STEAMBOAT NAPOLEON *vs.* ETTER.

Pleas in abatement should be certain to every intent, and pleaded without any repugnancy.

A plea in abatement setting up several distinct and independent facts, either of which, if true and well pleaded, would be sufficient to defeat the action, is bad.

Under sec. 5, chap. 14, Rev. Stat. p. 126, in proceedings, by attachment, against a steamboat, by name, a bond made payable to the State of Arkansas, "*for the use and benefit of the steamboat Napoleon,*" is good.

The words—*for the use and benefit of the steamboat Napoleon*—being merely surplusage, do not affect the validity of the bond.

Where, in such proceedings, the bond is executed by the plaintiff to the State of Arkansas, with the condition prescribed by law, it is then perfect, and all the rights, intended to be conferred by the statute, are vested in the owners of the boat, without the insertion of the words, "*for the use and benefit,*" in the bond.

Writ of error to the circuit court of Hempstead county.

ATTACHMENT, by Chambers Etter against steamboat Napoleon, under the 14th chapter of Revised Statutes, determined at the May term of the Hempstead circuit court, 1844, before the Hon. JOHN FIELD, one of the circuit judges.

On the 9th Dec'r, 1843, plaintiff filed in the clerk's office an affidavit as follows:

"I, Chambers Etter, being first duly sworn, depose and say that the steamboat Napoleon, running upon Red river, a navigable stream in the State of Arkansas, is justly indebted to me in the sum exceeding one hundred dollars, to wit: in the sum of $298.60, for work and labor done on said boat, and for materials and provisions furnished her, which sum is due by a certain promissory note of the said steamboat Napoleon, signed by W. H. Conway, master of said boat, dated at Fulton, Ark's, July 27th, 1843, and payable to Chambers Etter, or order, one day after date, and that the said steamboat Napoleon is about to remove out of the State of Arkansas. CHAMBERS ETTER.

Sworn to and subscribed by the said Chambers Etter before me, Simon T. Sanders, clerk of the Hempstead circuit court, in the State of Arkansas, this 9th day of December, 1843.

S. T. SANDERS, *Clerk.*"

The plaintiff filed at the same time a bond, made payable to the "*State of Arkansas for the use and benefit of the steamboat Napoleon*"—conditioned in the usual form of such attachment bonds. On this affidavit and bond a writ issued, and the boat was attached. At the May term, 1844, the plaintiff filed a statement of his cause of action, alleging that the boat was indebted to him, by note, as described in the above affidavit, which note he averred was given for work and labor done for her by him, and for materials and pro-

visions furnished her, &c., exhibiting a bill of particulars for which the note was given.

The defendant filed two pleas in abatement, as follows:

"The said defendant comes, &c., and prays, &c., because she says that the affidavit of Chambers Etter, made previous to the issuing of the said writ of attachment, is not such as will authorize the issuance of said writ; and that the work and labor alleged to have been done on said boat, and the materials and provisions furnished her, if any such were done and furnished, were done and furnished by the said plaintiff, Chambers Etter, as part owner of the said boat, together with one Jackson Hessen, the other joint, part owner thereof, and for which William H. Conway, upon purchasing the interest of said boat, that belonged to the said Etter, gave the said Etter the foregoing promissory note of the said boat, signed by W. H. Conway, the then master thereof, so that the suit on the said note should have been against the owners of the said boat, or the master, or supercargo thereof in person, and not against the boat specifically; and this the said defendant is ready to verify; wherefore inasmuch as the said affidavit is insufficient, and the work and labor done on, and materials and provisions furnished for, the said boat, if any such were done and furnished, were done and furnished by the said Etter as part owner of the said boat as aforesaid, and for which the said promissory note was given by the said Conway, which extinguished the specific lien of said Etter for said supposed work and labor done, and materials and provisions furnished the said boat, if any indeed ever existed, she, the said defendant, prays judgment of the said writ of attachment, that the same may be quashed.

And for a further plea, &c., the said defendant comes, &c., and prays, &c., because she says that the said writ of attachment did not issue according to law, inasmuch as the bond of the said Etter, which he filed previous to the issuance of the said writ, is made payable to the *State of Arkansas for the use and benefit of the steamboat Napoleon,* when it should have been made for the use and benefit of Jackson Hessen and William H. Conway, the owners of the said steamboat, and this, &c., wherefore, &c."

To these pleas the plaintiff demurred; the court sustained the demurrer, and, the defendant saying nothing further, &c., gave final judgment for plaintiff.

PIKE & BALDWIN, HEMPSTEAD & JOHNSON, for plaintiff. The remedy by attachment is in derogation of the common law and must therefore be strictly followed: the bond is void, being given to the State, for the use of the steamboat Napoleon, instead of being made payable to the State for the use and benefit of the owners as the statute expressly requires. *Rev. Stat.* 126, *sec.* 4 *and* 5. *Didier vs. Galloway,* 3 *Ark.* 501. *Earthman vs. Jones,* 2 *Yerg.* 484. *Delano vs. Kennedy,* 5 *Ark.* 457.

If the note creates any liability, it is against "W. H. Conway," *individually;* the words "*master of said boat,*" being words of personal description; nor does the authority to bind the owners appear. *Ormsby vs. Kendall,* 2 *Ark.* 343. *Andover vs. Grafton,* 7 *N. H. Rep.* 298. *White vs. Skinner,* 13 *J. R.* 308. *Leadbitter vs. Farrow,* 5 *M. & S.* 349. The master of a ship is always personally bound by a contract for repairs, stores, provisions, or money advanced for the purposes of the ship, *unless he takes care, by express terms, to confine the credit to the owners only. Cowp.* 636. *The Aurora,* 1 *Wheat.* 96. *Abbott on Shipping,* 91—100. That the note was not intended to be binding on the owners is manifest from the fact, that they were not named or alluded to in any manner.

