* 47. 3 *Salk.* 31. 1 *Tidd*, 659.

Amendments are in all cases entirely in the discretion of the court, and are allowed only in furtherance of justice. 7 *T. R.* 699. 1 *Mass.* 50. 1 *Binn.* 369. 2 *Serg. & Rawle*, 219. 6 *Binn.* 88.

Ashley & Watkins, contra. The defendants in error refer the court to the following authorities, as bearing upon the question of amendment involved in this case: *Turner vs. Barnaby*, 2 *Salk.* 566. *Walker vs. Slackoe*, 5 *Mod.* 69. 1 *Salk.* 47. 3 *Salk.* 31. *Wentworth vs. Stafford*, 5 *Mod.* 148. 2 *Burr.* 756. 7 *T. R.* 475. 6 *T. R.* 1. *Wentworth vs. Stafford*, 1 *Ld. Raym.* 68. *Benton vs. Ames*, 1 *Bulstrode*, 217. *Smith vs. Jackson*, 1 *Paine*, 486. *Cooper vs. Bissell*, 15 *J. R.* 318. *Lee vs. Curtis*, 17 *J. R.* 86. *Close vs. Gillespey*, 3 *J. R.* 526. *Lansing vs. Lansing*, 18 *J. R.* 502. *Livingston vs. Rodgers*, 1 *Caines' Rep.* 587. *Hart vs. Reynolds*, 3 *Cow.* 42, *note a.* *Marsh vs. Berry*, 7 *Cow.* 344. 16 *J. R.* 55. 1 *Cow.* 132, (*relative*

to supplying amendments in ejectment, &c.) 9 *Cow.* 78. 19 *J. R.* 244. *Currie vs. Henry*, 3 *J. R.* 38. 3 *J. R.* 140. 9 *J. R.* 78, 287. *Atkins et al. vs. Sawyer*, 1 *Pick.* 354. 1 *Mass.* 51. 3 *Pick.* 401. *Wells et al. vs. Battelle*, 11 *Mass.* 477. *Keans vs. Rankin*, 2 *Bibb.* 88. *McKey vs. Moore*, 4 *Bibb*, 321. *Varnon vs. Moore*, 1 *Mon.* 214. *Berry vs. Triplett's heirs*, 2 *Mar.* 61. *Robb vs. Robb*, 2 *Marsh.* 240. 5 *Marsh.* 268. 1 *Mon.* 18. 7 *Mon.* 297. 1 *J. J. Marsh.* 365. 2 *Marsh.* 151. 2 *Marsh.* 375. *Davis vs. Ballard*, 7 *Mon.* 604. 2 *Haywood*, 376. 4 *Har. & McHen.* 498. *ib.* 163. *State vs. Calhoun*, 1 *Dev. & Battle*, 374. *State vs. Reid*, 1 *Dev. & Battle*, 377. *Smith vs. Dudley*, 2 *Ark.* 60. *Rev. Stat. Ark. p.* 634, *sec.* 112.

The court will find the following propositions to be deduced from the foregoing authorities:

First. That, in general, the record of a judgment is only amendable during the term at which it was rendered, and whilst the record is *in fieri*, or in the breast of the judge.

Second. That amendments, when allowed, are uniformly to support or sustain a judgment, but never to defeat or impair it.

Third. That in every case where an amendment has been allowed after the term has passed, it has been to supply some defect or omission, occasioned by the misprision of the clerk, attorney, or ministerial officer of the court, and which tends to perfect the record; but never in any instance to suffer an amendment which contradicts the record.

Fourth. That whenever a record is amended, there must be some other portion of the record to amend by; in other words, a record is amendable by its internal evidence; and no evidence of lesser grade, or *dehors* the record, is admissible to support an amendment changing, much less contradicting, the record.

In the present case, the record shows the simple naked fact, that the parties waived all exceptions to the judge of the court. There is no other portion of the record by which an amendment of that fact can be made.

I submit to the court, 1st: Whether the affidavits do not preponderate against the amendment sought for. 2d: Whether the presumption is not irresistible that the record is correct, or the defendants

would not have acquiesced in it so long—during two terms, and after execution had been issued and levied. 3d: There is no affidavit, or showing of any meritorious defence, which Conway seeks to interpose.

If an attorney appears without authority, or compromits the rights of a party without being retained, the judgment in such case is regular, and will not be set aside, but the party injured will be left to his remedy against the attorney. *Denton vs. Noyes*, 6 *J. R.* 296. *Jackson vs. Stewart*, 6 *J. R.* 34. *Field vs. Gibbs et al.* 1 *Peters C. C. Rep.* 155. *Barron vs. Jones*, 1 *J. J. Marsh.* 471.

By the Court, Dickinson J. This is an application to change and alter a record of the circuit court, by striking out, upon affidavit, the appearance of the defendants, and thereby, in effect, erasing the judgment of that court. We look upon the permitting of amendments, as a power which should be exercised with great caution and delicacy, after the case has been finally disposed of, and that court adjourned, lest in answering the substantial purposes of justice, it might lead to great mischief and injustice. It is not our intention to enter into a discussion of the doctrine of amendments; and indeed it is difficult to limit the discretion of the courts upon that subject within any certain or prescribed bounds. We certainly should not deem ourselves authorized to interfere with the record, in this instance, for in the entry preceding the judgment, it states affirmatively, "on this day, came the parties, by their attornies, and the said defendants, as well as the said plaintiff, entered their waiver of all exception" to the judge then sitting in the case.

In matters of doubt, all presumptions are in favor of the court below. Besides, it appears by the showing of the plaintiffs in error, that, with a knowledge of the judgment against them, nearly one year elapsed before there was even a suggestion of error in the entry.

Judgment affirmed.

Reagan and Others *vs.* Mitchell and Others.

Held, that if, on appeal from the probate court, the circuit court acts only on the exceptions taken, but wholly omits, on sustaining the exceptions, to try the matter *de novo*, or make such order and decision as should have been made by the probate court, the judgment is not final, and error does not lie to this court.

Woodruff, *Ex Parte.*

Held, that although the judges of an inferior court do not obey an order of this court, and thereby subject themselves to an attachment for contempt, yet, if their return to the mandamus shows that there was no *intentional* contempt on their part—instead of an attachment, an alias mandamus will issue.

APPENDIX.

ABSTRACT OF THE CONCLUDING ARGUMENT OF ALBERT PIKE, ESQ., IN THE CASE OF JAMES S. CONWAY ET AL. EX PARTE, REPORTED AT PAGE 302.

The first question presented in this case, is that of jurisdiction. I have already shown, that the judge to whom the application for an injunction was presented, was bound, if the deed was valid, to enforce the trust, and protect the trustees. As to *his* jurisdiction, there can be no serious question.

The first objection to the jurisdiction of this court is, that, as the constitution simply gives to this court the power to issue writs of mandamus, without defining in what particular cases the relief to be afforded by it shall apply, the uses to which the writ is to be put, are to be sought for in the common law, and in that alone, and the Legislature cannot, constitutionally, authorize the writ to be used in any cases wherein it could not be used at common law.

To sustain this argument, it is contended that the case of the *State vs. Ashley* is in point, where this court held that they had no jurisdiction in case of an information in the nature of a *quo warranto*. The cases are not parallel. In that case, the court held that, as they had original jurisdiction only in case of a proceeding by *writ* of quo warranto, which was, in its nature, a civil proceeding, the constitution did not allow them to take jurisdiction of an information, which was a *criminal* proceeding. This was not a question as to the form or application of *process*, or the cases to which it should extend, but whether the court had jurisdiction of one *action*, when the constitution gave jurisdiction only in an action wholly different and distinct.

Nor is the gentleman's argument any more fortunate, when he urges that the Legislature could not authorize the use of a quo warranto, to enforce John Stiles to pay a debt which he might owe. Such absurd examples as these may provoke mirth, but they form no part of a legitimate argument.

Undoubtedly the Legislature may extend the operation of any particular writ, so as to apply it to cases whereto it would not extend, at the common law, if, in so doing, they preserve the appropriate form of the writ, and use it to enforce the legitimate powers of the court. The constitution, which authorizes this court to issue certain writs, does not restrict the use of them to the cases, and those alone, in which they could be used at the common law. The constitution is not to be construed like a deed, as he thinks. That "stunted verbal interpretation," which is not out of place in construing the one, would be greatly misapplied in construing the other.

No doubt, at common law, a mandamus to a court would lie only *to set it in motion*, and not to prescribe what judgment it should give, or what decision it should make. But this court can do both, by some writ or other, which it is allowed to issue.

A writ of certiorari does not lie at common law to bring up *the evidence* in a case. It brings up only the questions of *jurisdiction* and the *regularity* of the proceedings. Yet can it be doubted, that the Legislature can authorize and direct the writ to be used, so as to bring up the evidence, as well as these matters of jurisdiction and regularity?

So, at common law, a writ of error will not lie in a suit in chancery. Could it be

doubted that the Legislature might provide that decrees in chancery should be brought up, as well by writ of error as by appeal?

So a writ of error, at common law, will not lie to bring up a judgment by default, a judgment refusing a motion for a new trial, or the like, yet, in all these cases, the writ is freely used by this court.

So a writ of prohibition would only lie from a tribunal having jurisdiction of a particular case, to an inferior tribunal attempting to take jurisdiction in the same case. Yet who doubts that the writ might be made by the Legislature to lie, though the superior court had not itself the jurisdiction?

The argument of the gentleman would, in fact, curtail, in a most singular manner, the powers of the Legislature, and prevent this court from exercising a large portion of the jurisdiction conferred upon it.

The gentleman, then, contends that the case is not within the appellate jurisdiction of this court, because the court has no power of revising or correcting the acts of a chancery judge, done at his chambers; and that the act of December 15, 1838, providing that this court may award a mandamus, commanding a judge of the circuit court, or the circuit court itself, to grant a writ of injunction, which has been refused by him, is unconstitutional.

The constitution of this State vests the whole judicial power of the State in the Supreme Court, circuit courts, county courts, and justices of the peace, corporation courts, and courts of chancery.

The equity jurisdiction of this State is all conferred upon the circuit courts, subject to appeal to this court, in the manner to be prescribed by law. This court has appellate jurisdiction, co-extensive with the State, and a general superintending control over all inferior, and other courts of law and equity. It has 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.

In like manner, by the Constitution of the United States, the judicial power is vested in *one Supreme Court*, and in such inferior courts as the Congress may, from time to time, ordain and establish.

Now, we contend, that, under both these constitutions, the chancery courts, both of the United States and of this State, are considered as always open, and that, whenever the chancellor does any act judicially, it is considered the act of the court: and that this must necessarily be so, because, as *all* the judicial power is vested in the *courts*, every judicial act must be done by the courts, or not at all.

In England, the court of chancery is *always open;* and therefore, it was always held there, that the Lord Chancellor could grant an injunction in vacation. *Temple vs. The Bank of England*, 6 *Ves.* 771. 5 *Ves.* 129.

The constitution, by giving to our circuit courts equity jurisdiction, has certainly, for there is no limitation, conferred upon them all the powers of chancellors, in England, so far as consistent with our frame of government. If this be true, then their courts are always open, and every act done by them, especially the granting or refusing an injunction, is the act of the circuit court. And, if so, the Legislature had the power, unquestionably, to authorize this court to review its action, and direct an injunction to issue, by writ of mandamus. Nor do I see why the writ could not issue, even if it were not the act of the circuit court. It would still be true, that the circuit judge has been made a special tribunal, to decide upon the rights of individuals, and the writ might lie to him, as to other inferior tribunals.

But I care not for this point, because I think the other is clear. As all the chancery power and jurisdiction of the State is vested in the circuit courts, it seems to me that, when the Legislature authorize a circuit judge to grant an injunction, *they open his Court*, or else it is not the circuit court exercising chancery jurisdiction, but some other tribunal not known to the constitution.

The framers of our constitution knew that, in England, the court of chancery was always open. They knew that, to the due exercise of chancery powers, it was necessary that a thousand acts should be done in vacation, and that such had been the legislative and judicial construction of the constitution of the United States. They have used no expression, nor let fall any hint, that our chancellors are not vested with the same powers as the courts of chancery in England, and they certainly give to this court a revising and controlling power over all their acts.

One further objection is taken, based upon the *resolutions*, which are made part of the case. It is objected that the bill does not show that the Attorney of the Bank ever certified to the Board that the Trustees had executed their bonds.

These resolutions were passed on the 4th of April. The deed was executed on the 2d, and, as we have shown, the whole property then vested in the Trustees, beyond the power of recall; and the deed also expressly provides that all the property should be delivered over, immediately on the execution of the deed.

The execution of the bonds is not a *condition precedent.* It is a duty to be performed, for neglect of which the Trustees might be ousted. It is not a condition precedent, because it did not become obligatory till the deed was executed, and at that instant the property vested. No obligation to execute bonds was created *until the property had vested in them.*

The resolutions could not qualify the deed, or delay it. They could only be considered, at the utmost, as an *agreement on the part of the Trustees,* made without consideration, that they would not require the property to be delivered, until a majority of the Executive Board, and of the committee at Little Rock, had given bonds, and that the Directory should not be required to turn over the property, until this fact was certified to them by the Attorney.

This the bill shows the Trustees have done. It shows that *the whole Executive Board,* and two of the Local Committee, have given bond. They are therefore entitled to the property. If the Attorney had not certified that fact to the Directory, *that was his fault,* and not the fault of the Trustees. It might show that the Directory were not in default, unless the bill stated facts to show them in default on other grounds.

This the bill does. It shows that the Directory refuse to make out a schedule, or permit it to be done, or to give up the property, upon the ground *that the deed is void;* and that they refuse to take or concur in any step to have the question as to its validity speedily determined.

By taking this ground, and making this absolute refusal, the Directory waive any objection in regard to the bonds; as a man waives the necessity of a *tender,* when he says, you need not tender the money—I will not take it if you do.

The Directory had nothing to do with judging of the security, nor had the Attorney. Three stockholders were to approve of that. The very defence, therefore, which these respondents make here, estops them from saying that they were not informed that the bonds had been executed. I regret that any such objection, frivolous as it is, has been thrown in; because it proves the determination of the respondents to hold on to the property, and avoid a determination as to the validity of the deed.

The argument of Mr. Cummins, that the right of the possession of property is always protected, is no doubt correct. But when he asserts that the property in this case is taken out of the legal possession of those entitled to it, he commits a great mistake. By the charter, it is true, the property of the Bank is deposited in the different banking houses, and in custody of the Directories, *as agents merely* of the corporation. The corporation is certainly competent to remove or dispose of this property; and the same question still recurs, whether she has done so.

That the Directors are agents, is true: that they cannot exceed the powers conferred upon them, is also true. But there are different classes of agents, and the law as to the responsibility and powers of each class, is peculiar to itself. There are public and private agents—agents with *general,* and agents with special powers. Legislators are agents, and so are bank directors. What powers are conferred upon the Central Board, is to be ascertained from the charter and the general law of the land.

Both the gentlemen contend *now* that the Central Board, by law and the charter, is a mere advisory body and board of conference; and that it has no powers except those *expressly* conferred upon it by the charter. We contend, on the contrary, that it has and can exercise all the powers vested in the corporation, except where it is specially limited.

This Bank has been once heretofore before the Court. In that crisis, the two gentlemen now opposed to us, were opposed to each other. The gentleman who last addressed the Court, contended, as he now contends, that the Central Board had no powers except those expressly conferred upon it, and that it was a mere board of conference and advisement. We (and the other was the Ajax Telamon who bore the brunt of the battle on our side,) contended, on the contrary, that all powers vested in the corporation, and not expressly denied to the Central Board, necessarily belonged to, and could be exercised by it.

This Court decided between us. The gentleman then opposed to us argues that its decision was in almost every respect extra-judicial, and entitled to no respect either from bar or community. But such is not the case. It was necessary for the Court first to decide whether the act creating the Bank was constitutional; for until that was

decided, they could not reach the other questions argued in the case. *In deciding this,* it was necessary to define the powers of the Branches and Directories, and of the Local Boards, and also to determine the powers of the Central Board, and the relation it occupied to the corporation. Moreover, the direct question before the Court was, whether the Central Board had the power to make certain regulations in regard to elections, the power to make which was not expressly given by the charter.

The Court decided these questions. They stated fully the argument now used in regard to the powers of the Central Board—absolutely denied that it was a mere board of conference or advisement; and held that the local boards had no powers except those expressly conferred upon them. And they further held, that the powers of the Central Board were *unlimited*, except in a few particulars specified in the charter; that it was gifted with *complete* and *plenary* power for the well governing and ordering the affairs of the institution; that it was difficult to conceive by what language the Legislature could have conferred upon them greater powers; and finally concluded with the emphatic declaration, that the Central Board might be said to represent the *sovereignty*, *unity*, and *indivisibility* of the corporation.

The charter, by section 3, gives to the local directories the entire control over the business belonging separately to each branch, *so far as relates* to the signing and emitting of notes, the extent of loans to be made, the purchase of exchange, and the deposite and direction of the funds; but *provided* the same were not done to the injury of the general interests of the institution; and that nothing should extend their powers beyond the control of the Central Board. It merely placed them beyond the control of *the Principal Bank*, but left them entirely subject to the Central Board. The 22d section authorized them to make by-laws, &c., *not contrary to* any by-laws, &c. of the Central Board. By the 9th section, a revising and controlling power is given the Central Board over all their acts.

It is manifest, from these provisions, that the Central Board is not a mere appellate power; and, moreover, that the custody of the funds is given to the local boards, entirely subject to the paramount control of the Central Board. The Central Board can not only revise, review, and reverse, but prescribe the future action of the local boards.

Moreover, by the 9th section, the Central Board is to attend to the payment of interest; and to *settle and control all the general accounts of the institution;* and, finally, to exercise such other powers, for the well governing and ordering the affairs of the institution, as might be deemed necessary and proper to advance the general interests.

Now, if the power over the property of the Bank was not given to the Central Board, *where was it vested?* To deny them the power to appropriate property to pay debts, seems to us to be a most palpable absurdity, directly in the teeth of the charter, and the decision of this Court. How else could they settle and control the general accounts? how else pay the interest on the State bonds? The power over the property—the power to pay debts by transferring property, is clearly not given to the local boards: that power as clearly belongs *to the corporation.* By whom, then, but the Central Board, is it to be exercised?

A *corporation*, it is true, has no powers but those granted by the charter. But authorities on this point do not apply in the discussion of the powers of the Central Board. I warned the Court that an attempt would be made so to apply them. The power to pay its debts, and to appropriate its property for that purpose, certainly belongs to the *corporation.* If so, it is vested in its magistracy somewhere.

Let the gentlemen admit that the Central Board could sell one solitary note, or article of property, to pay a debt, and they yield the whole question as to power. No man will be bold enough to deny that the Central Board could have ordered the banking-house to be transferred in payment of a particular judgment. Admit this, and the question is at an end.

For no man can find a defective link in the chain of reasoning of Chief Justice Marshall, in 1 *Brock.* 456, of the Supreme Court of the United States, in 11 *Wheat.* 78, or of Chief Justice Parker, in 11 *Mass.* 286. If one partner, says the first great luminary of the law, can sell one piece of goods for money, he can sell it to pay a debt, or on credit. If he can sell one piece to pay a debt, he can sell all. The amount of debt, or quantum of goods sold, can make no difference. If he can deliver over the goods in payment of a debt, he can equally as well convey them to trustees for that purpose. Such is also the reasoning in 11 *Wheat.* 78. The President and Directors, said Chief Justice Parker, could transfer or order to be transferred one piece of property, one bond and mortgage, in payment of a debt. *This* gave them absolute control over all the property of the institution. No doubt the power might be abused; but the

stockholders should guard against that when they elected them. Will any man show me the defect in these chains of argument? To my mind, one proposition inevitably follows as a corollary from the other.

One of the gentlemen speaks of our desiring the Court to take matters *upon faith* and our affirmation. Not so. Why will they not show the law, if they have any, that a Directory *cannot* transfer all the property of the Bank? I rest on the decision of this Court, and those of the great Judges I have quoted. I shall not be convinced, till something better than mere assertion and plausible argument is adduced against these.

They treat with lightness the "Little Berkshire case." Gentlemen never assume this tone in regard to a decision of a Court of as high a character as that in Massachusetts, where jurists as able as any in the Union have presided, unless they feel its weight heavy upon them.

If any further authority were requisite to show the Court that the Central Board had the power to assign, I would refer them to 1 *Ves. & B.* 226, where a mortgage executed by the select body of a corporation, was sustained, even against the corporators. The cases from the Connecticut Reports, and in the Court of Appeals of Maryland, conclusively demonstrate the same fact.

It is urged that the deed takes away from the stockholders the power of voting, the power of inspecting the acts of their agents, and in fact annihilates the Bank. Suppose the Central Board had simply, by an unconditional transfer of all the property of the Bank, paid all the debts of the Bank, without using the medium of trustees. Could any complaint have been made? Such a transfer does not annihilate the Bank. I have already shown that it is not even cause of forfeiture of the charter. It may *suspend*, as Judge Marshall said, the operations of the corporation; but that is certainly no legal ground of objection.

It is contended that the Central Board, being trustees, could not delegate their powers. There are many obvious answers to this. First, that this is not a delegation of power, but a mere appropriation of property to pay its debts. Second, that the Directors were not technical trustees. You might as well, as Lord Hardwicke said, call every bailment a trust, as this. The gentleman complains that I will not *define* what a Director is. I would like to gratify him; but a definition would shed but little light on the matter. He might as well ask me to define what a *Legislator* is. A Director is to some extent a trustee, to some extent an agent, to some extent a legislator. But he is not a *technical* trustee, who cannot delegate his powers. There are some powers he cannot delegate. He cannot vote at meetings of the Board, by proxy; but in regard to the *property* of the Bank, he can clearly act by agent. He is not a technical trustee. If he were, a majority could not act, nor could the Directory make a loan to one of themselves. *Third*, the trust which cannot be delegated, is a trustee's *discretion* and *judgment*. A trustee may appoint an agent or attorney, to do any act, where he does not delegate this discretion and judgment. Thus, a trustee to whom property is conveyed to pay debts, may convey it away on the same trusts.

The most conclusive answer is, that directors are not trustees, because they are *in no wise or manner* subject to the control and jurisdiction of a court of equity, as technical trustees, executors, and guardians are.

