SCOTT *vs.* FOWLER & PIKE.

An injunction bond executed to Harrell and Scott, upon suing out a writ of injunction to injoin a judgment at law rendered in favor of Harrell for the use of Scott, is a bond to the "adverse party" within the meaning of the statute, and suit may be sustained thereon for breach of its condition.

Writ of Error to the Circuit Court of Pulaski County.

DEBT by James A. Scott against Absalom Fowler and Albert Pike, determined in the Pulaski circuit court at the May term 1845, before Clendenin, judge.

The declaration set out the cause of action substantially as follows:

On the 14th day of February 1842, in the life-time of one Isham Harrell, since deceased, the defendants and one William Cummins, who has since died, made their certain writing obligatory, whereby the said Cummins as principal and defendants as securities acknowledged themselves to be held and firmly bound, jointly and severally, to said Isham Harrell and said plaintiff in the sum of $800, to be paid to said Harrell and said plaintiff, or their certain attorney, executors &c. for which payment they bound themselves &c.; conditioned that, whereas the said Cummins had that day obtained before the judge of the Pulaski circuit court, in vacation, an order for an injunction on a judgment rendered against said Cummins in favor of said Harrell for the use of plaintiff, at the Nov. term of said court 1838, for the sum of $250 debt, $78.12½ damages and for costs, on a writing obligatory &c., if said Cummins would abide the decision which might be made on the bill for injunction, and pay all sums of money and costs that might be adjudicated against him if the injunction should be dissolved, either in whole or in part, or his securities should do the same for him, then said bond was to be void, &c.—Breach: that after the execution of the bond and granting of the injunction, Cummins died, Ebenezer Cummins was appointed his administrator, the bill revived in his name, and on

the 23d January 1844 came on for final hearing, the injunction was dissolved, and decree against the administrator for the amount of the judgment at law, damages and costs, which had not been paid by him nor defendants, &c.

Defendants craved oyer of the bond and demurred to the declaration upon the ground that the bond sued on was not executed to Scott, the real plaintiff in the suit at law alone as it should have been, but to him jointly with the nominal plaintiff therein, and being a statutory bond, and not following the statute was void. The court sustained the demurrer, and plaintiff brought error.

WATKINS & CURRAN, for the plaintiffs. The only points we deem it necessary to notice in this case, are, 1st, Is the bond executed to the proper persons? 2d, If given to the wrong persons, is it void?

Our statute (*Rev. St. p.* 454, *sec.* 16) requires that the injunction bond should be executed to the "adverse party." Cummins made both Harrell and Scott, defendants to his bill: they were certainly the adverse parties and the bond was executed to them. It is contended that the bond should be to the adverse party in interest—to the party who was really the owner of the judgment enjoined. But we at once see that in many cases it would be impossible for a chancellor upon applications for injunctions, often ex-parte, and always merely upon the showing made by the bill, to determine who would ultimately be the party really interested in the bond. If such is the correct construction the complainant in a bill for injunction always has it in his power to impose upon the chancellor and give such a bond as would not be binding upon himself or securities.

Although it may be true that this bond was not executed according to the statute, and is not good as a statutory bond, it is nevertheless valid as a common law obligation, and will be enforced. *Allegany Supervisors of vs. Van Camphen,* 3 *Wend.* 48. *Stratten vs. Rowan,* 2 *Bibb* 199. *Cobb vs. Curtis,* 4 *Lit. R.* 236. *Stephenson vs. Miller,* 2 *Lit. R.* 306. *Fant &c. vs. Wilson,* 3 *Monroe* 342. *Hoy vs. Rogers,* 4 *Monroe* 225. *The People vs. Collins,* 7 *John. R.*

554. The general rule is that a bond, whether required or not by statute is good at common law if entered into voluntarily and for a valid consideration and if not repugnant to the letter or policy of the law. *Thornton vs. Buchanan,* 2 *J. J. Marsh.* 418. *Brown vs. Miller,* 3 *J. J. Marsh.* 437. *McCormick vs. Young,* 3 *J. J. Marsh.* 182. *The Alligator,* 1 *Gallis C. C. Rep.* 145. *The Struggle,* 1 *Gallis C. C. R.* 476.

But it may be urged that a departure from the statute in the name of the obligee differs from a variance in other respects, and that a bond made payable to the wrong obligee would not be valid as a common law obligation. But in the case of the *Justices of Christian vs. Smith et al.* (2 *J. J. Marsh.* 473) the bond sued on was executed to the justices of the county court when by the statute it should have been made payable to the commonwealth; and the court say that it is good as a common law bond, that suit may be brought on it in the name of the justices, and that inasmuch as "there is no statutory provision making such a bond void," and the subject matter is such as the parties had a right to contract about, the bond is valid.

PIKE & BALDWIN, contra. The defendants in error contend: First, that an injunction bond must be given to either the real or nominal plaintiff in the action at law, alone; and not to both, or the plaintiff and others who may be made defendants in the suit in chancery: Second, that if given to both, or to the plaintiff and others it is void.

The matter will be clearer by recollecting that though in this case both the obligees in the bond were parties to the action at common law, yet they were not joint parties and had no joint interest, but one or the other had the sole interest: and that the principle established will go beyond this case. In another case wherein one of the parties to this suit is concerned, the bond is given to the sole plaintiff at law and to four or five others not known in the suit at law or having any interest in the judgment but for other reasons made co-defendants to the bill. If this bond is good, so is that: and then this anomaly is presented, A has judgment at law

against B. When his judgment is enjoined and bond given, he finds that in suing on that bond, not he alone, but four or five others with him are to obtain a joint judgment; and what before was his exclusive property has been so transmuted that others have a joint and equal interest with him.

