BENTLEY *vs.* FOWLER AND BLACKBURN.

A judge of the Supreme Court has no authority to take a recognizance and award supersedeas in a chancery case, when the appeal was taken in the court below. The court or judge by whom the appeal is granted, in such case, can alone take the recognizance to stay execution of the decree.

Writ of Error to the Circuit Court of Pulaski County.

This was an action of debt, brought in the Circuit Court of Pulaski county, by George H. Bentley, against Absalom Fowler and Samuel D. Blackburn, and determined at the October term, 1846, before the Hon. JOHN J. CLENDENIN, Judge.

The declaration sets out a recognizance entered into before one of the then judges of this court, to stay proceedings under a decree of the Circuit Court, in a case then pending in this court, on appeal granted by the Circuit Court. The defendants demurred to the declaration; and the court sustained the demurrer; and the plaintiff sued out his writ of error.

The demurrer to the declaration assigns various causes: but the only question decided by this court is as to the validity of a recognizance to stay proceedings entered into before a judge of this court, when the appeal had been granted by the Circuit Court.

RINGO & TRAPNALL, for the plaintiff.

FOWLER, for himself. We object to the validity of the declaration, because, under the circumstances, a Supreme Judge had no lawful power to take the recognizance sued on; and consequently it has no binding effect on the parties. In this case, the Circuit Court had previously granted the appeal in chancery; and where the appeal has been so granted, the Supreme Judge cannot regard it, or take a recognizance. The act of the Circuit Court is perfect, and the party can either take it to the Supreme Court without giving security, or enter into a recognizance before the Circuit Court. And it is only where the party has neglected to take his appeal in the Circuit Court, that the power of the Supreme Court or judge can come in and grant the appeal. And the Supreme Court or judge thereof can in no case take the recognizance, except where it or he has granted the appeal. Because the law is express that the "recognizance shall be entered into" and "approved by the court or judge granting the appeal." In this case Dickinson did not grant the appeal, and therefore his act is a mere nullity. *Rev. Stat., page* 174, 175, *sec.* 137, 138, 139, 140 *et seq.* And so this court viewed the question in the case of *Fowler* v. *More,* at the July term, 1844. Fowler had prayed an appeal, and it had been granted by the Circuit Court, and he brought it up to this court, without entering into a recognizance to stay proceedings. In full bench he filed a motion for a supersedeas, on entering into recognizance here, but the court overruled it, without looking into the transcript to see if there were errors, and declared that, as the Circuit Court had granted the appeal, this court had no power to take the recognizance.

Again, the declaration shows that the recognizance was taken in a cause then pending in the Supreme Court, in which Cummins was appellant, and Levi Bentley and George H. Bentley were joint appel-

lees: and the recognizance was taken to George H. alone, when it ought to have been to him and Levi both, as joint parties to the suit. The recognizance must be "to the opposite party." *Rev. Stat., p.* 174, 175, *sec.* 137 *et seq.; p.* 639, *sec.* 143.

The first count does not show that the execution of the judgment at law was ever suspended, or superseded, without which Bentley could not be injured, and the recognizance falls innocuous—the plaintiff showing no cause of action. And the second count is liable to the same objection.

The declaration, and especially the second count, is bad, because the amount of a judgment at law is claimed, which had been enjoined, and the injunction dissolved, and from which decree dissolving the injunction, the appeal had been taken, when it is contended that the appeal, by law, from such a decree, does not continue the injunction, or supersede the judgment at law; consequently, the recognizors could not in law be liable for the amount of that judgment: therefore, the breach assigned in each count is, in this respect, radically bad; See 13 *Johns. Rep.* 140, *Hoyt* v. *Ghelston & Schenck.* 3 *Alabama Rep.* (*New Series*) 514, *Boren et al* v. *Chisholm.*

The plaintiff in error can derive no aid from sections 1, 2 and 6 of *Art.* 6, of the Constitution, on which he relies in his brief. Those sections only give the Supreme Court the appellate power "in such manner as may be prescribed by law," and for the manner of exercising that power, the Statutes alone are the guide. And those Statutes declaring that the power only which grants the appeal must take the recognizance, excludes absolutely the legal power of Judge Dickinson in this case, as he did not grant the appeal. See 2 *Ark. Rep.* 95, *Jones, Exparte.*