The gentleman remarked on 11 *Mass.* 286, that in that case a note was merely assigned to pay a debt, and that it was the same thing as getting the money on the note, and paying it over. Certainly; and that is the very ground on which this assignment is valid. The Central Board had the same power to transfer the property in payment of all debts, as to *collect* the money and pay it over. He remarks that in that case, too, no *legal* interest vested in the President. That is a mistake. Nothing but a legal interest vested in him, and such is the case here. These trustees have no beneficial interest.

The gentleman who last addressed the Court, contends that no reason is shown why the assignment is made: That the bill should show the necessity for it: That in order to make an assignment, a bank must be insolvent; and that such was shown to be the case in all the cases I have cited.

It was certainly not necessary to show any thing as to this in the bill. The resolution of the Central Board declares the necessity for making the assignment, and shows the Bank to be unable to pay her debts. The Court will certainly *presume* this to be the case, until the contrary is shown.

Nor is it true that a bank must be *insolvent*. The cases put a bank on precisely the same footing as an individual. An assignment made by a person while *solvent*, was never denied to be good. The whole dispute has been, whether he could do so when

insolvent. It was originally held, that, if *insolvent*, his prefering one creditor was fraudulent; but this objection, though morally, perhaps, correct, has been overruled, and the law settled the other way in a thousand cases. That was the very ground taken in the case of the Cantine Bank. It was argued, that, as the Bank *was insolvent*, her directors could not assign, but must hold the property as trustees for *all* the creditors. So, in the case of the Maryland Bank, the *State* contended, that, as the Bank was *insolvent*, she was entitled to be preferred, and the assignment was invalid. The gentleman cannot produce one single solitary authority for his position. The law has been settled, after much struggle, that an individual or a bank may assign, *although* insolvent. He urges, that a bank can only assign *because* she is insolvent: that is, he requires us to *prove* the very thing which, were it not for the modern cases, would defeat the deed.

Nor is it true that insolvency was admitted in the cases cited. On the contrary, in the case of the Maryland Bank, where a case was agreed, *not a word is said about insolvency*, and the deed expressly stated, *that the assets of the Bank were sufficient to pay her debts*, if economically administered.

He urges, that the directors could not change the Bank into a loan office. Certainly not; but to pay its debts with its property, is not to do this. If his argument be good, no bank ever could make any assignment at all.

It is true, as both gentlemen urge, that some of the cases cited were cases where a security only was transferred to pay a debt; but it is also true, that, from this power, the power to make a general assignment *inevitably* follows: for, although it is urged that the *minor* does not include the *major*, the *major* often results from the *minor*.

It is not true, that the assignment, by the Bank of Maryland, was made under any local law. The act read from Dorsey's laws only provides how a deed, made by a bank, shall be *acknowledged*, and allows it to be acknowledged by *attorney*.

It is true, that, to constitute a trust, there must be a *legal estate* in the *author* of the trust. The Bank here is the author. No *estate* at all, in any of its property, is vested either in the stockholders or in the directors. The Bank is the *principal*, and can create a trust, by agent or attorney, or by her legislature. The same question recurs, whether her legislature were authorized to create it.

In connection with the fallacious argument that it must be shown that the Bank was insolvent, (which *is* shown by the ordinance of the central board), it is insisted that there was, in fact, no necessity for the step being taken. The fact, that she had suspended specie payments, and was unable to resume; that she could not pay her interest; and, that she could not else protect her debtors, is a sufficient showing of necessity. If it were needful to prove her actual insolvency, I should find no difficulty in doing so, and in showing that, if she settles up her affairs to the best possible advantage, she will be a loser, on account of bad debts, to the amount of at least $400,000. The amount actually due on her bonds, without including interest, is about $1,700,000, and her circulation about $400,000. Her liabilities may be safely computed at *twenty-two hundred thousand dollars*. If she collected *every debt due her*, she could not more than pay this amount.

It is also contended that the case of *Catline vs. Eagle Bank*, is not in point, because, by the charter, in that case, power is given the directory to manage and dispose of the funds of the Bank. Is this any broader than the powers conferred on the central board? Laying aside the fact that they are unlimited, except in a few particulars, where they are restrained by the charter, and that it is difficult to conceive how the Legislature could have conferred broader powers, is not the power "to *settle*" and control the general accounts of the institution sufficient?

The first gentleman also insisted, that the central board could only make a deed as *trustees* or as *owners* of the property. They did not make the deed. As a *legislature*, or, if you please, as *agents*, they *directed* it to be done. That a technical trustee cannot deposite funds in a bank, surely has no application to this question. The cashiers had the *custody* of the funds, and the question here is, not as to the *custody* of them, but as to the right to dispose of them.

He contends that all the powers are vested *in the stockholders*. Certainly. One power is to loan money. Could not the directors do this? Another power is, to take mortgages. Could not they do this? Another is, to pass by-laws, ordinances, &c. Could the central board not do this? Another is, to take, sell, and convey property. Who is to do this?

Such are the reasons urged, why the central board had not the power to assign. To what do they amount. The gentlemen urge, that we ask the court to take our asser-

tions on faith, and, in the next breath, that we have read fifty law books. Where have they found and produced *one single authority*, that the directors of a bank cannot assign.

By what organ can the Bank speak? By what organ can it act? Its stockholders, if every one were to join in the conveyance, could not convey one dollar's worth of the property, for they have no legal interest in it. The local directories could not do it; and, if the power belongs to the corporation, it can and must be exercised by the central board.

I rest upon the cases I have cited. If this board could sell property, or assign securities for money, it could assign or sell to pay a debt. If it could so pay one debt, it could so pay all. The amount of property, or *quantum* of indebtedness makes no difference. If they could thus appropriate all its property to pay all its debts, directly, they can do so through the medium of trustees. If there be any defect in this argument, it is not my error, but that of Chief Justice PARKER, Chief Justice MARSHALL, and the Supreme Court of the United States. I should like to be able to agree with the gentleman, but am constrained to say "*ego assentior Scævolæ.*" Whatever *trust* was confided to the central board was not *delegated*, but ended. It was a direct sale of the property—an extinguishment of the debts, *pro tanto.*

If the directors of the Northampton Bank could assign large amounts of securities to pay debts; if the Eagle Bank could do the same; and if the Bank of Maryland could assign all its property to trustees, all without the assent or intervention of the stockholders, I ask for the authority, that this central board could not do the same.

Then, as to the objection that they conveyed to themselves, it is said that we dodged and disclaimed. Not so. I disclaimed any responsibility as to the *policy* and *expediency* of this step. But as to its *legality*, I wish to be distinctly understood, that I did give my opinion, as upon every other legal question presented by the deed, and then had, and still have, no doubt that it was and is a legal deed.

The gentlemen both admit that a Bank may assign to a stockholder, and that, if there had been left in the central board a *majority* besides those appointed trustees, there would have been no legal difficulty, on this ground.

Nothing is plainer, as I have already shown, than that the Bank and its stockholders are entirely different and distinct persons, in law; that one may contract with, convey to, and sue, and be sued by, the other, equally as any two individuals may do. The artificial body is totally distinct, in law, to all intents and purposes, from the natural persons composing it. To argue, therefore, that there must be two parties to every deed, though true, is so inapplicable as to be absurd.*

To avoid this inevitable conclusion, the gentlemen go into metaphysics and abstrusities. One urges, that the Bank was not *represented* in this transaction, because a majority of the central board was representing themselves, and complains, that I have not understood this argument. I apprehend he does not understand it himself. It is much like that celebrated point called *point no point.*

He cannot mean, that the Bank was not actually and legally *represented*, because there are proper, competent, legal parties to the contract. He must mean, simply, that the bank was not morally represented, because the trustees were seeing to their own interests, and therefore could not, at the same time, look to the interests of the bank. But in this there is no legal or actual impossibility. Whether they did look to her interests, is to be ascertained from the provisions of the deed.

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* In *Paul Revere vs. The Boston Copper Co.*, 15 *Pick.* 363, the Supreme Court of Massachusetts said: "One of the main purposes and principal effects of incorporation is, to create a separate person in law, capable of acting and contracting in a separate capacity; and such conventional person and body politic has a legal existence, independent of that of all its members, *and therefore may as well contract with one of its own members* as with other *persons. It follows, as a necessary consequence, that such contracts must be construed and carried into effect in the same manner as contracts between other parties.*"

Judge STORY said, in *Dartmouth College vs. Woodward*, 4 *Wheat.* 518, that a corporation "is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises, which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. *Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner as with any strangers.*"

In connection with, and as a part of this argument, he urges that a trustee *to sell*, cannot *purchase* the trust estate. Undoubtedly this is true. But the principle is merely that he cannot purchase the estate *absolutely*, or a *beneficial* interest in it. The reason given is, that he shall not make profit out of the estate committed to him; and if he does buy, he shall still hold as trustee. In this case the trustees take no beneficial estate. They take a mere *legal* estate, and the property is held in equity to have vested in the creditors at the instant the deed was made. *They were not representing themselves at all.* They were representing the bank and her creditors. They do not buy or take the property. They still continue *agents* merely, as they were before—*trustees* guarding her interests as closely as they did before.

Suppose A. has a power of attorney from B., authorising him to sell a certain estate of B., and with it pay a debt of B.; or to convey it to some third person, *in trust*, to sell the same, and pay the same debt. We know that A. could not purchase the estate for his own benefit. But suppose he executes a deed, by which A., by him, as his attorney, conveys to him the same estate, upon the self-same trusts. Is not this valid? Why, beyond the slightest shadow of a doubt. And this is just what has been done here. Could any court go behind the deed, and say that because A., who was the attorney of B., had caused the deed to be made to himself, as trustee, therefore A. was *unrepresented*, and the deed was void? This would be a kind of metaphysical argument, for which it would be hard to find an authority any where.

The other gentleman contends, that there must be not only two competent legal parties, but two distinct wills; and that such was not the case here. It is a plausible sophistry, but wholly untrue. *Wherever there are two legal contracting parties, there are in law two wills.* The *will* of a corporation is as distinct in law from the wills of its stockholders, as are its personal existence and identity distinct from theirs. Neither the identity nor the will is, *in fact, distinct;* but fact and law, in regard to corporations, are different things. All the authorities on corporations speak of *the one will.*

It is not true that there must be two distinct and separate wills, *in fact*, to make a contract. Cannot a man make a note to himself, and, by endorsing it, give a right of action? Suppose a corporation sole, or a corporation originally of many members, reduced by transfer to *one sole corporator*, conveys by its corporate name to the individual composing it. Is it not a valid contract? Unquestionably. Suppose a corporation of three loans money to two of the corporators, and takes their note to the corporation. Cannot suit be maintained upon it? Suppose the same corporation of three conveys property to two of its members, is not the conveyance good?

That there must be two wills, is the mere coinage of the gentleman's brain; and if there must, the simple answer is, that the deed is not held in law to be made by the will of the agent, but by the will of the principal.

The truth is, that these objections that the bank is not represented, and had no will in the matter, could only be urged to induce the court to look closely into the matter, and see that there is no fraud. They are not legal objections to the deed. The Central Board represented the bank, and uttered the will of the bank. They had as much right to make themselves trustees, as they would have had to make themselves agents of any kind. They certainly could see to the interests of the bank, although they appointed themselves. The only question is whether they *did* do so. It is only a little more plausible way of presenting the same old, stale objection, that a man cannot convey to himself. It is the same objection as that a corporation cannot sue a member; an objection exploded these three hundred years, if it *ever* had any validity.

It is further urged that the bank could not assign to her debtors, because it extinguished the debt. No authority is adduced for this position, except that where an executor is appointed, who is a debtor to the testator, the debt is held, *at law*, to be extinguished, although it may be recovered in equity, and even at law, where there is a deficiency of assets; in which case we have shown the court that if the executor did not pay his debt, it would be a devastavit. Now, by analogy, as this deed is made on the very ground of a deficiency of assets, the trustees are necessarily bound to pay their debts, if not at law, certainly in chancery.

But on what ground is it held that the appointment of a debtor as executor, extinguishes the debt? Why, that the appointment is considered as evidencing the intention of the testator to make to him a specific devise or bequest of the debt. This intention is presumed, where the assets are sufficient to pay the debts, because a man may do as he pleases with his own; but not where they are insufficient, because a man must be *just*, before he can be *generous*. If *all* the testator's property were devised

to the executor, *expressly in trust*, would the presumption *then* arise that the testator intended an absolute bequest of the debt? Of course not.

By what logic, then, is it argued that the bank here has relinquished and released these debts? Certainly not on the ground of intention; and if she did intend it, she could not do it by law.

Besides the debt due by A., one of the trustees, is not assigned to him alone in trust, but to him and his co-trustees, who form one person in law. Suppose a partner makes a note to his own firm. Is the debt extinguished? Certainly not. The *remedy* is suspended only. An endorsement will revive it.

But the gentleman urges that no body but the creditors can ever apply to chancery, to make them pay these debts. I ask why—and where is his authority? They are agents for the bank and the stockholders, as well as the creditors—and one can apply as well as the other. If they do not pay like other debtors, according to the terms of the deed, *their* securities will be liable; they will be bound to pay the whole amount immediately, and if the co-trustees connive at their delay, they also will be liable with them.

Before I proceed to consider the other objections to the deed, which, it is argued, show it to be fraudulent on its face, it may be well again to refer to authorities which I cited, upon the objection that these trustees conveyed to themselves.

Let me first remark, that the author of a trust may make *himself* a trustee. *Lewin*, 15. For example, suppose A. covenants with B. that he will stand seized *to the use of himself for life*, and after his death, &c. The principle is, simply, that he must be a person different from the *cestui que trust*. How much more may the agent, through whom the principal creates the trust, be himself the trustee.

I showed, from the case of the Bank of Maryland, that Ellicott, the trustee in the first deed, conveyed together with the Bank, to *himself* and two others, in trust. I showed, in the case of the Northampton and Berkshire Banks, that four directors, of whom the president was one, being a bare quorum, made the president the attorney of the Bank, to transfer securities. I showed, by 10 *Pick.* 126, that the Bank and its stockholders were wholly distinct and separate persons in law. These may be called "*petty authorities*," but they, and especially the "*little Berkshire case*," seem to have grievously troubled the learned counsel.

If the directors of the Berkshire Bank could make *one* of themselves attorney, why not make all. Larned was elected by a majority, it is true. *So was each trustee in this case.* I do not see the difference. The distinction is too fine for my perception.

I come now to the objections made to the *provisions* of the deed. The first is, that the order prescribed for paying the debts is not honest and fair, because the debt due on the hypothecated bonds is postponed to the payment of the other bonds, and it is a meritorious debt. Why, does a court ever inquire whether the debt postponed is more or less meritorious? Certainly not. The right of preference is absolute. On this point, the multitude of authorities I have cited will leave not a shadow of a doubt.

The gentleman argues, that the Bank attempts to compel Holford & Co. to take the amount actually advanced by the North American Trust and Banking Company, and provides for the payment of this amount only on condition the bonds are given up, expressly refusing to pay any amount which she is legally bound to pay to Holford & Co. This is a sheer mistake. The deed expressly requires the trustees to pay, not only the amount *received* on the bonds, but whatever amount the Bank is legally bound to pay. Let the holders establish her liability by suit, and the trustees are bound to pay it.

He insists that the trustees are not required to purchase any bonds until they fall due, and Holford's claim being postponed to the other bonds, cannot be paid for twenty years. Equity would compel the trustees to appropriate and pay out the moneys collected, as fast as received, and to pay *compound* interest on it, if they retained it, even if there were no provision as to when they should pay.

But he has not read the deed. It *does* expressly require them, "*forthwith, on the receipt of any moneys from any source*," to pay it out in discharge of the debts, in the order mentioned.

Therefore, all his argument, on this point, was without foundation in fact. So was his elaborate calculation that the Bank would finally lose her whole capital, for it was based on the supposition that the interest on the bonds would run on, while the trustees would hold the funds, and buy no bonds until they were due.

That the holders of the bonds may refuse to permit them to be paid, is no objection. So may the holders of their bills: so might the holders of an individual's paper. It is

not to be supposed, when all State bonds are disgraced and depreciated, and the market flooded with them, when they are hawked about from city to city of Europe, and can find no purchaser at any price, that the holders of them will not permit them to be paid. The supposition is too preposterous to merit notice.

The last gentleman who addressed the court, declares himself in favor of repudiation. This is neither the time nor place to discuss that question. But I take occasion to declare, lest silence should seem to give assent, that I am against it, now and forever. A proud State does not settle her obligations by the same rules which govern litigants in petty tribunals. If she has confided her bonds to her agents, and they have disposed of them wrongfully, I say that a moral obligation rests on her to pay them, which she cannot avoid without being disgraced and dishonored, and her escutcheon spit upon throughout the whole civilized world. I say, no repudiation, but let them be paid to the last farthing. Tax me to the last dollar before you disgrace the State.

Nor do I agree that the Bank had not the power to hypothecate. The only limitation in regard to her power over the bonds, was, that she should not sell them for less than their par value. I am much inclined to deny the assumption that she had not power to pledge.

The last gentleman further urges, that the trustees can take the money in their hands, and with it go into market, purchase up bonds, and make profit for themselves. Yet he well knows that a trustee can make no profit for himself out of the trust property, and that a court of chancery would at once compel him to account. This objection either goes to the point that we can place no confidence in human nature, or that our courts of chancery are corrupt and powerless. How can a trust be created, unless confidence is reposed. We have conferred upon this tribunal the power of deciding, in the last resort. We confide to your hands all questions touching our property, liberty, and life, with no other guarantee than your integrity, your oaths, and your consciences. We must rely upon the same honesty and integrity—we must rely upon human nature in a multitude of transactions of life, and to urge this argument is to deny the existence of such things as virtue and integrity, and assert that universal human nature is corrupt and dishonest.

To object to this deed, that the obligations resting upon the trustees cannot be enforced, except through a court of equity, is only to object that it stands, in this respect, like every other trust deed. Trustees are, by law, amenable to no other tribunal. To stipulate that they should settle, at certain times, or do any other acts, such as paying over the surplus, which equity will compel them to do, in the absence of stipulation, would simply be to declare that they should do certain things, without, in the slightest degree, creating or increasing the power and means of compelling them to do so.

The gentleman also objects that, by the deed, all moneys due the Bank on judgments, and where claims are in suit, and the defendants have attempted altogether to avoid the payment of them, shall be collected in specie, giving the trustees the power to extend the time in such cases, only where an attempt at immediate collection would jeopardize the debt; and insists that it is unfair and oppressive.

And why? If a debtor would pay the Bank in her paper, the law requires him to tender it when the note falls due. If he would offset her notes after suit brought, he must prove that he had her notes when his note fell due. These parties have no legal right to any indulgence. Indeed, I much doubt whether, in such cases, the creditors are not entitled to demand that these debts shall be collected in specie. I doubt the power of the trustees to collect them in any other way. At all events, if these parties have undertaken to avoid the payment of their just debts, they did it at their peril. If they have failed, they cannot complain that the Bank demands and enforces her rights. And more especially have they no right to complain, when their delay in paying, and the course that they have pursed, have, in a great measure, compelled the Bank to this assignment.

He objects, that the compensation of the trustees is too high. The local committees receive but three dollars per diem, while engaged in business, which can only be seventy-five days in the year, except those at Little Rock, who may be engaged one hundred and eighty. Thus, twelve of the trustees can receive but $225 each, per annum, and three, but $540 each, per annum, at the very utmost, and this compensation ceases altogether, at the endof two years. The Executive Board, of five, receive $4 per diem and their travelling expenses, while engaged; and your Honors and the Legislature can bear testimony whether this is an extravagant compensation.

As to the salary of the Attorney, it is to be remembered that the salaries of the several attorneys of the Bank have always cost more than my annual salary, at any time since

I have been attorney. Even at the Principal Bank, at one time, while one of these gentlemen received $1000 or $1500 per annum for his salary as attorney, the other received $500 as a fee for defending himself, in a "*crisis*" before this court. The aggregate yearly salaries of all the attorneys never was, before my appointment, less than $2750, and some years as high as $3150. Besides, so soon as notes are executed to the Trustees, suits will be instituted all over the State, and then the attorney's salary will not pay him for his labor, and the assistance he will be compelled to employ. The pay will be a small commission for collecting over two millions of dollars.

He insists that the bonds executed by the Trustees cannot be enforced, because the Trustees may turn out their attorney, and refuse to appoint another, and then no suit can be brought upon them. In fact, he thinks the attorney can have no successors. The latter idea I shall not trouble myself to notice. For the other, a court of chancery will compel Trustees to do any act which they are bound to perform, and to appoint an attorney, as well as to do any thing else. Nor would it matter if the attorney were removed. The bonds could still be sued on in his name. And, finally, the trust would be equally as valid, if no bonds at all had been required.

He thinks the amount of the bonds not sufficient. Have the Cashiers of the Bank ever given bonds amounting in the aggregate to $2,200,000? Have the Directors ever given bond at all? The bonds are sufficient in amount to secure any moneys that will ever be in their hands at any one time. And, in truth, we rely more on the honesty and integrity of men, than on their bonds. No age of the world has been so rife in peculation and defalcations as the last ten years, and in no time were bonds more scrupulously exacted. It is not the *bond*, but the character, on which we rely in cases of trust and confidence.

Nor has the deed been remiss in providing checks upon the Trustees. The bonds still exist: the State directors are still appointed, to watch with Argus eyes over the conduct and to scrutinize the proceedings of the Trustees.

He complains that there is a provision authorizing the Trustees to transfer all the property of the Bank in absolute payment of all its debts. Who can complain of a provision which would release the stockholders and State from all responsibility, and only expose the debtors to pay their just dues?

