POGUE USE CALVERT *vs.* JOYNER.

It is within the discretion of the circuit court to say whether the plaintiff or defendant shall open or conclude the argument to the jury: but the party pleading the affirmative is entitled to do so.

A release from the security to the principal (who had been discharged under the Bankrupt Law) renders the principal a competent witness for the security.

The condition of a delivery bond requires an actual delivery of the property: or an offer to deliver, which can be only by bringing forward, pointing out and offering it to the sheriff or his deputy.

Instructions given or refused will not be reviewed in this court, when there is no evidence proving or conducing to prove the facts supposed in them.

When there is no evidence to sustain the verdict a new trial will always be granted.

Writ of Error to the Circuit Court of Pulaski County.

THIS case was decided in this court on writ of error at the July term 1845, and reversed. *Vide* 1 *Eng. Rep.* 241.

The case being remanded to the circuit court a jury was empannelled to try the issues; and a verdict and judgment for the defendant.

Upon the trial the plaintiff offered to adduce testimony to prove the breaches assigned in his declaration; but the defendant claimed the right to open the case as the affirmative lay upon him; the court sustained the claim and the plaintiff excepted. The defendant then called several witnesses, by whom he proved that Lockert brought the boy mentioned in the condition of the bond sued upon, to Benton on the first day of the court; that he met Rutherford, the deputy sheriff, some seventy or eighty yards from the court house and said to him "George here is this boy John, I have brought him in to release Joyner on the bond;" that Rutherford replied "well" or "very well;" that the boy was present, but was not pointed out to Rutherford, nor did he take the custody, charge or control of him; that the boy was near the court house, within sight and hearing, during the sales of other property; that when Rutherford asked Lockert for the boy he was not produced. The defendant also called William S. Lockert, the principal obligor on the bond, and produced and read a release from the defendant; the plaintiff objected to his competency, but the court overruled the objection, and the plaintiff excepted. Lockert proved that he met Rutherford about seventy or eighty yards from the court house about 9 or 10 o'clock A. M. of the day named in the condition of

the bond, and said to him "here is the boy, I have brought him in to release Joyner on the bond;" Rutherford replied "well" or "very well," but he did not point out the boy nor knows whether Rutherford saw him: he afterwards saw him on the steps at the sheriff's office, and near the court house: that he did not deliver him to the sheriff or his deputy; did not tender him to the sheriff or his deputy, nor did either refuse to receive him.

The deputy sheriff on the part of the plaintiff testified that the boy was neither delivered nor tendered: that after the sales of other property he called for the boy, but he was not present; that Lockert sent for him but he was not found; the sheriff then told Lockert that if the boy was not produced the bond would be returned forfeited.

The defendant then moved the court to instruct the jury 1st, That if they believed from the evidence that the boy was delivered at the time "within sight and hearing of the court house" it is a substantial performance of the condition of the bond: 2d. That if the defendant offered to deliver "within sight and hearing of the court house" and the sheriff refused or neglected to receive him it is sufficient. Which instruction the court gave and the plaintiff excepted.

The plaintiff then moved the court to instruct the jury that a tender or offer to deliver at the distance of fifty yards from the place &c., and a neglect or refusal of the sheriff to receive is not a performance: and that such tender must be accompanied by actual possession. The court refused the instruction and the plaintiff excepted.

The verdict and judgment being against the plaintiff, he moved for a new trial, but the court overruled the motion, and he filed a bill of exceptions setting out the testimony and instructions given and refused: and has brought the case into court by writ of error.

RINGO & TRAPNALL, for the plaintiff. The instructions given on the motion of the defendant are evidently erroneous. The 1st, because the said delivery is not charged to have been accepted by

the sheriff; and the 2d, because the tender was not accepted. It may be that a delivery at another place than that named in the bond might be accepted by the sheriff in discharge of the bond due, then there would be an additional responsibility on him in the safe keeping of the property, but unless accepted it is clear that it would not be in compliance with the conditions of the bond, or release the defendant: and a tender at another place unaccepted can not be deemed a performance.

The instructions asked for by the plaintiff and refused by the court contain an accurate statement of the law of the case. But the instructions asked for by defendant were not only unsustained by testimony, but the facts alleged were expressly disproved by their own witness Lockert, as well as by the sheriff, and there was no evidence giving a color for them, and therefore the new trial should have been granted.

S. H. HEMPSTEAD, contra. 1. The performance of the condition of a bond according to the object and intention of the parties is sufficient. In fact in many cases a literal compliance will not furnish protection, but a substantial compliance will, at least so far as to exonerate a security: and if the condition of the bond in this case was substantially complied with, it is all that is required. 3 *Com. Dig. title condition (G.* 12, 13, 14,*) (L.) (M.) Hurlestone on Bonds,* 38, 45. *Beach vs. Proctor,* 1 *Dougl.* 382. *Martin vs. England,* 5 *Yerg.* 313. *Smith vs. Robinson,* 3 *Monroe* 174. *Duckham vs. Smith,* 5 *Monroe* 374.

The proof is full to the point that the negro boy was in fact delivered, and that it was so considered and understood by the parties, although it was not a formal and technical delivery at the court house door. Nor was it necessary. The object of the bond was to have the slave forthcoming at the place of sale, and this was effected, nor was any objection made by the officer to the delivery.

