WILAMOUICZ *vs.* ADAMS.

An order drawn by the public printer upon the Treasurer of the State, for a specified sum, payable out of any scrip in the hands of the Treasurer, that might be due the drawer for printing the Acts and Journals, is not, by the law merchant, a bill of exchange or draft, and the acceptance thereof, by the Treasurer, cannot be made the foundation of an action.

Such order could amount to nothing more than an authority from the drawer to the payee to receive the scrip, when legally issued, and if not delivered to him, he would have to resort to an action for the consideration paid by him for the order.

The Treasurer can only issue scrip to the person having the Auditor's warrant, and an agreement by him to deliver it to another, is illegal and void—Hence where the Treasurer agreed with W. that if he would purchase scrip to be issued to the public printer in future, he would deliver it to him, W., the agreement was illegal, and could not be made the foundation of an action.

Writ of Error to Pulaski Circuit Court.

This was an action of assumpsit, brought by Ignatius Wilamouicz against Samuel Adams, in Pulaski Circuit Court, founded on Adams' acceptance of the following instruments:

$375. LITTLE ROCK, *Feb.* 12, 1849.

SIR: On the first day of July next, please pay to I. Wilamouicz, or order, the sum of three hundred and seventy-five dollars, in State Scrip or Treasury Warrants, out of any monies in your hands due me for printing the Acts and Journals of the State.

Yours, &c., G. B. HAYDEN,

To Hon. SAMUEL ADAMS, *Printer to the State.*

Treasurer of the State of Arkansas.

Endorsed—"I accept the within order, this 12th Feb., 1849.

SAMUEL ADAMS, *Treasurer.*"

LITTLE ROCK, *Feb.* 13, 1849.

$1,200.

SIR: On the first day of August next, please pay to I. Wilamouicz, or order, the sum of twelve hundred dollars in State

Scrip or Treasury Warrants, out of any money in your hands due me for printing the Acts and Journals of the State of Arkansas, for value received of him.

Yours, &c., G. B. HAYDEN,

To Hon. SAMUEL ADAMS, *Printer to the State.*

Treasurer of the State of Arkansas.

Endorsed—"I accept the within order, this 13th Feb., 1849, payable after paying your preceding order.

SAMUEL ADAMS, *Treasurer.*"

There are ten counts in the declaration. The 1st, 2d, and 3d counts are upon the acceptance of the first, and the 5th, 6th, 7th, 8th, and 9th upon the acceptance of the second instrument above copied. They are declared on as orders, or drafts, and it is alleged in all these counts that at the time the orders were to have been paid, Adams had in his hands and under his control, a sufficient amount of scrip belonging to Hayden, and issued to him for printing the Acts and Journals, to have paid the orders, but neglected and refused, &c. The 4th and 10th are special counts, and similar in substance. The 10th is as follows:

That on the 13th Feb., 1849, the defendant, in consideration that plaintiff would purchase of Hayden the sum of twelve hundred dollars in Warrants issued by the Treasurer of the State in payment of debts due by said State, according to the statutes for such purpose made and provided, commonly called State Scrip or State Treasury Warrants, to be delivered and paid by the said Hayden on the 1st day of August, 1849, then and there faithfully promised the plaintiff that he, the defendant, would pay and deliver to the plaintiff, or his order, on the said first day of August, 1849, the said sum of twelve hundred dollars in such State Scrip or Treasury Warrants out of any money in his, the defendant's hands, due said Hayden for printing the Acts and Journals of the General Assembly of the State, to be paid by the defendant after paying the preceding orders of said Hayden: and plaintiff in fact says that afterwards, *to wit:* on the day and year last aforesaid, upon faith and in consideration of the said promise of the defendant, the plaintiff did purchase of the said

Hayden, and then paid and advanced to him a valuable consideration therefor, the said sum of twelve hundred dollars in such Scrip or Treasury Warrants, to be paid and delivered to plaintiff on the 1st day of August, 1849: and plaintiff avers that after said promise was so made by defendant, he, the defendant, had in his hands and under his control an amount of such Scrip or Treasury Warrants belonging to, and issued in favor of, said Hayden on account of money due him for printing the said Acts and Journals, not only sufficient to have paid all preceding or previous orders drawn by said Hayden upon said fund, and accepted by said defendant, but also sufficient to have paid, and out of and with which defendant might and ought to have paid the said last mentioned sum of twelve hundred dollars in State Scrip or Treasury Warrants; by means whereof the said defendant then and there became liable to pay to said plaintiff the said sum of twelve hundred dollars in such Scrip or Treasury Warrants, according to the tenor and effect of his said promise and undertaking; and being so liable, defendant afterwards in consideration thereof, undertook and promised, &c. The value of the scrip is then alleged, as it is in all the counts.