He further objects that the deed gives too much time to the debtors, and tends to delay the creditors. Unquestionably an instrument of this nature, which attempts to delay and defer the creditors, *fraudulently* and without necessity, would be void. But in order to determine as to this matter, the situation of the country and the motives of the Bank must be looked at. The country is overwhelmed with debt. Money is not to be procured, and distress pervades every corner of the land. To attempt now to enforce the immediate collection of these debts, would involve the whole country in ruin, make Texas populous with emigrants, and absolutely lose to the Bank and its creditors *at least one-half of the debts due her*. She will lose at all events, upon the best calculation, at least $400,000 by bad debts. Press the collection of all that is due her at once, and she will lose *a million of dollars*. We need but open our eyes, to see that this will be the inevitable result. Let the opportunity be but afforded for us to make the proof, or let the Court act upon its own knowledge, and it will be abundantly manifest that it is *utterly and absolutely impossible* for the debtors to the Bank, or even the whole people of the State, to pay what is due this Bank in less than eight years. Consequently, it is for the interest of the creditors that this time and indulgence should be granted. Nor can they complain. Of the amount due by the Bank, seventeen hundred thousand dollars is not yet due, nor will be for eighteen years. So much of her debt she is not delaying, but providing means to pay it ten years before it will be due. As to the residue, there will be no delay, because the amounts to be collected will extinguish that in two years at the very furthest,

The Bank had a right to protect her debtors. She owed it to them to do so, because they borrowed with the understanding that they were to pay by instalments. She owed it to the State and her creditors, whom otherwise she could not save from great loss. And it may safely be averred, that neither any number of individuals, nor the Legislature itself, can or will ever put our Banks into liquidation on any other terms. If they did, it would work ruin to the State, and bring distress and lamentation into every house in the land.

Is there any pretence for saying that this is a fraud? On whom? The holders of the circulation? The assets appropriated to pay them, are sufficient to do so, without delay. The bond-holders? They will be paid ten years before their bonds fall due. The State? It is the only means of guaranteeing her against loss and depopulation.

The only remaining objection to the deed is, that five of the Trustees are to perform the principal portion of the trusts. The objection merits not a moment's notice. It is an arrangement which the parties were competent to make, and the only one by which, with such a number of trustees, the trusts could be by possibility carried into execution.

I am glad that these frivolous objections have been brought forward here. I desired an opportunity to confute them. The Court, like myself, will be inclined to inquire, with some amazement, whether these are all the objections to a deed which gentlemen regard with so much horror and indignation.

I come now to the last remaining objection. It is partly an objection to the deed—partly a plea to the jurisdiction. It is, that five of the Trustees have not executed the deed, and therefore it has not yet taken effect: That these five are improperly joined as parties here, and therefore we are entitled to no relief.

I have already shown the Court, that the execution of the deed by the Trustees, and their entering into the covenants in the deed, are mere formalities: that the deed took effect at the moment of its execution, beyond the power of the Bank to recall it: that if the Trustees accept, or in any way assent to the trust, they are bound in the same way, and compellable to act in the same way, as though they had *executed* the deed, and bound themselves by the covenants in it. The execution of the deed by these five, or any of the others, was wholly unnecessary, except merely to show that they took upon themselves the trusts, which may as well be shown by other acts. They are here prosecuting this case. It is not shown to the Court that they have not authorized this to be done, and this is a full assent.

And I have shown that even if they did not assent, the deed is equally operative, and that even in the case of a lease, where two parties were intended to execute it, if one executed it alone, he would still be bound by the covenants.

Moreover, I have shown that these five may now sign the deed, and their execution of it will relate back to the day when it was made.

I have thus gone over the whole argument of both the gentlemen. I find nothing to shake my belief in the validity of the deed. On the contrary, it has been by the discussion strengthened and confirmed. Knowing as I do that the motives of its framers were pure and upright—dictated as it was by an ardent desire to protect the debtors, and at the same time do equal justice to the creditors of the Bank, I sincerely hope that the Court may be enabled to take jurisdiction of the case, and decide upon its merits a question fraught with consequences so grave to the community at large.*

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* Since the decision of this case, the following opinion in regard to it, has been received, written by Chancellor KENT:

CASE AND OPINION.

I have read and considered the following documents, submitted by counsel for my opinion:

1. The copy of a bill in Chancery, sworn to on the 28th of April, 1842, and filed in Chancery, before the Hon. John J. Clendenin, Judge of the Circuit Court for the county of Pulaski, in the State of Arkansas, and sitting therein as Chancellor, by James S. Conway and fourteen others, as Assignees of a Deed of Assignment in trust, made by the Real Estate Bank of Arkansas, to the complainants.

2. The admissions, on the argument for an injunction, of certain facts, and of two resolutions of the Central Board of the said Bank.

3. The decretal order of the Circuit Judge, made on the 2d of May, 1842, denying the application for an Injunction, for want of jurisdiction.

4. The charter of the Real Estate Bank of Arkansas, passed 26th of October, 1836, and several other acts of the Legislature of Arkansas, supplementary thereto.

5. The opinion of the majority of the Supreme Court of the State of Arkansas, on appeal from the decretal order of the Circuit Judge, in which the decision of the Circuit Judge sitting in Chancery is reversed.

The following questions arise upon the case:

1. Had the Circuit Judge, sitting as Chancellor, jurisdiction of the case?

2. Was the deed of assignment by the Bank, as set forth in the bill, valid in law and binding in equity, so as to require a court of chancery to sustain and enforce it?

First, as to the jurisdiction of the Circuit Judge:

The constitution of Arkansas declares, that until the General Assembly shall deem

it expedient to establish courts of chancery, the *circuit courts shall have jurisdiction in matters of equity*, subject to appeal to the Supreme Court. As the powers of the courts in equity are not defined, they are presumed to have, and it necessarily follows that they have, the general jurisdiction and powers in matters of equity, which belong to the equitable jurisprudence of the United States, as recognized and adopted in the National and in the State tribunals, and which is not inconsistent with the constitution of the State of Arkansas, nor controlled by her statute laws.

It is clear and demonstrable, that the Circuit Court, upon established principles of equity, was bound to take cognizance of the case stated in the bill; and if the assignment should be found to be just and true, (and nothing otherwise appeared before the Court), to give it effect by the process of Injunction, enforcing the surrender and delivery of the assets unduly withheld.

I cannot conceive of any plausible ground for disclaiming jurisdiction over that trust deed. It is one of the plainest cases on that point that ever came under my observation. Trusts are one of the great leading heads of equity jurisdiction. They in fact fall within the exclusive cognizance of courts of equity. The books, and the language and decisions of the courts in England and in this country, are uniform, and speak one clear and decided language. I need not go into the survey of authorities on the point; and indeed this duty has been performed in a complete manner in the opinion of the Judges accompanying the case. I will barely allude to the latest case on the subject, that of *Watkins vs. Holman*, 16 *Peters Rep.* 25, 58, 59, in which the Supreme Court of the United States declare, that equitable interests are cognizable in equity, and not at law; and any attempt in a court of law to give effect to equitable rights, leads to confusion and uncertainty; and that equitable and legal jurisdictions are wisely separated in those States where courts of chancery are established.

Secondly. I think it is equally clear, that the deed of assignment was made upon a valuable consideration, by persons competent to make it, and made in good faith, and was to be regarded as valid and binding, and to be sustained, and its just provisions enforced by the powers and process of the Circuit Court exercising "jurisdiction in matters of equity." There can be no reasonable doubt of it. A corporate Bank, or other institution, as well as private individuals, has a right, when in failing circumstances, and it becomes, in most cases, a duty, under such a condition of things, to assign its property in trust to pay its debts, with the powers requisite to collect and distribute the proceeds of the assets, and to give preferences among the creditors, if it thinks proper, according to its view of the relative merits of the debts. All this is recognized, and declared, and practiced upon, as a settled doctrine, in the jurisprudence of the country. I do not know that it was ever before, under the modern and highly cultivated principles of equity, questioned or denied. The cases in Maryland, before the Court of Appeals, in 6 *Gill & Johnson*, 369 and 205, are apposite and striking. I allude to the cases of *Union Bank of Tennessee vs. Ellicott*, and *State of Maryland vs. The Bank of Maryland*. In each case, the Bank being unable to meet its debts, assigned its property to a trustee, in trust to collect claims, and pay debts, and distribute the proceeds as prescribed. The Court of Appeals held the assignment to be valid, and that the Bank had a right to give preferences among the creditors. The same doctrine was admitted and sustained in the cases of *Paul Revere vs. Boston Copper Company*, 15 *Pick. R.* 351, and of *Catline vs. Eagle Bank of New Haven*, 6 *Conn. R.* 233. And, indeed, the principle is so well settled and radicated in the equity powers of the English and American courts, that it would seem to be a waste of labor to give the point further illustration. The masterly ability with which the whole law of the case is considered and discussed in the opinion of the Supreme Court, is such, that I do not feel able to bring any thing new to the support of the doctrines of that court.

It is impossible for me to apprehend how a court of chancery, duly instructed and enlightened, and duly sensible of its character, its trusts, and its duties, can find ground to renounce jurisdiction over such a created trust.

I am perfectly satisfied that the Central Board of the Bank was the proper, and indeed the only power, to direct the assignment; and that the deed of assignment was valid and effectual with the signatures of ten trustees, and that a court of equity ought to have held it to be equally so, if not signed at all by the trustees, and that their acceptance of the trust, and acting under it, gave it validity from the time of its execution. I am equally satisfied that the deed was founded on a legal and meritorious consideration, and that the creditors who are the *cestuis que trust*, have a vested interest in the assignment, and a right to cause it to be carried into execution; and that the direction to pay by preferences, and by annual instalments, was lawful and just. I do not

perceive that there is a single objection to the deed, which is left unnoticed and unanswered in the elaborate judgment of the Supreme Court; and I venture to say, that I subscribe entirely to the reasoning and to the conclusions of that Court. Their opinion has exhausted the subject; and the Court, in my opinion, could not have done otherwise than to reverse the decretal order below, and award a *mandamus* to the Circuit Court to grant the injunction, and carry the provisions of the deed into effect. Such a decision was within their appellate jurisdiction, and that jurisdiction rests upon an express provision in the constitution of the State.

JAMES KENT.

New-York, October 17, 1842.

[Other opinions have been received, from the most distinguished jurists in the country, and among them, Judge STORY, Judge GASTON of North Carolina, Judge NICHOLAS of Kentucky, and S. S. PRENTISS and GEORGE S. YERGER, Esqs., of Mississippi, all coinciding fully with this Court, on the questions of the jurisdiction of the Chancellor and the validity of the deed.]

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABATEMENT.

1. It is not matter in abatement, that the tax, and issuing fees of the writ, were not paid before it issued. *Brown* v. *Peevey.* 442
2. If the clerk suffers the writ to go out, without payment of the tax and fees, it is at his own personal risk. *id*

ACCORD AND SATISFACTION.

1. In an action of debt, by two obligees, upon a bond executed by the defendant alone to them jointly, it is not a good plea in bar, by way of accord and satisfaction, that the defendant, by an executory verbal contract, agreed to do certain work, and furnish certain materials, for *one* of the obligees, which agreement that obligee accepted in full satisfaction of the bond; and that, though the defendant was ready, and offered to perform his contract, that obligee failed to perform certain precedent conditions. *Crary* v. *Ashley & Beebe.* 203
2. An accord must be executed in all its parts, before it can produce satisfaction. An accord executory constitutes no bar. *id*

ACTION.

1. Where A. makes a written contract with B. to build a gin for him, on certain terms, he cannot sue him for work and labor done; nor, if such suit is brought, can he show, by oral testimony, that the work was or was not executed and completed according to the contract. *Hawk* v. *Walworth.* 577
2. A plaintiff, to maintain his action, must be entitled to a legal interest in the suit. *Cummins & Pike* v. *James & Woolbridge.* 616
3. As, by the act of Congress, of March 2d, 1838, the Bank of the United States still has a corporate existence, for the special purposes of proceeding to final judgment, execution, satisfaction and settlement of her affairs, the refusal of a court to instruct the jury that if they believe the legal interest in the demand sued for is in that bank, they ought to find for the defendants, is a clear decision by the court that there is no evidence tending to show that the bank is the legal owner of the demand. *id*
4. If such suit be against attorneys, to recover moneys collected by them on a judgment in favor of the bank, this raises a presumption that the bank possesses the legal interest; and though there is no testimony rebutting and contradicting this presumption, yet whether it is fully

overthrown or dispelled, is a question for the jury, and the instruction in such case is erroneous. *id*

5. The plaintiffs could recover, in such case, in assumpsit, if legally entitled to the proceeds of the judgment, by assignment or otherwise. It is not necessary that they should be its legal assignees. *id*

See PETITION & SUMMONS.

AFFIDAVIT.

1. Filing an affidavit, as required by law, constitutes a condition precedent to the right of a party to appeal to this court. *The Bank of the State* v. *Hinchcliffe.* 444
2. A paper in the record, purporting to be an affidavit, signed by the party, but with the attestation not signed by any officer authorized to administer an oath, cannot be construed as an affidavit. *id*

AGREEMENTS.

See CONTRACTS.

AMENDMENTS.

1. The Chancellor, upon the hearing, has power to permit a commission, under which testimony has been taken, to be amended, by filling up the blank direction with the words, "to any judge or justice of the peace," &c.; for the commission is nothing more than the process of the court, which may, at any time, be amended in an unimportant point, on suggestion. *Nicks' Heirs and Others* v. *Rector.* 251
2. Permitting amendments is a power which should be exercised with great caution and delicacy, after the case has been disposed of, and the court has adjourned. *McDonald and Others* v. *Watkins, Adm.* 624
3. It is difficult to limit the discretion of the courts, as to amendments, within any certain or prescribed bounds. *id*
3. Where the record of the circuit court expressly states that the parties came, by their attorneys, and the defendants, as well as the plaintiff, entered their waiver, &c., the record will not be so amended in this court, upon affidavits, as to strike out the appearance, nor the decision of the circuit court, refusing the amendment, reversed; especially where the party lay by for a year, without suggesting the error, knowing of the judgment. *id*

APPEAL.

1. According to the act of the General Assembly regulating the practice of the circuit courts in cases in chancery, a party is not entitled to an appeal, unless upon a final decision, order, or decree. *Johnson's Ex'r* v. *Clark.* 235
2. Where the decree affirms that the conveyance of certain slaves is a mortgage, and that the complainant has a right to redeem under it, and directs the Master in Chancery to take an account, and make return to the next term of the court; these facts clearly show that the decree is merely interlocutory, and not final or conclusive between the parties; and the appeal will be dismissed for want of jurisdiction. *id*
3. Filing an affidavit, as required by law, constitutes a condition precedent to the right of a party to appeal to this court.—*The Bank of the State* v. *Hinchcliffe.* 444
4. A paper in the record, purporting to be an affidavit, signed by the party, but with the attestation not signed by any officer authorized to administer an oath, cannot be construed as an affidavit. *id*

ASSIGNMENTS.

1. Trustees appointed by a deed of assignment for the benefit of creditors, executed by a bank, have a right to proceed in equity against directors who refuse to deliver over to them the property and assets of the bank, in order to have the property surrendered, and the directors enjoined from intermeddling with it; and the bill, in such case, is a bill to have the trust established and protected. *James S. Conway and Others, ex parte.* 302
2. And the deed, in such case, conveying the property absolutely, by words of present grant, and expressly providing that the property shall be delivered to the trustees immediately on the execution of the deed, a stipulation in the deed that each trustee shall execute a certain bond, is not a *condition* at all, in the technical meaning of the term, and, if a condition, is only a condition subsequent, and not a condition precedent, to be performed before the estate vests, or the trustees are entitled to the property. *id*
3. And, therefore, when the bill is filed to obtain the property, it is no ground for

refusing the relief, that part of the trustees have not given bond. *id*

4. There is no necessity for the trustees to sign such a deed to make it valid, in the first instance; but any act done by them which shows their assent, will make it obligatory on them, and equity will enforce the trust. *id*

5. Resolutions, passed by the directory who ordered the deed to be made, and approved it before its execution, restricting the delivery of the property, cannot alter or vary its legal tenor or effect; and if such resolutions provide that the property should not be delivered until a third person should certify to the directory that certain of the trustees had executed bonds, the accidental or culpable negligence of that person could not prejudice the rights of the trustees, much less those of the stockholders and *cestuis que trust.* *id*

6. The moment the deed was executed, the relation of trustee and *cestui que trust* placed the estate under the jurisdiction of a court of equity; and if there could possibly arise any difficulty upon the subject, that jurisdiction would still pursue the estate, and transfer its possession to the trustees who had given bond, holding it for the others to come in and give bond; and if they failed in a reasonable time to do so, would remove them from office, and cause others to be put in their places. *id*

7. By filing such a bill, the trustees become officers of the court, stand in the same attitude as if they had originally been appointed by the court, and are to be regarded, in this point of view, merely as receivers. *id*

8. A debtor, in failing circumstances, has a right to prefer one creditor or set of creditors to another, in all cases not affected by the bankrupt or insolvent laws. *id*

9. He may make the assignment for the benefit of a single creditor, in exclusion of all others; or he may distribute his property in unequal proportions among a part or the whole of them. No matter how, or on what principles the distribution is made, provided he assigns the whole of his property for the payment of his just debts. *id*

10. And a corporation, either public or private, unless it is restrained by the provisions of its charter, has the same power as an individual, to assign its property to trustees, to pay its debts; and, like an individual, it may make such an assignment, whether it is solvent or insolvent. And this is true, whether the assignment be partial or general, if it transfer the whole fund, in good faith, and without fraud. *id*

11. Neither the stockholders or local directories of the Real Estate Bank could make such an assignment. The *Central Board* is the only organ by which that bank can speak and act. *id*

12. And the Central Board could order the bank, by her corporate seal, to pass the legal right and possession, by a *bona fide* assignment, to trustees, for the benefit of her creditors. *id*

13. It is a universal rule, in the construction of all deeds, that fraud is never to be presumed. *id*

14. That ten of the trustees were also members of the Central Board, who ordered the deed to be made, and composed a majority of it, is no objection to the deed. *id*

15. The corporation is one thing, and its directors and stockholders entirely distinct and different things. They are different *legal* persons, having separate and distinct wills in law. *id*

16. Nor can it be said that the Central Board, being themselves trustees, could not delegate their trust. They were not trustees, in the technical meaning of the term, nor amenable to a court of chancery for their acts. Nor was the ordinance, by virtue of which the deed was made, a delegation of power. *id*

17. There is no necessity that the trustees should execute such a deed, or enter into covenants to perform the trusts. The moment it is made, the right of property passes and vests in the assignees; and the relation of trustee and *cestui que trust*, as between them and the creditors, is at once established, so that the assignor cannot recall the deed. *id*

18. And the creditors are presumed to give their assent to such deeds, unless they come in, and specially object. *id*

19. Though part of the trustees should be incompetent to take, a court of equity would not permit the trust to fail. It never wants a trustee. *id*

20. If a trust is created, by deed, will, or operation of law, and no one appointed trustee, equity will follow the estate, and cause the trust to be executed. So, if the trustee dies, or is incompetent, equity will appoint. *id*

21. It is no objection to such a deed, that it provides for reducing, after a certain time, the number of trustees. *id*

22. Nor is it any objection that part of the trustees are largely indebted to the bank. Their appointment as trustees does not release or extinguish the debt. Their

co-trustees may sue them in equity; and their failure to pay would be a breach of trust, and good cause for removal. *id*

23. Nor does the assignment to debtors create the slightest presumption of fraud. *id*

24. Any assignment, which unnecessarily delays, or unjustly hinders, creditors in the collection of their debts, is, of course, fraudulent, and therefore void. *id*

25. The Real Estate Bank is a public corporation, and the court is bound judicially to know the condition of her liabilities and assets; for these are to be found in the general history of the country, and in the reports of the Legislature, and her own sworn officers. *id*

26. And from the condition of the bank and of the country, the court knows that the provision in the deed allowing the debtors of the bank to pay their debts by equal annual payments, in eight years from the first of January, 1843, does not unnecessarily delay its creditors, but is a reasonable and proper indulgence; and a less time would have seriously injured as well the creditors as the stockholders and the State. *id*

27. No profits can arise to the trustees, in any case whatever. *id*

28. Each trustee is responsible, for every *devastavit* he commits, not only to the extent of his bond, but to the full amount of waste committed. *id*

29. It is no objection to such a deed, that it provides that the trustees may at once extinguish all its debts, by turning over all the assets to the bondholders. *id*

30. It was not necessary for the bank to be insolvent, or in failing circumstances, before it could make an assignment; and, moreover, the court judicially knows that she was in failing circumstances. *id*

31. A bond given, as required by the deed, to the attorney of the bank, and his successors in office, is as legal as one given to the Executive and his successors in office. In both cases, the law makes the party to whom it is given, hold it only for the benefit of those for whom it was executed; and if he vacates the office, it passes, with all its attaching rights, into the hands of his successors, for the just and equitable purposes. *id*

32. Whether the bonds are sufficient, as to amount, was a matter of discretion with the Central Board, which this court cannot inquire into, unless it was so flagrantly unjust and inequitable as to raise a presumption of fraud; which is not the case here. *id*

33. The compensation of the trustees is, in the present case, a question only of policy and propriety, not affecting the validity of the deed, or raising any presumption of fraud. *id*

34. That more onerous terms are imposed on debtors who have been sued, and against whom judgments have been obtained, is a matter of the same kind. *id*

35. That the schedule attached to the deed is imperfect, is no objection. It may be completed hereafter. *id*

36. The deed of assignment made by the Real Estate Bank is, therefore, valid on its face, and contains no provisions that can defeat its operation, or raise an imputation of fraud against it. *id*

37. Where a note is assigned, all the legal interest vests in the assignee, and he alone is entitled to sue, unless the assignor is again invested with the legal interest by a new assignment, or otherwise. *Purdy* v. *Brown & Taylor*. 535

38. As long as the assignment remains upon the note, no proof is competent to show legal interest in another. *id.*

39. To a plea that the note had been assigned, a replication that it was assigned without any consideration, and for purposes of collection merely, and that the assignee received it merely as an agent, and did not thereby become the owner of it, or take any interest in it, or entitled to any part of the proceeds, is not a good replication. *id.*

ATTACHMENTS.

1. Service of a writ of attachment, by merely summoning a *garnishee*, gives the court no jurisdiction. *Richmond* v. *Duncan & Preston*. 197

2. Manner of serving writ prescribed. *id.*

3. If a third party would interplead in a suit by attachment, and claim the property attached, his interpleader must be in writing, and embody sufficient matter to make up an issue upon it, if necessary, and to support a verdict and judgment. *Neal* v. *Newland*. 459

4. If this is not done, there is no action in court, as between the interpleader and the original plaintiff. *id*

5. That part of the Revised Statutes under the head of *attachments*, which requires the plaintiff to file his allegations and interrogatories as to the garnishee, *during* the return term of the writ, is merely a rule of practice, to be controlled by sound legal discretion. *Ashley* v. *Dunn*. 516

6. The time may be extended in the same manner as time to plead may be enlarged. If, in enlarging the time, the

rights of the garnishee were seriously affected, he might move to strike the allegations and interrogatories from the files. But so long as they remain on the files, he cannot be discharged. *id.*

BAIL.

