ADAMS ET AL. *vs.* STATE, USE OF WALLACE.

The principle in the case *Caldwell vs. Bell & Graham*, 3 *Ark.* 420, *S. C.* 1 *Eng.* 230, that objection may be made to the legal authority of the judge presiding on the trial of the cause, re-affirmed.

Where there are two or more counts in a declaration, to which there are pleas and issue, it is error to empannel and swear the jury to try the issue to one count only.

A judgment for the penalty of a conditional bond and a further judgment for damages assessed by the jury for the breach and award of execution, though informal, is not erroneous.

An exemplification of the record, of the same court where the trial is had, is not sufficient to sustain the issue under the plea of nul tiel record: the original record itself must be produced.

[illegible] of the debtor inadmissible in a suit on a sheriff's bond for failure to sell property levied under an execution against the debtor.

Under Art. 6, sec. 12, Const. and Amendment 2d, and the statute, ch. 47, sec. 8, Digest, a judge of one circuit cannot be commissioned or directed to try one cause in another circuit where the regular judge is incompetent to preside. In such case he must interchange with the judge for the entire circuit. Per JOHNSON, C. J.

Contra. SCOTT, J., who held that, in such case, the judge might be required to hold the courts of the entire circuit or of one county in the circuit, or to try one single cause.

Appeal from the Circuit Court of Johnson County.

This was an action of debt instituted upon a sheriff's bond; and was decided in this court at the January term, 1846, upon

demurrer to the declaration, *vide* 1 *Eng.* 497. Upon the return of the case to the circuit court the defendant, Samuel Adams, pleaded payment in part in money, and payment of the residue in Arkansas Bank paper and an order of the plaintiff to the sheriff to desist from selling the property levied upon, upon such payment. To these pleas there was demurrer which does not appear to have been disposed of: but replications denying the truth of the pleas were afterwards filed.

The defendant, William Adams, pleaded nul tiel record of the recovery set forth in the declaration; that no writ of *fieri facias* ever issued on such judgment: that the plaintiff in the judgment ordered the writ of *fieri facias* to be returned without a sale of the property levied upon; and that the sheriff did pay to the plaintiff the debt, damages and costs in said writ ordered to be levied. To these pleas general replications were filed and issue taken.

The cause was heard at the August term, 1848, before the Hon. WILLIAM H. FEILD, who produced the following commission and caused it to be spread upon the record:

"The State of Arkansas. To all whom these presents shall come, Greeting: Whereas by the provisions of an act of the General Assembly, the judges of the fourth and seventh judicial circuits were required to change circuits and hold courts for each other: and whereas it has been certified to me by the judge of each of said circuits that neither of them is competent to decide the following case, to-wit: The State of Arkansas, who sues for the use of Alfred Wallace vs. William Adams, James P. Patterson, Samuel Adams, John W. Patrick and Joseph James, pending for adjudication in the circuit court of Johnson county in said seventh circuit. Now therefore, I, Thomas S. Drew, Governor of said State by authority in me vested by the third section of the act above referred to, entitled 'An act to compel circuit judges to change circuits and hold courts for each other,' approved 21st December, 1846, do hereby appoint and direct William H. Feild, judge of the 5th circuit to exchange with the

judge of the 7th circuit for the purpose of trying the case above mentioned. In testimony &c."

The defendants objected to the power and authority of the Hon. W. H. Feild to preside or adjudicate the cause, but he overruled their objection and they excepted.

A jury was empanneled and sworn "to try the issues joined in this behalf and to inquire into the truth of the first breach assigned in the declaration of the said plaintiff and damages assess," who found "the issues joined for the within named plaintiff and that the first breach in her declaration alleged of the condition of the bond therein described by the defendants to be true and do assess the plaintiff's damage because of the commission of said breach by the said defendants to the sum of one thousand and fifty-one dollars and twenty-five cents." The court then rendered the following judgment: "Wherefore it is considered by the court here that the said plaintiff do have and recover for the use of the said Alfred Wallace the sum of ten thousand dollars against the said defendants for the debt in her declaration mentioned together with her costs herein expended. And it is further considered by the court that the plaintiff have and recover of and from the defendants in said declaration mentioned for the use of the said Wallace the said sum of one thousand and fifty-one dollars and twenty-five cents the damages so by the jury assessed as aforesaid and that the said plaintiff have execution for the damages assessed as aforesaid."

Upon the trial of the issue upon the plea of *nul tiel record*, which was submitted to the court, the plaintiff offered to read in evidence an exemplification of the record of the judgment set out in the declaration, to the reading of which the defendants objected "upon the ground that the proceedings and judgment aforesaid are null and void, in this that the defendants in said judgment were not served with process in that behalf and also in this that the court acquired no jurisdiction of said defendants, but the court overruled the objections and permitted said ex-

emplifications of the record to be read in evidence," to which the defendants excepted.

