ADAMS ET AL. *vs.* STATE USE OF WALLACE.

It is a general rule that profert is not necessary of public records, or of deeds to which the plaintiff has not the right of possession.

This rule applies to the originals of sheriff's bonds, but does not supersede the necessity for profert of a certified copy, as by statute such copy is made evidence to the same extent as the originals.

Profert of such copy necessarily includes the condition as well as the bond, the former being prescribed by law, and indispensable to the binding force of the bond in its official character.

The declaration, after reciting in the usual form as to date, place and manner of execution, makes profert thus: "a certified copy of which said writing obligatory is now to the court here shown"—held to be sufficiently comprehensive, and to embrace the condition of the bond as fully and certainly as if the words—"and also the condition thereof"—had been added.

Where the declaration assigns several breaches of the condition of the bond, some of which are good and others bad, on demurrer, the plaintiff is entitled to judgment.

In action on sheriff's bond for failing to make the money on an execution, where a breach, assigned in the declaration, alleges that at the time the execution came to the sheriff's hands, the defendant therein had sufficient property in the sheriff's bailiwick to satisfy the execution, that he levied upon the property of the defendant in the execution, advertised it for sale to satisfy the execution, but wholly failed and neglected to sell the same or any part thereof, the breach is substantially good.

On demurrer to the declaration, and judgment for plaintiff, the order for the

jury should be to enquire into the truth of the breaches, as well as to assess damages, and the jury should be so sworn. *Rev. Stat. sec.* 7, *page* 609, requires that both should be included.

Where the jury are not sworn to enquire into the truth of breaches, but merely as to the damages, though they return that they find the breaches true, the form of the verdict does not cure the omission, and a final judgment rendered upon the verdict will be reversed.

Writ of error to the circuit court of Johnson county.

THIS was an action of debt, determined in the Johnson circuit court, at the March term, 1845, before the Hon. R. C. S. BROWN, judge.

The declaration, in substance, follows:

"The State of Arkansas, suing for the use of Alfred Wallace, complains of William Adams, James P. Patterson, Samuel Adams, John W. Patrick and Joseph James, of a plea that they render to the plaintiff the sum of ten thousand dollars, which they owe to, and detain from her.

For that whereas, heretofore, to wit, on the 19th day of April 1841, at &c one Abram Sinclair, who has since departed this life, and is not sued, and the defendants, by their certain writing obligatory, sealed with their seals, a certified copy of which said writing is now to the court here shown, the date whereof is the day and year aforesaid, acknowledged themselves held and firmly bound, as the securities of the said Sinclair, unto the State of Arkansas, in the sum of ten thousand dollars, above demanded, to be paid to said state; for the payment of which defendants and Sinclair bound themselves, &c., &c., which said writing obligatory was and is subject to certain conditions thereunder written to the following effect: after reciting, that whereas the above bounden Sinclair had been elected sheriff of Johnson county, that if the said Sinclair should well, truly and faithfully discharge and perform the duties of his said office (meaning said office of sheriff) then the above obligation was to be void &c. otherwise to remain &c., as by the said writing obligatory and the conditions thereunder written, reference being thereunto had, will more fully appear.

And the said plaintiff avers that heretofore, to wit, on the 16th day of March in the year A. D. 1841, at the March term of the circuit court within and for the county of Johnson aforesaid, the said Alfred Wallace (as the assignee of one Lemuel D. Evans) for whose use this suit is brought, by the judgment and consideration of said court, recovered against Laban C. Howel and William Moore as well a certain debt of six hundred and fifty-eight dollars and thirty-six cents, as the further sum of sixty-seven dollars and fifty cents for his damages, together with all costs of suit whereof the said Laban C. and said William Moore were convicted, as by the record and proceedings of said judgment, in said court remaining, more fully appears; which said debt, damages and costs aforesaid being wholly unpaid to the said Alfred Wallace, he the said Wallace to obtain the same, afterwards, to wit, on the 27th day of May, 1841, sued out from the office of the clerk of said court, and under the seal of said court a certain writ, commonly called a *fieri facias,* directed to the then sheriff of said county, by which said writ the sheriff of said county was commanded that of the goods and chattels, lands and tenements of said Laban C. and said William Moore he should cause to be made the debt, damages and costs aforesaid; and that the said sheriff should have the same before the said circuit court, at the court house in the town of Clarksville, in said county on the 21st day of September, 1841, next after the date of said writ, to satisfy the said Alfred Wallace of his debt, damages and costs aforesaid, and that the said sheriff should certify to said court how he executed said writ: which said writ afterwards, and while the same was in full force, to wit, on the 2d day of June, 1841, in the county aforesaid, was delivered to the said Abram Sinclair, who was then and from thence-forth continued to be until and at the return day of the writ, sheriff of the county of Johnson aforesaid, to be by him executed.