1. Where a bail bond is adjudged insufficient, there must be entered of record a *rule* upon the defendant, or *notice*, to *perfect the* bond; and until this is done, the sheriff cannot be joined as a co-defendant. *Bennett & Young* v. *Brickey.* 469

BANKS.

See ASSIGNMENTS.

BANK OF THE STATE.

1. Under the decision of the Supreme Court of the United States, in *Briscoe* vs. *The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, by which in this case this court is bound, whatever may be its opinion to the contrary, HELD, that the notes issued by the Bank of the State of Arkansas are not *bills of credit*, within the meaning of the Federal Constitution, and that the act incorporating the bank is constitutional. *McFarland et al.* v. *The State Bank.* 44
2. If a defendant would object that a bank cannot discount bonds, he must do it by plea, showing the facts. *id*
3. The notes of the Bank of the State of Arkansas and its branches, are not bills of credit within the meaning of the Federal Constitution. *McFarland and Others* v. *The Bank of the State.* 416
4. The 1st and 5th sections of chap. 80, of the Revised Statutes, as printed, which are declared to be the law of the land, by act of 14th December, 1838, put in operation by proclamation of the Governor, issued in pursuance of that act, on the 20th of March, 1839, do not repeal the acts of 3d March, and 10th December, 1838, fixing the rate of interest to be taken by the bank. *id*
5. It is a universal rule in construing statutes, and a settled maxim of the common law, that all acts passed upon the same subject, or *in pari materia*, must be taken and construed together, and made to stand, if capable of being reconciled. *id*
6. The *general* law in regard to interest does not apply to cases not within its meaning or reason, nor repeal a special law passed at the same session, applicable to a particular corporation. *id*
7. The Bank of the State is constitutional. Its constitutionality is not an open question. *Webster and Others* v. *The Bank of the State.* 423
8. In a suit by that bank, she being properly described in the writ and declaration, if, in the caption of the judgment, the style is, "The State Bank of Arkansas," it will be considered a mere clerical misprision. *id*
10. The Bank of the State has a right to take a higher rate of interest than six per cent., without specifying it in the note, bond, &c.; and bills, notes, and bonds, due her, bear interest from maturity, at the rate of ten per cent. per annum. *id*
11. Though the Bank of the State of Arkansas is authorized to sue, in the counties where the principal bank or a branch is situate, and to have writs issued to any county in the State, yet as there is no such corporation in the State, as "The President and Directors of the Branch of the Bank of the State of Arkansas at Batesville," writs cannot so issue, in a suit purporting to be brought by such a corporation. *Elliott and Others* v. *The President, Directors, &c.* 424
Hay & Trice v. *President and Directors, &c.* 454
12. On a note given to the State Bank, judgment for the debt, with interest at ten per cent. from the time the note fell due till paid, is regular. *Elliott & Redmon* v. *The Bank of the State.* 437
13. In order to bring before the court, the question, whether the Bank of the State has the right to sue on a bond, it must be raised by a proper plea. There is one state of the case, in which the bank has unquestionable right to take bonds. *Neely et al.* v. *The Bank of the State.* 522
14. The act creating the State Bank, creates a corporation by implication. *Mahony et al.* v. *The Bank of the State.* 620

BANK OF THE UNITED STATES.

1. As, by the act of Congress of March 2d, 1838, the Bank of the United States still has a corporate existence, for the special purposes of proceeding to final judgment, execution, satisfaction and settlement of her affairs, the refusal of a court to instruct the jury, that, if they believe the legal interest in the demand sued for is in that bank, they ought to find for the defendants, is a clear decision by the

court, that there is no evidence tending to show that the bank is the legal owner of the demand. *Cummins & Pike* v. *James & Woolbridge.* 616

2. If such suit be against attorneys, to recover moneys collected by them on a judgment in favor of the bank, this raises a presumption that the bank possesses the legal interest; and though there is other testimony, rebutting and contradicting this presumption, yet whether it is fully overthrown or dispelled, is a question for the jury; and the instruction in such case is erroneous. *id*

3. The plaintiffs could recover, in such case, in assumpsit, if legally entitled to the proceeds of the judgment by assignment or otherwise. It is not necessary that they should be its legal assignees. *id*

BILLS OF CREDIT.

1. The notes of the Bank of the State of Arkansas and its branches are not bills of credit, within the meaning of the Federal Constitution. *McFarland & Others* v. *The Bank of the State.* 410

BILLS OF EXCHANGE.

1. Where there are several parties to a bill, the legal consequence of the holder endorsing it to the acceptor, is, that no action can thereafter be maintained against any party to the bill, unless the declaration shows the assent of the other parties to the subsequent endorsement thereof by the acceptor to the plaintiff, so as to avoid the legal presumption that it had been taken up and extinguished by the acceptor. *Beebe* v. *The Real Estate Bank.* 546

2. The acceptor would still be liable, but not in his character of acceptor. *id*

BONDS.

1. A bond executed to A. B., administrator, *or* C. D., administratrix, of E. F., is a good bond, and negotiable, so that, if assigned by both A. B. and C. D., suit may be brought on it by the assignee. *Brittin* v. *Mitchell.* 92

2. The word *or* must be taken for *and*, in such a case. *id*

3. "Due C. P. Bertrand, for cash lent, three hundred dollars," signed R. C. Byrd, and having the word "*seal*" written at the end of the name, with a scrawl around it, is a *sealed* instrument, within the meaning of the Revised Statutes.—*Bertrand* v. *Byrd.* 195

4. That provision of law which enacts that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl, by way of seal, shall be deemed and adjudged to be sealed," is merely declaratory of what the law was before. *id*

5. Where an instrument is signed by a partnership name, with a seal after it, it is properly described in the declaration as the bond of the individual members of the firm. *Day and Others* v. *Lafferty.* 450

6. A signature and sealing, in the name of the firm, with a single seal, is good, and binds all the partners who are present, or assent to the execution. If none but the executing partner assent, it is still good as to him. *id*

7. In a suit on such a bond, a plea of payment by all the partners, necessarily admits its execution by all. *id*

BOND FOR COSTS.

1. The *obligation* required to be filed for the payment of costs in certain cases, must be a *bond*. *Pelham et al.* v. *Grigg et al.* 141

2. A *bond* must arise upon a good and valid consideration, between persons capable of contracting, and be executed in the manner required by law. *id*

3. An instrument under seal, without any *obligee* named, by which a person acknowledges himself bound to pay all costs which may accrue, is not sufficient under the statute. *id*

4. An obligation for costs must be under seal. *Hickey et al.* v. *Smith, Hubbard, & Co.* 161
Prather v. *Palmer.* 456

5. In a suita gainst *Thomas B. Hanly*, a bond for costs, executed to *Thomas B. Han*, is insufficient; and if the bond states that the plaintiff is a non-resident, the suit should be dismissed on motion. *Hanly* v. *Campbell.* 562

CASES CITED, &c.

1. The case of *Ringgold* v. *Newkirk & Olden*, explained and restricted. *Lane* v. *Levillian, Adm.* 76

2. *Womsley* v. *Cummins*, 1 *Ark.* 125, *explained*, and held erroneous in that it decides that the dismissal, as to *Riggs*, operated as a discontinuance, as to

Womsley, he having afterwards appeared and pleaded in bar. *Elliott & Redmon* v. *The Bank of the State.* 437

CERTIORARI.

1. On certiorari to the county court, the circuit court can only quash or affirm.—*County of Pulaski* v. *Irvin.* 473

CONDITION.

See ASSIGNMENTS, 1, 2.

CONSTITUTIONAL LAW.

1. That clause of the Revised Statutes which makes wearing concealed weapons a penal offence, is not contrary either to the constitution of the United States, or of this State. *The State* v. *Buzzard.* 18
2. Under the decision of the Supreme Court of the United States, in *Briscoe* v. *The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, by which, in this case, this Court is bound, whatever may be its opinion to the contrary, HELD, that the notes issued by the Bank of the State of Arkansas, are not *bills of credit*, within the meaning of the Federal Constitution, and that the act incorporating the bank is constitutional. *McFarland et al.* v. *The State Bank.* 44
3. The constitution of this State expressly takes from justices of the peace all original jurisdiction, in all actions which are not matters of contract, and in which the sum in controversy does not exceed one hundred dollars, and even in matters of contract, where the action is covenant. *McLain* v. *Taylor.* 147
4. An action of forcible entry and detainer is, in no sense of the word, a matter of contract. *id*
5. The law, therefore, giving justices of the peace jurisdiction in actions of forcible entry and detainer, is unconstitutional and void. *id*
6. The act of the General Assembly providing that if any judge of the circuit court of this State shall fail to hold court in any of his counties, at the times required by law, he shall forfeit and pay to the State the sum of one hundred and fifty dollars, is contrary to the constitution, and void. *L. B. Tully, ex parte.* 220
7. The Legislature has no power to diminish the salary of a judge, during the time for which he shall have been elected.—They cannot effect indirectly, what they are directly forbidden to do. *id*
8. But if there has been no appropriation to pay the salary so withheld, the Auditor of Public Accounts cannot be compelled, by mandamus, to pay it. *id*
9. The notes of the Bank of the State of Arkansas and its branches, are not bills of credit, within the meaning of the Federal Constitution. *McFarland et al.* v. *The Bank of the State.* 410
10. The Bank of the State is constitutional; its constitutionality is not an open question. *Webster and Others* v. *The Bank of the State.* 423
11. The Legislature possesses the power to authorize the running of process from the circuit court of one county into another county, and its execution in the latter. *Tucker and Others* v. *The Real Estate Bank.* 431
12. The act of March 3d, 1838, authorizing suits by the Bank of the State, or the Real Estate Bank, to be brought in the county where the bank or branch is situate, and process to run into any county in the State, is constitutional. *id*
13. The constitution, although it defines and limits the jurisdiction of the circuit courts, as to the subject-matter, is silent as to their powers in regard to issuing process out of the county, and as to their jurisdiction over the person of a defendant, or other person necessary to be called before them; and the power of prescribing the jurisdiction in these respects, is left to the Legislature. *id*
14. That provision in the constitution of this State, which provides that the judges of the circuit courts may temporarily exchange circuits, or hold courts for each other, under such regulations as may be pointed out by law, confers upon the Legislature power to require the judges temporarily to exchange ridings, and to hold courts for each other, in contradistinction to any constant or permanent alternation or rotation of circuits.—*Knox and Others* v. *Beirne & Byrnside.* 460
15. Upon the interchange of ridings, the judges for the time being, are *quoad hoc*, the lawful incumbents of the circuits in which they may be summoned to preside; and during the temporary interchange, their official functions are superseded in their own respective circuits. *id*
16. The Legislature may point out the mode in which this *temporary* exchange shall take place, and what shall constitute notice of its direction upon the subject. The law, in such case, may be a

general one, but the interchange must be *temporary*, and not *permanent* or *lasting*, looking to a definite period when it shall terminate. *id*

17. Temporarily, a judge may be directed by the Legislature to pass out of his own territorial jurisdiction, and be required to perform the duties of another circuit, for a given space of time, but not for one-half or two-thirds of the time for which he is elected; and that time to be constantly fixed as a permanent rule of policy in the system. *id*

18. The act, approved 25th December, 1840, providing for the interchange of circuits, provides for a *permanent*, and not a *temporary* interchange, and is, therefore, unconstitutional. *id*

19. The provision in the constitution of this State, that the county courts shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other purpose that may be necessary to the internal improvement and local concerns of their respective counties, does not confer on those tribunals the power of *taxation* and *disbursement*, without legislative action. *County of Pulaski* v. *Irvin.* 273

20. And section 205, of the chapter on Criminal Proceedings, in the Revised Statutes, providing that each county shall pay the costs of criminal proceedings had within it, is imperative on the county courts, and they have no discretion but to obey it. *id*

CONSTRUCTION.

1. Words and terms used in agreements between individuals, must be taken in a general sense, and not in a technical signification. *Dillard* v. *Evans.* 175

2. A contract to pay a specified sum of money, 12 months after date, to bear interest at 10 per cent., and interest to be paid quarterly, carries interest from the date. *Inglish et al.* v. *Watkins.* 199

3. Such a contract must, according to the well established rules of construction, be construed most strongly against the obligors. *id*

4. It is a universal rule in construing statutes, and a settled maxim of the common law, that all acts passed upon the same subject, or *in pari materia*, must be taken and construed together, and made to stand, if capable of being reconciled.—*McFarland and Others* v. *The Bank of the State.* 410

5. The *general* law in regard to interest does not apply to cases not within its meaning or reason, nor repeal a special law passed at the same session, applicable to a corporation. *id*

See Bonds, 1, 2.

CONTRACTS.

1. Where by one paper, signed by both, A. sells B. his improvement on the public lands, and gives him authority to locate the same with a donation claim, the land, when so located, to be for the joint benefit of both, and to be divided in a certain manner; and by a note of the same date, B. promises to pay A. a certain sum, by a day certain, as the price of his improvement, on the condition that B. should by that day secure the same land by a donation claim; the two instruments in law constitute one entire contract. *Nicks' Heirs et al.* v. *Rector.* 251

2. The rule of law is, that where a transaction is evidenced by two papers, the connection between which is established by their contents, without any necessity of referring to other matter to connect them together, they will be taken as an entire agreement. *id*

3. In all agreements, there must be a mutuality of obligation upon the respective parties, to render them obligatory; and a court of equity will never decree a specific performance, unless the remedies are mutual, or where one party only is bound to perform. *id*

4. As B., therefore, could avoid the payment of the note by deferring the location, consequently on his failure to make the location by the day fixed, the authority given to him expired, and the obligation on him to pay the money also expired at the same time. *id*

5. An agreement to convey a tract of land, executed by A. to B. and C. jointly, part of the purchase money being paid by each, cannot be cancelled and delivered up by A. and B., and a deed substituted to B. alone, without any authority from C. *Henry A. Engles* v. *William Engles.* 286

6. One party cannot cancel and alter a contract, without the consent and agreement of the other. All the parties to it must agree and consent to its change or alteration; and as a general rule, the contract can only be dissolved or cancelled by an instrument of equal dignity with the one that created it. *id*

7. And although C. directs B. to sell his interest in the land, and pay himself for

money advanced, he can only sell to third persons, and cannot take a conveyance to himself. *id*

8. If a party covenants to pay in specific articles, he must meet his contract *at the time* and *in the manner* specified. *Day et al.* v. *Lafferty.* 456

9. Tender cannot be made *after the day*, unless the damages are capable of being reduced to certainty, by computation. *id*

10. Therefore a plea of tender, after the day, is not good, in case of a note payable in specific articles. The damages cannot be ascertained by computation. *id*

11. And such is the rule on a note payable in current Arkansas bank notes. *id*

12. Where a contract is made for the payment of *corn* or other *farm produce*, no time or place of payment being fixed by the contract, a *demand* is necessary before suit. *Bradley* v. *Farrington.* 532

13. Where two are sued, as having executed a bond, although a seal is only attached to one name, this is no objection, on demurrer. The other may have adopted the seal. *McKiel* v. *Porter.* 534

14. In covenant, on an instrument payable in current bank notes of the State of Arkansas, it is error, on default, to give judgment for the nominal amount of the note. There must be a writ of inquiry, to ascertain their value. The plaintiff is only entitled to recover their value at the time they were to have been paid. *id*

15. Where a note is assigned, all the legal interest vests in the assignee, and he alone is entitled to sue, unless the assignor is again invested with the legal interest by a new assignment, or otherwise. *Purdy* v. *Brown & Taylor.* 535

16. As long as the assignment remains upon the note, no proof is competent to show legal interest in another. *id.*

17. Where there are several parties to a bill, the legal consequence of the holder endorsing it to the acceptor, is, that no action can thereafter be maintained against any party to the bill, unless the declaration shows the assent of the other parties to the subsequent endorsement thereof by the acceptor to the plaintiff, so as to avoid the legal presumption that it had been taken up and extinguished by the acceptor. *Beebe* v. *The Real Estate Bank.* 546

18. The acceptor would still be liable, but not in his character of acceptor. *id*

19. Where A. makes a written contract with B. to build a gin for him, on certain terms, he cannot sue him for work and labor done; nor, if such suit is brought, can he show, by oral testimony, that the work was or was not executed and completed according to the contract. *Hawk* v. *Walworth.* 577

See ASSIGNMENTS.

CORPORATIONS.

See ASSIGNMENTS, BANK OF STATE. REAL ESTATE BANK.

COSTS.

1. Where defendants are jointly indicted, and do not ask to sever, in their pleadings, it is regular to assess separate fines, and render a judgment against them, jointly, for costs. *Calico and Drake* v. *The State.* 430

2. If they sever in their pleadings, the costs up to the time of severance only, should be taxed against them jointly. *id*

3. Where an action is discontinued as to the defendant, he is entitled to a judgment for his costs, if any have been expended by him; but, if he was never served with process, or in court, no such judgment could be given. *Elliott and Redman* v. *The Bank of the State.* 437

4. The county in which a prosecution is commenced, though a change of venue is afterwards obtained, is liable for all the costs. *County of Pulaski* v. *Irvin.* 473

COUNTY COURTS.

1. The provision in the constitution of this State, that the county courts shall have jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every other purpose that may be necessary to the internal improvement and local concerns of their respective counties, does not confer on those tribunals the power of *taxation* and *disbursement*, without legislative action. *County of Pulaski* v. *Irvin.* 473

2. And section 205, of the chapter on Criminal Proceedings, in the Revised Statutes, providing that each county shall pay the costs of criminal proceedings had within it, is imperative on the county courts, and they have no discretion but to obey it. *id*

COVENANT.

1. Where S., by covenant, sold and agreed to convey to C., by deed in fee simple, and with general warranty, a tract of land, in consideration of which agreement C. agreed to pay S. $8,947 36, at a future day, and $5,000 at another day; and

that, to secure the payments, he would deliver to S. bills on New-Orleans, drawn by a third person and accepted by himself, falling due at the dates, and for the amounts, of the respective payments; and it was agreed that possession should be delivered to C. by a day certain, prior to the debts falling due, covenants were independent, and S. might sue without averring performance or readiness to perform. *Sayre* v. *Craig*. 10

2. The rules as to dependent and independent covenants quoted and discussed. *id*

3. And in a suit for the first payment, a plea that the defendant had paid part, and tendered bills for the residue, offers an immaterial issue. *id*

CRIMINAL LAW.

1. The rule in relation to the joinder of different offences in one indictment, is as plain and well settled as that in relation to the joinder of several causes of action in one declaration. *Baker* v. *The State*. 56

2. Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and convicted of one and not of the other. *id*

3. The law is now well settled, that different offences may be charged in the same indictment, if the offences are subject to the same punishment. *id*

4. Since the passage of the act "modifying the penal code to correspond with the establishment of a penitentiary," the punishment for maiming, (in which offence shooting or stabbing a person is included), is imprisonment in the penitentiary: for shooting *at* a person, with intent to kill, imprisonment in the common jail of the county. *id*

5. Still, counts for each of these offences may be joined in the same indictment; or, in any event, if this is objectionable, the objection should have been addressed to the discretion of the court below, before conviction. That court, in its discretion, might have quashed the indictment, or compelled the prosecutor to elect on which charge he would proceed *id*

6. It is no ground for a motion in arrest of judgment, or objectionable on demurrer or upon writ of error; and a general verdict of guilty, on both counts, is good. *id*

7. And upon such an indictment, for shooting at, and for shooting A. B., evidence that A. B. was a constable, then engaged in arresting the prisoner, in the discharge of his official duty, is admissible, although there is no mention of his official character in the indictment. *id*

8. The statute defining maiming to be "unlawfully disabling a human being, by depriving him of the use of a limb, or member, or rendering him lame, or defective in bodily vigor," it is implied that the act, being unlawful in itself, evidences a malicious intent; and it is immaterial by what means, or with what instrument, the injury is effected, or whether the party is deprived of the use of a limb or member, or rendered *permanently* lame, or whether his bodily vigor is merely affected, by his strength, activity, or the like, being decreased. *id*

9. And if the proof is that the party was shot, and thereby so far disabled as to be unable to walk at the time, there being no other evidence showing the wound to have been but temporary, or that the party had recovered, the disabling is sufficiently established, and is presumed to have continued. *id*

10. In the case before mentioned, if the verdict is guilty on both counts, and the jury assess the punishment to be imprisonment in the penitentiary, which punishment could only be inflicted under the second count, if the judgment of the court is entered on the first count, it is erroneous; but a new trial will not be granted, or the prisoner discharged. The case will be remanded, and the court directed to enter judgment in conformity to the verdict. *id*

11. In a criminal case, the presumption of law is in favor of the verdict. Unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong has been done in the premises. *Waller et al.* v. *The State*. 88

12. Where defendants are jointly indicted, and do not ask to sever, in their pleadings, it is regular to assess separate fines, and render a judgment against them, jointly, for costs. *Calico & Drake* v. *The State*. 430

13. If they sever in their pleadings, the costs up to the time of severance only, should be taxed against them jointly. *id*

D.

DAMAGES.

1. In covenant, on an instrument payable in current bank notes of the State of Ar-

kansas, it is error, on default, to give judgment for the nominal amount of the note. There must be a writ of inquiry, to ascertain their value. The plaintiff is only entitled to recover their value at the time they were to have been paid. *McKiel* v. *Porter*. 534

DEBT.

1. Where a demand certain is payable by instalments, debt can be maintained after all the instalments are due. *Inglish et al.* v. *Watkins*. 199

DEBTOR AND CREDITOR.

See ASSIGNMENTS.

DECREE.

1. According to the act of the General Assembly regulating the practice of the circuit courts in cases in chancery, a party is not entitled to an appeal, unless upon a final decision, order, or decree. *Johnson's Ex'r* v. *Clark*. 235
2. Where the decree affirms that the conveyance of certain slaves is a mortgage, and that the complainant has a right to redeem under it, and directs the Master in Chancery to take an account, and make return to the next term of the court; these facts clearly show that the decree is merely interlocutory, and not final or conclusive between the parties; and the appeal will be dismissed for want of jurisdiction. *id*

See PRACTICE IN EQUITY, 14, 15.