General breach of non-payment in scrip or otherwise, &c.

The defendant demurred to the declaration, and assigned for causes of demurrer to the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 9th counts, the following:

1st. That said orders, checks or drafts in said counts described are not, by law, negotiable instruments, and therefore said supposed acceptances thereof are not by law binding or obligatory upon defendant.

2d. Said orders, checks, or drafts are drawn, not for the payment of money, but for State Scrip or Treasury Warrants, and therefore said supposed acceptances thereof by defendant, are not, in law, binding upon him, and constitute no liability against him upon which an action will lie.

3d. Said orders, checks or drafts are drawn upon a particular fund, and therefore said pretended acceptances thereof by defendant constitute no actionable liability against him in law.

4th. They are drawn upon a contingent fund, or liability of the State to said Hayden, and therefore said pretended acceptances by defendant are not obligatory.

5th. They were drawn by Hayden as a prospective official creditor of the State upon said defendant in his official capacity as Treasurer of the State, and said pretended acceptances thereof, if made at all by defendant, were made in his official character, and were contrary to law, public policy, and are therefore null and void.

6th. Said counts show no legal liability on the part of defendant upon said pretended acceptances—show no cause of action against him.

7th. Said orders, checks or drafts amounted to nothing more than mere directions given by Hayden to defendant as public Treasurer to pay scrip to plaintiff, which might thereafter become due to Hayden from the State, and were revocable at the pleasure of Hayden.

8th. The defendant as public Treasurer could only pay a debt due by the State upon the Auditor's warrant, and only to the person presenting such warrant—any acceptance or agreement made by him to pay another, would not be binding, nor could he, by law, comply therewith. There is no allegation in the declaration that plaintiff obtained the warrants of the Auditor.

9th. Defendant could not bind himself to deliver scrip to become due to a public creditor to any other person than such creditor.

10th. No consideration is disclosed or alleged in said counts, which would make said pretended acceptances binding in law upon said defendant.

11th. Said counts are bad in substance and in form.

For causes of demurrer to the 4th and 10th counts in the declaration, defendant assigned:

1st. That said counts do not allege that said Hayden directed or authorized defendant to deliver said scrip or treasury warrants to plaintiff.

2d. No such consideration is disclosed in said counts as would

in law, render the said pretended promises and undertakings of defendant to deliver said scrip to plaintiff binding.

3d. Defendant had no legal power or right to bind himself to deliver to plaintiff, scrip, which was to become due from the State to Hayden, and a promise to do so, if any such was made by him, is not binding in law.

4th. Defendant could not bind himself to pay to plaintiff a debt due by the State to Hayden.

5th. Said pretended promises were illegal (which plaintiff was bound by law to know,) and are not obligatory.

6th. Said counts disclose no cause of action against defendant; and are bad in substance and form.

The court sustained the demurrer, final judgment for defendant, and writ of error by plaintiff.

WATKINS & CURRAN, for the plaintiff.

ENGLISH, and PIKE & CUMMINS, contra. All the counts in the declaration which charge the defendant by virtue of the orders and acceptances, treating them as bills of exchange, are clearly bad. A bill of exchange must be payable in money, and if payable in property or any paper medium, it is void as a bill, (*Story on Bills, sec.* 43. *Hawkins v. Watkins,* 5 *Ark.,* 482. *Ch. on Bills,* 132, 3. 1 *McCord* 115. 4 *Mass.* 245. 10 *Serg. & Rawle* 94,) and must be payable absolutely and not out of a particular fund or upon conditions. *Story on Bills, sec.* 46. *Hamilton v. Myrick et al.,* 3 *Ark.* 541. *Henry v. Hazen,* 5 *Ark.* 401. *Ch. on Bills,* 132, 133, 134, *&c. Dawkins & wife v. De Lorane,* 3 *Wils.* 207. *Gwinn v. Roberts,* 3 *Ark.* 72. *Jenny et al. v. Herle,* 2 *Ld. Raym.* 1361. *Haydock v. Lynch, ib.* 1563. *Carlos v. Fancourt,* 5 *ib.* 482. *Watkins v. Hawkins,* 5 *Ark.* 481.