2. There was at all events a sufficient tender which was equivalent to performance, and the neglect of the sheriff cannot be visited upon the defendant who was a mere security. There is this differ-

ence as to the tender between portable and cumbrous articles, or articles in their nature portable, such as slaves, horses and the like; as to the latter it will be sufficient if the defendant is ready and offers to deliver, and no objection is made, and if there is a refusal to accept, the relation of the parties is changed to bailor and bailee. *Kemble vs. Wallis,* 10 *Wend.*. 374. *Coit vs. Houston,* 3 *J. C.* 234. *Slingerland vs. Morse,* 8 *J. R.* 474. *Lamb vs. Lathrop,* 13 *Wend.* 95. *Sheldon vs. Skinner,* 4 *Wend.* 525. *Phil. on Ev.* 132.

Now whether there was or was not a delivery, or an offer to deliver was a question of fact for the jury, to be determined from the intentions and acts of the parties and from all the circumstances at the time. On evidence submitted to them they have solemnly affirmed the facts to be so, and as that finding is fully warranted it is not competent for this court to disturb the verdict. Two juries, as the record shows, have found the same way, and it would certainly be a strong exercise of power for this court to say that there was neither a delivery nor an offer to deliver.

That Lockert was a competent witness is beyond all kind of doubt. He had been regularly discharged by the judgment of the court on a plea of bankruptcy, and was no longer a party to the suit or the record. The defendant then executed a full and ample release and made it a matter of record, which rendered the witness competent as the authorities on that point amply prove. 1 *Phil. Ev.* 133. 1 *Burr.* 423. 1 *Stark. Ev.* 125. *Perry vs. Fleming* 2 *Car. Law Rep.* 458. *Lessee of Lilly vs. Kintzmiller.* 1 *Yates* 28. *Buckley vs. Dayton,* 14 *J. R.* 387. *Woods vs. Williams,* 9 *J. R.* 123. *Boynton vs. Turner,* 13 *Mass.* 391. 3 *Term Rep.* 27. 2 *Phil. Ev. Cowen & Hill's notes, page* 261, *note* 257.

OLDHAM, J. One of the causes assigned for error in this case is, that the circuit court permitted the defendant below to open and conclude the argument to the jury. This is a question within the discretion of the circuit court and is not subject to the control of this court unless the discretion should be abused to the prejudice of the parties litigant. The decision, however, was correct the present instance. By issue made up between the parties, the

onus probandi was upon the defendant and he was entitled to begin.

After the release was executed and delivered by Joyner to Lockert the latter became a competent witness, and the objection taken to his competency was properly overruled.

It is contended for the defendant in error that although there was not a literal and technical performance of the condition of the bond, yet there was a substantial performance. Lockert states that about nine or ten o'clock on the day the negro was to be delivered, that he saw Rutherford, the deputy sheriff, crossing the street rapidly from the post office to the sheriff's office at the distance of seventy or eighty yards from the court house, that he hailed him and spoke of the rumor in the county that he (Lockert) would not bring the boy to Benton and then said "here is the boy, I have brought him to release Joyner on that bond:" to which Rutherford answered "well" or "very well." He did not point out the boy to Rutherford and does not know that he saw him. McCullough's testimony is to the same effect.

It cannot be contended with any plausibility that this was a performance of the condition of the bond. The only conclusion that can be rationally deduced from such a state of fact is, that Lockert intended to inform Rutherford that contrary to the prevailing rumor he had brought up the boy to be delivered in performance of the condition of the bond. It is very clear that Rutherford never regarded it as constituting a delivery and his testimony is full upon the point. To have constituted an offer to deliver sufficient to discharge the bond the intention of the party should have been clearly manifested to the sheriff, and the boy should have been brought forward, pointed out, and offered to the sheriff or his legally authorized deputy. It is very clear from the evidence that Lockert did not conceive that he had made such delivery or tender as would discharge him from liability; for when the sheriff called upon him to produce the boy to be sold and it was ascertained that he was gone, the sheriff remarked that if he was not immediately forthcoming, the bond would be returned forfeited. Lockert did not deny but that such would be the legal consequence,

and immediately employed a man to go after the negro. From this circumstance it is to be inferred that the sheriff did not consider the negro in his possession, and that Lockert did consider him in his own. Taking this view of the evidence, and it is susceptible of no other, the verdict of the jury was wholly unsupported by proof and should have been set aside and a new trial granted.

Two instructions were asked by the defendant, given by the court, and excepted to by the plaintiff. Whether they were correct in point of view is not necessary to be determined by this court, as that question does not legitimately arise. Had there been a delivery as contemplated by the first instruction, or had there been a tender by Lockert, and refusal or neglect by the sheriff as supposed by the second, then the correctness of the instructions in point of law, would have been legitimately before this court. But as has been shown, there was no evidence proving either a delivery or a tender, or conducing to prove either, and for that reason the instructions might have been refused. For the same reason the court did not err in refusing the instruction asked by the plaintiff.

This court has often expressed itself opposed to disturbing the judgment of the circuit courts for refusing to grant a new trial. The reasons for sustaining the verdict are still stronger in a case like the present where two successive juries have returned the same verdict: yet this is one of the cases where justice imperiously demands that the verdict be set aside and a new trial granted. There is not an iota of evidence to sustain the verdict, but the whole clearly and conclusively establishes the right of the plaintiff to a recovery. Reversed.