PIERSON *vs.* WALLACE.

Covenant on a bond for six hundred dollars in current bank notes. Two pleas of tender, *ante diem et ad diem*, replication to each plea, traversing the tender, and averring that defendant tendered Arkansas bank notes, which were at fifty per cent discount: demurrer to the replication—Held that the replications were complete by containing a general traverse of the pleas, and all the matter which follows is mere surplusage, and may be rejected.

The conclusion of a plea, or replication, is matter of form, not of substance, and an improper conclusion is no ground for demurrer—As held in *The State, use Gibson vs. Saddler et al.* 1 *English's R.* 235.

Upon a writ of inquiry to assess damages in covenant upon a bond for current bank notes, a witness will not be allowed to state the amount of damages he believes the plaintiff has sustained by reason of the non-payment of the current bank note—he should state the value of current bank notes. It is for the jury to determine the amount of damages, and this they are enabled to do by aid of testimony.

Current bank notes are such as are convertible into specie at the counter where they were issued, and pass at par in the ordinary transactions of the country.

Appeal from the Circuit Court of Washington County.

COVENANT, by Alfred Wallace against Benj. H. Pierson, determined in the Washington circuit court, at the May term 1845, before the Hon. Sebron G. Sneed, judge.

Plaintiff declared on a writing obligatory executed by defendant to L. Brodie for "the sum of six hundred dollars in *current bank notes,*" dated Dec. 1st 1840, and due 1st Dec. 1842, which was assigned to plaintiff by Brodie.

Defendant filed two pleas, first, tender on the day before, and, second, on the day the bond fell due, in current bank notes.

Plaintiff replied to both pleas substantially in the same form; the second replication follows: "And for replication to defendants second plea, plaintiff says *precludi non,* because he says that the said defendant did not on the first day of December 1842, at &c., nor on any other day since that time and before the commencement of this suit, tender to this plaintiff the said sum of six hundred dollars in current bank notes, as by him in said plea pleaded; but the tender then and there pretended to be made to said plaintiff, by said defendant, was made in notes of the State and Real Estate Banks of the State of Arkansas, which were not current but were uncurrent and then and there, to-wit: on the said first day of December and ever since that time hitherto still are at a great discount, to-wit: a discount of fifty per cent, which said Arkansas bank notes were then and there objected to by said plaintiff because the same were not current; and the said bank notes so by the said defendant now offered to be paid into court here are not current, but are notes of the State and Real Estate Banks of the State of Arkansas, which are still uncurrent bank notes, &c., without this that ever the defendant tendered to the plaintiff current bank notes: all of which the said plaintiff is ready to verify, and prays judgment of the court if he ought further to be precluded."

Defendant demurred to the replications, the court overruled the demurrer, and, the defendant declining to answer over, gave judgment for plaintiff, and ordered a jury to assess damages. The case was submitted to the jury, and they returned their verdict thus: "We the jury do find and assess the damages sustained by the said plaintiff in the said action to the sum of five hundred and eighty-five dollars, and to the further sum of eighty-seven dollars and seventy-five cents for the detention thereof, making the true amount of damages six hundred and seventy-two dollars, seventy-five cents."

During the inquest plaintiff took one bill of exceptions, and defendant two. From plaintiff's it appears that plaintiff asked Wilson, a witness introduced by himself, "what amount of damages do you believe the plaintiff sustained by reason of the non-payment

of the current bank notes in the covenant specified?'' To which defendant objected, the court sustained the objection, and plaintiff excepted. It further appears that after the evidence was closed (which is set out in defendant's bills of exception) defendant moved the court to instruct the jury ''that unless the jury believed from the evidence that the plaintiff had proven the value of current bank notes in the county of Washington where the covenant matured, they must find for the defendant;'' which the court gave, and plaintiff excepted.

