PAUP ET AL. *vs.* DREW, AS GOVERNOR, &C.

The 28th section of the charter of the State Bank, which provided that the notes of the bank should be received in payment of debts due the State, having been repealed by act of 10th January, 1845, since the repeal, notes of the bank are not a legal tender in payment of a bond executed to the governor for a part of the seminary lands, even if the debt be regarded as due to the State in her own right.

The General Assembly had full power to pass the repealing act, as it is not a law impairing the obligation of contracts, as held in *Woodruff vs. Attorney General*, 3 *Eng. Rep.* 236, which case is approved.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought by Thomas S. Drew, as governor of the State of Arkansas, and successor of Archibald Yeil, late governor, against John W. Paup, James Trigg, and Richard Pryor, and determined in the Pulaski circuit court, in December, 1847, before the Hon. WM. H. FEILD, judge.

The action was founded on five writings obligatory for $784 each, executed, by the defendants, on the 13th day of May, 1842, to Archibald Yell, governor of the State of Arkansas, or his successor in office, payable and negotiable at the bank of the State of Arkansas, in specie or its equivalent, in one, two, three, four

and five years from date, and bearing interest at ten per cent. per annum.

The defendants filed a plea of tender in Arkansas bank paper, after suit brought, in substance as follows:

The plea alleges that the bonds sued on were executed to the governor, by the defendants, on the day of their date, for the purchase money of six hundred and forty acres of the lands granted to the Territory, and confirmed to the State, by acts of Congress, for the support of a seminary of learning, sold by the governor of the State, under the act of 28th December, 1840, authorizing the governor to sell said lands, to defendant Paup. That the bonds sued on, and the moneys and interest thereby secured, belonged exclusively to the State, and constituted, in law and in fact, a debt due to her and to no other person, and that the governor was therein and in regard thereto a mere naked trustee and a mere nominal party to the suit.

That before the sale of said land to Paup, and before the execution of said bonds, *to wit:* on the 2d day of November, 1836, by an act of the General Assembly of the State of Arkansas, entitled "An act to incorporate the Bank of the State of Arkansas," approved on that day, the Bank of the State of Arkansas, a public corporation, was created, the said State being the sole stockholder therein, and was authorized to issue and emit such bank bills as are hereinafter mentioned, and to exercise banking powers and privileges, and it was among other things provided and enacted that the funds arising from the sale of said seminary lands should be deposited in the principal branch of said bank, and constitute a part of the capital thereof; and it was further expressly provided, enacted, and stipulated, and by said State expressly agreed and contracted, that all the bills and notes issued by said bank should be received in all payments of debts due to said State of Arkansas, which provision, enactment, stipulation and contract was in full force, in no wise repealed, annulled, or set aside, at the time and times of the issuance by said bank of all its bills and notes, and particularly the bills and notes hereinafter mentioned; and the same were issued on

the faith and credit thereof, and by means thereof obtained currency, and the said contract is in all respects binding, obligatory, and valid upon and against said State and said plaintiff, and cannot be repealed by said State, nor the obligation of said contract impaired under the constitution of the United States of America:

That, after the said bonds fell due, and after the commencement of this suit, *to wit:* on the 20th day of October, 1847, the defendants tendered and offered to pay to said plaintiff, and to said State, or to either of them, the sum of $6,050 in the notes and bills of said bank, payable in current money of the United States, and long before then due, with the further sum of ninety-five cents in specie, to receive which of the defendants the State and the plaintiff wholly refused; and which sum the plea alleged to be the full amount of principal and interest due upon said bonds, and made profert thereof in court.

The record shows that the defendants brought said money into court, and also offered to pay costs of the suit.

The plaintiff demurred to said plea, on the following grounds: 1st. The plea shows no legal tender: 2d. That any law authorizing the paper of said bank to be received in payment of said bonds was repealed long before said tender: 3d. The plea only shows an equitable ground of off-set, if any thing, and no legal ground of defence: 4th. That the proceeds of said bonds are part of a trust fund committed to the State by Congress for special purposes, over which the State has no power, except to collect and disburse the same in pursuance of the objects of the grant; and the State has no power to apply said funds to the payment of her ordinary liabilities, nor is the State bound to accept in payment of such bonds depreciated bank paper, even though she may be ultimately liable to redeem such paper: 5th. The bonds sued on never constituted any part of the capital of said bank, nor were the issues of said bank ever made receivable in payment of debts due the State in a merely fiduciary capacity: 6th. The plea does not show that said bank bills were in the hands of defendants, or tendered, when the same, if ever,

were receivable in payment of said bonds: 7th. That if the charter of said bank created any obligation on the part of the State to receive said bank bills in payment of such debts, the defendants waived all right thereunder by expressly stipulating in said bonds to pay in specie or its equivalent: 8th. That in a law court the defendants have no right to go into or show upon what consideration said bonds were given, &c., &c.

