

## FUNK vs. THE STATE.

Where demurrer is sustained to a plea in abatement, and the defendant pleads over to the merits, the first plea is abandoned; and the decision on the demurrer cannot be revised in this court.  
He who seeks to reverse a judgment must point out the errors.

*Appeal from the circuit court of Jackson county.*

THIS was an indictment against Liberty Funk, charging him with the murder of B. F. Bath, determined in the circuit court of Jackson county, at the May term, 1842, before the Hon. THOMAS JOHNSON, then one of the circuit judges.

The defendant pleaded in abatement that the indictment was not found by a lawful grand jury—that it was composed of 18 and not 16 men as the law required. The State demurred to the plea, and the court sustained the demurrer. The defendant then pleaded not guilty, the cause was submitted to a jury, and they found him guilty of voluntary manslaughter, and awarded him imprisonment in the penitentiary for six years. The judgment of the court was rendered accordingly.

The defendant moved for a new trial, and in arrest of judgment, both of which motions the court overruled, and he excepted, and filed a bill of exceptions.

The defendant appealed to this court, and assigns as error, that the court below erred in sustaining the demurrer to his plea in abatement.

J. YELL, for appellant.

WATKINS, ATT'Y GEN., contra.

JOHNSON, C. J., not sitting.

OLDHAM, J., delivered the opinion of the court.

After the demurrer was sustained to the plea in abatement, filed

by the defendant below, by pleading over, he abandoned his first plea, and cannot now take advantage of the judgment of the court upon the demurrer. *Walker vs. Wills*, 5 *Ark. R.* 166. In *Wilson vs. Fowler*, 3 *Ark. R.* 463, the court held that "it is a general rule to which there are few exceptions, that he who abandons one point or position and selects another, must rest his cause upon it; and if that is adjudged against him, he will not be allowed to return to the first point which he has voluntarily relinquished. The law supposes each party to understand his own cause, and it therefore holds him bound by his own election."

The defendant, by pleading to the merits, abandoned all matters in abatement. He cannot, after verdict against him upon the plea of not guilty, return back to and rely upon his plea in abatement, no matter in what manner it may have been determined against him. *Clark vs. Gibson*, 2 *Ark. R.* 109. This is a rule of universal observance both in civil and criminal practice.

No other error being assigned by the defendant either specially or generally, according to the rule that he, who seeks to reverse a judgment, must point out the errors that exist, the judgment of the circuit court must be affirmed.

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