From defendant's first bill of exceptions, it appears that plaintiff, ''in order to establish the value of current bank notes introduced Wilson, as a witness, who stated that current bank notes at the maturity of the bond sued on were *specie paying notes*—such as were at par—that there were in circulation in Washington county, Alabama notes, which were at a discount of fifteen per cent, and Missouri notes which were at par or very nearly so. Defendant then called Brodie, a witness in his behalf, who testified that he did not see the instrument sued on executed, but saw it delivered in Washington county, Arkansas. Defendant then proceeded to cross-examine Wilson, and asked him the following questions: ''what kind of bank notes were in common circulation in the county of Washington at the time the writing sued on fell due, and what was the value of the bank notes usually or most commonly in circulation at that time?'' To which plaintiff objected, the court sustained the objection, and defendant excepted.

From the defendant's second bill of exceptions, it appears that in addition to the above evidence, Dickson, a witness for plaintiff, testified that current bank notes, at the time of the maturity of the writing sued on, were at par or nearly so—that current bank notes were readily converted into specie in said county at from ½ to 5 per cent discount—by current bank notes, he said, he meant such as were convertible into specie at the counter where payable—say Missouri, Kentucky, Virginia, Indiana, Tennessee and New Orleans, specie paying banks—would have commanded specie if wanted. The above, with the bond sued on, being all the evidence introduced, plaintiff moved the court to instruct the jury that under the

state of pleadings in the case it was wholly unnecessary to prove where the bond sued on was made or fell due; and the court so instructed the jury, to which defendant excepted.

Defendant appealed. The overruling of defendant's demurrer to plaintiff's replications, and the points reserved by defendant's bills of exception are assigned as errors.

D. WALKER, for appellant. The sufficiency of the replication is raised by demurrer, and the first point to be considered is as to the sufficiency of the replication. Pleas, replications &c. must either traverse, or confess and avoid, but cannot do both. 1 *Chitt. Pl.* 610, 64. These replications deny the tender and should have concluded to the country. *Gould Plead.* 392, 1 *Chitty* 610. They contain matter of evidence, to-wit: that Arkansas paper was at 50 per cent discount. 8 *Cowen* 727. 20 *Wend.* 57.

The judgment and traverse must go to the same point, and unless the traverse follow the issue as a necessary consequence from the inducement, so that if either be true the other must necessarily be so, the replication is demurrable. *Gould Plead.* 416. The inducement in this case was that the tender was made in Arkansas paper at 50 per cent discount. It does not follow, however as a necessary consequence, that because the notes were Arkansas notes and at 50 per cent discount, that no tender was made: all notes might have been at a like discount, and yet have generally, freely and currently circulated.

The value of the notes is not the only test whether they be current or uncurrent; evidence of its free and general circulation is as important as mere value to determine this fact: and yet, by the issue tendered, the defendant would have been limited to the simple inquiry of the value of the Arkansas notes, which is the only new matter alleged in the replication. The courts of Kentucky, 5 *Little* 235, *id.* 335, and our own courts, 4 *Ark. R.* 178, 5 *Ark. R.* 182, *id.* 272, have invariably attached a different meaning to the term "current."

As to the second point: the jury were sworn to inquire of damages, to-wit: the value of current bank notes. The evidence sought

to be elicited by the defendant was directly to this point, and it was too upon cross-examination. The circuit court clearly erred in refusing to allow the witness to depose as to the kind of notes usually in circulation and the value thereof. It is a well settled rule that evidence to be excluded must be wholly irrelevant. 1 *Marshall R.* 3. Any fact from which a jury may infer a fact should be left to them. 1 *Marshall* 19. *Henry vs. Hazen*, 5 *Ark. Rep.* The instructions given the jury by the court at the instance of the plaintiff were clearly erroneous. The value of the paper at the time and place, when and where the note fell due, was altogether necessary: the value at another time or place will not answer. *Hanna vs. Harter* is a case in point in this court.

PIKE & BALDWIN, contra. All the points in this case resolve themselves in one; and that is, what is the legal import and effect of a contract for the payment of so many dollars, in current bank notes. The questions raised on the assessment of damages were frivolous, being merely attempts to renew and procure the court to revise its decision on demurrer.