The court overruled the demurrer, and the defendants permitted the final judgment to go thereon.

By a bill of exceptions taken by defendants, it appears that the bank paper tendered by them was worth but thirty cents on the dollar.

PIKE & BALDWIN, for plaintiffs in error.

E. CUMMINS, *Land Attorney,* contra.

JOHNSON, C. J. The question involved relates to the sufficiency of the plaintiffs' plea. The argument is that the governor being the mere naked trustee of the State, the moneys, though sued for in his name, are in reality due to the State in her own right. We deem it wholly immaterial for the purposes of this case, whether the governor is the real or nominal plaintiff. Under either state of the case the plea interposed by the plaintiffs could not avail them as a legal defence to the action. We will concede for the sake of the argument that the State is the party really and beneficially interested in the subject matter of this suit, and then see how the defence set up accords with the law. Upon the assumption that the State is the party really interested in this suit, which is the strongest grounds that could be taken for the plaintiffs, we conceive that the whole question is conclusively settled by the decision of this court in the case of *William E. Woodruff, Ex parte,* pronounced at the last July Term. That was an application for a mandamus by Woodruff to compel the Attorney General to receive the notes of the State Bank in payment of a debt due the State. The debt demanded in that case

accrued after the passage of the State Bank charter, and before its repeal by the act of 1845. It was insisted that the liability having accrued after the passage of the charter and before its repeal, it could be discharged in the bills and notes of that institution, and that the act of 1845 is a law impairing the obligation of contacts and consequently void. (*a*) This court, in that case, said: "It is objected that the act of 1845 is a law impairing the obligation of contracts, and that, therefore, it is repugnant to the constitution of the United States and void. This brings us to the only question really involved, and that is whether the act of 1845 so operated as to impair any obligation imposed by the contract in this case. It will be conceded that the entire debt accrued prior to the passage of the repealing act, and that the petitioner had an undoubted right to discharge it at any time before the repeal in bills or notes of the State Bank, we think, cannot, for a moment, admit of a doubt. But did the act of 1836 so incorporate itself into the contract as to become a part of the contract, and to fix and vest a right in the petitioner to discharge it in the kind of funds specified in that act? If such was the legal effect and operation of it, then it is clear that the doctrine contended for is not only sound in principle, but that it is conclusive upon the question, and the necessary result is that the legislature possessed no power to divest that right by a repeal of the act. We think that a single observation, touching the consequences which might very naturally flow from this mode of reasoning, will be fully sufficient to expose its utter fallacy. The act by which the State Bank was created was nothing more than a grant of power for certain purposes therein specified, which was exclusively under the control of the legislature, and consequently subject to be repealed at any time whenever in the wisdom of that body it should seem expedient for the good of the country. Suppose that, instead of merely modifying the charter and placing the bank in liquida-

(*a*) NOTE. The 28th section of the bank charter provided that the bills and notes of the bank should be received in payment of all debts due the State. The act of 10th January, 1845, repealed that section of the charter.—*Reporter.*

tion, they had conceived a total repeal better calculated to subserve the interests of the community. Upon the passage of the act abolishing the charter, that moment would the entire circulation of that institution have become wholly valueless, and, as a necessary consequence, it would in effect have operated as an extinguishment of the debt. The act relied upon by which the debtors of the State were permitted to make payment of the bills or notes of the State Bank was a mere gratuity, and, of course, liable to be revoked and withdrawn at any time when it should suit the purposes of the power that conferred it. If this position be correct, then it clearly results that the privilege of paying debts due the State in bills and notes of the bank was only conferred upon the implied condition that such debt should be paid before the repeal of the law, but, if delayed till after that event, in the absence of any saving in the repealing act, they could be discharged alone in the constitutional currency of the country." This, we believe, to be the sound and legitimate construction of the statutes, and as such fully approve and adopt it in this case. If the State would not be legally bound to receive the bills of the bank in case she is the party really and legitimately interested in this suit, for a much stronger reason would she not be if she is not entitled to the moneys in her own right. Under this view of the law, we do not conceive it necessary, or even important, to determine the attitude of the governor in relation to the subject matter of the suit, as in no aspect of the case could the defence set up by the plaintiffs be admitted.

We are, therefore, clearly of opinion that there is no error in the judgment of the circuit court in sustaining the demurrer, and that the same ought to be affirmed. The judgment of the circuit court is in all things affirmed.

NOTE. The case of *Trigg et al. vs. Drew, as Governor &c.*, was similar to this, and was affirmed under the decision in this case. Both cases have been taken to the Supreme Court of the United States by writs of error, and are now pending there.—*Reporter.*