FERRIER *vs.* WOOD.

Where the record entry states that a party prayed an appeal, filed his affidavit therefor and the appeal was granted, on the 15th day of the month, but the clerk certifies at the bottom of the affidavit that it was sworn to and subscribed on the 16th of the month, the record entry must prevail over such certificate, and the affidavit will be regarded as having been filed before the granting of the appeal.

Case and assumpsit are concurrent remedies against a bailee for negligence.

A count in trover may be joined with case.

Where plaintiff bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition, he cannot maintain case or trover for the value of the horse against a bailee who was to deliver him on the performance of such precedent condition.

Appeal from the Marion Circuit Court.

Trespass on the case, brought by Wood against Ferrier in the Marion circuit court, and determined at the April Term, 1847, before the Hon. W. W. FLOYD, one of the circuit judges.

There were two counts in the declaration: the first in case, alleging in substance, that on the 24th October, 1846, plaintiff delivered to defendant a brown bay mare, the property of plaintiff, to be taken care of and safely kept by defendant for the plaintiff, and redelivered on request. That defendant, though requested, failed to redeliver the mare, and by his negligence she was wholly lost to plaintiff. The second count was in trover, in the usual form.

The cause was tried on the plea of not guilty, and verdict in favor of plaintiff for $30 damages. Defendant moved for a new trial, which was refused, he excepted, put the evidence on record, and appealed. The substance of the evidence is stated in the opinion of this court.

CONWAY B, J., *on motion.* This case is here by appeal, and appellee moves its dismission for want of an affidavit in the court below to authorize the appeal.

There are two things necessary for a litigant to do to entitle him to an appeal from the circuit to the supreme court. *First,* he must pray it during the term at which the judgment or decision complained of was given: and *secondly,* during the same term he must file in the court an affidavit stating that such appeal is not made for vexation or delay, but because the affiant verily believes that the appellant is aggrieved by the decision or judgment of the court.

No objection is made to the time of praying the appeal, or the form or terms of the affidavit. The motion is based alone on the ground that the appeal appears to have been prayed and granted on the 15th of the month, and the clerk certifies at the bottom of the affidavit filed, that it was sworn to and subscribed on the 16th of the month. The record shows that the case was tried at the April term, 1847, on the 14th of the month, that on the 15th (the next day) appellant moved the court for a new trial, which, on the same day, was overruled, and that he then prayed an appeal and filed his affidavit. The entry is, "And the said defendant prayed an appeal in this case to the supreme court of the State of Arkansas, and filed his affidavit as the law requires, and thereupon it is ordered by the court that the said appeal be and it is hereby granted." The record entry of the court must govern the certificate of the clerk. The clerk was mistaken as to the day the affidavit was made; for it could not have been filed before it was made. Besides, for some purpose, the whole term of a court is to be considered as but one day, and we apprehend such should be the rule in cases of appeal under our statute. The motion is overruled.

E. H. ENGLISH, for appellant. The first count in the declaration, though in case in form, exhibits, if any, a cause of action in assumpsit, according to Chitty's *pig* case. *Chitty Plead.* 156, 185. If so, assumpsit and trover cannot be joined. But if this objection cannot be made on error, the verdict is unsustained by law or evidence.

The horse n question was won by plaintiff below on a horse

race, but never delivered to him, and the law, discountenancing gaming, will not aid him to recover it or the value. On the contrary, if the horse had been delivered, the loser could have recovered it back under our statute. *Digest, Tit. Gaming.*

To maintain trover or trespass, plaintiff must have a special or general property in the thing, and possession, or immediate right to possession. *Chitty Plead. Tit. Trover.* The proof here shows neither. Nor is a conversion proven.

There was no contract between plaintiff and defendant—no consideration moving from the former to the latter—the horse was never delivered to plaintiff and re-delivered, and there is no foundation for the verdict. If the plaintiff has a cause of action at all, it is against witness with whom he made the bet, and he cannot recover the horse of him, because he won him gaming.