DELIVERY BONDS.

1. Where the record of a judgment on a delivery bond enables this court to ascertain that the bond was executed for the delivery of property levied on by virtue of an execution issued on a judgment which has been reversed in this court, the judgment on the bond will also be reversed. *Fowler et al.* v. *Gibson et al.* 427
2. By repealing a portion of the Revised Code, concerning *delivery bonds*, the Legislature totally destroyed the summary mode of proceeding on them, when forfeited. *Patton & Stewart* v. *Walcott*. 579
3. The plaintiff must either bring an ordinary suit upon the bond, or pursue his statutory remedy against the property. *id*
4. But he may file his declaration at the term when the bond is returned, and the obligors will be bound to appear without process, they being held to have the same notice as though process was served. *id*

DEMAND.

1. To support an action upon a contract for the payment of money on demand, no previous demand is necessary. *Pullen* v. *Chase*. 210
2. In an action upon a promissory note, payable on demand, *non assumpsit infra sex annos*, is a good plea; but, if the promissory note was to do a collateral thing, which would create no debt until demand made, it would be otherwise. *id*
3. The distinction is, that a debt, arising from a positive existing promise to pay on demand, is due at the date of the contract, and the right of action is then perfect; but, if the promise is to do a collateral thing, on request, nothing is due until request made. Until then, no right of action accrues, and hence, in such case, the demand must be specially avowed and proved. *id*
4. Where a contract is made for the payment of *corn*, or other *farm produce*, no time or place of payment being fixed by the contract, a *demand* is necessary before suit. *Bradley* v. *Farrington*. 532
5. In a suit against the maker of a note payable at a particular place, it is not necessary to prove a demand at the place. *McKiel et al.* v. *The Real Estate Bank*. 592

DEMURRER TO EVIDENCE.

See PRACTICE IN CIRCUIT COURT, 6, 7, 8.

DISCONTINUANCE.

1. Although, under our statute, any person, having cause of action *ex contractu*, against several persons, may sue one, any, or all of them, at his election, yet, if he sue more than one, he elects to treat it as a *joint* contract, and a discontinuance as to one defendant, *who has been* served with process, is a discontinuance as to all. *Frazier et al.* v. *The Bank of the State*. 509
2. In a suit, under our statute, against several parties to a bill, a discontinuance as to one defendant served with process, is

a discontinuance as to all. *Beebe* v. *The Real Estate Bank.* 546

DONATION CLAIMS.

See SETTLERS ON PUBLIC LANDS.

E.

ENDORSERS.

1. A count in assumpsit against the *endorser* of a bond, is defective, unless it alleges *demand* on the obligor, and *notice* to the endorser, or shows some sufficient legal excuse to supersede the necessity of the averment. *Hicks* v. *Vann.* 526

EQUITY.

1. Under the territorial statutes, a party could not, at law, impeach the consideration of a sealed instrument. If entitled to relief, he was compelled to resort to a court of equity. *Clark* v. *Oakley's Administrator & Clark.* 236
2. If the material allegations in the bill are denied in the answer, they must be established by competent and direct evidence. *id*
3. Where a record is appealed to in the bill for proof of a fact, that fact cannot be established by oral testimony; and, if the complainant fails to produce the record the presumption is, that it would have disproved the allegations in the bill. *id*
4. Proceedings for the foreclosure of mortgages, under chapter 101 of the Revised Statutes, are within the jurisdiction of a court of equity, and must be governed by the principles and rules of practice in courts of equity. *McLain & Badgett* v. *Smith.* 244
5. The person entering a donation claim located it at his peril. If he located it on lands occupied and improved by an actual settler, and without his consent, such location is null and void, and the settler relievable in equity. And the entry being void, the patent issued upon it confers no title. *Nicks' Heirs et al.* v. *Rector.* 253
6. In such case, the actual settler, especially if having a valid pre-emption claim, is entitled to a decree forever quieting his possession against the patent. *id*
7. And not only the pre-emptor himself, claiming under the pre-emption act of 1830, but his assignee, to whom he assigned subsequently to January, 1832, may proceed in equity to have his possession quited in such case. Such an assignment was contrary neither to the letter nor policy of the law; and one who was prevented from purchasing, by the fraud of a third person, and the dereliction of duty and negligence of the officers of the United States, could dispose of his interest as fully as one who had actually been allowed to purchase and enter his land. *id*
8. Trustees appointed by a deed of assignment for the benefit of creditors, executed by a bank, have a right to proceed in equity against directors who refuse to deliver over to them the property and assets of the bank, in order to have the property surrendered, and the directors enjoined from intermeddling with it; and the bill, in such case, is a bill to have the trust established and protected. *James S. Conway and Others, ex parte.* 302
9. There is no necessity for the trustees to sign such a deed to make it valid, in the first instance; but any act done by them which shows their assent, will make it obligatory on them, and equity will enforce the trust. *id*
10. The moment the deed was executed, the relation of trustee and *cestui que trust* placed the estate under the jurisdiction of a court of equity; and if there could possibly arise any difficulty upon the subject, that jurisdiction would still pursue the estate, and transfer its possession to the trustees who had given bond, holding it for the others to come in and give bond; and if they failed in a reasonable time to do so, would remove them from office, and cause others to be put in their places. *id*
11. The right of a court of equity to entertain such a bill, flows from the familiar and universally attested fact, that the establishment, enforcement, and protection of the trusts, constitute one of the great original branches of equity jurisdiction. *id*
12. As chancery will compel the performance of trusts, so it will assist the trustees, and protect them in the due performance of the trust, whenever they seek the aid and direction of the court, as to its establishment, management, and execution. *id*
13. It is a fundamental rule, that if, originally, the jurisdiction attached in equity, on account of any supposed defect of remedy at law, the jurisdiction is not changed or abridged by courts of law now entertaining suits in cases where they were formerly rejected. *id*

14. It is no objection to the jurisdiction of courts of equity, that a party has a remedy at law, unless it be shown that the legal remedy is *plain*, *direct*, and *complete*. No action at law would, in the present case, afford such a remedy. *id*
15. A court of chancery will interfere, by injunction, where the remedy at law is doubtful or difficult, or to prevent a multiplicity of suits. *id*
16. In such a bill by the trustees, where the bill prays, "to the end that the trusts may be established, and the complainants protected and aided in the performance and discharge thereof," that the defendants "be perpetually restrained from further intermeddling with any of the property, effects, or assets of the Bank," this is tantamount to a prayer that the property may be surrendered and delivered to them; and there is no necessity for a prayer of general relief, or a particular prayer for the surrender and delivery of the property. To restrain the directors from intermeddling with it, necessarily transfers it to the trustees. *id*
17. It is true that the general principle is, that the court will not, by a preliminary injunction, change the possession of property, and transfer it to the complainant. But this is a rule to which there are exceptions. *id*
18. The interference, in the present case, as in cases of nuisance, rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented. *id*
19. If the possession of the defendant is a mere *interruption* of the prior possession of the plaintiff, the interruption will be remedied by injunction, if the right is clear and certain, without driving the plaintiff to establish his title at law. *id*
20. And the general rule only holds, in cases where the right to possession cannot be settled until a final decree. *id*
21. By filing such a bill, the trustees become officers of the court, stand in the same attitude as if they had originally been appointed by the court, and are to be regarded, in this point of view, merely as receivers. *id*

See MORTGAGES 1, 2, 3, 4.

ERROR.

1. Upon the filing of a demurrer to evidence, the usual course of proceeding is, either to take a verdict for the plaintiff, conditionally, and then discharge the jury; or, to discharge the jury before any verdict is rendered, and then dispose of the demurrer; in which case, if the demurrer is overruled, and the damages are unliquidated, a new jury is summoned to assess the damages. *Obaugh* v. *Finn*. 110
2. And though it is, in some respects, a matter of practice, yet it is error for the court to retain the jury after the demurrer is filed, and, after overruling it, to have the damages assessed by the same jury. *id*
3. It is a course of proceeding wholly unauthorized by any rule or precedent, and in derogation of the defendant's legal rights. *id*
4. A writ of error lies to the refusal of the court below to grant a new trial. *Trowbridge & Jennings* v. *Sanger*. 179
5. After demurrer to declaration sustained, and no objection made to an amendment of the declaration at the time, irregularity, in that respect, cannot be taken advantage of on error. *Pelham* v. *The State Bank*. 202
6. When a party obtains judgment in the Circuit Court, his adversary is, of right, entitled to a writ of error, but not to stay of execution, unless he enters into recognizance, under the statute, conditioned that he will prosecute such writ with effect, and pay the money adjudged against him by the Supreme Court, or otherwise abide its judgment. *Fowler* v. *Thorn & Wilson*. 208
7. In equity, matters of practice are within the discretion of the Chancellor, and if any error or mistake is committed by him, it cannot be taken advantage of in this court on appeal, especially when such questions do not enter seriously into the merits of the decree. *Nicks' Heirs et al.* v. *Rector*. 251
8. This court is not authorized to reverse a decree upon mere questions of practice, unless the Chancellor has expressly violated some important principle of equitable jurisprudence, or disregarded some plain and authoritative command of the statute upon the subject. *i*
9. In declaring on a note, expressed on the face to bear legal interest, it is not error, after judgment by default, that the breach in the declaration does not negative payment of the interest. *Causin* v. *Taylor*. 408
10. It is not error that the declaration and writ are against *Gerard N. Causin*, and judgment against *G. N. Causin*. *id*
11. When there are several defendants, one of whom is not served with process, nor

appears, and judgment taken by default against all, it is erroneous as to all. *Gibson et al.* v. *Gibson et al.* 27

12. Where there are several defendants, one of whom is not served with process, nor appears, and judgment taken by default against him with the others, it will be reversed as to all. *Palmer et al.* v. *Edwards.* 31

13. It is no objection to a writ, after judgment by default, that it does not call on the defendant to answer the demand for interest claimed in the declaration, in a suit by the Real Estate Bank, to which the law gives ten per cent. interest after the note, bond, or bill matures, or is protested. *Tucker et al.* v. *The Real Estate Bank.* 32

14. Where a note bears interest from maturity, at the rate of ten per centum per annum, and the breach in the declaration does not negative the payment of the interest, judgment for the debt, and six per cent. interest from the date of the note, is erroneous. *Fulcher* v. *Lyon.* 145

15. After demurrer to the declaration by one defendant correctly sustained, judgment against all the defendants, without any further steps taken by them, is erroneous. *Murphree et al.* v. *The Bank of The State.* 48

16. After the defendant introduces evidence to support a plea in replevin, he cannot move the court to instruct the jury to find as in case of a nonsuit. *Goodrich* v. *Fritz.* 525

17. But still, if the final judgment is right upon the whole, it will not be reversed. *id.*

18. If depositions are improperly admitted in evidence, the judgment will be reversed, although the bill of exceptions does not state that it contains all the testimony offered, if the depositions so admitted contain material testimony, directly applicable to the issue. *Woodruff* v. *Lapsley et al.* 527

19. In covenant, on an instrument payable in current bank notes of the State of Arkansas, it is error, on default, to give judgment for the nominal amount of the note. There must be a writ of inquiry, to ascertain their value. The plaintiff is only entitled to recover their value at the time they were to have been paid. *McKiel* v. *Porter.* 534

EVIDENCE.

1. Under our statute, replevin may be maintained either for an unlawful taking, or a wrongful detention. *Robinson* v. *Calloway.* 94

2. The plaintiff, to support the action, must show title. *id*

3. Consequently, the plaintiff cannot recover, unless he shows title in himself; and the defendant can defeat the action, by showing title in a third person, without connecting himself with that third person. The affirmative is with the plaintiff. *id* 95

4. Evidence that a slave belonged to a person deceased, and that the plaintiff, who is his widow, administered jointly with another person still living; that there are several heirs, and has been no distribution of the estate; that, after the death of the intestate, the plaintiff obtained possession of the negro, who has been called her own, and she has had possession of him until shortly before suit commenced, clearly shows that she has no such title as will maintain replevin. *id*

5. Parol evidence cannot be admitted to establish the contents of notes, which are not produced, or their absence accounted for, especially when the notes have been prosecuted to judgment in another State, and a judicial record of that fact exists. *Williams* v. *Brummel.* 129

6. A judicial record can only be proven by itself, or a duly certified copy from the rolls. *id*

7. In an action by an assignee of a note, the note cannot be excluded from going in evidence, because the plaintiff does not state, in the commencement of his declaration, that he sues as assignee. *Featherston* v. *Wilson.* 154

8. In an action on a note, parol evidence is not admissible to prove that, at the time the note was made, there was an agreement that the value of certain peltries should be credited on the note, when the amount should be ascertained. *id*

9. Under our statute, in an action on a note, the production of the note is full evidence of its execution, and the consideration, unless questioned by the plea of *nil debet, non assumpsit, non est factum*, or the like, supported by affidavit. *Trowbridge & Jennings* v. *Pitcher, Weaver & Co.* 157

10. And, in a suit against a firm, on a note executed by the partnership name, it is not necessary, under our statute, upon the plea of *nil debet*, not sworn to, to prove the partnership. *id*

11. An executor or administrator may maintain trover for the property of the testator or intestate, wrongfully converted in his lifetime. *Eubanks* v. *Dobbs, Administrator.* 173

12. Where such action is brought against

the son of the intestate, who relies upon a receipt of his father, given by way of acknowledgment of satisfaction for the property converted, the administrator cannot avoid the effect of this receipt, by proving that it was given in fraud of creditors; but may prove that the intestate was *insane* when he gave it. *id*

13. It is an inflexible rule of law, that written evidence is of a higher grade than oral testimony; and, when a writing contains no ambiguity, oral testimony is not admissible to explain or prove it. *Trowbridge & Jennings* v. *Sanger*. 179

14. If the instrument be ambiguous, its defects may be supplied, or its uncertainty explained. It is competent to prove the date of a receipt by oral testimony, or show it by circumstances connected with the transaction. *id*

15. Dates, and amounts of receipts, are capable of being proved orally. They are mere defects or omissions, which may properly be supplied by other proof than the instrument itself. The admission of such testimony comports with the rule of written evidence, and goes far to uphold it. *id*

16. In an action against *partners*, on an account, the partnership of the defendants must be proved. *id*

17. The official return of a sheriff, upon the process executed by him, cannot, in a proceeding against him, be contradicted or disproved by evidence introduced by himself. *Lawson* v. *Main*. 184

18. The certificate of a Notary who protested the bill, that he forwarded due notice of protest, though under his notarial seal, is no evidence of that fact. *The Real Estate Bank* v. *Bizzell*. 189

19. Exhibits and papers referred to in a deposition, cannot be read, unless they are attached to the deposition, inclosed and in it. *Crary* v. *Carradine & Newman*. 216

20. If the material allegations in the bill are denied in the answer, they must be established by competent and direct evidence. *Clark* v. *Oakley's Administrator & Clark*. 236

21. Where a record is appealed to in the bill for proof of a fact, that fact cannot be established by oral testimony; and, if the complainant fails to produce the record, the presumption is, that it would have disproved the allegations in the bill. *id*

22. Under our statute, the power is expressly given the Chancellor to permit an exhibit to be proved *viva voce* at the hearing, provided the party is not taken by surprise, or any serious wrong committed thereby. *Nicks' Heirs et al.* v. *Rector*. 251

23. And in case of an exhibit attached to the bill, and there being no pretence that the other party had not a fair opportunity, if he desired, of questioning its genuineness, it may be proved *viva voce*, without any previous order or notice. *id*

24. Where it was proven that a subscribing witness to an instrument had gone to another State four years before, that nothing more had been heard of him, and he was supposed to be dead, this proof being uncontradicted, his hand-writing was properly permitted to be proven. *id*

25. Although parts of the contents of a paper read on the hearing may be irrelevant, yet it cannot be presumed that such matter could have had any influence on the mind of the chancellor, nor could it exclude other portions, relevant and legal. *id*

26. The seal of the General Land-office, and the signature of the Commissioner to copies of original papers required by law to be deposited in his office, *prima facie* prove themselves; and such copies are competent evidence in our courts. *id*

27. Whether the evidence given in this case, established insanity, considered and discussed. *Pyeatt* v. *Spencer*. 563

28. A writ or other process, lost or destroyed, may be supplied by parol evidence of its contents, if no better evidence thereof can be produced. *Fowler* v. *More*. 570

29. In debt by the Auditor, on a sheriff's bond, breaches assigned, that the defendant did not execute the duties of his office according to law, and that he collected and failed to pay over a given amount of money, which was due the State, are well assigned, and the plaintiff is bound to prove that the defendant *collected* the money. *Taylor et al.* v. *The Auditor*. 574

30. The Auditor's certificate of the indebtedness of the defendant, was not the best evidence the nature of the case admitted, and was inadmissible. *id*

31. Secondary evidence will not be admitted, unless a proper showing is made of the loss or destruction of the best testimony. *id*

32. The proper evidence would have been the sheriff's receipt on the tax book, or list transmitted to the Auditor. *id*

33. Where A. makes a written contract with B. to build a gin for him, on certain terms, he cannot sue him for work and labor done; nor, if such suit is brought, can he show, by oral testimony, that the work was or was not executed

and completed according to the contract. *Hawk* v. *Walworth.* 577

34. Although a sheriff becomes liable, on receiving a tax list, for the whole amount of tax charged therein, less the credits to which he may, by law, be entitled, and there is no necessity, in a suit against him, to charge him with having *collected* the money; yet, if the breach in the declaration against him on his bond is, that he did collect the money, and fail to pay it over, the *collection* of the money must be proved. Merely producing the tax list, receipted by him, is not sufficient to charge him, on such a state of proceeding. *Taylor et al.* v. *The County of Pulaski.* 596

35. The certificate of a land-officer cannot, of itself, be evidence of any fact, unless expressly made so by statute of the State, or by act of Congress. *Mays & Meeks* v. *Johnson & Clark.* 513

36. To prove the rejection of a donation claim, a copy of the record of the land office, and the adjudication of the land-officers thereon, properly certified by them as a complete transcript, is necessary. *id*

EXCEPTIONS.

1 Exceptions not reserved at the trial, but signed afterwards, form no part of the record. *Pelham* v. *The State Bank.* 202

2. Where, on an appeal from a justice of the peace, from a judgment rendered in an action on account, the Circuit Court gives final judgment, without a writ of inquiry, the presumption which generally obtains in favor of the regularity of the proceedings of the court below, is controvened, if the record shows that the judgment was rendered by default, without appearance of the defendant. *Pirtle & Mitchell* v. *Allhime.* 440

3. Pleas stricken out by the court, form no part of the record, unless made so by bill of exceptions. *Day and Others* v. *Lafferty.* 450

4. If a plea is stricken from the files, and no exception is taken, it forms no part of the record. *Blackmore et al.* v. *President, Directors, &c.* 454

5 Pleas ought not to be stricken out, unless the court perceives that they are wholly frivolous. *id*

6. If the President and directors of the Branch of the Bank of the State of Arkansas at Batesville, sue on a note executed to them, they are only entitled to recover six per cent. interest, unless a greater rate is expressed in the contract. *id*

EXECUTION.

1. Where, after a delivery bond has been taken and forfeited, the plaintiff sues out an alias execution on his *original* judgment, and does not follow up his remedy against the property seized, this writ is a legal justification to the officer to whom it is directed, and imposes on him the duty of executing it. *Cummins, Ex Parte.* 103

2. If the officer fails to sell, upon such alias execution, whether on account of the interference of the plaintiff, or otherwise, he cannot proceed to sell the property on five days' notice: and if the court below refuses an order to compel him to sell, this court will, certainly, not compel the court below, by mandamus, to issue a *venditioni exponas*, commanding the sheriff to sell, on five days' notice. *id*

3. Where the return of the officer upon an execution shows no legal disposition of the property levied upon under its authority, the law presumes the property to be in his custody, and of sufficient value to satisfy the execution; and so long as the execution and levy remain and are not suspended, or otherwise legally avoided, the plaintiff can only look to the officer and the property for satisfaction, though the execution be irregular, but not void. *Cummins* v. *Webb.* 229

4. When an officer omits, neglects, or refuses to sell property levied upon, according to law, the creditor may have a *venditioni exponas*, to compel him to sell, or forfeit issues to the amount of the demand. *id*

5. The property in the officer's hands, under the levy, may be sold to satisfy the execution, though the plaintiff may have another adequate legal remedy. The law will not compel him to abandon his execution because the levy under it is inoperative, and to commence a new action to attain the same end. *id*

6. The law affords defendants ample redress against a plaintiff who makes any unlawful use of its process of execution. *id*

7. On an application for a supersedeas to an execution issued by a justice of the peace, if the transcript does not exhibit the execution, or a copy of it, but simply states that an execution was issued, this court, in the absence of affirmative evidence to the contrary, must presume that the justice acted in conformity to law, and refuse the supersedeas. *Smith, Ex Parte.* 601

8. But, if the execution is produced, and it appears that a *ca. sa.* issued, on an affi-

davit that the defendant, *as the plaintiff believes*, "is secret his property, or is putting it out of his hands, for the purpose of defrauding his just creditors," and that the plaintiff verily believes that the debt will be lost or greatly delayed, unless an execution issue forthwith, this court will issue a supersedeas, without recognizance, the execution having improvidently issued, and without a sufficient legal affidavit. *id*

EXECUTORS AND ADMINISTRATORS.