The defendant in this case was Treasurer of the State when the orders were drawn and accepted. Hayden was State Printer, and upon performance of the work was entitled to draw compensation for the printing, from the State Treasury, upon a voucher filed in the Auditor's office, and an Auditor's Warrant upon the

Treasurer; the Treasurer could only pay, whether in money or Treasury Warrants, to the person holding the Auditor's warrant, and when the warrant was presented he was bound to pay as Treasurer, and neither the warrant nor the money was held by him in his private capacity. It is a familiar principle that an officer of the State, or any private or public corporation is not bound by contracts made by him in his official character, even where he exceeds his authority, if his official character is known. *Bowen v. Morris,* 2 *Taunt.* 374. 1 *Durn. & East* 172. *Brown v. Austin.* 1 *Mass.* 208. *Bainbridge v. Downie,* 6 *Mass.* 253. *Hodgson v. Dexter,* 1 *Cranch* 105. *Gidley v. Ld. Palmerston,* 3 *B. & B.* 275. *Freeman v. Otis,* 9 *Mass.* 260, *note a. Mann v. Chandler, ib.* 335. *Davees v. Jackson, ib.* 490. 2 *Conn.* 680. *Ib.* 435. 9 *Sm. & Mar.* 29. *Syme v. Butler, exr.,* 1 *Call* 105. *Tutt v. Lewis, exr.,* 3 *Call* 233. 12 *J. R.* 444. *Perry v. Hyde,* 10 *Conn.* 329. 10 *Sm. & M.* 398.

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

The record sent up in this case raises two distinct questions for our consideration. The first involves the legal sufficiency of those counts which are based upon the acceptance endorsed upon the order considered in the light of bills of exchange; and the second relates to those which are framed upon a supposed special contract.

The declaration contains ten counts, and exhibits two separate orders upon the defendant in favor of the plaintiff and drawn by a certain George B. Hayden. The orders do not differ in any essential particular except as to date and amount. They are both addressed to the defendant in the character of Treasurer of the State of Arkansas, and request him to pay at a future time the respective sums therein specified, to the plaintiff in State Scrip or Treasury Warrants, out of any moneys in his hands due him (Hayden,) for printing the Acts and Journals of the State, and are each signed by Hayden, as printer to the State.

This court, in the case of *Gwinn v. Roberts,* (3 *Ark. Rep.* 72,) said, "The statute declares that the term 'Bill of Exchange,' as

used in this act, shall be so construed as to include all drafts or orders drawn by one person on another for the payment of a sum of money specified therein. From the least observation, it will be perceived that the writing in question is neither a bill of exchange, draft, or order for the payment of a sum of money specified therein, because the drawee is not requested thereby to pay any sum of money whatever to the payee or any other person. The defendant simply requests Mr. Sangrain to let Mr. Chambers have merchandise in his store to the value of $32.38, and to charge him, Roberts, with the amount, which was evidently the understanding of the parties, and such is the operation and legal construction of the writing, which cannot be regarded either as a bond, bill, promissory note, draft or order, within the operation of the law merchant, nor any statutory provision whatever in force in this State."

This court, in the case of *Hawkins v. Watkins,* (5 *Ark. Rep.* 483-4,) also said that "Bills of exchange derived their negotiable quality from the usages and well established principles of the mercantile law. The negotiability of bills of exchange were confined to such instruments in that form as were drawn for the direct payment of money; and such is the definition of the term under our statute, *p.* 151, *sec.* 13, *Rev. Stat.* By the common law, therefore, this is not a bill of exchange. *Ch. on Bills,* 152. *Rex v. Wilson, Bailey* 11. *Jones v. Fales,* 4 *Mass.* 245. *Liber v. Goodrich,* 5 *Cowen* 186. *McCormick v. Trotter,* 10 *Serg. & Rawle* 94. *Lunge v. Kohne,* 1 *M. C.* 115, *and* 3 *Ark. Rep.* 73, *Gwinn v. Roberts.* And although bank notes are, for many purposes, equivalent to money, yet a bill or note for the payment of them is not deemed a bill of exchange at common law or a promissory note within the 3 and 4 Ann., chap. 9, and consequently not assignable. Many peculiar and legal qualities belonged to such instruments which distinguished them from choses in action. They were assignable by endorsement so far as to transfer the legal title and property in them and enable the endorsee to sue upon them in his own name. From their commercial character, they imported a consideration, 2 *Bl. Com.,* and