Upon the trial of the issues the plaintiff offered to read to the jury an exemplification of the record of said judgment in the declaration, and also to prove by witnesses that one of the defendants in said judgment at the time of the issuance of said execution owned and was in possession of property more than sufficient to satisfy the execution; to all which the defendants objected but the court overruled their objection and permitted the exemplification of the record to be read, and the parol testimony to be given to the jury, and the defendants excepted: they then moved for a new trial which was refused, and they excepted setting out the testimony and the bill of exceptions taken during the trial.

This cause was argued before the Hon. THOMAS JOHNSON, C. J. and the Hon. C. C. SCOTT, J. The Hon. D. WALKER, not sitting.

WATKINS & CURRAN, for the appellants, argued that the declaration is defective and shows no cause of action or breach of the bond; and contended that the judge who presided at the trial, had no authority to hear and determine the cause. The 3d sec. of the act of 21st December, 1846 (*Dig. ch.* 47, *sec.* 8) under which the Governor issued the commission to Judge Feild directing him to try this cause, contemplates an exchange of circuits and does not authorize the appointment of a judge to try any particular cause during a term held by the regular judge. That if the commission of Judge Feild was warranted by the true construction of the act of December 21, 1846, that act is in violation of the constitution, 12 *sec. Art. VI,* 2 *Amend.* of 1846. That the objection to the power of the judge was properly made in this case. *Caldwell vs. Bell & Graham,* 1 *Eng.* 227.

That the court erred in empanneling the jury to inquire into the truth of the first breach only, whilst the second remained upon the record: in rendering judgment for the penalty, costs *and damages* (*Dig. p.* 775, *sec.* 8): in receiving an exemplification of the record as evidence of a judgment rendered by the

same court (1 *Greenl. Ev.* 547, *sec.* 502; 1 *Stark. Ev.* 188; *Burk's ex. vs. Tregg's ex.* 2 *Wash. C. C. R.* 215) and in admitting parol testimony not pertinent to the issue—such testimony being as to possession of property by the defendant in execution, and the issue being as to a levy by the sheriff and failure to sell.

PIKE, contra. The copy of the bond and the exemplification of the judgment and execution offered in evidence correspond in every particular with the statement of them in the declaration; and the parol testimony was both material and relevant to the issue.

As to the authority of Judge Feild, under the commission or direction of the Governor to try this cause, he cited the cases of *Caldwell vs. Bell & Graham,* 3 *Ark.* 419; *Caldwell vs. Bell & Graham,* 1 *Eng.* 231, erroneously decided, *Rives vs. Pettit et al.* 4 *Ark.* 582. *The People vs. White,* 24 *Wend.* 564; *id.* 526. The *Heirs & Legatees of Maffei,* 7 *Journal du Palais* 111, and contended that the competency of a judge who presides under color of right cannot be inquired into collaterally; that the only mode of testing his power is by a direct proceeding, and not by plea or exception as in the case, *sup.* 1 *Eng.;* for that assumes his power to decide and acknowledges him as judge—he is either judge, when he signs a bill of exceptions, or there is no bill of exceptions —judge or there is no record: that public policy, the interest of the community, the peace of the country require that where a person takes the bench by virtue of a law though unconstitutional, of a commission though illegal, of a certificate though false, the authority must be held good until canceled: and relying upon this rule, which is older than the English law (*Journal du Palais, sup.*) and unwilling to countenance, even apparently, an infringement of it, he declined to discuss the ground of the objection to the judge's competency.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question of the legal sufficiency of the first count has heretofore been settled by this court and consequently cannot

now be raised. See *Adams et al. vs. State use Wallace,* 1 *Eng.* 503.

The next objection relates to the competency of the judge who presided upon the trial of the cause. He claimed to exercise the functions of a circuit judge under a commission from the Governor of the State, which was predicated upon the eighth section of chapter 47 of the Digest. Two questions are presented: First, was the act referred to authorized by the constitution; and second, whether the direction or commission under which the judge claimed to act was in pursuance of the statute.

The clause in the original constitution is that "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," and the amendment is that "The General Assembly shall have power to compel judges of the circuit court to interchange circuits either temporarily or permanently, under such regulations as may be provided by law." The section of the statute upon which the commission is based, reads thus: "If a case shall occur in any judicial division as provided for in the first section of this act, which by the constitution and laws neither of the judges therein is competent to decide, such judges shall certify the same to the Governor, specifying in such notice the judge of the circuit for the time being as well as the circuit in which such case or cases have occurred, and it shall be the duty of the Governor forthwith, to direct one of the judges of an adjoining division to exchange for the time being with said judge." We cannot discover any thing inconsistent with the constitution after a regular and permanent interchange of the judges of two adjoining circuits has been established, in requiring one of those to exchange temporarily for causes specified, with another and different judge. It will be observed that the act requiring the two judges to certify the cases over which they are incompetent to preside, also requires that they shall specify in such certificate the name of the judge of the circuit for the time being, as well as the circuit in which such case or cases have occurred, and upon the receipt of such certificate it is made the duty of the Governor forthwith to direct one of the judges of an adjoining