And the said plaintiff avers that the said Laban C. Howel and William Moore at the time of the delivery of said writ of *fi. fa.* to the said sheriff as aforesaid, and afterwards and before the return day of said writ, were well able to pay said debt, damages and costs, and had divers goods and chattels, lands and tenements with-

in the bailiwick of said sheriff, and more than sufficient, to satisfy the said Wallace of his aforesaid debt, damages and costs, to wit, in the county aforesaid.

And said plaintiff further avers that the said Abram Sinclair, so being sheriff as aforesaid, afterwards and whilst the said writ was in full force, and before the return day thereof, to wit, on the 4th day of August, 1841, levied the same upon the property of the said Laban C. Howel and William Moore, and advertised the said property so levied upon the sale to satisfy said writ, but wholly failed and neglected to sell the same, or any part thereof, to satisfy said writ; and that in this respect the said defendants have broken their said covenant, so by them made as aforesaid.

And the said plaintiff further saith that the said defendants have also wholly failed to keep and perform the conditions of said writing obligatory, according to the spirit, true intent and meaning thereof, but have broken the same in this, to wit, that the said Abram Sinclair, so being sheriff as aforesaid, wholly failed and neglected to collect from the said Laban C. Howel and William Moore, and pay over the said sum of six hundred and fifty-eight dollars and thirty-six cents, the amount of the debt aforesaid, and the said sum of sixty-seven dollars and fifty cents, the damages, and the costs aforesaid, or any part or either of said sums to the said Alfred Wallace, nor did he the said sheriff have the said sums of money, or any part thereof, before the said circuit court of the county of Johnson aforesaid, on the said 21st day of September in the year, 1841, to satisfy the debt, damages and costs aforesaid, as by the said writ of *fi. fa.* he, as sheriff of said county, was imperatively commanded.

And the said plaintiff further says that the said defendants have been guilty of a further breach of the conditions of their said writing obligatory in this, to wit, that the said Abram Sinclair, so being sheriff as aforesaid, failed and refused to pay over the aforesaid sums of six hundred and fifty-eight dollars and thirty-six cents, the debt aforesaid, and sixty-seven dollars and fifty cents, the damages aforesaid, and costs aforesaid, after same had been collected by him from the said Howel and Moore, and although the said Alfred

Wallace, for whose use this suit is brought, on the —— day of —— in the year —— requested him, the said Sinclair, so to do, to wit, in the county aforesaid. By reason whereof, and by force of the statute in such cases made and provided, an action hath accrued to the said plaintiff to sue the said defendants, for the use and benefit of the said Alfred Wallace, for the sum of ten thousand dollars above demanded; yet the said defendants, although often requested so to do did not nor have either of them paid the said plaintiff the said sum of ten thousand dollars above demanded, or any part thereof according to the tenor and effect of the said writing obligatory, and the conditions thereunder written or otherwise; nor have they, the said defendants, or either of them, paid the said plaintiff the said sum of six hundred and fifty-eight dollars and thirty-six cents, the debt aforesaid, and the sum of sixty-seven dollars and fifty cents the damages aforesaid and the costs aforesaid or any part or either of said sums of money and costs; nor did the said Abram Sinclair, in his lifetime, pay the same or any part thereof to the said plaintiff, or the said Alfred Wallace, for whose use this suit is brought: as aforesaid, they, the said defendants, have, and each of them hath hitherto wholly refused and still refuse and fail —to the damage of the said plaintiff, for the use and benefit of said Wallace, ten thousand dollars, and therefore she sues."

