CUNNINGHAM *vs.* CHEATHAM.

In action upon a conditional bond, it is sufficient to assign breaches in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import or effect: and so, in an action upon a delivery bond, it is sufficient to negative the delivery of the property according to the condition of the bond, and affirm that the sheriff returned the bond as forfeited.

Writ of Error to the Hempstead Circuit Court.

DEBT, determined in the Hempstead Circuit Court, at the May term, 1846, before the Hon. GEORGE CONWAY, Judge.

Declaration:

"William Cunningham complains of Henry Cheatham of a plea," &c.—(usual commencement in debt.)

For that said defendant (and Robert Carrington, since deceased,) on the first day of March, 1842, at, &c., executed and delivered to the plaintiff their certain writing obligatory, in the words and figures following, to wit:

Know all men by these presents, that we, Robert Carrington, as principal, and Henry Cheatham, as security, are held and firmly bound unto William Cunningham, in the sum of two thousand five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, &c., &c., firmly by these presents: signed, &c., sealed, &c., this 1st day of March, 1842.

The condition of the above obligation is such, that, whereas, the above named William Cunningham has sued out an execution for one thousand two hundred and fifty-nine dollars and fifty cents, including debt, damages, and costs, on a judgment obtained by him against the above named Robert Carrington, in the Circuit Court, in and for the county of Hempstead, at the October term thereof, in the year 1841; which execution has been placed in the hands of William Arnett, sheriff of said county, and is made returnable to the second day of the next April term of said Circuit Court; and where-

as, the said William Arnett, sheriff as aforesaid, to satisfy said execution, has levied on the following described property of the said Robert Carrington, viz: two negro men, named Charles, (about 25 years old), and Robert, (aged 25 years), both slaves for life: Now, if the above bounden Robert Carrington and Henry Cheatham, shall safely deliver into the hands of William Arnett, sheriff as aforesaid, the above described personal property, levied on as aforesaid, without injury or waste, at the court-house door in the town of Washington, in the county aforesaid, on the 4th day of April next, between the hours of 9 o'clock in the forenoon and 3 o'clock in the afternoon of said day, then the above obligation to be void and of no effect, otherwise to remain in full force and virtue. In testimony whereof," &c. &c. "ROBERT CARRINGTON [seal.]

HENRY CHEATHAM [seal.]"

"And which said writing obligatory having been lost, the said plaintiff cannot produce to the court here.

And the said plaintiff, for assigning a breach of the condition of the said writing obligatory, avers that the said Robert Carrington in the lifetime of the said Robert, and Henry Cheatham did not safely deliver into the hands of said William Arnett, sheriff as aforesaid, the said negro men, slaves for life, named Charles and Robert, as mentioned and specified in the said condition of the said writing obligatory without injury or waste, at the court-house door in the town of Washington, in the county aforesaid, on the fourth day of April, then next ensuing the date of said writing obligatory, between the hours of nine o'clock in the forenoon, and three o'clock in the afternoon of said day, but wholly neglected and refused to comply with the said condition of said writing obligatory, or any part thereof; and that said William Arnett, as such sheriff as aforesaid, did afterwards, to wit: on the fifth day of April, A. D. 1842, return said writing obligatory, certifying that the condition of the same had not been complied with. By means whereof, and by force of the statute, &c., an action hath accrued, &c. Yet the said defendant, &c." — (usual conclusion in debt.)

Defendant demurred to the declaration, on the following grounds: "1st. The declaration does not state whether said delivery bond was

given upon an execution lawfully issued from any court—or whether the execution was returned or not, or what return, if any, was made thereon—nor whether the bond was returned with the execution as required by law: 2d. Said declaration does not allege the non-payment of the debt, damages, and costs, in the said supposed execution specified."

HEMPSTEAD, for the plaintiff. According to the approved rules of pleading, this declaration is sufficient in form and substance. It sets out the bond *in haec verba,* and properly assigns the breach in the very language of the condition. 1 *Chitty's Pl.* 116. *Bender* v. *Fromberger,* 4 *Dall.* 436. *Fletcher* v. *Peck,* 6 *Cranch,* 127. *Hughes* v. *Smith,* 5 *J. R.* 168. *Smith* v. *Janson,* 8 *J. R.* 111. *Sedgwick* v. *Hollenback,* 7 *J. R.* 376. *Craghill* v. *Page, Governor, &c.,* 2 *Hen. & Munf.* 446.