division to exchange for the time being with said judge. If the act had said emphatically, in so many words, that the Governor, under such circumstances, should direct the judge of an adjoining division to change circuits for the entire term, it could not have conveyed the intention of the legislature more clearly than the language adopted. The judges are not required to specify the county or counties, but on the contrary the circuit in which such case or cases have occurred. When the judges are required to specify the judge of the circuit for the time being, the necessary import of the language is, for the next term of the entire circuit and not for any particular case or cases pending in that circuit; and as a necessary consequence, the authority of the Governor to direct an exchange with such judge for the time being is a mere repetition of the previous expression and therefore signifies precisely the same thing. We consider it clear that, under the constitution, no exchange is recognized, whether temporary or permanent, which does not look to and embrace, at the least, one entire circuit.

There is nothing in the act in conflict with this construction; but on the contrary it is framed with a direct and exclusive view to such a construction.

But admitting the act to be constitutional, the question still recurs, whether the commission produced, was framed in accordance with it so as to confer the authority claimed by its possession. The commission issued by the Governor, and under which Judge Feild claimed to act in this case, falls far short of the requirements of the statute; and consequently conferred no authority upon him to preside in the case. According to the commission he had not been informed as to the name of the judge for the time being, or in other words, whose duty it was to preside in the circuit at the next term of the court, nor has he directed Judge Feild to exchange with such judge for the time being, or which is equivalent to it, for the next term of such circuit. The act did not contemplate an exchange simply for the purpose of trying the cases which might render it expedient and necessary, and thereby to substitute the third in the place of a special

judge, who could only hold his court or try his cases during the regular term of the judge of the circuit, but, on the contrary, it designed that he should exchange for the whole circuit, and that during such exchange he should possess all the powers and exercise all the authority of the regular judge. Under this construction it is clear that the commission of Judge Field conferred no authority upon him to preside over and pronounce judgment in this case and that consequently his acts in doing so are voidable and erroneous.

But it is contended that inasmuch as Judge Feild had the color of authority, which appeared by his commission, no objection could be made before him so as to defeat the exercise of such office. In support of this position some authorities have been cited and an ingenious and plausible argument based upon them. This court has ruled differently, so far back as the case of *Caldwell vs. Bell & Graham,* 3 *A. R.* 420, and has uniformly adhered to the doctrine of that case down to the present time. (See *Rives vs. Pettit et al.* 4 *A. R.* 582, and *Caldwell's Ex. vs. Bell & Graham,* 1 *Eng.* 230.) This point we consider as well settled in this court, and therefore do not feel disposed to disturb it.

The plaintiff below should not have been suffered to have the jury sworn to try the truth of the breaches laid in the first count alone whilst the second was standing in the declaration. Pleas had been filed to the first and second counts and issues taken upon them and under such a state of case, the plaintiff, though he might have entered a *no le prosequi* as to the second count, could not disregard it so long as it remained in the declaration.

It is also objected that the verdict and judgment are not taken in pursuance of the statute. The judgment, though not exactly formal, is believed to be a substantial compliance with the statute.

The court below clearly erred in permitting the plaintiff in that court to read an exemplification of the record and proceedings described in the declaration. The record set out in the declaration was of the same court and in such case it is not sufficient to read a certified copy, but the original record itself

must be produced and inspected. See 2 *Wash. R.* 215. *Burk's Ex. vs. Trigg's Ex.* 5 *Call* 549. *Anderson vs. Dudley.*

The parol evidence was not admissible under the state of the pleading. The charge in the first count was that the sheriff had levied upon property and had failed and neglected to sell the same. Testimony tending to show the kind or value of property belonging to the defendant in execution, certainly could not have had the slightest influence in establishing the allegation that the sheriff had levied and had failed to sell.

Upon a full view of this case we are satisfied that there is error and that consequently the judgment of the court below ought to be reversed. The judgment of the circuit court of Johnson county herein rendered is therefore for the errors aforesaid reversed, annulled and set aside and it is further ordered that the cause be remanded to said circuit court to be proceeded in according to law and not inconsistent with this opinion.

Mr. Justice SCOTT. I wholly dissent from all of the views of the Chief Justice relating to the constitutional question discussed by him in the foregoing opinion, as well as those touching the construction of the act of the legislature, which question the rightful authority of the circuit judge under the commission set out in the record. But I do not deem it either necessary or proper to present my views at large on these questions as there has been no action of this court in the premises to call forth my reasons. I will say, however, that in my opinion it is clear that the constitutional power of the legislature to send a judge beyond the limits of his own circuit to hold the courts of another entire circuit, necessarily includes the power to compel him to hold the court in a single county of that circuit, as well as to try any single case pending in any such county. And that this power is not qualified so as to make its rightful exercise in any way necessarily dependent upon legislative provision for technical interchange or reciprocity of judicial labors.