HOYS & PATTEES *vs.* TUTTLE.

The legal effect of a bond for the payment of a sum of money on or before a certain day, with a provision inserted that it may be paid in Arkansas currency, is, that it may

be discharged on or before the day of its maturity in Arkansas currency, but if not so paid, it becomes a specie debt.
A tender of Arkansas currency after the day it falls due, is not valid.
In such case, the obligee is not required to make demand, or present the bond for payment; but the debtor is bound to seek the creditor, if within the State, and tender payment in order to avail himself of the privilege of paying in Bank paper.
Where the security in a cost bond is required as a witness, the plaintiff may substitute a new bond, release the security, and use him as a witness. *McLain's adr'x* v. *Churchill et al.*, 5 *Ark. R.* 240, cited.

Appeal from the Circuit Court of Washington County.

In July, 1843, John D. Hoy, William Hoy, John Pattee and Henry Pattee, partners under the firm name of Hoys & Pattees, sued John M. Tuttle, before a Justice of the Peace of Washington county, on the following instrument:

"Prairie Township, Washington county.

$40,00

On or before the first day of July, 1843, I promise to pay to Hoys & Pattees, or their order, the sum of forty dollars, without defalcation or discount, with ten per cent. interest after the first day of July, 1843, till paid. This note was given for a Wheat-fan: if the signer is not suited with this Fan, he is to return it by the first day of October next, at Hoys & Pattee's Factory, at Campbell's Mills, and they are to furnish him with a new Fan, provided the signer takes good care of this Fan, and keeps it in a dry place. Witness my hand and seal, this 13th day of July, 1841.

This note may be paid in the currency of Arkansas." JOHN M. TUTTLE. [L. S.]

The Justice gave judgment for defendant, and plaintiffs appealed to the Circuit Court of Washington county.

The cause was submitted to a jury at the June term, 1846, and they returned a verdict in favor of appellants for $13.68, and the court gave judgment in their favor for that sum, but rendered judgment in favor of appellee for costs, upon the ground, as the record states, that it appeared to the court, from the evidence, that appellee had tendered to appellants the amount of their said demand, before the commencement of this suit.

The appellants moved for a new trial, which being refused, they took a bill of exceptions, setting out the evidence, &c., from which it appears:

"On the trial appellants read to the jury the instrument sued on, and called a witness (Hoy) who testified that he was the agent of appellants, and that they were trading under the firm name of Hoys & Pattees. Appellee asked witness if he had not deposed on the trial before the Justice, and if he did not there testify that he had kept the bond sued on out of the way for the purpose of making appellee pay it in good money after it fell due? Witness answered that he had not so deposed, and that the bond was not kept out of the way when it fell due. Appellee then called several witnesses by whom he proved that they were present at the trial before the Justice, that said witness (Hoy) testified in the case, and was asked by appellee's counsel whether he had not kept the writing sued on out of the way on the day it fell due? Which question was repeated several times. That witness refused to answer, saying it was an unfair question. That the counsel of appellants then told him to say *yes,* and witness said *yes*—that he had kept the writing out of the way on the day it fell due to prevent appellee from paying it in Arkansas Bank paper.

The court then permitted the appellee to call a witness and prove that he tendered a sum of Arkansas currency, sufficient to discharge the debt, to the agent of appellants in payment of the bond sued on, about three days after it fell due, to which testimony appellants objected, and excepted to the decision of the court permitting it to be introduced.

The appellants then offered to prove by John Lewis, that A. B. Hoy, the agent of appellants, resided with witness before and at the time the bond fell due, in the vicinity of defendant, and in the county where the contract was made, and that before and at the time the bond fell due said agent left it with witness with special instructions to collect and receive the amount due thereon in Arkansas currency. Appellee objected to the competency of Lewis upon the ground that he was security in a bond for costs filed by appellants on the institution of the suit. Appellants then tendered a new bond with good security for all costs which had or might accrue in the case, and moved

that it might be substituted for the one filed originally, and witness released. But the court refused to permit the new bond to be substituted, or to allow Lewis to testify, to which appellants excepted. The above was all the evidence offered in the case.