If there remain to be done upon a contract some act to ascertain the quantity or *price,* the vendee cannot maintain trover until that be done. 1 *Chit. Plead. p.* 172.

If plaintiff had bought the horse of defendant, instead of having won him of *witness,* he could not maintain trover, because the evidence shows that the parties were to meet the next day and settle the *price* of the horse, prior to his delivery, and plaintiff did not attend.

If defendant had absolutely agreed to deliver the horse to plaintiff on the next day, and plaintiff had attended and defendant failed, plaintiff could not maintain this action, because the proof shows no consideration from plaintiff to defendant.

The verdict is therefore *"shocking on the first blush"* to our sense of justice, and a new trial should be awarded.

FOWLER, contra. Take the case in the most favorable view for Ferrier, it is still but a mere conflict of testimony—evidence on both sides—which it was the exclusive province of the jury to weigh: and in such case no court will overrule their decision. 5 *Ark. Rep.* 243, *McLain's adr. vs. Churchill et al.* 1 *English's Rep.* 430, *Lewis vs. Read.* 6 *Mo. Rep.* 63, *Dooley vs. Jennings.*

6 *Hill's Rep.* 447, *Conrad vs. Williams.* 2 *Pet. Rep.* 323, *Roach vs. Hullings.* 6 *Pet. Rep.* 621, *Crane vs. Morriss et al.*

Wood's attorney has not had leisure to examine the pig case, referred to in the written argument for Ferrier: but suggests respectfully, that the learned counsel is mistaken in his position, that there is a misjoinder of action in this case. The counts are both in case and are by the safest and highest authorities well joined in the same declaration, and aptly drawn when tested by approved precedents. 2 *Chit. Pl.* 275, 276, 323 *et seq.* 1 *Ch. Pl.* 196, 197, 198. 1 *Term Rep.* 276, *Brown vs. Dixon.* 2 *Wils. Rep.* 321, *Dickson vs. Clifton.*

Any number of causes of action in case proper may be joined with trover. 1 *Chit. Plead.* 198. 1 *Term Rep.* 277, *Brown vs. Dixon.*

And even if a cause of action which ought to be laid in assumpsit be improperly laid in case and joined with a count in trover, no objection can be taken with effect on the ground of misjoinder, but by demurrer to the defective count. 1 *Ch. Pl.* 197.

And again, as a full set-off to the pig case of appellant's counsel, it is laid down and so expressly adjudicated that a count for not returning a dog delivered to the defendant, to be returned in a reasonable time to the plaintiff, may be joined in one action with a count in trover. 1 *Ch. Pl.* 198. 1 *Term. Rep.* 276, *Brown vs. Dixon.*

JOHNSON, C. J. It is insisted that, though the first count in the declaration is framed in case, it lay in assumpsit, and that therefore it is a misjoinder. The plaintiff below had the undoubted right to elect between the two, and having chosen to frame it in case, he was clearly at liberty to add a count in trover. Case is the appropriate remedy for injuries to personal property, not committed with force or not immediate, or where the plaintiff's right thereto is in reversion. It lies against attorneys or other agents for neglect in the conduct of a cause or other business, or for not accounting for money, &c., though it has been more

usual to declare in such cases in assumpsit. It also lies for negligence against bailees, as against carriers, wharfingers, and others having the use or care of personal property. See, 1 *Chit. Pl.* 140. It is laid down by the same writer, that case will lie for not returning a spaniel delivered to the defendant to be tried and returned in a reasonable time, and also, that a count in trover may be joined with it. See, 1 *Chit. Pl.* 202. The two counts therefore were well joined in the declaration.