1. Where a paper, purporting to be a will, was produced for probate, and rejected, and letters of administration granted to a third person, if the executor removes the matter into the Circuit Court, without giving the administratrix notice, and the Circuit Court refuses to permit the administratrix to be made a party on the record, and orders an issue to be made up, *ex parte*, as to the validity of the will, which is tried, and the will decided to be valid, the proceeding has no color of law, or shadow of justice to support it. *Billings, Administratrix*, v. *Billings*. 90
2. The administratrix was entitled to notice, and to be made a party to the record. *id*
3. Where oyer is craved of the letters testamentary of an executor, who sues, if he exhibits letters, granted by the clerk of probate, in vacation, and duly authenticated, the plaintiff's legal right to the debt sued for cannot be impeached, without showing a legal revocation of the letters, or such facts as are sufficient to prove that the grant of them was void. *Carter, Ex'r of Ellis*, v. *Menifee*. 152
4. An executor or administrator may maintain trover for the property of the testator or intestate, wrongfully converted in his lifetime. *Eubanks* v. *Dobbs, Administrator*. 173
5. Where such action is brought against the son of the intestate, who relies upon a receipt of his father, given by way of acknowledgment of satisfaction for the property converted, the administrator cannot avoid the effect of this receipt, by proving that it was given in fraud of creditors; but may prove that the intestate was *insane* when he gave it. *id*
6. The interest that a person has in an improvement on public land, is of a peculiar kind, known only to our laws. It is a possessory right against all the world but the United States. It partakes, in some degree, of the nature of a chattel real, and vests in the personal representatives of the deceased. *Pelham, Adm'r of Ryan*, v. *Wilson, Cravens, et al.* 289
7. The executor or administrator can sell it, without the intervention of the Probate Court. *id*
8. If the administrator professes to sell, and the purchaser supposes he is buying *a pre-emption right*, and there is, in fact, no pre-emption, the contract will be rescinded. If only an *improvement* is sold, the purchaser buys at his peril, and must comply with his contract. *id*

F.

FEES.

1. A justice of the peace cannot legally refuse to enter a prayer of appeal, in a case decided by him, take a recognizance and grant an appeal, unless the fees for granting the appeal are first paid or secured to him. *Levy* v. *Inglish*. 65
2. He has no right to demand the fees until he has performed the services. If he does, he forfeits the fees, and five dollars for each item demanded, and is liable to an indictment for extortion. *id*

G.

GARNISHEES.

See ATTACHMENTS, 5, 6.

GUARANTEE.

1. Where a person gives a continuing guaranty, or one relating to future transactions, he has a right to know whether his guaranty has been accepted, or to what extent he may be liable; and demand of the principal, and notice to the guarantor, are necessary, to charge him. *Lane* v. *Levillian, Adm'r*. 76
2. When the debt has become due and absolute when the guaranty is given, the guarantor's obligation is not considered secondary or collateral, but primary and positive, and no demand or notice is necessary. *id*
3. Nor when the guaranty is, that the debt shall be paid by a particular day. *id*
4. All the later cases seem to tend to dispense with demand and notice, unless the guarantor's liability is shown, either by

his express contract, or by its necessary implication, to be a collateral agreement; provided the creditor's delay be unaccompanied by fraud, or an agreement not to prosecute the principal, made without the guarantor's assent. *id*

5. By the laws of Louisiana, which govern in all cases of contracts made there, upon a guaranty made after a note has become due, no demand or notice is necessary. *id*

H.

HABEAS CORPUS.

1. Where S., by covenant, sold and agreed to convey to C., by deed in fee simple, and with general warranty, a tract of land, in consideration of which agreement C. agreed to pay S. $8,947 36, at a future day, and $5,000 at another day; and that, to secure the payments, he would deliver to S. bills on New-Orleans, drawn by a third person and accepted by himself, falling due at the dates, and for the amounts, of the respective payments; and it was agreed that possession should be delivered to C. by a day certain, prior to the debts falling due, covenants were independent, and S. might sue without averring performance or readiness to perform. *Sayre* v. *Craig*. 10

2. The rules as to dependent and independent covenants quoted and discussed. *id*

3. And in a suit for the first payment, a plea that the defendant had paid part, and tendered bills for the residue, offers an immaterial issue. *id*

HUSBAND AND WIFE.

1. Where a husband purchases land, pays the purchase money, and causes the deed, on consideration of affection merely to be made to the wife, and afterwards improves the land, if his wife thereafter dies without issue, leaving other landed estate, one-half of which vests in him, and he voluntarily relinquishes to her heirs his interest in such other estate, not upon the consideration that the heirs shall release or convey to him the lands so purchased and paid for by him; this gives him no right, in equity, to have such lands enure to, or be conveyed to, him. *Smith et al.* v. *Yell*. 294

I.

INDICTMENT.

See CRIMINAL LAW, 1 *to* 7.

INJUNCTION.

See EQUITY.

INTEREST.

1. Under the provisions of the Revised Statutes, upon judgment on a contract bearing more than six per cent. interest, interest at the rate specified in the contract accrues on the *whole* judgment, (including the debt, and the interest to the date of the judgment, as damages,) from the date of the judgment. *Henry* v. *Ward*. 150

2. A note for $500, payable at 12 months, "with ten per cent. interest, until paid," bears interest from date. *Dickinson et al.* v. *Tunstall*. 170

3. But if the breach does not negative the payment of the interest, it is bad on demurrer, and no judgment can legally be given for interest. *id*

4. A contract to pay a specified sum of money, 12 months after date, to bear interest at 10 per cent., and interest to be paid quarterly, carries interest from the date. *Inglish et al.* v. *Watkins*. 200

5. Such a contract must, according to the well established rules of construction, be construed most strongly against the obligors. *id*

6. There is no difference between the right to sue and recover upon a contract stipulating to pay interest quarter-yearly, and one stipulating to pay interest at the end of the year. *id*

7. Under our statute giving interest, a promissory note, payable on demand, draws interest from date. *Pullen* v. *Chase*. 210

8. A note payable on demand, bears interest from date. *Gerard N. Causin* v. *Creed Taylor*. 408

9. Under the territorial law concerning interest, if a party contracted for a higher rate of interest than six per centum per annum, he could only recover the principal, unless the rate of interest was stipulated in the contract, in writing, in which case it might be as high as ten per cent. *Alston* v. *Brashears*. 422

10. If the rate of interest, stipulated in writing, was higher than ten per cent.,

only the principal could be recovered. *id*
11. If the President and Directors of the Branch of the Bank of the State of Arkansas at Batesville sue on a note executed to them, they are only entitled to recover six per cent. interest, unless a greater rate is expressed in the contract. *Blackmore and Others* v. *President, Directors, &c.* 454

INTERPLEADER.

1. If a third party would interplead in a suit by attachment, and claim the property attached, his interpleader must be in writing, and embody sufficient matter to make up an issue upon it, if necessary, and to support a verdict and judgment. *Neal* v. *Newland.* 459
2. If this is not done, there is no action in court, as between the interpleader and the original plaintiff. *id*

J.

JUDGMENT.

1. Under the provisions of the Revised Statutes, upon judgment on a contract bearing more than six per cent. interest, interest at the rate specified in the contract accrues on the *whole* judgment, (including the debt and the interest to the date of the judgment, as damages,) from the date of the judgment. *Henry* v. *Ward.* 150
2. Final judgment for costs, against the defendant, must be considered as given only for the costs expended by the plaintiff. *Pelham* v. *The State Bank.* 202
3. Terms used in a judgment, which are vague and uncertain, but do not directly contradict a statute, will be presumed to conform to it. *id*
4. Where the record of a judgment on a delivery bond enables this Court to ascertain that the bond was executed for the delivery of property levied on by virtue of an execution issued on a judgment which has been reversed in this Court, the judgment on the bond will also be reversed. *Fowler and Others* v. *Gibson and Others.* 427
5. On demurrer to plea in abatement sustained, the judgment should be *respondeat ouster*. *Fulcher* v. *Lyon.* 445
6. If, in replevin, there is judgment for the defendant, *de retorno habendo*, and an order for a writ of enquiry to assess damages, there is no final judgment from which an appeal lies to this court. *Bailey* v. *Ralph.* 591
7. If, on appeal from the probate court, the circuit court acts only on the exceptions taken, but wholly omits, on sustaining the exceptions, to try the matter *de novo*, or make such order and decision as should have been made by the probate court, the judgment is not final, and error does not lie to this court. *Reagan and Others* v. *Mitchell and Others.* 630

JUDICIAL NOTICE.

1. In March, 1840, bank paper continued the common medium of exchange, or ordinary circulation, in Arkansas; and of this fact the court is bound, judicially, to take notice. *Dillard* v. *Evans.* 175
2. Therefore, a note of that date, payable in "*common currency of Arkansas*," is a note payable in Arkansas bank paper, and not in specie. *id*
3. The Real Estate Bank is a public corporation, and the court is bound judicially to know the condition of her liabilities and assets; for these are to be found in the general history of the country, and in the reports of the Legislature, and her own sworn officers. *Conway et al. ex parte.* 304
4. And from the condition of the bank and of the country, the court knows that the provision in the deed, allowing the debtors of the bank to pay their debts by equal annual payments, in eight years from the first of January, 1843, does not unnecessarily delay its creditors, but is a reasonable and proper indulgence, and a less time would have seriously injured, as well the creditors, as the stockholders and the State. *id*

JURISDICTION.

1. The Supreme Court has full power to issue writs of habeas corpus, and to try and determine the same. *In the matter of Beard.* 9
2. After a change of venue granted in a case, the case is no longer within the jurisdiction of the court awarding the change. It belongs exclusively to the court to which the order is directed.—*Frazier & Tunstall* v. *Fortenberry.* 162
3. The court to which the case is transferred, has a right to remit the papers, for the purpose of having them properly made out and authenticated. Such an order cannot re-invest the former court with jurisdiction; and, if it proceeds to

hear and determine the case, the proceedings are *coram non judice.* *id*

4. Under the territorial statutes, a party could not, at law, impeach the consideration of a sealed instrument. If entitled to relief, he was compelled to resort to a court of equity. *Clark* v. *Oakley's Administrator & Clark.* 236

5. The general jurisdiction of this court is *appellate*, and most of the writs that it is authorized to issue, are in aid of its appellate powers; but it has undeniable authority to issue other writs, as a portion of its *original* constitutional jurisdiction, among which is the writ of mandamus. *James S. Conway and Others, ex parte.* 302

6. It has been the constant and invariable practice of this court to issue writs of mandamus, whenever the party applying showed that he was legally entitled to their benefit, and to direct them either to ministerial or judicial officers. *id*

7. When addressed to *judicial* officers, they can be executed only in term time; but when addressed to ministerial officers, they may be executed at any time. *id*

8. The issuing or refusing an injunction, is not a *judicial* act, but the exercise of a ministerial discretion. *id*

9. If, therefore, an injunction has been improperly refused, this court will, under our statute, award a peremptory mandamus to the judge, commanding him to grant the writ. *id*

10. The constitution, although it defines and limits the jurisdiction of the circuit courts, as to the subject matter, is silent as to their powers in regard to issuing process out of the county, and as to their jurisdiction over the person of a defendant, or other person necessary to be called before them; and the power of prescribing the jurisdiction in these respects, is left to the Legislature. *Tucker et al.* v. *The Real Estate Bank.* 432

11. Where there is no appeal, but a mere agreement of the parties to refer the matters in dispute to the judgment of this court, this confers no power on the court to give judgment. *Knox et al.* v. *Beirne & Byrnside.* 461

See EQUITY, 8 to 14.

JUSTICES OF THE PEACE.

1. A justice of the peace cannot legally refuse to enter a prayer of appeal, in a case decided by him, take a recognizance, and grant an appeal, unless the fees for granting the appeal are first paid or secured to him. *Levy* v. *Inglish.* 65

2. He has no right to demand the fees, until he has performed the services. If he does, he forfeits the fees, and five dollars for each item demanded, and is liable to an indictment for extortion. *id*

3. When an appeal is prayed, and an affidavit filed as required by law, it is the magistrate's duty, if sufficient security is offered, to take the acknowledgment of the recognizance, make it out in due form, obtain the signatures of the recognizors to it, approve and attest it, and then grant an appeal, and make an entry of it in his docket. *id*

4. In performing these duties, he acts *ministerially*, and can exercise no discretion, other than to see that the security is sufficient, the recognizance in legal form, and acknowledged and signed according to law. *id*

5. It is no excuse for not granting the appeal, upon an alternative mandamus, commanding the appeal to be granted, or cause shown, that *after* the refusal to grant the appeal, the justice discovered that the recognizance was insufficient, for want of a stipulation required by law. That was the justice's own fault. He was bound to take it in legal form. *id*

See CONSTITUTIONAL LAW, 3, 4, 5.

L.

LIEN.

1. One part owner of the land, who has paid more of the purchase money than another, can have no lien, in preference to other creditors, for the excess of purchase money paid. If one part owner or partner pays more than his proportion, it is but a simple contract debt, constituting no lien or mortgage on the land. *Henry A. Engles* v. *William Engles.* 286

LIMITATIONS.

1. Under the Revised Statutes, chap. 91, sec. 6, which provides that certain actions shall be commenced within three years after the passage of that act; or, when the cause of action shall not have accrued at the taking effect of that act, then within three years after the cause of action shall have accrued; the right of action is not barred by the statute, where suit is brought within three years after

the law took effect, though the right of action might have accrued more than three years before action brought. *Hawkins* v. *Hensley*. 167

2. In an action upon a promissory note, payable on demand, *non assumpsit infra sex annos*, is a good plea; but, if the promissory note was to do a collateral thing, which would create no debt until demand made, it would be otherwise.—*Pullen* v. *Chase*. 216

3. The distinction is, that a debt, arising from a positive existing promise to pay on demand, is due at the date of the contract, and the right of action is then perfect; but, if the promise is to do a collateral thing, on request, nothing is due until request made. Until then, no right of action accrues, and hence, in such case, the demand must be specially avowed and proved. *id*

LITTLE ROCK.

1. The ordinance of the city of Little Rock, of 13th July, 1841, entitled "An ordinance concerning elections," provided only for such elections for city officers as were annual; and the judges who held the election under that ordinance, had no right to hold an election for justices of the peace, the election of those officers being *biennial*. *The State* v. *Smith*. 613

M.

MANDAMUS.

1. If the facts set forth in a writ of mandamus, do not show a legal title in the relator to the right claimed, the writ may be quashed. *Levy* v. *Inglish*. 65

2. Unless it is quashed, the defendant must return it, and set forth, in his return, either a positive and direct denial of the facts, or state other facts, sufficient in law to defeat the right claimed. *id*

3. It is no excuse for not granting the appeal, upon an alternative mandamus, commanding the appeal to be granted, or cause shown, that *after* the refusal to grant the appeal, the justice discovered that the recognizance was insufficient, for want of a stipulation required by law. That was the justice's own fault. He was bound to take it in legal form. *id*

4. That the party applying here for a mandamus, could have resorted to the circuit court for a *rule* on the justice to send up the appeal, is no objection to the jurisdiction of this court. *id*

5. Although the judges of an inferior court do not obey an order of this court, and thereby subject themselves to an attachment for contempt, yet, if their return to the mandamus shows that there was no *intentional* contempt on their part—instead of an attachment, an alias mandamus will issue. *Woodruff, ex parte*. 630

See JURISDICTION, 5 to 9.

MORTGAGES.

1. Proceedings for the foreclosure of mortgages, under chap. 101, of the Revised Statutes, are within the jurisdiction of a court of equity, and must be governed by the principles and rules of practice in courts of equity. *McLain & Badgett* v. *Smith*. 244

2. And in proceedings under this chapter, the actual occupant of the land, if there be one, is a necessary party, and must be made a party by the petition, or it must be shown in the petition that there is no occupant, or that the mortgagor or mortgagee is the occupant. The omission to make the actual occupier a party, without showing some adequate reason therefor, is not only ground of demurrer, but a valid objection even at the hearing, and good ground for a plea. *id*

3. Where all the defendants in such proceeding reside in the county where the suit is instituted, they must be embraced in a single writ, and no copy of the petition need accompany it. If they reside in different counties, separate writs issue to each county, and a copy of the petition must accompany each writ which issues to a county different from the one where the suit is brought. *id*

4. Upon sustaining and allowing a plea that the actual occupier of the land is not made a party, the court should not abate or dismiss the suit, but should give the plaintiff leave to amend his petition, upon the payment of costs within a reasonable time. *id*

5. On failure to amend upon the terms prescribed, the suit might be dismissed. *id*

N.

NEW TRIAL.

1. A motion for a new trial waives all exceptions taken at the trial, unless they

are specifically put upon the record by the objections to the overruling of the motion for a new trial. *Waller et al.* v. *The State.* 87

2. Where the verdict is sustained by two unimpeachable witnesses, though their testimony, is contradicted by one other witness, a new trial will not be granted. *Crary* v. *Carradine & Newman.* 216

3. When an account for goods, with interest charged at 8 per cent., has been presented to the defendant, and he has admitted it to be correct, and promised to pay it, a verdict and judgment for the *whole* account, principal and interest, with legal interest on both from the promise, is just, and will not be disturbed. *id*

4. Where a witness, sworn on his *voir dire*, stated, that he considered himself bound to pay the account sued on, and though he would pay the judgment, if obtained; that he had promised to settle the account for the defendant; that no particular consideration has passed between them, but he promised merely out of good feeling for defendant, who was his brother, he was a competent witness for the defendant. *id* 225

5. His evidence having been excluded, although it might not have been sufficient to overthrow the other evidence, yet it was erroneous to refuse a new trial. *id*

NOTICE.

1. *Reading* a notice to take depositions, is not a sufficient service, under a statute requiring *notice in writing* to be served on the party. A *copy* must be delivered. *Williams* v. *Brummel.* 129

2. Notice of taking depositions must be served *by copy*. Reading is not sufficient. *Woodruff* v. *Laflin et al.* 527

3. In assumpsit, the defendant cannot set off unliquidated damages, caused by the negligence of the plaintiff in keeping a slave, placed in his hands by defendant, to be sold. *id*

4. If depositions are improperly admitted in evidence, the judgment will be reversed, although the bill of exceptions does not state that it contains all the testimony offered, if the depositions so read contain material testimony, directly applicable to the issue. *id*

O.

OFFICERS.

1. When a sheriff returns, upon execution, that he levied it upon property of the defendant in execution, sufficient to satisfy it, and that he exposed the property to sale, and the bid was sufficient to cover the amount of the execution, these facts fix his liability. *Lawson* v. *Main.* 184

2. The levy being sufficient to satisfy the execution, it was, in contemplation of law, satisfied, unless the return shows, on its face, some matter sufficient to avoid this legal consequence. *id*

3. The sheriff cannot discharge himself, by showing, by parol, that the property levied on was that of another, or that he has applied the fund to some other execution. He should have made a proper return in the first instance. *id*

4. Where one circuit judge interchanged courts with another, under authority of an act of the Legislature, invalid, because it prescribed a *permanent*, and not a *temporary* interchange of courts, the parties having voluntarily submitted to his jurisdiction, and not attempted to question his authority, his acts were *valid*. *Rives* v. *Pettit et al.* 582

5. Upon general principles, the acts of a judge, exercising his power by virtue of an act of the Legislature, would be valid as to the public and third persons, though the law were afterwards decided to be constitutional. *id*

See EXECUTION, 1, 2.

P.

PARTNERSHIP.

1. In England, upon the death of one partner, a joint creditor could not proceed against his separate estate; the joint debt was extinguished; and the creditor's right of action is against the survivor. At law, this is well settled; but, in equity, there is a conflict of authority. *McLain & Badgett* v. *Carson's Ex'r.* 164

2. In equity, the creditor is permitted to have satisfaction of his debt out of the estate of the deceased partner, through the medium of subsisting equities between the parties themselves. *id*

3. The general rule is, that if, upon the decease of a partner, the creditor's contract is to be treated as several as well as joint, in respect to the firm, then he will be entitled to receive satisfaction in equity, immediately out of the estate of the deceased partner, and to take his portion, by the same gradation, with separate creditors. *id*

4. Under our laws, a joint contract, as understood in England, has no existence. *id*
5. Here, a partnership debt is a several as well as joint contract; and a partnership creditor may proceed immediately, at law, against the estate of a deceased partner, and be paid at the same time with separate creditors. *id*
6. The old debt against the firm, is separate, as well as joint; the death of one partner cannot extinguish the separate demand against his estate. *id*
7. That contingency leaves this right in full operation; the estate of the deceased partner is separately bound for the debt. *id*
8. Where two persons own a horse jointly, and, by written contract between them, one of them agrees to keep the horse a certain time, at a given price, and that one-half of the expenses thereof shall be paid by the other, there is nothing in the contract making them partners, although they call themselves partners in it. *Oliver* v. *Gray*. 425
9. They are mere part owners, and the one keeping the horse may recover of the other, half of the expense, at law, or offset it, if sued by him for other cause of action. *id*
10. Where an instrument is signed by a partnership name, with a seal after it, it is properly described in the declaration as the bond of the individual members of the firm. *Day and Others* v. *Lafferty*. 450
11. A signature and sealing, in the name of the firm, with a single seal, is good, and binds all the partners who are present, or assent to the execution. If none but the executing partner assent, it is still good as to him. *id*
12. In a suit on such a bond, a plea of payment by all the partners, necessarily admits its execution by all. *id*

PAYMENT.

1. Payment, *ante diem*, is a good plea in bar, in debt on bond. *Brent* v. *Fenner et al.* 160
2. Where a surety in a note takes it up, after it is due, and cancels it by giving his own note, which is accepted by the creditor, this is equivalent to payment of the first note, and will support a count for money paid, laid out, and expended. *Neale* v. *Newland*. 506

PETITION AND SUMMONS.

1. The proceeding by petition and summons, under the statute, will only lie in cases where debt lay at common law. It will not lie on a note executed solely for property, or an agreement for unliquidated damages. *Mitchell* v. *Walker*. 145
2. It will not lie on a note payable in Arkansas State Bank paper. *id*
3. The action by petition and summons will only lie on instruments for the direct payment of money. *Blevins* v. *Blevins*. 441
4. It will not lie on an instrument acknowledging a debt to be due, and stating that it is to be paid out of the proceeds of a particular security, placed in the hands of the creditor. *id*
5. In petition and summons, on a note bearing ten per cent. interest, it is only necessary to set out the note, and to aver that the debt remains unpaid, and to demand judgment for the debt, damages, and costs. It is not necessary specially to negative the payment of the interest. *Cail* v. *Brookfield*. 554

PLEADING.