they raised against the parties to them a legal liability and were sued on as the foundation of an action. These qualities do not belong to the instrument here sued on unless it is aided by the statute upon assignments before referred to. A note for property would be assignable because the payee has a right of action on the privity of contract; but could the payee of this bill have sued Hawkins on his acceptance in this form of action? We think not. The liability of an acceptor is one raised by law applicable to mercantile instruments, and he was never liable as such except upon those instruments. No right of action lay in favor of any party against an acceptor upon the bill itself in any other case; and inasmuch as the statute did not intend to give a right to the original payee, where none in this form subsisted before, it is clear that by the endorsement the assignee acquired no new or better right. We are therefore clear that the instrument in question was never assignable as a bill of exchange at common law, nor embraced within the provisions of our statute." The instrument sued upon in this case was in these words, "You will please pay to the order of Col. L. C. Howell four hundred dollars in Arkansas money of the Fayetteville Branch, it being the balance of the five hundred dollar bill I sent you to exchange, your particular attention to this will greatly oblige." This draft was drawn by L. W. Wallace upon Hawkins, and by him accepted generally. Howell assigned the draft to Watkins, who declared upon it by a simple count in the ordinary form on bills of exchange. The judgment of the circuit court was reversed in that case and sent back, when the plaintiff (Watkins) filed an amended declaration, and in which he counted upon the original consideration and made an exhibit of the order as evidence to be used in the cause, whereupon he obtained a judgment, which was afterwards affirmed by this court. (See 1 *Eng. Rep.* 291, *Hawkins v. Watkins.*)

The case of *Coyle's executrix v. Satterwhite's adm'rs, p.* 124, 5, and reported in 4 *Monroe,* is directly in point. The declaration was in assumpsit, and set out a demand created by the sale and assignment of a note by the plaintiff's intestate to the testator

of the defendant, for the price of which said testator owed a balance of $400, due in hemp yarn at eight cents per pound, payable on demand. It then set forth that the plaintiff (or rather his predecessor in administration, the then plaintiff being an administrator *de bonis non*) demanded the yarn, and that the testator of defendants drew an order for it on Thomas H. Pindell, of the following tenor: "Thomas H. Pindell, sir: Please to pay to the executors of William Satterwhite, dec'd, four hundred dollars in yarn, at eight cents per pound, and this shall be deemed your sufficient receipt for the same, agreeably to the contract between you and myself. Lexington, Sept. 10, 1814. C. Coyle." That the representative of Satterwhite presented this order and Pindell would not accept or pay it, of which Coyle had notice; and that Pindell had no funds of the drawer, and that Coyle still refused to pay the yarn. The court in delivering their opinion, said "Upon the trial the principal questions which seem to have arisen, proceeded from the parties' treating this order as a bill of exchange. It was insisted that due diligence was not used in presenting it, in causing it to be presented and giving notice to the drawer, and that the evidence conduced to prove a reasonable expectation in Coyle that the bill would be honored; and therefore he was warranted in drawing it, and entitled to due diligence and notice. These same questions have been repeated in this court. On one palpable ground, we dismiss the whole of that part of the controversy. This writing is not a bill of exchange. It does not come within the provisions of the law merchant, and none of its doctrines can be applied to it. It is too well settled to need the citation of authority, that it is essential to a bill of exchange that it should be drawn for money, and all drafts or orders drawn for other commodities operate only as an authority to receive the contents, and the holder of them is not bound to apply either the speed or the formalities required in conducting a bill of exchange, and when they sue must resort to the original cause of action; and such was the case of this order. In this view, this controversy is brought down to one of great plainness and no difficulty. The declaration is based on

the original contract and consideration and demand arising by virtue thereof. So far as it sets out this writing, it can only be considered as showing a good and valid demand of the yarn, and not as taking the order for the base of the action. The evidence concurred to show the original contract and the use made of the draft, established a clear but unsuccessful demand of the yarn." The judgment in that case was therefore affirmed.