The decision in *Dillard vs. Evans*, 4 *Ark.* 178, ought not to be extended beyond its terms; and yet, from appearances, it bids fair to be prolific of defences like that in the present case. No doubt the words "common currency in Arkansas" meant the ordinary paper currency of the State. But current bank notes is another matter. This expression does not point to Arkansas Bank notes in particular; and is it to be allowed that a debtor who gives his note for $600, due at two years in current bank notes, shall be allowed to force upon his honest creditor any notes, worth perhaps ten cents in the dollar, on the ground that they are in circulation and therefore current. No doubt a party is bound by his contract, and if he choses to stipulate that his debt shall be paid in the common currency of Arkansas, he may be bound to take worthless rags, if they are the common circulation of the country. But if he stipulates for current bank notes courts of justice have not yet become such instruments of fraud as to aid the debtor in an act of unblushing robbery and fraud. No doubt debt will not lie, because current

bank notes are not money; but as little are they uncurrent, miserable, depreciated rags. One would think, to judge from the positions assumed at the present day in favor of the debtor, that the creditor was a public enemy, and that of common right all might unite to rob him.

The cases have not gone to the extent imagined by the plaintiff in error. If they had, it would be time to consider whether ordinary justice would not require the court to retrace its steps. We rejoice to be able to say that nothing in its decisions warrants the conclusions reached by the plaintiff here.

The Arkansas Banks suspended payment in 1839. This is a part of the public history of the country, judicially known to the court.

In *Keith vs. Jones,* 9 *J. R.* 120, it was held that a note payable in York State bills or specie, was the same as if payable in lawful current money of the State.

Bank bills are, for many purposes, treated as money. *Miller vs. Race,* 1 *Burr,* 457. *Handy vs. Daboin,* 12 *J. R.* 220, *Wright vs. Reed,* 3 *T. R.* 554. *Knight vs. Criddle,* 9 *East* 48. *Francis vs. Nash. Ca. Temp. Hard.* 52. *Fielding vs. Croft,* 4 *East* 510, *Holmes vs. Nuncaster,* 12 *J. R.* 396. *Mann vs. Extrs. of Mann,* 1 *J C. R.* 231.

"Bank notes current in the city of New York" mean the same thing as money; and these words distinguish such notes from bank notes which are only receivable at a discount. *Judah vs. Harris,* 19 *J. R.* 145. Current notes mean notes considered as cash. *id. Leiber vs. Goodrich,* 5 *Cowen* 187.

E. H. ENGLISH, also for appellee. 1st, By appellant's demurrer to appellee's replications, he admitted the facts therein averred—he admitted that *he did not tender* to appellee the amount of the bond in *current bank notes*—but that he tendered notes of the Arkansas Banks which were 50 *per cent below par.* These facts fully answer the pleas, and the only question arising upon the demurrer is, are the replications in good form?

The pleas aver that appellant tendered the amount of the bond

in current bank notes—the replications deny that he did so. Here appellee might have stopped, but the additional averments that appellant tendered bank notes wholly uncurrent, &c., if unnecessary, may be treated as surplusage. They are not repugnant to, or contradictory of the general denial made in the first part of the replications, but in harmony with it.

Where the replication presents a perfect answer and issue to the plea, any additional matter, not repugnant, may be disregarded. *Pilcher vs. Hart,* 1 *Humphries R.* 524. So where by striking out all surplus or unnecessary matter, the plea or replication presents a perfect issue, it is good. *Johnson & Lewis vs. Killian,* 1 *English's R.*

Mere surplusage, pleaded in connexion with that which is material, never renders a plea or replication double, not only because *utile per inutile non vitiatur,* but more particularly because matter of surplusage requires no answer, and consequently does not tend to multiply issues. *Gould Plead.* 427. If appellant had taken issue to the replications, the question at issue would simply have been, did he tender current bank notes, and any allegation in the replications foreign to this issue, would have been regarded as surplusage.

The counsel for appellant contends that the issues made by the replications were perfect, without the allegations that the tender made by him was of Arkansas paper, and that this was averring matter of evidence. If so regarded, it is merely unnecessary to state, in pleading that which is mere matter of evidence: it does not vitiate the pleading on general demurrer. *Chitty's Plead.* 207.