A delivery bond is governed by the same rule, applicable to other contracts, and consequently upon showing its execution and forfeiture, a complete right of action must accrue to the obligee.

It is true that this court held in *McKnight* v. *Smith.* 5 *Ark.* 410, that in the summary proceeding by motion for judgment on a delivery bond, the law affixed the force of notice to two acts, the forfeiture of the bond and the return of the execution unsatisfied, and that those two facts must appear before a party could be said to have the statutory notice. The doctrine in that case has no application to this suit, which was commenced by filing a declaration in the ordinary mode, issuing regular process, and actually serving it on the defendant.

If the bond was void, or the execution satisfied, or the property delivered, these are matters of defence, which it was neither necessary nor proper to introduce into the declaration. The bond estops the defendant from denying the existence of the judgment and the issuance of execution upon it, and the return of the bond by the proper officer forfeited is at least *prima facie* evidence that the execution was unsatisfied. All these appear in the declaration, and the demurrer should have been overruled.

PIKE & BALDWIN, contra. The sufficiency of the declaration is

the only point here: and it is not a little remarkable that any doubt could exist upon this subject after the manifold decisions of this court upon this subject. *Patton* v. *Walcot,* 4 *Ark.* 579. *Jennings* v. *Ashley,* 5 *Ark.* 128. *McKnight* v. *Smith,* 5 *id.* 410. *Byrd* v. *Brown, id.* 709, *and Pelham* v. *Page,* 1 *Eng. R.* 148, all go to settle this cause and free it from doubt. *See People* v. *Russell,* 4 *Wend.* 510. *People* v. *Brush,* 6 *Wend.* 454.

It may be true that every thing in the declaration stated, is as set forth, and then the party not be entitled to judgment, and this is the criterion of decision in this cause.

Admit that the negroes were not delivered: what then? unless the judgment was yet unsatisfied no cause of action accrued upon the bond. It must affirmatively appear upon the declaration itself that the cause of action is subsisting and unsatisfied. *Hammett* v. *Lindsay,* decided subsequent to 1 *Eng.* and *Dickerson* v. *Morrison,* 5 *Ark.* 318.

It must be averred that the judgment is unsatisfied. *McKnight* v. *Smith, and Pelham* v. *Page ub. sup.*

It cannot be safely contended that the defendant might have shown payment of the judgment by plea. That is asking the whole argument: as well might I declare upon a bond due me for $500, without alleging that it yet remained unpaid. If declarations are but to show that men once owed a debt, every principle of good pleading is at once abandoned. A debt due must be shown. 1 *Chit. Pl.* 285, *a.*

Where a party does not allege his cause of action with precision and certainty, or leaves anything to inference or deduction, he ought to be punished in costs for careless and slovenly pleading. *Carpenter* v. *Alexander,* 9 *J. R.* 291.

It should also be borne in mind that Cheatham is but the security of another, and in *Hempstead & Conway* v. *Watkins,* 1 *English,* it was held that securities should have causes clearly made out against them before judgment.

OLDHAM, J. This was an action of debt by Cunningham against Cheatham upon a delivery bond. The declaration sets out the bond and the condition. The breach especially negatives the delivery of

the property, according to the condition of the bond, and avers that the sheriff returned the bond as forfeited. The defendant demurred, and assigned as causes for demurrer, that there was no averment in the breach, that the execution had been returned unsatisfied, and that the original debt had not been paid. The court sustained the demurrer. The plaintiff has brought the case into this court by writ of error, and assigns for error the decision of the court below upon the demurrer to the declaration.

A breach may be considered well assigned, if it be in the words of the contract, either negatively or affirmatively, or in words co-extensive with its legal import, or effect. *Phillips & Martin* v. *Gov.*, 2 *Ark. R.* 382. The breach in this case contains a complete denial of the performance of the condition of the bond, and, according to the well established rules of pleading, is sufficient. The case of *McKnight* v. *Smith*, 5 *Ark. R.* 409, and other cases, to the same effect, are not analagous to the one now before the court. The proceedings in those cases were summary, and without actual notice, and it was there held that the record should affirm the facts as evidence of a constructive notice, for the purpose of showing the court possessed jurisdiction of the parties and of the subject matter. But the present case is a regular action according to the course of the common law, with actual personal notice upon the defendant. by summons legally executed. The causes assigned for demurrer are matters of evidence, to be brought forward by plea, and it is not necessary that the plaintiffs should deny them by anticipation. We consider the breach well assigned, and consequently that the Circuit Court erred in sustaining the demurrer.

Reversed.