1. A plea of *non est factum*, not sworn to, in an action on a bond, is a nullity, and will be stricken from the files, on motion. *McFarland et al.* v. *The State Bank*. 44
2. A plea of usury must allege a *corrupt agreement*, or it is defective on demurrer. *id*
3. If a defendant would object that a bank cannot discount bonds, he must do it by plea, showing the facts. *id*
4. As in *Clary & Webb* v. *Morehouse*, 3 *Ark*. 261, where a note is sued on which bears interest at a rate greater than six per cent. per annum, non-payment of the interest must be alleged in the breach. *Pelham* v. *Oakey*. 71
5. Variance between the writ and declaration in the name of the plaintiff; or between the writ and declaration in the capacity in which the plaintiffs sue; or between the writ and declaration in the names of the assignees, are no bar to the action; and if available for any purpose, can only be in abatement of the suit. *Stone* v. *Bennett et al.* *id*
6. Anciently, after oyer of the original writ, advantage might be taken, either by plea in abatement, demurrer, motion in arrest of judgment, or writ of error. *id*
7. Nothing which was ground of only special demurrer at common law, can now be specially assigned as cause of demurrer. *id*
8. When oyer of the assignments is neither prayed nor granted, though copied into

the transcript, they are no part of the record. *id*

9. It is not necessary to allege, in the declaration, that the defendant had notice of the assignment. *id*

10. That there is no venue distinctly laid to every material allegation in the declaration, cannot be taken advantage of on general demurrer. *id*

11. When, in a declaration on a note drawing ten per cent. interest per annum, the breach negatives the payment of the debt, but is silent as to the interest, on general demurrer, the court will disregard or amend the defect, unless it is specially stated as ground of demurrer. *Pitcher & Walters* v. *Morrison & Morrison.* 74

12. In an action by an assignee of a note, the note cannot be excluded from going in evidence, because the plaintiff does not state, in the commencement of his declaration, that he sues as assignee. *Featherston* v. *Wilson.* 154

13. It is not necessary to say that he sues "*as assignee*," if he sets out the assignment, or shows, by proper averments, that he is assignee. *id*

14. In a suit by an assignee upon a lost note, a plea of set-off, alone, admits the existence of the note, its assignment and loss; and if the record fails to show that the defendant offered to set off, the presumption is in favor of the court below. *Wilson* v. *Light.* 158

15. Payment, *ante diem*, is a good plea in bar, in debt on bond. *Brent* v. *Fenner et al.* 160

16. Tender, before the day, is good, and bars interest from that time, and costs. *id*

17. If a note, payable at a particular place, is described in the declaration as payable generally, it is a variance, and fatal on demurrer. *Dickinson et al.* v. *Tunstall.* 170

18. A note for $500, payable at twelve months, "with ten per cent. interest until paid," bears interest from date. *id*

19. But, if the breach does not negative the payment of the interest, it is bad on demurrer, and no judgment can legally be given for interest. *id*

20. In a count against the acceptor of a bill, which is accepted "payable in a settlement between himself and the plaintiff," if there is no averment that there has been a settlement, the count is bad. *Bertrand* v. *Byrd.* 187

21. A count on a contract with the defendant alone, may be joined, in assumpsit, with a count for goods sold to him and others jointly, and work and labor done for him and others jointly. *id*

22. In debt, on sheriff's bond, a breach, charging him with collecting money on execution and failing to pay it over, must allege a demand and refusal. *The Governor, for use, &c.,* v. *Pleasants et al.* 193

23. In such action, a breach that he has not returned the execution, is good. *id*

23. Unliquidated damages claimed upon mutual verbal agreements with an obligee, are no bar to an action by both obligees, upon a writing under seal. *Cary* v. *Ashley & Beebe.* 203

24. Such pleas are dilatory and frivolous, tender no natural issue, nor are they adapted to the form of the action, and the plaintiffs might disregard them, and sign judgment. *id*

25. The rule is, that, if the pleas are informal, and go to the merits, the plaintiffs should demur, because then the defendant might obtain leave to amend; but, if they are without color of truth to support them, or are intended as instruments of delay, they should be stricken out. *id*

26. These pleas being so palpably erroneous, the plaintiffs might have signed judgment as for want of a plea. *id*

27. At common law, if the pleas were unnecessary and improper, they were stricken out on motion: the motion is addressed to the sound discretion of the court. *id*

28. The omission of a venue is aided at common law by a judgment by default. *Pullen* v. *Chase.* 210

29. By our own law, it is immaterial, in transitory actions founded on contract, to state the venue in the body of the declaration. The statement in the margin, of the county in which the action is brought, is sufficient. *id*

30. In an action upon a promissory note, payable on demand, *non assumpsit infra sex annos*, is a good plea; but, if the promissory note was to do a collateral thing, which would create no debt until demand made, it would be otherwise. *id*

31. The distinction is, that a debt, arising from a positive existing promise to pay on demand, is due at the date of the contract, and the right of action is then perfect; but, if the promise is to do a collateral thing, on request, nothing is due until request made. Until then, no right of action accrues, and hence, in such case, the demand must be specially avowed and proved. *id*

32. To constitute a good plea of usury, the pleader must aver a corrupt intent. *McFarland et al.* v. *The Bank of the State.* 410

33. It is no error to disregard a plea of non est factum, not sworn to. *id*
34. There needs no averment as to the residence of the defendants, in a declaration at the suit of the State Bank, to authorize the writs to run into a county other than that where the suit is brought *Elliott and Redman* v. *The Bank of the State.* 437
35. In declaring on a judgment for several sums of money, each of which sums the judgment adjudges shall bear interest from a date prior to the rendering of the judgment, and some at a higher rate than six per cent. per annum, the non-payment of the interest accruing must be specially negatived in the breach. *Bank of Louisiana* v. *Watson.* 518
36. It is not sufficient, after demanding a certain sum in the commencement, and after setting out the judgment, alleging that it remains in full force, strength, and effect, not in anywise reversed, annulled, vacated, paid off, or satisfied, and no execution obtained on it, whereby an action has accrued to demand and have the sum demanded, then, for a breach, to allege simply the non-payment of the sum demanded, or any part thereof. *id*
37. In debt by the Auditor, on a sheriff's bond, breaches assigned, that the defendant did not execute the duties of his office according to law, and that he collected and failed to pay over a given amount of money, which was due the State, are well assigned, and the plaintiff is bound to prove that the defendant *collected* the money. *Taylor et al.* v. *The Auditor.* 574
38. A plea putting in issue such collection, is a good answer to the declaration, and should not be stricken out. *id*
39. *Nul tiel* corporation is a good plea, in form, in a suit by a bank. *Mahony et al.* v. *The Bank of the State.* 620

See ACCORD AND SATISFACTION, 1, 2.
REPLEVIN, 3, 4.

POWERS.

1. A power, coupled with an interest, must be engrafted on an estate in the thing. The interest must be an interest in the thing itself, and the power and the interest must be united in the same person It is not a power, by the exercise of which the estate is to be created; for in such case, the power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences. *Nicks' Heirs and Others* v. *Rector.* 251

PRACTICE IN CIRCUIT COURT.

1. A party defendant, by agreeing to a continuance, waives any defect which may exist in the service of the original writ, and makes himself a party to the record. *Rogers* v. *Conway.* 70
2. Judgment by default against him thereafter is irregular, but cured by our statute. *id*
3. That the writ does not set out the Christian names of the plaintiffs; and that there is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue; are neither objections to the writs, nor in bar of the action, and cannot be taken advantage of, on general demurrer. *Pitcher & Walters* v. *Morrison & Morrison.* 74
4. The common-law rule on demurrer is, that, where there are good and bad counts in the same declaration, and a general demurrer, the plaintiff has judgment on the demurrer. *Lane* v. *Levillian, Adm'r.* 76
5. A motion for a new trial waives all exceptions taken at the trial, unless they are specifically put upon the record by the objections to the overruling of the motion for a new trial. *Waller et al.* v. *The State.* 87
5. Upon the filing of a demurrer to evidence, the usual course of proceeding is, either to take a verdict for the plaintiff, conditionally, and then discharge the jury; or, to discharge the jury before any verdict is rendered, and then dispose of the demurrer; in which case, if the demurrer is overruled, and the damages are unliquidated, a new jury is summoned to assess the damages. *Obaugh* v. *Finn.* 110
6. And though it is, in some respects, a matter of practice. yet it is error for the court to retain the jury after the demurrer is filed, and, after overruling it, to have the damages assessed by the same jury. *id*
7. It is a course of proceeding wholly unauthorized by any rule or precedent, and in derogation of the defendant's legal rights. *id*
8. Under our statute, profert is necessary of a promissory note, as well as of a bond, and its omission is ground of general demurrer. *Beebe et al.* v. *The Real Estate Bank.* 124
9. Upon quashing the original writ, it is

error to enter final judgment against the plaintiff. *Burnett* v. *Menifee*. 140

10. Where the defendants reside in different counties, the plaintiff may either issue separate writs to the different counties, each against the defendants only who reside in each, or he may issue one writ to the county where the suit is brought against *all* of the defendants, and, upon its being returned *non est* as to some, may discontinue as to them, and take judgment against the others. *id*

11. In an action on a note bearing ten per cent. interest, where the declaration does not negative the payment of the interest, a general demurrer, not stating this objection specially as cause of demurrer, must be overruled. *Brooks et al.* v. *Palmer*. 159

12. But, upon the overruling of the demurrer, judgment can only be given for the *debt*, as the breach does not notice the interest. *id*

13. Judgment against one defendant, after the suit is regularly discontinued as to him, without any subsequent appearance on his part, will reverse the judgment as to all the defendants. *Inglish et al.* v. *Watkins, Adm'r*. 199

14. The objection of repugnancy between different parts of the declaration, was only cause of special demurrer at common law, and cannot be assigned as cause of demurrer under our law. *id*

15. The allegation as to where the instrument was made, is a substantive averment of that fact, but forms no part of the description of the contract. *id*

16. It is no error to disregard a plea of non est factum, not sworn to. *McFarland et al.* v. *The Bank of the State*. 410

17. Where defendants reside in different counties, writs issue to each, and each writ contains the names of all the defendants, all the writs must be quashed, on motion. *Pelham & McFarland* v. *The Bank of the State*. 418

18. On demurrer to plea in abatement sustained, the judgment should be *respondeat ouster*. *Fulcher* v. *Lyon*. 445

19. After demurrer to the declaration by one defendant correctly sustained, judgment against all the defendants, without any further steps taken by them, is erroneous. *Murphree et al.* v. *The Bank of The State*. 448

20. If an instrument, executed by several, is declared on as *sealed*, it is no ground of demurrer for variance, that, to the name of one of the signers, no seal is affixed. He may have adopted one of the other seals, and thereby made it his own. *The Bank of the State* v. *Bailey*. 453

21. He could only deny his having sealed it, by plea, under oath, denying the execution. *id*

22 Pleas ought not to be stricken out, unless the court perceives that they are wholly frivolous. *Blackmore et al.* v. *President, Directors, &c.* 454

23. Where a bail bond is adjudged insufficient, there must be entered of record a *rule* upon the defendant, or *notice*, to perfect the bond; and that, until this is done, the sheriff cannot be joined as a co-defendant. *Bennett & Young* v. *Brickey*. 460

24. Although, under our statute, any person, having cause of action *ex contractu*, against several persons, may sue one, any, or all of them, at his election, yet, if he sue more than one, he elects to treat it as a *joint* contract, and a discontinuance as to one defendant, *who has been* served with process, is a discontinuance as to all. *Frazier et al.* v. *The Bank of the State*. 509

25. In an action *ex contractu* against two or more, all being served with process, the plaintiff cannot take judgment against *part*, by default, omitting the others. *Hutchings et al.* v. *The Real Estate Bank*. 517

26. After the defendant introduces evidence to support a plea in replevin, he cannot move the court to instruct the jury to find as in case of a nonsuit. *Goodrich* v. *Fritz*. 525

27. But still, if the final judgment is right upon the whole, it will not be reversed. *id*

28. Although in an action at common law on a penal bond, a default admitted the truth of the breaches assigned, yet such is not the case, under our statute. The jury must still be sworn to inquire into the truth of the breaches, and the plaintiff must prove them, as alleged. *Taylor et al.* v. *The Auditor*. 574

29. Although a discontinuance as to one defendant is a discontinuance as to all, yet, if the remaining defendant, after the discontinuance, appears, and demurs or pleads, he waives the discontinuance, and can have no advantage of it. *Haply* v. *The Real Estate Bank*. 598

30. Where oyer is granted of an instrument by filing it, it becomes a part of the record, without being set out in any pleading. *id*

31. If on an appeal from the probate court, the circuit court acts only on the exceptions taken, but wholly omits, on sustaining the exceptions, to try the matter *de novo*, or make such order and decision as should have been made by the probate court, the judgment is not final, and er-

ror does not lie to this court. *Reagan et al.* v. *Mitchell et al.* 630

See ATTACHMENTS, 5, 6.

PRACTICE IN EQUITY.

1. If the material allegations in the bill are denied in the answer, they must be established by competent and direct evidence. *Clark* v. *Oakley's Administrator & Clark.* 236
2. Where a record is appealed to in the bill for proof of a fact, that fact cannot be established by oral testimony; and, if the complainant fails to produce the record, the presumption is, that it would have disproved the allegations in the bill. *id*
3. In equity, matters of practice are within the discretion of the Chancellor, and if any error or mistake is committed by him, it cannot be taken advantage of in this court on appeal, especially when such questions do not enter seriously into the merits of the decree. *Nicks' Heirs et al.* v. *Rector.* 251
4. This court is not authorized to reverse a decree upon mere questions of practice, unless the Chancellor has expressly violated some important principle of equitable jurisprudence, or disregarded some plain and authoritative command of the statute upon the subject *id*
5. The rigid application of the rules of English practice to our courts, would, in many cases, be wholly impracticable, and, if allowed, would work most manifest injustice and wrong. *id*
6. The Chancellor, upon the hearing, has power to permit a commission, under which testimony has been taken, to be amended, by filling up the blank direction with the words, "to any judge or justice of the peace," &c.; for the commission is nothing more than the process of the court, which may, at any time, be amended in an unimportant point, on suggestion. *id*
7. It is not necessary, under our statute, for exhibits referred to in a deposition, to be attached to, and returned with it, in a case where they are made a part of the bill, and filed with it. All the statute requires is, that the exhibits should be identified and their execution proved. *id*
8. Under our statute, the power is expressly given the Chancellor to permit an exhibit to be proved *viva voce* at the hearing, provided the party is not taken by surprise, or any serious wrong committed thereby. *id*
9. And in case of an exhibit attached to the bill, and there being no pretence that the other party had not a fair opportunity, if he desired, of questioning its genuineness, it may be proved *viva voce*, without any previous order or notice. *id*
10. And permitting such exhibit to be so proven, is, at any rate, matter of *practice*, of which no advantage can be taken on appeal. *id*
11. Where it was proven that a subscribing witness to an instrument had gone to another State four years before, that nothing more had been heard of him, and he was supposed to be dead, this proof being uncontradicted, his hand-writing was properly permitted to be proven. *id*
12. Although parts of the contents of a paper read on the hearing may be irrelevant, yet it cannot be presumed that such matter could have had any influence on the mind of the chancellor, nor could it exclude other portions, relevant and legal. *id*
13. Where an answer states that the land in dispute has been mortgaged, although if this be true, the mortgagee should be a party, yet, if no mortgage is exhibited, nor any proof adduced to support the allegation, a decree, without the alleged mortgagee being made a party, will not be disturbed. *Henry A. Engles* v. *William Engles.* 286
14. Under our statute as to chancery practice, a decree *pro confesso*, taken at the first term after process executed, or publication, is a final decree, so far as that an appeal to this court may be taken, at the same term. If that term is suffered to elapse, no appeal can afterwards be taken, unless by an application to this court, or one of its judges, within one year. *Smith and Wife, and Others*, v. *Yell.* 293
15. The extension of time to the first three days of the next term, before the decree shall become absolute, is but a privilege, of which the defendant can avail himself or not, as he thinks proper. No further action of the circuit court is necessary to make the decree absolute. *id*
16. If a defendant, by his answer, admits the parol agreement, and relies upon the statute of frauds, he is fully entitled to the benefit of it. If he denies the agreement, he need not insist on the statute. The plaintiff, in such case, must produce legal evidence of it. *Sorrells* v. *Sorrells.* 296

See MORTGAGES, 1 *to* 5.

PRACTICE IN SUPREME COURT.

1. Remittitur of part of the interest adjudged, allowed to be entered in this court. *McFarland et al.* v. *The State Bank.* 44
2. This court will not issue a certiorari, on motion of the defendant in error, after he has filed a joinder in error; nor permit him to withdraw his joinder; but they will *ex officio* issue the writ, for the purpose of affirming, though not to reverse. *Causin* v. *Taylor.* 55
3. A writ of error, tested and signed by H. Haralson, who had, previous to its date, ceased to be clerk of this court, was void; and case dismissed, for want of jurisdiction. *Burks et al.* v. *Dickson.* 87
4. If, upon a motion to affirm a judgment appealed from, because the transcript was not filed in time, the appellant shows that his counsel made timely application for a transcript, and used due exertion to obtain it, and that it was not obtained because the clerk of the court below was not able to prepare it, owing to the great number of transcripts required for the Supreme Court, the affirmance will be denied. *The Real Estate Bank* v. *Bizzell.* 189
5. A party not served with process, and against whom a discontinuance is entered, becomes a party, by prosecuting a writ of error to this court, and must be considered, thereafter, as having been duly served with process. *Inglish et al.* v. *Watkins.* 200
6. The statute which provides that a judgment shall be affirmed, where the transcript is not filed in this court, at least ten days before the term to which the appeal is taken, applies only to cases where a recognizance is given, and the judgment suspened. *Clark* v. *Oakley's Adm'r & Clark.* 236
7. The appellee cannot wait until the appellant has filed his transcript, and then move upon that, to affirm. He must procure the certificate of the clerk below. *id*
8. Where there are several writs, all defective, and liable to be quashed, although one defendant moves to quash, and the motion is overruled, yet, if he is not a party plaintiff in this court, and the defendant, who is plaintiff here, afterwards demurred to the declaration, he can have no advantage of the defect of the writ. *The Bank of the State* v. *Bailey.* 453
9. It is more regular to *demur* to a plea, when it is bad, than to move to strike it out; but, if stricken out, this court will not reverse the cause, to the end that a demurrer may be filed to a bad plea. *Mitchell* v. *The Real Estate Bank.* 513
10. Where there was an omission, in this court, to enter a judgment for costs, where such judgment was proper, it will be entered at a subsequent term. *Levy* v. *Inglish.* 591

PRE-EMPTION CLAIMS.

1. The person entering a donation claim, located it at his peril. If he located it on lands occupied and improved by an actual settler, and without his consent, such location is null and void, and the settler relievable in equity. And the entry being void, the patent issued upon it confers no title. *Nicks' Heirs et al.* v. *Rector.* 253
2. And not only the pre-emptor himself, claiming under the pre-emption act of 1830, but his assignee, to whom he assigned subsequently to January, 1832, may proceed in equity to have his possession quited in such case. Such an assignment was contrary neither to the letter nor policy of the law; and one who was prevented from purchasing, by the fraud of a third person, and the dereliction of duty and negligence of the officers of the United States, could dispose of his interest as fully as one who had actually been allowed to purchase and enter his land. *id*

PRESUMPTIONS.

1. In a criminal case, the presumption of law is in favor of the verdict. Unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong has been done in the premises. *Waller et al.* v. *The State.* 88
2. In the circuit court, on appeal from a justice of the peace, each party is entitled to a trial by jury; and if the record does not show that a party *demanded* a jury, and the case was tried by the court, the presumption is that he waived his right. *Wilson* v. *Light.* 158
3. In a suit by an assignee upon a lost note, a plea of set-off, alone, admits the existence of the note, its assignment and loss; and if the record fails to show that the defendant offered to set off, the presumption is in favor of the court below. *id*
4. Where, on an appeal from a justice of the peace, from a judgment rendered in

an action on account, the Circuit Court gives final judgment, without a writ of inquiry, the presumption which generally obtains in favor of the regularity of the proceedings of the court below, is contravened, if the record shows that the judgment was rendered by default, without appearance of the defendant. *Pirani & Mitchell* v. *Allhime.* 440

5. It being proven that a person was, *seventeen years ago*, a resident of another State, the law presumes that residence still to continue, until the presumption is overthrown by other testimony. *Prather* v. *Palmer.* 156

6. On an application for a supersedeas to an execution issued by a justice of the peace, if the transcript does not exhibit the execution, or a copy of it, but simply states that an execution was issued, this court, in the absence of affirmative evidence to the contrary, must presume that the justice acted in conformity to law, and refuse the supersedeas. *Smith, Ex Parte.* 601

PROFERT AND OYER.

1. Under our statute, profert is necessary of a promissory note, as well as of a bond, and its omission is ground of general demurrer. *Beebe et al.* v. *The Real Estate Bank.* 124

2. Where oyer is craved of the writing only, and not of the assignment upon it, the assignment becomes no part of the record by being copied into the transcript. *Pelham* v. *The State Bank.* 202

3. Want of profert cannot be taken advantage of after judgment by default, but only on demurrer. *Tucker & Others* v. *The Real Estate Bank.* 429

4. Want of profert of a promissory note, is, under our statute, good cause of general demurrer. *Buckner and Others* v. *The Real Estate Bank.* 440

5. Craving oyer of the instrument sued on, does not entitle the party to oyer of the assignments on it, nor place *them* on the record. *Dardenne* v. *Bennett et al.* 458

6. Where oyer is granted of an instrument by filing it, it becomes a part of the record, without being set out in any pleading.—*Hanly* v. *The Real Estate Bank.* 598

PROHIBITION.

1. The province of a writ of prohibition, and the method of proceeding upon it, defined. *Williams, ex parte.* 537

2. The proceeding, by prohibition, is a *quitam* action, and a bond for costs is not necessary before the filing of the declaration, which is the commencement of the action. *id*

3. On final judgment, in such a case, a writ of error will lie, as in common cases. *id*

4. Forms of suggestion, and other writs and proceedings in prohibition. *id*

PROMISSORY NOTES.

1. A note must be for the direct payment of money. The payment must be absolute, and not contingent, either as to the amount, credit, fund, or person. *Blevins* v. *Blevins.* 441

PURCHASERS.