Appellants moved the court to instruct the jury: "that it was the duty of appellee to seek the appellants, or their agent, if resident in the country where the debt was contracted, and tender the Arkansas currency, or seek so to do, on the day the writing fell due, and if he failed so to do the jury should find for appellants." Which the court refused, but instructed the jury as follows: "If a note be made payable in Arkansas currency, or money, in the alternative, on or before a particular day, the maker is bound to pay, or tender, the Arkansas currency on or before the day the note falls due, and if he fail to do so, his election is gone, and he is bound to pay the money: and if the jury believe the Arkansas currency was not tendered until three days after the writing became due, they must find for the plaintiffs."

The court also instructed the jury as follows: "This is a suit upon a writing for forty dollars, which may be discharged in Arkansas currency. The defence is, that on the day the note fell due, the agent of appellants so arranged it that it was impossible for the appellee to discharge the obligation. If you are satisfied from the evidence that said agent did not bring to appellee's knowledge his agency for appellants, appellee was not bound to hunt him up at his boarding-house, or elsewhere, for the purpose of discharging the bond. It is the duty of a debtor, however, to redeem his note, and he should go to the residence of the creditor (where it is presumed men usually keep their notes) to discharge his debts, that is, if the creditor reside in the county or State. If Hoy, the agent, kept the note out of the way, and concealed his agency from Tuttle, for the purpose of converting the Arkansas currency into specie, and you are satisfied of this from the evidence, the law presumes it to be a fraud, and you will find for appellee. If you are satisfied Tuttle knew where his note was, it was his duty to tender the money on the day, or otherwise the debt would become a specie debt, and you will find for appellants. A tender after the day is no tender unless the principal and interest is also tendered. A tender of a chattel after the day is no tender." To which instructions appellants excepted."

Appellants incorporated all of the above exceptions in their motion for a new trial: and appealed to this court.

D. WALKER, for appellant. The Circuit Court erred in refusing the appellants leave to qualify their witness, and use his evidence on the trial. The security for costs may at any time be discharged by giving a new bond, and when thus discharged, the security is a good witness. *McLain* v. *Churchill*, 5 *Ark. Rep.* 239.

The Circuit Court permitted a tender of Arkansas currency, after the day the note became due, to be given to the jury. This was clearly erroneous. After the note became due, it could only be discharged in cash, not currency; it would not even stop interest. *Chit. Cont.* 796. 3 *Pick.* 414. 5 *Pick.* 187, 240. 12 *Mass.* 277. Tender after the day can never be made, unless the damages can be ascertained by computation. *Day et al.* v. *Lafferty*, 4 *Ark. Rep.* 450.

The Circuit Court erred in refusing to instruct the jury that it was the duty of the defendant, to seek the plaintiffs, or their agent, if residents of the county, and tender, or seek to tender, the Arkansas currency on that day, and to excuse him from doing so, he must show that he was ready on that day, and made diligent enquiry for the plaintiffs, and they were not to be found, or did not reside in the county. 2 *Bibb*, 404. 5 *Monroe*, 372. 2 *Pirt. Dig.* 434. *Chitt. on Con.* 727.

He, who is to make the tender, must seek him to whom it is to be made, if within the State. 2 *Hill*, 352, *note A. Pirt. Dig.* 439.

On a plea of tender and refusal, the money must be brought into court, and so stated in the plea, and upon issue for defendant, the plaintiffs are entitled to the money out of court. 1 *Bibb*, 275. *Tidd's Pract.* 646, 895. 1 *Saund.* 33, *notes.*

In this case the damages were unliquidated, and therefore, a plea of tender could not be interposed. 1 *Saund.* 33, *note C.;* and particularly after the day when payment is to be made. 4 *Ark. Rep.* 450.

A plea of tender admits indebtedness, and cannot be pleaded with the general issue. 1 *Saund.* 33.

Although formal pleadings were dispensed with, the same facts

must appear in proof, as in a case of original Circuit Court jurisdiction.

E. H. ENGLISH, *contra.*

JOHNSON, C. J. This case was brought into this court by appeal, to reverse the decision of the court below, overruling the motion for a new trial.

