## NEWTON *vs.* TIBBATTS.

The State Legislatures have power to pass laws abolishing imprisonment for debt, and such laws may operate upon present as well as future cases without impairing the obligation of contracts: such laws act merely upon the remedy.

Where the principal would be entitled to an immediate discharge if he were surrendered, the bail are entitled to relief by entering an exoneratur without any surrender: and *a fortiori* this rule applies where the law prohibits the principal from being imprisoned, or where by positive operation of law a surrender is prevented.

And so where, after execution of the bail bond, but before the return day of the *ca. sa.* the Legislature repealed the act authorizing imprisonment for debt, a failure of the bail to surrender his principal did not render him liable for the debt.

*Writ of Error to the Circuit Court of Pulaski County.*

THIS was an action of debt brought by Leo Tibbatts against Thomas W. Newton upon a bail bond, determined in the Pulaski circuit court, at the November term 1847, before CLENDENIN, judge.

The declaration alleged that on the — day of April 1842, plaintiff filed a declaration, in case, in the office of the clerk of the circuit court of said county against Peter P. Pitchlynn, together with the affidavit required by law to obtain a *capias ad res.* thereon. That a *capias* issued, returnable to the following term of the court, endorsed with direction to the sheriff to take bail in the sum of $1600; it came to the hands of the sheriff of the county on the 18th April 1842, and he arrested Pitchlynn. To release himself from custody, he executed the bond sued on to the sheriff, with the defendant, Newton, as his security, conditioned that he would appear at the return term of the writ, Sept. 1842, and if judgment was given against him, pay damages and costs, or surrender himself in execution, &c., &c. That at the return term, on the 29th November, 1842, plaintiff recovered judgment against Pitchlynn for $455 damages, and for costs, upon which plaintiff sued out a *ca. sa.* returnable to the following term, commanding the sheriff to levy the same of the goods and chattels, &c. of Pitchlynn, and in default thereof to take his body in execution. The sheriff returned the writ *nulla bona,* and *non est.* The declaration also negatived the payment of the judgment by Pitchlynn, or Newton, and concluded in the usual form.

Newton demurred to the declaration, and assigned for causes: "1st, there was no law authorizing the sheriff to arrest and detain Pitchlynn according to the exigency of the said writ of *ca. sa.*: 2d, the statute authorizing the arrest and detention of a debtor was repealed before the return day of the writ of *ca. sa.*"

The court overruled the demurrer, and, the defendant refusing to answer over, rendered judgment for plaintiff.

Newton brought error.

WATKINS & CURRAN, for plaintiff. The security had until the return of the *ca. sa.* to surrender his principal in discharge of the bond, but before the return day the act abolishing imprisonment for debt was passed, consequently, it is evident that Pitchlynn could not have been surrendered after the time, and if he had been in prison at the time of the passage of the act he would *ipso facto,* have been entitled to his discharge. Now the only question is, does the creditor's right to imprison a debtor form any part of the contract, or is it merely a remedy given him to enforce the performance of the contract. This question having been settled by a long series of adjudications is now open to discussion. In the leading case, *Sturges vs. Crowingshield,* 4 *Wheaton R.* 122, *Chief Justice Marshal* says "Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." The establishment of this principle of itself decides this case, but there are cases more directly in point. Questions precisely similar to the one involved in this case have been decided in the courts of Kentucky, New Hampshire, Tennessee and Mississippi, and in the courts of the United States, fully sustaining the positions we contend for. The case of *Brown vs. Dillahunty et al.* 4 *Smedes & Marshal* 713, involved precisely the same question upon substantially the same state of facts presented in the case now before this court, and ought to be conclusive. See also *Gray, Sherwood & Co. vs. Monroe et al.* 1 *McLain's Ct. Ct. R.* 528. *Beers et al. vs. Haughton,* 9 *Peters* 329. *Mason vs. Haile,* 12 *Wheaton R.* 370. 7 *Mon.* 130. 1 *J. J. Marshal* 55. *Gilman vs. Perkins,* 1 *N. Hamp.* 343.

PIKE & BALDWIN, contra.

OLDHAM, J. It has frequently been decided that the State Legislatures have the power to pass law abolishing imprisonment for

debt, and that such laws may operate upon present as well as future cases without impairing the obligation of contracts; that such laws act merely upon the remedy only, and that in part only. *Sturgis vs. Crowningsheild,* 4 *Wheat.* 200. 4 *Cond. R.* 409. *Mason vs. Haile,* 12 *Wheat.* 370. 6 *Cond. R.* 535. *Beers vs. Haughton,* 9 *Peter's R.* 359. It was also held in Beers vs. Haughton, that where the principal would be entitled to an immediate discharge if he had been surrendered there the bail are entitled to relief by entering an exoneratur without any surrender: and *a fortiori,* this doctrine applies where the law prohibits the party from being imprisoned, or where by the positive operation of the law a surrender is prevented.

Such is the case here. After the execution of the bail bond, but before the return day of the *ca. sa.* the legislature repealed all laws authorizing imprisonment for debt except in cases of fraud. Had Pitchlynn been in jail at the time of the passage of the act he would have been entitled to an immediate discharge. He was no longer liable to be imprisoned either upon a voluntary surrender, or surrender by his bail. The bail was deprived by law of the power to surrender his principal in discharge of the bail bond, and therefore a failure to surrender him did not render the bail liable for the debt. The circuit court therefore erred in overruling the demurrer to the declaration: wherefore the judgment is reversed.