PENDLETON *vs.* THE STATE.

In criminal cases no affidavit is necessary to entitle a defendant to an appeal to the supreme court: *Sec.* 142, *p.* 638 *Rev. Stat.* embraces only appeals in civil cases.

The act "to prohibit the emigration and settlement of free negroes, or free persons of color, into this State, passed 23d January, 1843, is not in conflict with the Constitution of the United States or of Arkansas."

Free negroes, or free persons of color, are not *citizens* within the meaning of Sec. 2d, article 4th, Const. U. S.

Appeal from the circuit court of Crawford county.

This was an indictment against John Pendleton, a free negro, determined in the Crawford circuit court at the September term 1843, before BROWN, Judge.

The indictment was framed under the 3d section of the act of 1843, "to prohibit the emigration and settlement of free negroes, or free persons of color, into this state," charging a non-compliance with its requisitions. *See acts of* 1842-3, *page* 61.—The defendant was convicted, and appealed to this court.

ROANE, for the appellant.

WATKINS, Att'y. Genl.

It is contended by the appellant that the act of the general assembly, entitled "An act to prohibit the emigration of free negroes or free persons of color into this state," approved 20th Jan., 1843, (see acts of 1842 p. 61) is unconstitutional.

I am unable to see in what particular this act conflicts with any clause either in the State or federal constitution. It may be that the appellant relies upon the 2d sec. of the 4th art. of the const. of the U. S., which provides "that citizens of one state shall be entitled to all the privileges and immunities of citizens of the several

states." But that question cannot arise upon the record, because it does not appear that Pendleton ever was a citizen of any other state, or ever was entitled to the "privileges and immunities of a citizen of any state."

In the case of *Amy vs. Smith,* 1 *Lit. Rep.* 327, the court of appeals of Kentucky decided that negroes cannot become citizens of the United States. If Pendleton is not a citizen, the judgment is certainly correct, because every government has an undoubted inherent right to prohibit the emigration of foreigners or to impose conditions upon them while they remain.

But even if a negro could become a citizen, the presumption would be against the appellant, and it would devolve on him to prove it.

At Jan. term 1844, on motion to dismiss, the following opinion was delivered by SEBASTIAN J.

A motion to dismiss this cause has been filed by the attorney general upon the ground that no affidavit was made and filed by the appellant in the circuit court previous to taking the appeal. The provisions of the *Rev. Code,* p. 638, sec. 142, embrace only appeals taken from final judgments in civil cases. There is no such affidavit required in criminal causes. Apart from the conclusion drawn from the absence of any enactment requiring it, the nature of the affidavit shows its want of application to criminal proceedings. The motion to dismiss is overruled.

OLDHAM, J., not sitting.

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

The record shows that the appellant, a free negro, was convicted in the court below of a violation of the provisions of the act approved the 20th Jan. 1843, entitled "An act to prohibit the emigration &c. of free negroes or free persons of color into this state? and thereupon judgment was rendered accordingly. To reverse this judgment upon the ground that the act upon which it was founded is unconstitutional and void, is the object of the appeal.

The proceedings appear to have been instituted upon the fourth

section of the act, which provides "That every free negro or mulatto, who may have emigrated to this state prior to the first day of July 1843, shall on or before the said first day of July, enter into bond to the state of Arkansas with good and sufficient security for the use of any county, or of any person that may be damnified by such negro or mulatto, in any sum not less than five hundred dollars, before the clerk of the county court, conditioned for the good behavior of such negro or mulatto and to pay for the support of such negro or mulatto in case he shall at any time thereafter be unable to support himself and become chargeable to any county in this State, and also to pay and make good to any person in this State any injury or loss which they may sustain either in their person, money or property of every description by the wrongful acts or misconduct of said negro or mulatto." See *Ark. Pamph. Acts,* 1842-3 *p.* 62. The legislature no doubt intended not only this section but the entire act as a measure of police, necessary to the security and well being of the people of the State. In this view we are unable to perceive any clause or provision of either the federal or State constitution, with which it conflicts. If any it is that clause of the former which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." Are free negroes or free colored persons citizens within the meaning of this clause? We think not. In recurring to the past history of the constitution, and prior to its formation, to that of the confederation, it will be found that nothing beyond a kind of quasi citizenship has ever been recognized in the case of colored persons. It is a principle settled in all the states of the Union, at least where slavery is tolerated, that a colored person, although free, cannot be a witness where the parties are white persons. See *Treatise on the law of Slavery, by Wheeler p.* 194 *and references.*

In Kentucky the courts have said that "although free persons of color are not parties to the social compact, yet they are entitled to repose under its shadow." *Ely vs. Thompson,* 3 *Mar.* 70: And again *Amy vs. Smith,* 1 *Litt. Rep.* 327, that "prior to the adoption of the federal constitution, States had a right to make cit-

izens of any persons they pleased, but as the constitution does not authorize any but white persons to become citizens of the United States, it furnishes a presumption that none others were citizens at the time of its adoption." The protection of their persons and the right of property is provided for to a humane and just extent. To assault, to maim or to murder a free person of color is as fully prohibited by our constitution and laws, as the like offences against one of the white race: and so, as to depredations upon their property or habitations. If citizens in a full and constitutional sense, why were they not permitted to participate in its formation? They certainly were not. The constitution was the work of the white race; the government, for which it provides and of which it is the fundamental law, is in their hands and under their control; and it could not have been intended to place a different race of people in all things upon terms of equality with themselves. Indeed, if such had been the desire, its utter impracticability is too evident to admit of doubt. The two races differing as they do in complexion, habits, conformation and intellectual endowments could not nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human agency must change the decree. Those who framed the constitution, were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause to which we have referred. Another clause of the constitution declares that "The powers not delegated to the United States by the constitution nor prohibited by it to the States, are reserved to the States respectively or to the people." *Art.* 10 *Amts:* Under this provision, it will be seen, that no restriction is imposed upon State legislation.

In our State constitution there is nothing either express or implied, with which, in our judgment, the act in question conflicts. We entertain no doubt therefore as to the constitutionality of the act upon which the prosecution is based. Let the judgment be affirmed.