It appears from the plea that Etter was a *part owner,* and if so he was not authorized to proceed against the boat. *Abbott on Shipping,* 110. 2 *P. Wm's,* 367. *Collier on Partnership,* 114—666. 1 *Barn. & Cress.* 76. 5 *Maule & S.* 336. 2 *Dowl. & Ryl.* 196. *Causten vs. Burke,* 2 *Har. & Gill.* 295.

The unliquidated account, which seems to be the main foundation of the action, was *extinguished,* at least *sub modo,* by taking a higher security, and which destroyed any specific lien Etter may have had. *Chitty on Contracts,* 290. *Hughes vs. Wheeler,* 8 *Cow.* 77. *Pintard vs. Tuckington,* 10 *J. R.* 105. *Booth vs. Smith,* 3 *Wendell,* 66.

TRAPNALL & COCKE, contra. The greatest possible accuracy and precision are required in framing pleas in abatement. They should be certain to every intent, and pleaded without repugnancy; must give the plaintiff a better writ or bill, and not be double. 1 *Chitty,* 491—2. *Bacon Abr. Abatement, P.* 1 *Saunders,* 274, *note* 3. 285, *note* 4.

There is neither accuracy nor certainty in the two pleas in this case: they do not point out the particular defects nor give the plaintiff a better affidavit, bond or writ.

The first plea is repugnant, uncertain, and double, and the latter part of it is matter in bar of the action. There is no foundation in fact for the second, as the bond accords with the statute. It is required to be given to the "*State of Arkansas,*" for the use and benefit of the owners; but it is not necessary to express on the face of the bond that it is given for their use—the statute makes it so.

The note given, on settlement, for the amount does not affect or extinguish the plaintiff's lien; it is not a higher security, but mere evidence and acknowledgment of the amount. *Graham & Co. vs. Holt, Breedon & Co.,* 4 *B. Monroe,* 61-2. *Lavallette vs. Redding, idem,*81. *Finche & Hale vs. Ridding, idem,*88. Nor would the negotiation of the note in bank impair or discharge the lien if the payee afterwards took it up and exhibited his bill to enforce his lien, within the time prescribed by statute.

The whole case turns on the sufficiency of the plea in abatement and final judgment was properly given. *Moore vs. Mulin,* 1 *Bibb,* 234.

JOHNSON, C. J., delivered the opinion of the court.

The defendant in the court below filed her two several pleas in abatement, to each of which the plaintiff demurred, and issue was taken thereupon. The court sustained the demurrer to both pleas, and the question now submitted for the decision of this court is, did the circuit court err, or not, in thus sustaining the demurrer? As pleas in abatement do not deny, and yet tend to delay the trial of the merits of the action, great accuracy and precision are required in framing them. They should be certain to every intent,

and be pleaded without any repugnancy. The first plea when tested by these principles will be found to be wholly defective and insufficient in law. It sets up several distinct and independent facts, either of which, if true and well pleaded, would be sufficient to defeat the present action. It is therefore bad, and the court decided correctly in sustaining the demurrer to it. We will now dispose of the questions arising upon the demurrer to the second plea. It has already been ruled by the court, that the want of a bond, or of a bond in pursuance of the statute, is pleadable in abatement to the whole suit. It is a condition precedent to the suing forth, the writ, intended to afford the opposite party ample redress for any injury which may result from its abuse, or improper exercise by the plaintiff. Without it the party is not rightly in court, and it is to be regarded as in the nature of a personal disability of the plaintiff to sue; and to be pleaded at the proper time and in proper order. *Didier vs. Galloway,* 3 *Ark. Rep.* 501. The mater set up in this plea is well pleaded and tenders a single issue to the plaintiff. It now remains to be seen whether it is sufficient in point of law as a defence to the action. To decide this question correctly will involve a proper construction of the statute. The statute requires that in all cases where proceedings are instituted by attachment against a boat or vessel, by her name or description only, the bond to be given by the plaintiff shall be made payable to the "State of Arkansas" for the use and benefit of the owners of such boat or vessel, who may institute a suit thereon, if damages be occasioned by the issuing of said attachment wrongfully and have recovery thereon, in the same manner as if said bond had been given to such person in his proper name, or in the name and style of the partnership. Is it essential that it should be stated in the bond that it is executed for the use and benefit of the owners of the boat? We regard the words "for the use and benefit" as mere surplusage and as having no legal effect whatever. When the bond is executed by the plaintiff to the State of Arkansas, with the condition prescribed by law, it is then perfect, and all the rights, intended to be conferred by the statute, are vested in the owners, and not at all dependent upon the fact whether the words "for the

use and benefit'' are inserted or not. The great difficulty in many instances, if not utter impossibility, of ascertaining the names of the owners of boats, was doubtless the cause that prompted the legislature to provide that the bond, in such cases, should be made payable to the State, and to require the plaintiff to insert the names of the owners would be to create the identical difficulty which it was the especial object and care of the legislature to obviate. The bond filed in this case is perfect without the words ''for the use and benefit of the steamboat Napoleon;'' they are mere surplusage and cannot in the slightest degree, affect its legal operation. The demurrer admits the facts stated in the plea to be true, but denies their sufficiency in point of law to defeat the plaintiff's action. It is the opinion of the court that there is no error in the judgment of the circuit court in sustaining the demurrer to the second plea. It is therefore considered and adjudged by the court, that the judgment of the circuit court of Hempstead county, in this case, be in all things affirmed with costs.