STATE *vs.* THOMPSON, USE, &C.

The 12th *Sec. of Chap.* 23, *Digest,* which declares "that all persons having claims against the State, shall exhibit the same, &c., to the Auditor to be audited, settled, and allowed within two years after such claim shall accrue and not after," applies only to such claims as are recognized by some law authorizing the liquidation, and providing for the payment thereof.

Said section is no bar to an action against the State for money paid into the Treasury under an illegal assessment upon a billiard table.

If the State were liable at all for interest upon money thus illegally paid into the Treasury, it would only be from the time of demand, and default of payment.

But the State is not liable for interest in any case, unless by express agreement she makes herself liable.

Payment of money into the Treasury under such illegal assessment may be established by parol evidence.

Writ of Error to the Circuit Court of Pulaski County.

This was an action of assumpsit brought by Davis Thompson for the use of Darby Pentecost, against the State of Arkansas, and determined in the Pulaski Circuit Court at the April Term, A. D. 1846, before the Hon. JOHN J. CLENDENIN, then one of the Circuit Judges.

The declaration alleges that defendant, on the 1st Jan'y., 1845, was indebted to plaintiff in the sum of $1000, for so much money by her before that time had and received, to and for the use of plaintiff, &c.

The defendant pleaded, first: non-assumpsit. Second: "that the said claim in the said declaration mentioned, together with the evidence in support thereof, was not exhibited to the Auditor of Public Accounts of the State of Arkansas, to be audited, settled and allowed, within two years next after said claim accrued to said plaintiff." To the first plea plaintiff took issue, and demurred to the second, on the following grounds:

1st. Statutes of limitation do not apply in favor of, or against a Sovereign State, unless the State be included by express words.

2d. There is no Statute of limitations barring a demand against the State after the lapse of two years from the accrual of the right of action.

3d. The 12th Sec. of the law relative to the Auditor and Treasurer, does not, either in letter or spirit, comprehend suits against the State, and only governs the Auditor in a particular class of cases, and does not in any way embrace this case.

4th. The declaration shows a matter of trust, and that the State *quo ad hoc* stands in the relation of trustee for the plaintiff, and cannot, therefore, plead the Statute of limitations as a bar to this action.

The demurrer was sustained; the issue to the first plea submitted to the Court, sitting as a jury, and finding and judgment in favor of plaintiff for $754.50 damages.

By a bill of exceptions taken by the State, it appears that on the trial of the case, the plaintiff proved, by record evidence from the office of the Auditor of Public Accounts, that in the year 1837, a Billiard Table was assessed for taxes at $500, in Phillips county, to and in the name of Darby Pentecost. Plaintiff then offered in evidence the depositions of Miller Irvin and William E. Butts, to the reading of which defendant objected for matter of substance and not of form, but the Court overruled the objection. Irvin deposes that he was Sheriff of Phillips county from the year 1836 to 1840. That Darby Pentecost had a Billiard Table in Helena, in said county, and that a tax of $500 was assessed and collected on said Billiard Table by the State of Arkansas for the first six months of the year 1837, through him as Sheriff of said county, and that he paid the same into the Treasury of the State within the time prescribed by law. That, to the best of his recollection, the amount so taxed upon the Billiard Table, was paid to him by Davis Thompson. The Table was taxed in the name of Pentecost, but Thompson paid the tax. He stated these facts with the tax book of 1837 before him, &c.

Butts deposes, in addition to the facts stated by Irvin, that a short time after said Billiard Table was assessed to Pentecost, Thompson and one Applegate became the owners of it, and on

that account Thompson paid the tax of $500 to the Sheriff and collector, Irvin. The above is the substance of all the evidence. Upon these facts the Court decided that plaintiff was entitled to interest upon the $500 from the time it was paid into the State Treasury, and assessed the damages accordingly.

(It may be proper to remark, in explanation of this case, that by *Sec.* 5, *Chap.* 128, *Rev. Stat.* a Billiard Table was taxed $500 for six months. In *Stevens & Woods vs. The State,* 2 *Ark. R.* 291, the act was held to be unconstitutional and void.)

WATKINS, Att'y. Gen'l., contended, 1st: That by the 12*th Sec., Ch.* 23, *Dig.,* the plaintiff below was bound to present his claim to the Auditor within two years after it accrued, to be audited, settled and allowed, otherwise he could not sue; that this was a condition prescribed by the State, as she had a right to do, in allowing herself to be sued.

2d. That the plaintiff is not entitled in this case to interest, because he made no demand upon the State or her proper public officer for payment; if the State is liable to pay interest in any case.

3d. That parol evidence was improperly admitted to prove the payment of money on an illegal assessment of taxes—certified copies from the records, books and accounts of the Auditor's office should have been required. *Dig. ch.* 23, *Sec.* 6, 9, 15, *ib. ch.* 66, *Sec.* 11. *United States vs. Jones,* 8 *Peters* 375.

S. H. HEMPSTEAD, *contra.* 1st. The 12th section of the law regulating the duties of the Auditor and Treasurer upon which the second plea is founded is directory and addressed to the Auditor alone, and was obviously intended to apply to the business of his office and not as a period of limitation for any proceeding in Court. *Rev. Stat.* 141. *United States vs. Kirkpatrick,* 9 *Wheat.* 735. *United States vs. Van Zandt,* 11 *Wheat.* 184. *United States vs. Nicholl,* 12 *Wheat.* 509. *The United States vs. Bank of the Metropolis,* 15 *Peters* 401. Acts of limitation must be construed strictly. 3 *Bac. Abr.* 502.