The statute (*Rev. St. p.* 454) requires the bond to be given to the adverse party. What is the meaning of the term. Is it the adverse party in the suit at law or in chancery. Scott and Harrell were not the adverse party at law. The adverse party is unit, the plaintiff. They were not a party; one was a nominal, the other a real party.

The bond is given to secure payment of the judgment. The person entitled to the proceeds of the judgment must alone be entitled to sue on it. It covers the damages to be assessed on the dissolution. The decree for these damages will be in favor of the judgment creditor alone. Consequently the bond must be to him alone.

The meaning of the words *adverse party* is not left to conjecture. It is used in the same chapter in section 7, which requires that before injunction is granted, notice shall be given to the adverse party. Certainly no one is entitled to notice but the judgment creditor. No notice is required, where the bill is filed in the same court in which the judgment is obtained. Why? Because the judgment creditor is presumed to know what takes place. This proves that he alone is meant by the term, the adverse party.

"All words," says Lord Bacon, "whether they be in deeds or statutes or otherwise, if they be general and not express or precise, shall be restrained unto the fitness of the matter or person, *Bacon's Maxims* 52; and certainly it was never intended that bond should be given to a person who had no interest whatever in the matter.

Nothing, we think, can be clearer than that the adverse party means the plaintiff at law. A bill for injunction between the same parties as at law is not an original bill. *Dunn vs. Clarke,* 8 *Peters* 1. And if so, then clearly the bond is void. It stands as a bond given to one having no interest—to a party different from the one pointed out by the statute, to a party having no interest: and this being

the case it is void as a statutory bond and not good as a common law bond. No bond is good as a common law bond where the parties to it are not right. *Purple vs. Purple et al.* 5 *Pick.* 226.

An injunction is never granted against persons not parties to the suit. *Fellows vs. Fellows,* 4 *J. C. R.* 25.

None of the cases cited by the plaintiff in error touch this, except *Justices of Christian vs. Smith & Clarke.* No other of the cases cited was upon a bond given to a wrong person, though the court in that case thought that such a bond would fall within the principle that a bond not conformable to the statute might be good as a common law bond. The decision in that case was made without due consideration and shows the danger of deciding by analogy.

The general principle is this: if a bond is taken under a statute, containing in the condition, not only what is prescribed by the statute, but more than is required or authorized by it, it is not void, unless the statute declares that it shall be in a prescribed form and no other. But if it be easily divisible, a recovery may be had on it for a breach of the part prescribed by the statute. If the condition is not divisible, it is void. *The United States vs. Brown, Gilpin* 163. *Newman vs. Newman,* 4 *M. & S.* 70. *U. S. vs. Sawyer,* 1 *Gallison* 99. *Morse vs. Hodsdon,* 5 *Mass.* 315. *U. S. vs. Bradley,* 10 *Peters* 357.

The distinction is that if the bond is given to a person who has the capacity to take it, it may be good, though not in all respects conforming to the statute. If given to a party who has no such capacity it is wholly void. 10 *Peters* 360. See *Goodman vs. Newell,* 13 *Conn.* 75. *Clarke vs. Mixe,* 15 *Conn.* 169. *Van Deuson vs. Hayward,* 17 *Wend.* 67.

But a bond given to a wrong person is not divisible. It is bad as a statutory bond, and equally bad as a common law bond. *Purple vs. Purple,* 5 *Pick.* 226. *Johnston vs. Meriwether,* 3 *Call.* 523. *Warner vs. Racey,* 20 *J. R.* 74.

CONWAY B, J. This was an action of debt instituted in the Pulaski circuit court on an injunction bond. The defendants demurred to the declaration; the demurrer was sustained and plaintiff

declining to amend final judgment was rendered against him, and he has brought the case into this court by writ of error.

The statute respecting injunctions provides that no injunction shall be issued in any case until the complainant execute bond with security to the adverse party &c. The judgment enjoined was in the name of Isham Harrell for the use of James A. Scott, the plaintiff in this suit. The bond sued on was executed to Isham Harrell and James A. Scott. It is contended by the defendants that it should have been given to Scott alone and that Harrell's being joined as an obligee makes the bond a nullity. We do not think so. It is true, Harrell was only a nominal party, and Scott was the beneficiary, as well as the person liable for the payment of cost; but in fact it took both Harrell and Scott to constitute the adverse party. If the bond had been executed to Scott alone, it might have been valid, but surely not more in exact compliance with the statute. In truth, the letter of the law would have required the bond to be given to Harrell for the use of Scott. But a literal compliance with its requisitions was not necessary to the validity of the bond. The object of the statute being simply to compel complainant to secure from loss or damage the party against whom he obtains an injunction, and the question is, was that the intention of the parties when this bond was executed? It most assuredly was; for upon its execution the injunction issued, and its benefits were realized and enjoyed until the cause finally was lost by complainant. It would then be hard indeed if Scott, after being so long delayed of his just rights, should be defeated of his intended indemnity by some mere technicality or inadvertence. From the justice and reason of the thing, as well as all of the authorities cited by counsel, we are clearly of the opinion that the objection raised should not defeat the validity of the bond. The judgment is therefore reversed.