The defendants demurred to the declaration, and assigned for causes of demurrer: "1st, it is not sufficient to aver that defendants had goods and lands sufficient to pay the debt, as in said declaration averred, but in order to charge the sheriff the plaintiff must aver that the property was within the legal grasp of the sheriff, and that it was shown to him, or he might with reasonable diligence have levied on it: 2d, it is not sufficient to aver a levy on property without showing the quantity or value thereof: 3d, it is not shown that the sheriff did not make the money, there being property within his bailiwick shown to him, or which he might with diligence have found: 4th, no demand or request is alleged in the declaration: 5th, the general breach does not negative the payment to Wallace by defendants, and the declaration is in other respects insufficient, &c."

The record states that the court sustained the demurrer as to "the third, fourth and fifth breaches assigned in the declaration," and overruled it as to the "first and second causes of demurrer:" and the judgment of the court was, "that plaintiff recover of defendants the sum of ten thousand dollars, the penalty of the bond, together with damages occasioned by the committing of the said first and second breaches of the condition of said bond, &c. but because it is wholly unknown to the court what damages the said Alfred Wallace, for whose use this suit is brought, hath sustained by reason of the said defendants having broken the condition of said bond, it is ordered by the court that a jury come *instanter* to inquire what damages said Wallace has sustained by reason of the aforesaid breaches of the condition of said bond."

The sheriff brought in a jury, "who [as the record states] being sworn well, truly and diligently to inquire into and assess the damages in this case, after hearing the evidence &c. retired &c., and returned into the court the following verdict—we the jury do find that the defendants have broken their covenant as specified in the first breach as assigned in the declaration, and do assess damages against them because of said breach to the amount of $966.92," upon which verdict final judgment was rendered.

Defendants brought error.

LINTON & BATSON, and WALKER for plaintiff.

In declaring on a penal bond, profert of the condition is as essential as the bond itself. Our statute has changed the practice in pleading on penal bonds and notes. *Rev. Stat. p.* 608, *sec.* 1, *id. p.* 633, *sec.* 102.

Oyer may alone be required of that which is tendered in pleading. An assignment unless brought before the court by oyer constitutes no part of the record. *McLain vs. Onstot,* 3 *Ark.* 478.

The condition of a bond is wholly distinct from the bond, and oyer of the bond is not oyer of the condition. 1 *Gallis C. C. R.* 86. *Peter's Dig.* 138. 3 *Ark. R.* 478. 1 *Saunders R.* 9. 4 *Ark. R.* 458. Want of profert of the condition of a bond, fatal on demurrer. 5 *Cranch* 257. 2 *Con. R.* 247.

An averment that defendant in execution had property in the county is not sufficient to charge the sheriff with neglect. The averment should also show that the property was shown to the sheriff, or that with reasonable diligence he might have levied on it. 1 *J. J. Marsh.* 550.

Each breach must contain within itself a distinct cause of action. *Lyon vs. Evans,* 1 *Ark. R.* 367. *Phillips vs. Gov.* 2 *Ark. R.* 382.

In this cause every breach, including the general breach, except the first, was decided insufficient upon demurrer. That breach merely states that the sheriff "levied and failed to sell;" does this contain a cause of action; might not the debt have been paid? *State, use &c. vs. Engles,* 5 *Ark.* 27. Might not the penalty have been paid? This is not denied: there is no general breach: that was decided insufficient on demurrer. *Hardin's R,* 295.

It was error to order that a jury come to inquire of damages; the order should have been to *inquire of the truth of the breaches, and damages* assess &c. *Rev. Stat. p.* 609, *sec.* 7. *Phillips & Slartin vs. Governor,* 2 *Ark. R.* 382. *Taylor vs. Auditor,* 4 *Ark.* 574.

It was error to swear the jury to inquire of damages. They should have been sworn to inquire into the truth of the breaches, and damages assess. *id.*

It was error to render judgment for the damages with costs. The judgment should have been for the penalty of the bond, as in other actions of debt, together with costs of suit. The verdict should have been entered on the record, and a further judgment that the plaintiff have execution for the damages. *Rev. St. p.* 609. *sec.* 8, 2 *Ark. R.* 382.

PIKE & BALDWIN, contra.

CROSS J., delivered the opinion of the court.