1. Whatever parol agreement may exist between the grantor and grantee of real estate, in regard to a trust existing in parol, it is wholly nugatory, as to any purchaser from the grantee in the absolute deed, who relies on the statute of frauds in his defence. *Sorrells* v. *Sorrells.* 296

2. If a defendant, by his answer, admits the parol agreement, and relies upon the statute of frauds, he is fully entitled to the benefit of it. If he denies the agreement, he need not insist on the statute. The plaintiff, in such case, must produce legal evidence of it. *id*

3. An innocent purchaser, for a valuable consideration, without notice of a secret trust, will always be protected against it. *id*

See VENDOR AND VENDEE.

R.

REAL ESTATE BANK.

1. The Real Estate Bank, in suits upon notes executed to it, is entitled to recover interest at the rate of ten per centum per annum, from maturity, by way of damages. *Beebe et al.* v. *The Real Estate Bank.* 124

2. The Real Estate Bank is entitled to interest at the rate of ten per cent. per annum, on all notes, &c., due her, after maturity, and it is not necessary to demand it in the declaration. *Buford* v. *The Real Estate Bank.* 520

3. The act of March 3d, 1838, authorizes the Real Estate Bank to charge the same rate of interest as the State Bank, and is

not repealed, as to the Real Estate Bank, by the act of December 10, 1838. *McKiel et al.* v. *The Real Estate Bank.* 592

4. In a suit by the Real Estate Bank, it is not necessary to prove her corporate existence on the general issue. The court judicially knows it. *id*

See ASSIGNMENTS.

RECOGNIZANCE.

1. When a party obtains judgment in the Circuit Court, his adversary is, of right, entitled to a writ of error, but not to a stay of execution, unless he enters into recognizance under the statute, conditioned that he will prosecute such writ with effect, and pay the money adjudged against him by the Supreme Court, or otherwise abide its judgment. *Fowler* v. *Thorn & Wilson.* 208
2. The recognizance is to secure the debts, damages, and costs, in both courts. *id*
3. The words "prosecute his writ with effect," mean, that, if he fails, the recognizors will pay the money for his failure. It binds them to pay the money adjudged against him in the Supreme Court, or otherwise abide its decision. It is the same thing whether this Court adjudges the money against him, or orders the Circuit Court to adjudge it. He is bound to abide its judgment, and of course, the legal consequences of that judgment. *id*

RECORD.

1. A writ or other process, lost or destroyed, may be supplied by parol evidence of its contents, if no better evidence thereof can be produced. *Fowler* v. *More.* 570

See EXCEPTIONS. PROFERT AND OYER.

REGISTER AND RECEIVER.

1. The decisions of the Register and Receiver, under the pre-emption and donation laws, are conclusive as to all matters within their jurisdiction, in the absence of fraud. Thus, under the donation law, as to the facts of the settlement in the country ceded to the Cherokees, and the removal from it, by the claimant, necessary to entitle him to his donation, the decision of those officers was conclusive, because to decide these facts appertained strictly to their jurisdiction. But if they undertook to decide that the improvement of an actual settler and pre-emption claimant had been legally located by a donation claim, then they were deciding in a matter entirely beyond their jurisdiction. *Nicks' Heirs et al.* v. *Rector.* 253

REPLEVIN.

1. Under our statute, replevin may be maintained, either for an unlawful taking, or a wrongful detention. *Robinson* v. *Calloway.* 94
2. The plaintiff, to support the action, must show title. *id*
3. When a defendant pleads property in himself, or in a stranger, he must conclude with a *traverse* of the plaintiff's title; and the point on which the issue is joined, and upon which the jury must pass, is whether or not the plaintiff has such a title as will enable him to maintain the action. *id*
4. The allegation of property in the defendant, or in a stranger, is merely inducement to the traverse of the plaintiff's title, and no issue can be formed upon it. The plaintiff cannot waive the issue as to his own title, and tender a traverse of the defendant's title. *id*
5. Consequently, the plaintiff cannot recover, unless he shows title in himself; and the defendant can defeat the action, by showing title in a third person, without connecting himself with that third person. The affirmative is with the plaintiff. *id*
6. Evidence that a slave belonged to a person deceased, and that the plaintiff, who is his widow, administered jointly with another person, still living; that there are several heirs, and has been no distribution of the estate; that after the death of the intestate, the plaintiff obtained possession of the negro, who has been called her own, and she has had possession of him until shortly before suit commenced, clearly shows that she has no such title as will maintain replevin. *id*
7. Replevin cannot be maintained against an officer who has the custody and possession of property, under a valid execution. *Goodrich* v. *Fritz.* 525

RESIDENCE.

1. It being proven that a person was, *seventeen years ago*, a resident of another State, the law presumes that residence still to continue, until the presumption is overthrown by other testimony. *Prather* v. *Palmer.* 456

SATISFACTION.

1. An entry made in the margin of a record of a judgment, by a clerk, at a term subsequent to the entry of the judgment, stating that the plaintiff appeared in open court, and acknowledged satisfaction of the judgment, but not signed or attested by the clerk, or any other person, is no valid entry of satisfaction under the statute. *Cummins* v. *Webb*. 229

SEAL.

1. "Due C. P. Bertrand, for cash lent, three hundred dollars," signed R. C. Byrd, and having the word "*seal*" written at the end of the name, with a scrawl around it, is a *sealed* instrument, within the meaning of the Revised Statutes. *Bertrand* v. *Byrd*. 195
2. That provision of law which enacts that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed," is merely declaratory of what the law was before. *id*
3. If an instrument, executed by several, is declared on as *sealed*, it is no ground of demurrer for variance, that, to the name of one of the signers, no seal is affixed. He may have adopted one of the other seals, and thereby made it his own. *The Bank of the State* v. *Bailey*. 453 534
4. He could only deny his having sealed it, by plea, under oath, denying the execution. 453
5. The clause of *in cujus rei, &c.*, is not necessary to constitute a sealed instrument, under our statute. *Dardenne* v. *Bennett et al.* 458

SERVICE AND RETURN.

1. It is not necessary for a sheriff to state, in his return, that he executed the process in his own county. The law requires him to state *how*, but not *where*, he executed it. If he states that he executed it, the presumption is, that he executed it within his own county. *Henry* v. *Ward*. 150 555
2. Service of a writ of attachment by merely summoning a *garnishee*, gives the court no jurisdiction. *Richmond* v. *Duncan & Preston*. 197
3. Manner of serving such writ prescribed. *id*
4. Where a summons is served by leaving a copy with a member of the family of the defendant, the return must show that such member of the family was *white*, and over fifteen years of age. If it does not, judgment by default is erroneous.—*Ringgold and Others* v. *Randolph*. 428
5. The return of service of a summons is sufficient, although it does not state *in what county* the writ was executed, and although the Christian name of the defendant is abbreviated in the return.—*Elliott & Redman* v. *The Bank of the State*. 437
6. A return on a summons, that it was executed on the defendants by their acknowledging service of the same, shows a good service. *Lewis & Spurlock* v. *The State Bank*. 443
7. A capias *ad respondendum*, in a civil case, is not duly executed, under our statute, unless it is read to the defendant, or a copy delivered to him; and if the return is merely that the body of the defendant was arrested, and he gave bond for his appearance, it should be set aside, on motion. *Fulcher* v. *Lyon*. 449
8. A return, that the writ was executed by reading it *in the presence and hearing* of of a defendant, is good. It is tantamount to reading it *to him*. *McPherson and Others* v. *The Bank of the State*. 558

SET-OFF.

1. In assumpsit, the defendant cannot set off unliquidated damages, caused by the negligence of the plaintiff in keeping a slave, placed in his hands by defendant, to be sold. *Woodruff* v. *Lafflin & Others*. 527
2. In a suit on an assigned note, by *assignee* against *maker*, the maker may set off any demand due him, by the *assignor*, before and at the time of the assignment. *Oldham* v. *Wallace*. 559
3. A debt or demand, to be set off, must be due from the sole plaintiff, or all the plaintiffs, to the sole defendant, or all the defendants. This is the law under our statute, as well as elsewhere. *Trammell* v. *Harrell*. 602
4. A defendant or defendants cannot set off a claim due to him or them, by only one or a part of several plaintiffs; nor can one defendant, of several, set off a claim due to him alone, from the plaintiff or plaintiffs; and whether the claim sued on, or that attempted to be set off,

or both, are joint, or joint and several, makes no difference. *id*

SETTLERS ON PUBLIC LANDS.

1. The clause in the act of Congress of 6th January, 1829, providing that any location of a donation claim on the improvement of any actual settler, before the same should have been offered for sale, without the consent of such actual settler, should be null and void, creates a mere personal privilege or protection to the actual settler. *Nicks' Heirs et al* v. *Rector.* 251
2. If by any means the settler transferred this right or privilege, or signified his consent to the location, it would be a mere waiver of his privilege, and perhaps a personal covenant that would bind him so long as he continued to reside on the land. It might be made to operate by way of an equitable estoppel, and probably could not be revoked, if in terms absolute and unconditional. It would be otherwise, if in terms conditional, and limited to a particular time. *id*
3. Such agreement would be binding as long as he remained upon and in possession of the land. If he voluntarily abandoned the land, his consent to the location was of no avail. *id*
4. Such a license to locate, given by the actual settler, does not create a power coupled with an interest, nor is irrevocable. *id*
5. Where an actual settler gave another person a license to locate the land with a donation claim, within a time certain, he did not thereby constitute that person his agent, although the land was to be located for the joint advantage of both. *id*
6. And when, after such time expired, the actual settler sold to others, who settled on the land, there were no equal equities as between them and the original purchaser. The principle as to equal equities did not apply. *id*
7. A., the first actual settler, had neither a legal or equitable interest in the land.—He had a mere inchoate and imperfect right of possession, good against all the world except the United States, but only good so long as he continued on the land. *id*
8. And where B., the person to whom he originally gave a license to locate the land, entered the same with a donation claim, after the time agreed on had expired, after A. had sold all his right to D. and C., and removed from the land, leaving them the only actual settlers upon it; such location, without the consent of D. and C., was *in fraudem legis*, and wholly null and void. *id*
9. And it makes no difference if D. and C. had notice of the original contract between A. and B. *id*
10. The person entering a donation claim, located it at his peril. If he located it on lands occupied and improved by an actual settler, and without his consent, such location is null and void, and the settler relievable in equity. And the entry being void, the patent issued upon it confers no title. *id*
11. In such case, the actual settler, especially if having a valid pre-emption claim, is entitled to a decree for ever quieting his possession against the patent. *id*
12. And, such entry being void, if the actual settler has a valid pre-emption claim, and has in due time proven it up, and tendered to the proper officer the purchase money, he or his assignee has a vested legal and equitable right, equivalent to an interest in the land. *id*
13. And not only the pre-emptor himself, claiming under the pre-emption act of 1830, but his assignee, to whom he assigned subsequently to January, 1832, may proceed in equity to have his possession quieted in such case. Such an assignment was contrary neither to the letter or policy of the law; and one who was prevented from purchasing, by the fraud of a third person, and the dereliction of duty and negligence of the officers of the United States, could dispose of his interest as fully as one who had actually been allowed to purchase and enter his land. *id*
14. The interest that a person has in an improvement on public land, is of a peculiar kind, known only to our laws. It is a possessory right against all the world but the United States. It partakes, in some degree, of the nature of a chattel real and vests in the personal representatives of the deceased. *Pelham, Adm'r of Ryan,* v. *Wilson, Cravens, et al.* 289
15. The executor or administrator can sell it, without the intervention of the Probate Court. *id*
16. If the administrator professes to sell, and the purchaser supposes he is buying a *pre-emption right*, and there is, in fact, no pre-emption, the contract will be rescinded. If only an *improvement* is sold, the purchaser buys at his peril, and must comply with his contract. *id*

SHERIFFS.

1. Although a sheriff becomes liable, on re-

ceiving a tax list, for the whole amount of tax charged therein, less the credits to which he may, by law, be entitled, and there is no necessity, in a suit against him, to charge him with having *collected* the money, yet if the breach in the declaration against him on his bond, is that he did collect the money, and fail to pay it over, the *collection* of the money must be proved. Merely producing the tax list, receipted by him, is not sufficient to charge him, on such a state of proceeding. *Taylor and Others* v. *The County of Pulaski.* 596

SLANDER.

1. The distinction between *verbal* and *written* slander, by which an action may be maintained for written or printed words, which, if only spoken, would not support an action, has been uniformly maintained for ages in England and the United States, and is too well established to be now departed from. *Obaugh* v. *Finn.* 110
2. The rule is well established, that any words, written and published, throwing contumely on the party, or prejudicing him in his employment, are actionable, without any allegation of special damage. *id*
3. Therefore, a publication in a newspaper, whereby one person cautions the public against another, stating him to be a plasterer by trade, who absconded on a certain day, without paying any of his numerous debts, and swindling him out of fifty-five dollars, which he had advanced him, on his promise to do a certain piece of work; that he was from Baltimore, and was said to have left that place in a similar manner; and concluding, "It is not for the small amount of money, out of which he has swindled me, that I now publicly advertise him, but to put others on their guard against his villany," is a *libel*, and actionable, without allegation of special damage. *id*
4. And, in an action thereon, a demurrer to evidence being put in, admitting the publication, and that the plaintiff was a plasterer, doing business, as such, in Little Rock, these facts were sufficient to maintain the action; and the demurrer was properly overruled. *id*

STATUTES.

See CONSTRUCTION.

STATUTE OF FRAUDS.

1. Whatever parol agreement may exist between the grantor and grantee of real estate, in regard to a trust existing in parol, it is wholly nugatory, as to any purchaser from the grantee in the absolute deed, who relies on the statute of frauds in his defence. *Sorrells* v. *Sorrells.* 296
2. If a defendant, by his answer, admits the parol agreement, and relies upon the statute of frauds, he is fully entitled to the benefit of it. If he denies the agreement, he need not insist on the statute. The plaintiff, in such case, must produce legal evidence of it. *id*

SUPREME COURT.

See ERROR. JURISDICTION, 1, 5, 6, 7, 8, 9. PRACTICE IN SUPREME COURT.

SURVIVORSHIP.

1. By the common law, in England and America, where two or more payees or obligees have a joint interest in a note or bond, and one dies, *the right of action* survives to the other. *Trammell* v. *Harrell.* 602
2. And this is not changed by our statute, by which all survivorships of real and personal estate are abolished. *id*

T.

TENDER.

1. Tender, before the day, is good, and bars interest from that time, and costs. *Brent* v. *Fenner et al.* 160
2. The rule in regard to a tender is, that if a debtor offers to produce the money, and its production is dispensed with by the creditor, the tender is sufficient, without the money being actually produced; and this rule holds under the land laws, in case of an application to enter land.—*Nicks' Heirs et al.* v. *Rector.* 251
3. If a party covenants to pay in specific articles, he must meet his contract *at the time* and *in the manner* specified. *Day and Others* v. *Lafferty.* 450
4. Tender cannot be made *after the day*, unless the damages are capable of being reduced to certainty by computation. *id*
5. Therefore, a plea of tender, after the day, is not good, in case of a note paya-

ble in specific articles. The damages cannot be ascertained by computation. *id*

6. And such is the rule on a note payable in current Arkansas bank notes. *id*

TROVER.

1. An executor or administrator may maintain trover, for the property of the testator, or intestate, wrongfully converted in his lifetime. *Eubanks* v. *Dobbs, Adm'r.* 173

TRUSTS AND TRUSTEES.

See ASSIGNMENTS.

U.

USURY.

1. To constitute a good plea of usury, the pleader must aver a corrupt intent. *McFarland et al.* v. *The Bank of the State.* 410

V.

VARIANCE.

1. Variance between the writ and declaration in the name of the plaintiffs; or between the writ and declaration in the capacity in which the plaintiffs sue; or between the writ and declaration in the names of the assignees, are no bar to the action; and if available for any purpose, can only be in abatement of the suit. *Stone* v. *Bennett et al.* 71

2. Anciently, after oyer of the original writ, advantage might be taken, either by plea in abatement, demurrer, motion in arrest of judgment, or writ of error. *id*

3. That the writ does not set out the Christian names of the plaintiffs; and that there is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue; are neither objections to the writs, nor in bar of the action, and cannot be taken advantage of, on general demurrer. *Pitcher & Walters* v. *Morrison & Morrison.* 74

4. If a note, payable at a particular place, is described in the declaration as payable generally, it is a variance, and fatal on demurrer. *Dickinson et al.* v. *Tunstall.* 170

5. The condition of a recognizance was, to appear and answer an indictment for *gaming*. The condition, as stated in the *scire facias* upon the recognizance, was, to appear and answer an indictment for *keeping a gaming-table*. No variance. *Whitfield* v. *The State.* 171

6. Where the declaration expressly states that the defendant executed a note, *as principal*, and the note produced on oyer is executed by another person as principal, and by the defendant *as security*, the variance is fatal on demurrer. *The Bank of the State* v. *Hubbard.* 419

7. In debt, a variance between the writ and declaration, as to the amount of the *ad damnum*, is immaterial, and no ground of abatement. *Fulcher* v. *Lyon.* 445

8. Where a declaration, in a suit by the Real Estate Bank, states a note, payable at its branch at *Washington*, and the note given on oyer is payable at its brach at *Washing*, this variance is fatal on demurrer. *Caruthers* v. *The Real Estate Bank.* 447

9. Where a note is declared on as payable to *the Bank of the State of Arkansas*, and on oyer it is found to be payable to *the Branch of the Bank of the State of Arkansas at Batesville*, the variance is fatal, on demurrer. *Murphree and Others* v. *The Bank of the State.* 448

10. Though there is a mistake in the declaration, as to the *place* where a note was executed, this is immaterial. It is an averment as to *place* alone, and not a description of the writing sued on. *Watkins* v. *Weaver.* 556

11. It is no variance, that the declaration states a note, due at one day, with interest at eight per cent. till paid, and then alleges that the defendant became liable to pay such interest *from the time the note fell due till paid.* *id*

12. Nor is it material that the note is stated to be for $646 89 cents, and the breach alleges the non-payment of "said sum of $649 98 cents. *id*

13. If a note is described in the declaration as bearing date a certain day, and the note filed on oyer has no date, this is a variance fatal on demurrer, although it is a note given to a bank, payable at a certain time after a certain day, and though the cashier is authorized by the note to insert the date. *Hanly* v. *The Real Estate Bank.* 598

VENUE.

1. The omission of a venue is aided at common law by a judgment by default. *Pullen* v. *Chase.* 210

. By our own law, it is immaterial, in transitory actions founded on contract, to state the venue in the body of the declaration. The statement in the margin, of the county in which the action is brought, is sufficient. *id*

VERDICT.

1. In a criminal case, the presumption of law is in favor of the verdict. Unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong has been done in the premises. *Waller et al.* v. *The State.* 88
2. If a verdict is by mistake, and endorsed by the jury on a wrong paper, it may be transferred to the proper paper, and signed by the foreman, after the jury is discharged, and when they are not all present. *Crary* v. *Carradine & Newman.* 216

W.

WILLS.

1. Where a paper, purporting to be a will, was produced for probate, and rejected, and letters of administration granted to a third person, if the executor removes the matter into the Circuit Court, without giving the administratrix notice, and the Circuit Court refuses to permit the administratrix to be made a party on the record, and orders an issue to be made up, *ex parte*, as to the validity of the will, which is tried, and the will decided to be valid, the proceeding has no color of law, or shadow of justice to support it. *Billings, Administratrix*, v. *Billings.* 90
2. The administratrix was entitled to notice, and to be made a party to the record. *id*

WITNESS.

1. A. B. and C. D., being in partnership, executed their notes to a third person for goods furnished the firm, and E. F. became their security on the note. E. F., having been compelled to pay the notes, sued C. D. to recover the amount paid, A. B. is not a competent witness for E. F. in such suit, to establish the fact of the partnership, or the liability of C. D. *Williams* v. *Brummel.* 129
2. Where a witness, sworn on his *voir dire*, stated, that he considered himself bound to pay the account sued on, and though he would pay the judgment, if obtained; that he had promised to settle the account for the defendant; that no particular consideration has passed between them, but he promised merely out of good feeling for defendant, who was his brother, he was a competent witness for the defendant. *Crary* v. *Carradine & Newman.* 225

WORK AND LABOR.

1. Where A. makes a written contract with B. to build a gin for him, on certain terms, he cannot sue him for work and labor done; nor, if such suit is brought, can he show, by oral testimony, that the work was or was not executed and completed according to the contract. *Hawk* v. *Walworth.* 577

WRITS.

1. Where the return term of a writ was by law to be held on the second Monday after the fourth Monday of September, a writ commanding the party to appear "on the first day of our next October term," is good. *Phillips* v. *Lemoyne.* 144
2. *A fortiori*, it is good, if it also states that the court is to be held on the eleventh day of October, that being the second Monday after the fourth Monday of September. *id*
3. A summons, directed to the sheriff of one county, commanding him to summon the defendant to appear before the circuit court of another county, *at the court-house in the county aforesaid*, is good. *Tucker and Others* v. *The Real Estate Bank.* 429
4. Where two counties are named in a writ, and then the party is required to appear "at the court-house in the county *aforesaid*," the word "*aforesaid*" relates to the last county named. *Tucker et al.* v. *The Real Estate Bank.* 432
5. It is no objection to a writ, after judgment by default, that it does not call on the defendant to answer the demand for interest claimed in the declaration, in a suit by the Real Estate Bank, to which the law gives ten per cent. interest after the note, bond, or bill matures, or is protested. *id*
6. There needs no averment as to the

residence of the defendants, in a declaration at the suit of the State Bank, to authorize the writs to run into a county other than that where the suit is brought. *Elliott and Redman* v. *The Bank of the State.* 437

7. Where a writ, after mentioning *two* counties, requires the defendant to appear *at the court-house in the county aforesaid*, the word *aforesaid* refers to the county last named. *id*

8. A summons, by which the sheriff is commanded to summon the defendant to appear "on the third Monday of our next March term, A. D. 1841, at a court, to be holden on the 15th day of March next," that day being the third Monday March, and the day on which, by law the court is required to be held, and t court, by law, sitting only one week, good. *Buford* v. *The Real Estate Ba* 5

9. Where the writ states that one of the fendants is sheriff of the county, it is properly directed to the coroner, without any affidavit that such defendant is sheriff. *McPherson and Others* v. *The Bank of the State.* 558

10. A writ or other process, lost or destroyed, may be supplied by parol evidence of its contents, if no better evidence thereof can be produced. *Fowler* v. *More.* 570

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