STATE, USE OF CHICOT COUNTY *vs.* RIVES ET AL.

The breaches assigned in an action on a penal bond, are, in effect, so many distinct counts in a declaration—they are the gravamen and foundation of a recovery—and it is as much error to embrace two or more breaches in one assignment, as it would be to embrace so many distinct causes of action in one count in a declaration; but such error, being duplicity, is only ground of special demurrer.

This being an action on a collector's bond, the first assignment alleged that defendant failed to return a delinquent list as required by law, that he failed to make a proper settlement with the court at the time required by law, and that he was indebted to the county, as such collector, a sum specified, and failed to pay the same over. Defendant pleaded that he was not so indebted, payment, &c. HELD, that the pleas professing to answer the whole assignment, but answering in fact but one breach, were bad on demurrer, and that the demurrer to the pleas would not reach back to the duplicity in the assignment, that not being grounds of general demurrer, and being amendable, would be treated, under the statute, as amended, and the breaches regarded as if separately assigned.

County warrants issued under a statute providing for their issuance, and making them receivable in payment of county taxes, &c., are a legal tender, by a collector, in payment of county revenue—such tender does not fall within the provision of the constitution, declaring that nothing but gold and silver coin shall be made a legal tender, &c.—And the case of *Games v. Rives*, 3 *Eng. R.* 220, is overruled.

Writ of Error to Chicot Circuit Court.

This was an action on the bond of Rives, as collector of Chicot county. The first breach alleged that the tax book was placed in his hands on the 1st day of June, A. D. 1847, for which he gave receipt, the county tax thereon being $3,608.46. That he returned no delinquent list to the term of the county court next after November 1st, 1847, nor made settlement of the county revenue collected by him, nor paid it over, and was then indebted therefor $2,878.87.

The 2d breach alleged that at January term, 1848, of the county court, Rives having neglected to make settlement, the county court adjusted his accounts, and found that he was in-

debted $3.479.40, and at April term, 1848, he appearing in court, the same was re-adjusted and $2,878.87 found due, which is unpaid, and Rives in debt in that amount.

The 3d breach avers the same settlement at April term, 1848, and that he was indebted in the same sum.

The securities filed six pleas, and Rives pleaded separately.

The 1st plea of the securities was that they did not owe the sum of money demanded by the several breaches

The 2d was that Rives did not owe the sums demanded in the breaches.

The 3d was payment after suit commenced by Rives, to the treasurer of the county, of all the moneys collected by him for 1847, with all interest due.

The 4th, that the county court had indulged Rives for thirty days.

The 5th, that the county extended time to Rives, in January, 1848, without the consent of the securities, from January 5th to March 6th, 1848.

The 6th, payment by Rives after commencement of the suit.

Rives' separate pleas were, 1st, 2d and 3d to the respective breaches, that he never was indebted in the sum mentioned in each.

4th, *actionem non,* as to all of the breaches, except as to costs, because he paid the whole amount adjudged against him, on the 3d October, 1848, with all interest.

5th, that on the 6th day of October, 1848, there was due to the county on the judgment of the county court, for principal sum, penalty and interest $3,809.30, which amount he then tendered to the county, "in warrants drawn by the clerk of said county court, upon the Treasurer of said county, and by said county issued out, and paid to divers persons in payment of debts due to them by said county, in accordance with law, and by order of said county court, under and by virtue of the 28th section of chapter 41 of the Revised Statutes, adopted and in force in the year 1839, all which warrants were issued in the year 1843, were duly presented for payment to the Treasurer of said county, and payment refused, and still remain wholly unpaid by said county and

are by law required to be received by said county in payment of said amount so adjudged against the said defendant," and offered to pay all the costs of the suit: which tender the county refused —with profert of the costs and of the warrants so tendered.

Rives also, by motion, averring the sum of $3,967.62 only to be then due, brought the amount in warrants into court, and paid the costs.

The plaintiff demurred to each plea. The court sustained the demurrers to the 4th and 5th pleas of the securities, and overruled them as to the residue of their pleas, and all of Rives. Judgment went on the demurrers.

The suit was commenced 4th October, 1848, and determined at the following November term, before Hon. WM. H. SUTTON, then one of the circuit judges.

F. W. & P. TRAPNALL, for the plaintiff. The first four pleas of Rives, and the pleas of the securities, are not comprehensive enough to answer the assignment of breaches in the declaration, and the demurrers to them were therefore improperly overruled.

The 5th plea of Rives is without precedent. The warrants tendered, under some circumstances might have been good as a set-off, but nothing is good as a tender but gold or silver. A defendant has the right to pay money into court, but nothing else than money. He certainly cannot pay into court the obligations of the plaintiff and claim as a payment what could have been good only as a set-off.

The question does not arise in this case whether the county would be compelled to receive the warrants issued by her in discharge of the county revenue; and if it did it has already been settled in the case of *Gaines v. Rives,* 3 *Eng.* 220.