The replications are not double. A double replication sets up two distinct matters in answer to the matter of the plea. Here, to say the most, the replications aver the same matter, or rather deny the tender set up in the pleas in two modes merely. First, it is denied that current bank notes were tendered: 2d, it is averred that the notes tendered were uncurrent &c.

It is said the pleas are not answered by the replications except argumentatively. Even if this were true, they are good on general demurrer. *Gould Plead.* 65. This however is not true, for the

replications do positively deny a tender in current bank notes. Suppose they had not—had simply averred that the tender made was in uncurrent notes—in Arkansas paper which was 50 per cent below par, these allegations would have been equivalent to a denial of the tender as alleged by the pleas—would have amounted to a good traverse of the matter of the pleas. *Gould Plead.* 356. Regarding the replications in any light, they are good on general demurrer.

2d, The points saved by appellant's bills of exception, taken on the inquest of damages, may be settled by determining what the parties to the contract intended by current bank notes. On this subject the brief of Messrs. Pike & Baldwin is ample.

The bond was made Dec. 1, 1840, due Dec. 1, 1842. The Arkansas banks were then, as were many others, in a state of suspension. The obligee might well have anticipated a greater depreciation of their notes. To avoid loss from this, he took the bond payable in *notes at par,* which is surely meant by current bank notes.

Assuming the reasonable hypothesis that the bond is payable in par notes, the bills of exception show no error in the ruling of the court on the inquest; and surely the finding of the jury is just. The question for the jury was not what notes were or were not circulating in Washington county, but what was the value of current bank notes or par notes. The questions asked the witness by appellant, and excluded by the court, were designed to induce the jury to find for the value of $600 in Arkansas paper, which was not current. Arkansas paper is now circulating in this State, but who would say it is current bank notes: it circulates at a heavy discount—25 cents to the dollar is its value.

There are no words used in the bond to show that the parties intended Arkansas bank paper—the State is not named, nor banks of the State. Among business men, current bank notes mean notes circulating at par. In the case of *Dillard vs. Evans,* 4 *Ark. Rep.* 178 "common currency in Arkansas" was the language. There the words "common" and "Arkansas" were adjudged to limit and qualify the meaning of the parties. Here no such words are used.

JOHNSON, C. J. It is contended by the appellant that the replications of the appellee to his two pleas of tender are wholly insufficient in law. He filed a demurrer to each replication and has consequently brought the question of their legal sufficiency directly before this court. It is insisted that every fact contained in the replications is admitted by the demurrers. It does not necessarily follow that every thing that a party may insert in a replication is admitted to be true by a demurrer. A demurrer only admits those facts to be true which are well pleaded.

We will now test the replications under consideration by this rule, and endeavor to ascertain what it is that stands admitted by the demurrer. The declaration avers a promise on the part of the defendant below to pay to the plaintiff the sum of six hundred dollars in current bank notes; to this declaration the defendant pleaded two several pleas of tender, the one before, and the other at the day fixed for payment; to each of which the plaintiff replied that he did not tender the sum specified in current bank notes, and further that he did tender the said sum in Arkansas Bank notes, which were at a discount of fifty per cent; and to each of these replications the defendant filed his demurrer. It seems to have been assumed, by some of the counsel at least, that every fact set up in the replication stands admitted by the demurrer, and that consequently the question of the legal signification of the terms used in the obligation is legitimately raised. We will now proceed to an analysis of the replications and see whether they contain a direct denial of the defence set up in the pleas, or confess and avoid it. The replications are substantially the same, and are only varied to meet the different dates referred to in the pleas. The plaintiff by way of replication averred that the defendant did not tender to him the sum of six hundred dollars in current bank notes, but that the tender pretended to be made was in notes of the State and Real Estate Bank of the State of Arkansas, which were not current but uncurrent, and at a discount of fifty per cent on the dollar, and that he refused it on account of its depreciation. This is not the exact language, but it is believed to be the substance of the replications. The office of a replication is either to traverse the allegations