CONWAY B, J. This was a suit on a recognizance entered into before one of the precedent Judges of this court. Its object was to obtain supersedeas of execution on a chancery decree, from which an appeal, then pending, had been granted by the Circuit Court, without appellant's giving recognizance. And the principal question is, whether in such case the judge has authority to take the recognizance

and award the supersedeas? Our State Constitution, in article sixth, section second, expressly confers the power on each of the judges of this court, to issue writs of error and supersedeas. There is no explicit authority given them to take recognizances, but that power is unquestionably implied, if necessary to the exercise of the express grant. By the common law, no recognizance or bail in error was required to obtain supersedeas. The writ of error itself operated as a supersedeas. So a litigant, by bringing error, could stay execution of the judgment against him without giving to his adversary any security whatever. But the inconvenience and injustice of this was early felt. As far back as the reign of Henry Seventh of England, the court of King's bench refused to allow such writs until some error in the record was shown them, lest they should be brought on purpose to delay execution; and in the reign of Queen Elizabeth, the justices of the court of Common Pleas made a similar order; and Parliament, in the third year of James the first, passed a Statute requiring (in many cases) that plaintiffs in writs of error should enter into recognizances with approved securities, before they obtained stay of execution. Subsequently, other acts on the subject were passed, more general in their provisions, but none of them were ever in force here, except the act of the third of James first, and that has been superseded by our own Statutes on the same subject. They allow writs of error to issue of course on all judgments of the Circuit Court any time within three years from their rendition, but do not authorize supersedeas of execution unless the plaintiff in error be litigating as executor or administrator, or unless he enter into recognizance with approved security. *Rev. Stat.*, 641-2, *sec.* 1, 2 and 16. The writ of error and supersedeas, however, are remedies confined entirely to proceedings and judgments at law. They are inapplicable and unknown means of redress in chancery. A person aggrieved by a decision, order or decree, cannot have relief therefore by writ of error and supersedeas. He must resort to appeal or bill of review. He can have an appeal from the Circuit Court any time during the time at which the decision, order or decree was made, or this court, or a judge thereof in vacation, may grant it to him any time within a year from the rendition of the decision, order or decree. And he may take it without

giving recognizance to the adverse party, but it will not then operate as a stay of execution, unless he be executor, administrator or guardian, and appeal as such. *Rev. Stat.,* 174, *secs.* 137-8-9 and 140.

Thus there are three tribunals vested with competent authority to grant appeals, and it is optionary with the person desiring an appeal, to which of them he will make application. If he chooses to pray it of the Circuit Court making the decision, order or decree, he has the right to do so. If he asks it, without giving recognizance, it is his privilege to take it thus, but he assuredly precludes himself from afterwards resorting to either of the other tribunals to give recognizance and obtain stay of execution. The Statute obviously contemplates and requires such recognizance to be entered into before the tribunals granting the appeal. *Rev. Stat., chap.* 23, *secs.* 139, 140; and if the appellant fails to enter into it there, his right to give it is waived and his immunity of supersedeas lost. For there is no authority any where to change or modify the terms or conditions upon which the appeal has been granted and taken.

If the time for appeal has elapsed, and the grievances complained of, are errors apparent on the face of the decree, recourse may be had to a bill of review any time within three years from the enrollment of the decree. *Story's E. P.* 326, and *Rev. Stat.* 641, *sec.* 2. In the case of *Fowler* v. *More,* on motion for supersedeas, at the July term, 1844, this court determined "that it had no authority to grant the writ." The legal features of that case and the one in which the recognizance now sued on originated, were identical, and presented the same question as to the power. Both were chancery suits, in which injunctions to judgments at law had been granted and dissolved, bills dismissed, and appeals awarded by the Circuit Court. The case of Betterson against Jennings was essentially different. In that case the appeal was granted by this court. It was proper therefore for the recognizance to be entered into here. Independent of these cases, however, we have come to the conclusion, after a careful examination of the Statutes on the subject, that the tribunal granting the appeal is the only one possessed of authority to take the supersedeas recognizance. As, therefore, the Circuit Court had granted the appeal in this case, the recognizance sued on was taken

without due warrant, and consequently has no validity. The demurrer was properly sustained by the Circuit Court, and its judgment is affirmed.