PIKE, contra. The only question in this case is whether the county of Chicot can be compelled to receive her warrants issued in payment of debts due by her in discharge of debts due to her, as directed in *section* 47, *chap.* 13, *Digest,* which is decided by this court, in the case of *Gaines v. Rives,* 3 *Eng.* 220, to be in viola-

tion of the constitution of the United States, prescribing that gold and silver only shall be a legal tender.

That the section in question is not a violation of the constitution, is apparent from the commentaries of Judge STORY, (3 *Story on Const. sec.* 1, 365, 6, 7,) and the several opinions of the judges in the case of *Ogden v. Saunders,* (12 *Wheat.* 274, 289, 269, 306, 323.) It is perfectly obvious that to deny to a legislature the power of providing by law that corporations shall receive their own issues in payment of debts, so far from carrying out the principles of the constitution, is diametrically in opposition to them. And this power has been clearly recognized in the case of banking corporations. *Bank of Niagara v. McCracken,* 18 *J. R.* 493. *Bank of Niagara v. Rosevelt,* 9 *Cowen* 409. *Union Bank of Tennessee v. Elliott,* 6 *Gill & John.* 364. *Bank of Maryland v. Ruff,* 7 *Gill & John.* 460. *United States v. Robertson,* 5 *Peters* 641. *Planters Bank v. Sharp,* 6 *How.* 329.

Mr. Justice WALKER delivered the opinion of the Court.

In this case it is assigned as error that the circuit court improperly overruled the plaintiff's demurrer to the defendant's pleas. The ground of objection to part of them is, that they answer less than they purport in the outset to answer. It therefore becomes necessary to examine the breaches in order to ascertain the truth of the objection.

The action is debt on a collector's bond, with the usual covenants to collect, pay over, &c. There are three breaches assigned. In the first, it is alleged that the collector failed to return a delinquent list as required by law: that he failed to make a proper settlement with the court at the time required by law: and that he was indebted to the county as such collector $2,868.87, and failed to pay the same over. There can be no doubt but that this breach is objectionable for duplicity. This court has repeatedly held that the breaches assigned in an action on a penal bond, are, in effect, so many distinct counts in a declaration. They are the gravamen and foundation of a recovery. And it is as much error to embrace two or more breaches in one assignment as it

would so many distinct causes of action in one count in a declaration. *Lyon v. Evans,* 1 *Ark.* 367. *Phillips & Martin v. Gov. use, &c.,* 2 *Ark. R.* 386. There were then in this assignment three distinct breaches, upon either of which (if true) a recovery may be had. When therefore the pleas professed to answer the whole of the first assignment, it was not a sufficient answer to deny the indebtedness simply, leaving the breaches for having failed to return the delinquent list and to make a settlement with the court unanswered.

The defendants contend that this defect in their plea should not prejudice them because they were led into it by the previous error on the part of the plaintiff, and that judgment should be rendered against the sufficiency of the declaration. In most instances, this would certainly be true; but in this case the ground of objection is duplicity, which can only be taken advantage of by special demurrer at common law, (1 *Ch. Pl.* 228) and our statute expressly forbids that matter which is only cause for special demurrer at common law, shall be assigned as cause for demurrer, and that defects not assigned shall be amended by the court. Under this state of case, it is evident that the demurrer to the pleas did not relate back to the declaration, because if a demurrer could not have been interposed to the declaration, for additional reasons it could not by relation affect it. The statute requires that it shall be considered as amended. Thus considered, it presents three distinct assignments, which the pleas assume to answer, and forasmuch as they fail to do this, we must adjudge them insufficient and the demurrer, so far as the pleas were objectionable in this respect, should have been sustained, and upon examination of the several pleas it will be found that in this respect they are all objectionable, except the second and third pleas of defendant Rives. The objection to them is not good. There is no allegation in either of the breaches that damages or costs were adjudged against defendant, nor that by law he was bound for either.

We have now reached the main question at issue in this case. The defendant in the fifth plea sets up a tender of Chicot county

warrants, for the whole amount due said county for principal, penalty and interest. Which warrants, it is averred, were issued in 1843, under and by virtue of an act of the General Assembly, adopted and in force in 1839. The breach of covenant as alleged was for failing to collect, account for and pay over the county revenue for the year 1847.

Upon this state of case, it is objected, on the part of the plaintiff, that notwithstanding the express act of the Legislature to that effect, that warrants were not a legal tender in payment of the county revenue for the reason, as she alleges, that said act is in violation of that clause of the constitution of the United States which ordains that "no State shall make any thing but gold and silver coin a tender in payment of debts." This question has repeatedly been discussed in the United States court, by several of our most distinguished jurists, and believing that no investigation which we could give the subject would free it from doubts, which their profound reasoning could not remove, we shall content ourselves by referring briefly to the positions which several of them assume, and apply the principles deduced from these and other authorities to the case before us.

In the case of *Ogden v. Saunders,* 12 *Wheaton* 384, Chief Justice MARSHALL, and several other judges held, that the act of the Legislature, which is in force at the time the contract is made, does not enter into it, but that the contract derives its obligation from the act of the parties. Mr. Justice WASHINGTON, Mr. Justice TRIMBLE and Mr. Justice THOMPSON held, in the same case, that the law of the State in which the contract is made, attaches to the contract the moment it is made a qualification which becomes inseparable from it and travels with it, through all its stages of existence. In the case of *Champanque v. Burnell,* 1 *Wash. C. C. Rep.* 341, it was held that "laws which in any manner affect the contract, its construction, the mode of discharging it, or which control the obligation which the law imposes, are essentially incorporated in the contract itself."