in the plea or to admit and avoid them by the introduction of new matter. Do the replications in this case deny the defence set up in the pleas, or do they admit and avoid it? We think it will not be controverted but that the first branch, if left alone and unincumbered, would amount to a direct denial of the allegations in the plea, and that consequently it would not be demurrable. And this brings us to consider what effect the additional matter will have upon it. It is difficult to conceive what object the plaintiff had in view in going on to set up an insufficient tender after having broadly denied any tender whatever. It was certainly very un necessary, after having denied in general terms that the defendant had made the tender, to have proceeded to show wherein the insufficiency of the tender consisted. If that part of the replications which follow the general traverse, amounts to anything, it is a denial of the plea, and that too by way of argument. If this be the effect of it, and it most unquestionably cannot amount to more, then it is a mere repetition of the same thing, and the whole taken together would present but one single issue. The replications being complete by containing a general traverse of the pleas, all that matter which follows, is mere surplusage, and consequently may be rejected. It is a well settled rule in pleading that, where a plea contains a sufficiency of useful matter, it shall not be vitiated by that which is wholly useless. Upon this principle we consider the replications in this case clearly and fully sufficient in law. But it is objected that they conclude with a verification when they ought to conclude to the country. This objection is untenable according to the decision of this court in the case of *The State use of Gibson vs. Sadler et al.* 1 *English's R.* 235. It was there held that a plea of *nul tiel record* concluding to the country instead of a verification and prayer of judgment, is good on general demurrer, the conclusion of the plea being matter of form and not of substance. The same principle is involved in this case, and consequently the same answer may be given to the objection.

The next step in the progress of this case brings us to the points reserved upon the trial before the jury, which had been summoned to determine upon the *quantum* of damages. During the progress

of the trial the plaintiff below asked a witness to state to the jury what amount of damages, he believed, he had sustained by reason of the non-payment of the current bank notes in the covenant specified, which question was objected to by the defendant, and which objection was sustained by the court. The court was manifestly right in thus sustaining the objection. It was certainly not competent for the witness to give any opinion of his as to the amount of damages which the plaintiff had sustained. It is conceded that the damages were unliquidated and that proof was requisite to enable the jury to determine the amount of damages to which the plaintiff was entitled; and it is equally true that the witness could testify as to the value of current bank notes in money; yet he could not substitute his judgment for that of the jury in summing up the whole so as to determine and ascertain the quantum of damages to which the plaintiff was entitled. It is the peculiar province of the jury to assess the damages, and this they are enabled to do by the aid of the testimony of the witnesses. To receive the opinions of witnesses as to the quantum of damages would be to substitute their judgment for that of the jury, which the law would not tolerate.

The plaintiff then excepted to sundry instructions given by the court. We do not consider it important to decide whether those instructions were correct or not as he has since abandoned the ground then taken by coming into this court and admitting that there is no error in the judgment and proceedings of the court below.

The defendant below, then, upon cross-examination of one of the plaintiff's witnesses, asked him to state to the jury what kind of bank notes were in common circulation in the county of Washington and State of Arkansas at the time the writing sued upon fell due, and also, what was the value of the bank notes usually or most commonly in circulation at that time? The plaintiff objected to both questions which objection was sustained by the court. The question presented here is, whether the defendant was at liberty to show, in mitigation of damages, what kind of bank paper was then in circulation, and also the value of such paper. It will be conceded that it was his right to show anything in mitigation of damages,

which would be admissible under the terms of the contract. The contract is for six hundred dollars in current bank notes. It is wholly immaterial what kind of bank paper was then in common circulation or what was the value of such paper, in case it did not fall under the denomination of current bank notes. We have now reached the point where it becomes necessary to give a legal construction to the terms used in the instrument upon which this suit is founded, and to determine the extent of the defendant's liability under it. It does not follow that the value of such bank notes as were then in common circulation in the country, furnishes the true criterion by which to ascertain the value of current bank paper. Current bank notes are such as are convertible into specie at the counter where they were issued and pass at par in the ordinary transactions of the country. The terms current bank paper has a definite and legal signification. It certainly does not mean notes at a discount of fifty per cent and such as are bought and sold as merchandise; but that which passes from hand to hand as money. "Current notes" mean notes considered as cash. *Leiber et al vs. Goodrich,* 5 *Cow.* 187. We have now traveled over the whole record and find no error in it. Judgment affirmed.