The bill of exceptions exhibits several points for our adjudication, each of which will be disposed of, in the order there presented. The question first to be determined is, whether a tender in the currency of Arkansas at any time after the obligation fell due, could operate to protect the defendant from its payment in the constitutional currency of the country. The instrument upon its face, is in the alternative, and there can be no doubt but that it could have been discharged in the currency of Arkansas, in case the maker, by his own laches, did not deprive himself of that right. The legal interpretation of the contract is, that it may be discharged, on or before the day of its maturity, in Arkansas currency; but if not so discharged, then to become a specie debt. It is not pretended that any attempt was made to make payment until after the bond had reached maturity; but in order to excuse the omission an effort is made to show that the agent of the plaintiff concealed and kept it out of the way, so as to prevent its payment, and thereby to convert it into a specie debt. How this really was in point of fact, is wholly immaterial as it can have no influence upon the question involved. It is by no means essential that the debtor should be actually presented with the paper constituting the evidence of the contract between the parties, in order to enable him to make a complete legal tender. He is authorized to make the tender, on the last business hour of the day, upon which the debt falls due, and if he avails himself of his legal rights, he cannot be deprived of their benefit, by the neglect or refusal of the creditor to receive the thing contracted for, and to deliver up the evidence of the debt.

The next step taken by the plaintiff, in the progress of the trial, was to prove that their agent, before and at the time the debt became

due, resided in the vicinity of the defendant. This testimony was resisted upon the ground that the witness was a security in the bond for the costs of the suit. The objection was sustained by the court, and the reason assigned is, that the bond for costs, being a pre-requisite to the commencement of the suit, it could not be cancelled and another substituted in lieu of it. It appears affirmatively by the record that the plaintiff tendered good and sufficient security, and offered to execute a new bond, conditioned for the payment of all costs that had or might accrue. The opinion of the court delivered in the case of *McLain's admr'x* v. *Churchill et al.,* reported in the fifth volume of the Arkansas Reports, at page 240, is directly in point, and conclusive against the decision of the Circuit Court in this case.

After the testimony was closed, the court was called upon for sundry instructions. The plaintiff first moved the court to instruct the jury that it was the duty of Tuttle, the defendant, to seek the plaintiffs, or their agent, if resident in the county where the debt was contracted, and to tender the Arkansas currency, or seek so to do, on the day the writing fell due, and that if he failed to do so, the jury should find for the plaintiffs. This the court refused, but proceeded to instruct as follows, to wit: "That if a note be made payable in Arkansas currency, or money in the alternative, on or before a particular day, the maker of the note is bound to pay, or tender the Arkansas currency, on or before the day the note fell due; and that if he failed to do so, his election is gone, and the maker of the note is bound to pay the money: And that if the jury believe that the Arkansas currency was not tendered until three days after the writing obligatory became due, they must find for the plaintiffs." The court ruled correctly in refusing to instruct the jury in the terms indicated, as they would have been fully warranted in supposing that in case the creditors resided beyond the limits of the county where the contract was made, that there would be no necessity of using any exertion whatever to made the tender. The instruction given by the court was a substantial compliance with the law, and, therefore, correct. It is laid down in the case of *Smith* v. *Smith, 2 Hill, N. Y. R. p.* 351, that "In general, if no place for the payment of money be specified in a contract, the party who is to make the payment,

must seek the other party, if within the State; and a tender at the residence of the latter during his absence will not avail." The court also gave other instructions without the request of either party; some of which have already been virtually passed upon, and the rest are mere abstract propositions as having no evidence upon which they can be based. The defendant having wholly failed to tender the amount of the obligation, at any time during the day that it fell due, in Arkansas currency, or to show any legal excuse for his failure to do so, the debt became payable from that time alone in constitutional currency. It is not pretended that any attempt was made to discharge it in specie subsequent to its becoming a specie debt; it is, therefore, clear that no facts were adduced before the court, which would relieve the defendant from the costs of the suit. The Circuit Court, therefore, clearly erred in refusing a new trial.

Judgment reversed.