So, in the case of *Burner v. Bank of Columbia,* 9 *Wheat.* 586, the language of the court is, in effect, the same, and decides that

we may look out of the contract to any known law or custom with reference to which the parties may be presumed to have contracted, in order to ascertain their intention and the legal and binding force and obligation of their contract. And to the correctness of the latter decisions, this court has heretofore, to a limited extent at least, subscribed.

Be this rule however as it may, when applied to ordinary contracts, there is a class of contracts to which the rule will apply with increased force. They are such as are made and sanctioned under particular statutes: such as acts of incorporation, for instance, where the power to contract, the subject about which the contract may be made and the manner of discharging it, are all prescribed by law. In such cases, the contract is in many respects limited and controlled by the provisions of the act itself. Thus, where a bank is empowered to contract debts, to discount notes, &c., and the act also provides that the notes so discounted may be discharged by the bills issued by the bank, although the notes so discounted may purport upon their face to be payable in cash, yet, we apprehend, under the act authorizing the debtors of the Bank to pay their debts in bills issued by such bank, that a tender of such bills would be good in payment.

In support of this position, even Chief Justice MARSHALL, who denied the correctness of the rule when applied to contracts generally, has given his assent. In the case of *The United States v. Robinson,* 5 *Peters* 659, the Bank of Summerset assigned to the United States certain of her notes, and the question arose as to whether (although the State of Maryland declared the bills issued by the Bank a good tender in payment of the debts due to the bank) as the notes had been assigned, the United States as assignee was bound to receive them. The Chief Justice said, "on this question the court are divided. Three judges are of opinion that by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank, which original right remains in full force against the United States who comes in as assignee in law, not in fact, and who must therefore stand in place of the bank.

Three other judges are of opinion that the right to pay the debt in the notes of the bank does not enter into the contract. A note given to pay money generally is a note to pay in legal currency, and the right to discharge it with a particular paper is an extrinsic circumstance depending on its being due to the person or body corporate responsible for that paper, which right is determined by the transfer of the debt." It will be readily perceived in the case just cited, that the only matter of difference between the judges was as to the effect of the assignment, it being a conceded point by all of them that, as between the corporation and the debtor, the tender in paper would have been good. And such also was the decision of the Supreme Court of New York, in the case of *Bank of Niagara v. McCracken,* 18 *John. R.* 493. And in a very recent case from this State, *Woodruff v. Trapnall,* the Supreme Court of the United States held the pledge of the State to redeem the notes of the bank in payment of debts, was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed.

The decisions in these latter cases, we apprehend, are made upon principles which must govern the case under consideration. The plaintiff in this suit is by the 1*st sec., chap.* 41, *Dig.*, declared to be a corporation with power to contract, sue, &c. From the 1*st* to the 4*th sec., ch.* 138, power is conferred to levy and collect taxes, fines, &c.; from the 42d to the 47th section, same chapter, power is conferred to issue Treasury warrants; and by the last mentioned section it is declared "that all warrants drawn on the treasurer shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received in payment of all taxes, debts, fines, penalties and forfeitures accruing to the county." Under this corporate power, the county levied a tax and issued her warrants, which the sheriff was bound by law to receive in payment of the county revenue. Having received them, shall we say that the county is not bound to redeem them in payment of her revenue? If we declare that provision of the statute unconstitutional, which requires her to redeem her warrants, can we uphold that clause

of the statute which empowered her to issue them? or shall we not rather, in the language of Mr. Justice THOMPSON, say, that the law in force, when the contract was made, attached to it, when made, a qualification, which became inseparable from it, or, in the language of the court, in the case of *Trapnall v. Woodruff*, that the law is a standing guarantee that the corporation will receive her warrants in payment of all debts due her?

The case of *Gaines v. Rives*, 3 *Eng.* 220, is not reconcilable with the conclusion at which we have arrived. The court, in that case, in our opinion, failed to distinguish between a statute declaring warrants receivable in payment of debts generally and the particular case before it and then under consideration. Whatever may be the true rule in regard to general statutes upon this subject, we are decidedly of opinion that this statute is not in violation of that clause of the constitution, and was never intended to affect the subject of currency, but to affect a particular class of contracts made under authority of the act and in direct reference to this feature in it. There is no question but that if A. contract with B. to receive wheat of him in payment of a debt, wheat would be a good tender. So far from impairing the contract to require him to do so, it would be a gross violation of it to refuse to receive it in payment. This contract, though not made by an individual, is made by a corporation with definite prescribed powers, and when acting under or in reference to those powers, the corporation must be presumed to have adopted and acquiesced in all its provisions. We think the tender a good one.

The judgment and decision of the Chicot Circuit Court, must therefore be reversed, and the cause remanded, with instructions to permit the parties to amend their pleadings, and for further proceedings to be had therein according to law.