The defendant brought debt in the court below against the plaintiffs as the securities on the official bond of Abram Sinclair, late sheriff of Johnson county. The declaration recites the bond with profert of a certified copy, and assigns various breaches of its condition. Process having been served, the plaintiffs appeared, and, by

demurrer, questioned the sufficiency of the declaration; *first*, on account of the omission of profert of the condition of the bond; and *secondly*, as to the assignment of breaches. The demurrer was sustained as to some of the breaches, but overruled as to others, and the omission of profert. A judgment was thereupon rendered for the penalty of the bond, and an order made that "a jury come *instanter* to inquire what damages the said Wallace has sustained by reason of the aforesaid breaches &c." In accordance with this order, a jury came and was sworn "to inquire into and assess the damages," and "after hearing the evidence &c. returned into court the following verdict, to wit: "We the jury do find that the defendants have broken their covenant as specified in the first breach as assigned in said declaration, and do assess damages against them because of said breach to the amount of &c." Final judgment was entered upon this verdict, and its reversal is the object of the writ of error. The various grounds relied upon to reverse the judgment are set forth in the assignment of errors. These, so far as they are deemed material, will be noticed in the order they are presented by the record: and *first*, as to the omission of profert of the condition of the bond.

As a general rule it seems to be well settled that where the plaintiff has no right to the possession of the deed declared upon, and in the case of public records, no profert is necessary. 1 *Saund.* 9, *note* 1. 1 *Ves.* 394. 1 *Term. R.* 149. And if made in such cases, it is but surplusage and does not entitle the defendant to oyer. 1 *Saund.* 317; *note* 2, 1 *Chitty* 350. This rule applies to the originals of sheriffs' and all other official bonds, the possession of which is neither with, nor under the control of the party who brings the suit, but does not in our judgment supersede the necessity for profert of a certified copy. By express statutory provisions such copies are made "evidence to the same extent as the originals." See *Rev. Stat. sec.* 11, *p.* 371, and the reasons for profert in the case of an original deed or bond of which the party is possessed apply with equal force to that of a copy. If dispensed with in the latter case, having no right to oyer, the defendant would be unable to avail himself of defects not appearing upon the face of the declara-

tion, a variance &c. and thus the provision of the statute, whilst it increased the rights of one party, would, if it did not lessen, materially affect those of the other. No such consequences could have been intended, and certainly does not necessarily arise from its language. Besides, so far as sheriffs' bonds are concerned there can be no excuse for the omission. By *Rev. Stat. sec.* 3, *p.* 727, bonds of this description are required to be filed and recorded in the recorder's office of the proper county, whereby they become public records of which, any one, on application may procure a copy. Profert of such copy necessarily includes the condition as well as the bond, the former being prescribed by law and indispensable to the binding force of the bond in its official character. The declaration in the case before us, after reciting in the usual form, as to date, place and manner of execution, has the following language, "a certified copy of which said writing obligatory is now to the court here shown." This is sufficiently comprehensive and embraces the condition of the bond as fully and as certainly as if the words "and also the condition thereof" had been added.

2: As to the assignment of breaches. It is well settled that where there are several breaches assigned or counts in a declaration, some of which are good and others bad, on demurrer, the judgment must be for the plaintiff. 1 *Chitty* 643. *Com. Dig. Pleader* (243) 1 *Saund.* 286, *note,* 9. *Sumner vs. Ford & Co.* 3 *Ark. R.* 404. In the present case, although a portion of the breaches are badly assigned, the first is believed to be good in substance, and therefore the judgment was properly given on the demurrer for the defendant in error. Thus far the proceedings, if not technically correct, appear to have been sufficiently so, to the extent at least they are presented by the record in such shape as to entitle them to notice. The first step afterwards, however, which constitutes the next objection to be considered, was otherwise.

3: The order for a jury is defective in embracing the assessment of damages only and omitting altogether an inquiry as to the truth of the breaches. The statute requires that both should be included. *Rev. Stat. sec.* 7, *p.* 609.

4: In swearing the jury also the record does not show that an in-

quiry as to the truth of the breaches was embraced. The plaintiffs were certainly entitled to any benefit arising from the influence of an oath upon the conscience of the jury as fully in relation to the breaches as the damages. The omission was held to be error in the case of *Phillips and Martin vs. The Gov. &c.* heretofore decided by this court.

5: The verdict *per se* is well enough, but, having been returned by a jury sworn only to assess damages, although inclusive of the breaches, is no better than if they had not been mentioned.

6: It only remains to add that the final judgment rendered upon a verdict thus found is fatally defective and must be reversed. The cause therefore is remanded to the circuit court from whence it came, there to be proceeded in in accordance with this opinion.