The same doctrine as to what is requisite to constitute a bill of exchange, is also laid down by the same court in the case of *Breckenridge v. Ralls, p.* 354, and *Jones v. Overstreet, p.* 549, of the same volume. In *Chitty on Bills, p.* 596, he says, "It is here proper to observe that whenever the bill or note is not declared upon, it is not adduced in evidence as an instrument carrying with it the privileges it would otherwise be entitled to in respect of its bearing internal evidence of a consideration, but it is merely used as a piece of paper or writing to found an inference only in support of the money counts, which inference may be rebutted and destroyed by contradictory evidence on the part of the defendant, in which case the jury must draw from the whole of the evidence the conclusion of fact, whether or not so much money was lent, paid, or had and received, or that an account was stated." It is perfectly clear, from the authorities referred to, as well as numerous others which might be cited, that the instrument declared upon in this case does not possess the requisites of a bill of exchange, as it was not drawn for money, and that consequently the action based upon it cannot be maintained. The plaintiff in framing his declaration, has not thought proper to count upon the original contract or cause of action as between the drawer and drawee of the supposed draft, but on the contrary has elected to declare as upon a special contract, which, as he alleges, was entered into between himself and the defendant. The substance of this special contract is that in consideration that he would purchase the scrip or treasury warrants from Hayden, he (the defendant) promised that he would deliver them to him at a particular time therein specified. The question here presented is whether, admitting all this to be true in point of fact, it is such

a contract as the defendant is under any legal obligation to perfrom. The indispensable requisites of all valid contracts are, first, that they should be made by persons having a legal capacity to contract: secondly, that inducement or motive of the contracting parties, called the consideration, should be legal: thirdly, that they should be made without force or fraud, freely and voluntarily: fourthly, the act performed or contracted to be performed by it, must be such as the law permits. (See *Law Summary,* by CLINE, *p.* 19 *and* 20.) . Every contract the consideration to which is tainted with illegality, is void; and as the consideration of a contract is two-fold, moving from either party to the other, it follows that every agreement to do an illegal act is invalid, the act being the consideration on one side. A contract may be illegal because it contravenes the principles of the common law, or the special requisitions of a statute. The former illegality exists whenever the consideration is founded upon a transaction which violates public policy or morality; as, a contract to commit, conceal or compound a crime, a contract for illicit co-habitation, or a contract in fraud of the rights and interests of third persons. The illegality created by statute, exists when the act is either expressly prohibited, or where the prohibition is implied from the nature and objects of the statute. (See *Story on Contracts, p.* 87.) The 24*th sec., chap.* 23, *of the Digest,* provides that the Treasurer shall disburse the public moneys upon warrants drawn upon the Treasury according to law and not otherwise, and the 29th sec. of the same chapter, declares that where there may not be sufficient par funds in the Treasury to pay all legal demands upon the State, it shall be the duty of the Treasurer, on application of the claimant to issue to him a treasury warrant for the amount due bearing no interest. It is clear from these provisions of the statute, that the Treasurer is authorized to pay out the money or to issue his warrants, in case the money is not in the Treasury to the individual who presents him the Auditor's warrant, and to him only. That is his only authority to pay the one or to issue and deliver the other, and if he does otherwise, he necessarily acts in direct violation of, and

in defiance of the express prohibition of the statute. True it is that the declaration alleges that he had in his hands and under his control a sufficiency of the scrip of Hayden to have discharged the claim of the plaintiff. But can it be inferred from this allegation, that Hayden had previously presented his Auditor's warrant, and actually drawn the scrip, and that he had afterwards returned it to the defendant, and left it in his hands as a private individual. This cannot be the legitimate construction of the contract as disclosed by the declaration. The Treasurer stipulated before the scrip or warrants became due, that when they should fall due and become payable to Hayden, that he would not deliver them to him, but that he would withhold them from him and deliver them over to the plaintiff. This is the substance and legal effect of the undertaking on the part of the defendant, and this he most clearly could not do without a plain and palpable violation of the statute, and consequently, under the authorities, he could not be compelled to perform his promise. To tolerate such conduct on the part of a mere disbursing agent, would be to defeat the very object of the statute. (See *McMeechen v. The State,* 4 *Eng. Rep.* 553.)

It is clear therefore that, even upon the supposition that the special contract thus set up and relied on, is literally true in point of fact; yet it discloses no such cause of action as can be enforced in law, and that consequently the demurrer was rightfully sustained. The judgment of the circuit court is consequently in all things affirmed.