The only question remaining to be decided, relates to the sufficiency of the testimony to warrant the verdict. The first witness called by the plaintiff below testified that he was sitting on the road side, when the defendant passed along leading a certain brown brute, that the defendant was asked if that was the nag which was won on the race or put upon a race the day before, that he replied she was the mare the plaintiff won from Sinclair, and said he had borrowed her from the plaintiff for his little son to ride home, and that he was carrying her back to him, and enquired if the plaintiff was in town, and that this took place about two weeks after the last term of the Marion circuit court. The plaintiff proved, likewise, by another witness, that some time in the latter part of October last past, he was called upon by the plaintiff to witness the fact that he demanded his mare of the defendant, that the defendant replied that the mare was in town, and if he wanted her he could go and get her, and that he would not deliver her to him, that the plaintiff was to meet him in town to get the mare, and that the plaintiff denied that he was to meet him in town, but said the defendant was to come by his house, and that perhaps he would go with him to town, and that the defendant again said he was to meet him in town to get the mare. The defendant then introduced a witness, who stated that he and the plaintiff had made a race for one hundred dollars in property, which was to come off some time in the latter part of October last past, that he (the witness) wanted a nag to put up as a stake, that he stated to the plaintiff that he wanted to see Clements in order to get a nag from him, that defendant said he would let Cle-

ments have one, and told him (the witness) to take the nag and put it up to make the stake. He further stated that the plaintiff, the defendant and himself all agreed that if he (he witness) should lose the mare, that they and Clements, who was then present, would meet the next day in the town of Yellville, and have her valued, and that if he (the witness) was satisfied with the valuation, Clements would become accountable to the defendant for the value, and that in that event the witness would receive the mare from Clements and deliver her to the plaintiff; but that if the witness was not satisfied with the valuation, he would let Clements keep the nag and furnish the plaintiff with as good a one in its stead. He also stated that he lost the mare, that the plaintiff and defendant came to him after the race was over, and that the defendant said in the presence of the plaintiff that he wanted to ride her home, and that he would bring her back the next morning to be valued according to the agreement, to which he himself consented, that the defendant in pursuance of his promise brought the mare back the next day and delivered her to Clements, when Clements and himself agreed upon the price, that the plaintiff failed to meet them at Yellville to receive the mare according to their agreement, after having been sent for the second time, that he (the witness) remained there during that day and until near noon on the next, when he rode the mare to his residence, near twenty miles distant, and that he never did deliver her to the plaintiff, and that the plaintiff never had possession of her. This is the substance of all the testimony adduced upon the trial of this cause. We consider it clear that the facts as disclosed before the jury, were not such as to warrant the verdict. The declarations of the defendant, if taken alone, might have left some room to doubt the real state of case; but when the testimony offered by the defendant is considered in connexion with them, all doubts and difficulties are entirely removed. The latter fully explains the former, and leaves the whole case clear and easily understood. The defendant admitted that he had borrowed the mare from the plaintiff, and that he engaged to return her to Yellville, and that the plaintiff was to

meet him there to receive her. He also stated that he had taken her to Yellville pursuant to his promise, and that the plaintiff had failed to meet him. From the testimony of the defendant's witness, the mare had not been delivered to the plaintiff, nor had the title passed to, or vested in him. She was to become his property in case the parties should all meet at the time and place appointed, and the witness should be satisfied with the value that might be set upon her. Here there was a condition precedent, which had necessarily to be performed before the title vested in the plaintiff, and the testimony is that it never was performed. The testimony of the defendant's witness does not contradict the declarations of the defendant as detailed by the witnesses of the plaintiff, but support and explain them. Every word the defendant said about having borrowed the mare of the plaintiff may be strictly true, and yet he never may have had the title, nor the actual possession. It is quite natural that the plaintiff should have taken the liberty to loan the mare under all the circumstances as related by the defendant's witnesses. This he might have done when no objection was interposed by the party to whom she belonged, and that too without having any strict legal right. That such was the true state of case, we think is abundantly proven, and that, therefore, the verdict was improperly found for the plaintiff. The judgment of the circuit court in overruling the motion for a new trial is, consequently, erroneous and ought to be reversed. The judgment is reversed and the case remanded.