DUGAN AD'R *vs.* FOWLER.

The Territorial Statute authorizing the issuance of executions against the principal and securities in a forfeited delivery bond, did not preclude the creditor from instituting an ordinary suit upon the bond.

Writ of error to Pulaski Circuit Court.

Action of debt by James S. Dugan, as administrator of Ezekiel Dugan, against Absalom Fowler, on a forfeited delivery bond (taken under act of 7th Nov., 1831. *Steel & McCampbell's Dig.* 345), determined in the Pulaski Circuit Court, October term, 1846, before the Hon. WM. H. FEILD, Judge.

The facts are stated by the court.

WATKINS & CURRAN, for plaintiff.

FOWLER, contra. Under our present law upon delivery bonds they are not made to operate as a judgment; but on the other hand the party has to institute a new suit on the bond, either by motion or by ordinary proceeding, *(Rev. Stat. p.* 380, *sec.* 40*)*, consequently none of the decisions under this statute are applicable to the case before the court, and we are driven elsewhere to find an appropriate rule of law.

Under the Territorial statute, as decided by the courts of other States under like enactments, a forfeited forthcoming bond is a complete satisfaction of the old judgment. 3 *How.* (*Miss.*) *Rep.* 60. *McNutt et al.* v. *Wilcox et al., ib.* 419. *Schobee* v. *Dedman, &c.,* 2 *Lit. Rep.* 117. *Camp* v. *Laird,* 6 *Yerg. Rep.* 248. *Joyce* v. *Farquar,* 1 *Marsh. Rep.* 20. *Harrison* v. *Wilson,* 2 *Marsh. Rep.* 557.

The delivery bond being returned forfeited in strict compliance with the statute, the execution was completely at an end; and the forfeited bond assumed the form of, and became actually in law, a judgment. *Lusk* v. *Ramsay,* 3. *Munf. Rep.* 424. *Witherspoon* v. *Spring,* 3 *How.* (*Miss.*) *Rep.* 60. *McNutt et al.* v. *Wilcox et al.,*

ib. 419. *Hopkins* v. *Chambers, 7 Monroe's Rep.* 261. *Love* v. *Smith,* 4 *Yerg. Rep.* 129 *et seq. Downman* v. *Chinn, Ex. of Downman,* 2 *Wash. (Va.) Rep.* 191. *Hagan* v. *Lucas,* 10 *Peter's Rep.* 404, 405.

CONWAY B., J. In February, 1883, Ezekiel Dugan recovered a judgment against John H. Cocke, for about $200. He sued out execution against him and it was levied on slaves, and Cocke gave a delivery bond with William Cummins and Absalom Fowler as his securities and the bond was forfeited. Ezekiel Dugan died, and administration of his estate was granted to the plaintiff. Cocke and Cummins having also departed this life, plaintiff instituted this suit on the forfeited bond, against Fowler alone. He demurred to the declaration, and assigned for cause, that by virtue of the statute under which the bond was given, such bonds, when forfeited, operated as judgments, and thereby became merged and extinguished as bonds, and the court sustained the demurrer. To reverse this decision, the plaintiff prosecutes the present writ of error.

At the time the bond sued on was executed, there was a statute in force here, authorizing the issuing of executions against principals and securities, on the forfeiture of such bonds. But there was nothing in the statute indicating that the Legislature designed, by this provision, any thing more than to facilitate the remedy on the bonds. And notwithstanding they were made the bases of executions, and in this respect given the character and effect of judgments, they were not thereby constituted judgments. In truth, it was not within the scope of legislative authority, to make them such. The legislature may in their wisdom provide even summary means for the enforcement of rights, but they cannot, by legislation, metamorphose bonds into judgments. They are judicial sentences, not legislative acts. In the case of *McNutt et al.* v. *Wilcox & Feam,* Chief Justice SHARKEY, in delivering the opinion of the high court of errors and appeals of Mississippi, says "The statute gives to a forfeited forthcoming bond, the effect of a judgment, but there is, in truth, no judgment, as the court does not pass upon it, nor is any judgment entered on the record," 3 *Howard* 421.

The plaintiff did not loce all remedy on the bond, by the legislature's repealing the statute allowing execution. That was only a cumulative remedy, and even before its repeal the obligee might have disregarded it, and resorted to an ordinary suit. And its abrogation did not at all impair the obligatory force of the bond; it only deprived the obligee of the specific remedy prescribed by it, and did not preclude him from redress by an appropriate action. Judgment reversed.