2d. A State or Sovereign is not bound by a Statute unless there are special words to that effect. 5 *Com. Dig. Parliament* (R. 8.) *The King vs. Cook,* 3 *Term Rep.* 521. 2 *Ld. Raymond* 1066. *Powden's Com.* 240. *Dwarris on Statutes* 26. 9 *Law Lib.* 668. As to limitation the rule is "*nullum tempus occurrit regi*"—no time impedes the King. 1 *Bl. Com.* 247. And it has accordingly become a fixed principle that a statute of limitation does not run against a State or Sovereignty. 1 *Co. Lit.* 74 *note* 16. 1 *East.* 41. *Lindsey vs. Miller,* 6 *Peters* 666. *United States vs. Hoar,* 2 *Mason* 151. *The People vs. Gilbert,* 18 *J. R.* 228. On a parity of reasoning the State cannot avail herself of it as a defence.

3d. It was in 1840 that the law taxing billiard tables was declared unconstitutional in the case of *Stevens & Woods vs. The State,* 2 *Ark.* 298, and it was not until that time that the illegality of the tax was judicially known, although in reality the right of Thompson to reclamation accrued the moment the payment was made, and consequently if the argument of the Attorney General is correct, Thompson was barred before he had an opportunity of submitting his claim in any manner whatever, either to the Auditor or a Court of justice. A construction of a law producing such unjust consequences cannot be allowed.

MR. JUSTICE WALKER delivered the opinion of the court.

Thompson brings this suit to recover five hundred dollars which it appears the sheriff of Phillips county, under a misapprehension of law, received from him and paid into the Treasury.

We will first examine into the sufficiency of the plea of limitation. The State relies upon the 12th Sec. Dig. 203, which provides that "All persons having claims against the State shall exhibit the same with the evidences in support thereof, to the Auditor to be audited, settled and allowed within two years after such claim shall accrue and not after." The 13th sec. provides that "In suits brought in behalf of the State no set-off shall be allowed which has not first been presented to the Auditor and allowed." The 14th sec. authorizes the Auditor to issue process for witnesses, examine them on oath and pass upon the claim.

These sections were evidently intended to establish a tribunal to examine and pass upon claims presented against the State, and to limit the time for their presentation. The important inquiry in the present case is as to whether the terms "all claims" are to be taken in a comprehensive or a limited sense. By the 7th Sec. the Auditor is made the general accountant for the State: by the 9th Sec. he is required to audit, adjust and settle all claims against the State payable out of the Treasury; to draw warrants upon the Treasury for money: to express in the body of each warrant which he may draw on the Treasury for money the particular fund appropriated by law out of which the same is to be paid. These and numerous other duties and powers clearly indicate that the 12th, 13th and 14th sections have direct reference to the exercise of the power thus conferred; all of which, as well as these sections, pre-suppose the existence of some law authorizing the liquidation of the claim and providing for its payment. But cases, where the claim is not thus provided for by law, are not embraced within the provisions of the 12th section, for we will not presume that the legislature intended that claims should be presented which the Auditor had not power to hear and determine. We have found no Statute authorizing the Auditor to audit a claim of this kind: nor is there any provision made by law for correcting such mistakes. This being the case, the 12th section does not apply to the present case, and the demurrer was properly sustained to the plea of limitation.

The next question is whether the State is liable for interest; and if so, from what time shall it be computed?

The rule in regard to interest, where there is no express contract, is, that where the principal is to be paid at a specified time, the law has always implied an agreement to make good the loss arising from a default by the payment of interest. 2 *Burr.* 1086. This proceeds entirely upon the idea of a default; and it is a universal maxim, that, when interest does not run with the principal, none accrues until default is made in payment. 5 *Cowen* 611. KENT C. J. *in Day vs. Brett,* 6 *John.* 24, says "Money received or advanced to another carries interest after a default in pay-

ment." In the case of *Lynch vs. DeVian*, 3 *John. C.* 310 it is said, "It is a settled rule that money received to the use of another and improperly retained always carries interest." SPENCER J. in his very learned and thorough review of the law of interest, in the case of *Renss. Glass Factory vs. Reid*, 5 *Cowen*, 615, after referring to 9 *John.* 71. 13 *John.* 255, 11 *Mass.* 504, 13 *Mass.* 232. 1 *Dall.* 349. 4 *Dall.* 289. 3 *Binn.* 123 and 1 *Serg. & Rawle* 179, *says*, "All these cases allow interest where there has been fraud, injustice or delinquency, and none of them put the allowance of it on the ground of gain or benefit to the debtors for the use of the money alone." In Pennsylvania, interest is recoverable in assumpsit for money had and received, on money paid by mistake from the time of explanation and payment demanded." *Ring vs. Diehl* 9 *Serg. & Rawle* 409. These authorities we think in point, and it only remains for us to apply them to the case before us under consideration.

In this case the money was not only paid under a misapprehension of legal liability, but it was paid by a third person against whom the State had no claim, and to an agent who was not required to disclose to the State of whom he received the money. No presumption could arise that the State had any knowledge whatever of the claim of plaintiff to the money. On the contrary, the most violent presumption arises that the money paid in by the collector was collected from those assessed for taxation, and with regard to this particular sum, that it was collected of Darby Pentecost whose billiard table had been improperly taxed. But reviewed in the most favorable attitude for the plaintiff, he could not claim interest until he had presented himself as the real owner of this money and demanded it. The State, who must be presumed to be ever ready and anxious to pay all her debts and to do justice to all her citizens, could not, in the language of KENT C. J. be considered "in default of payment," or in that of SPENCER J., "guilty of fraud, injustice and delinquency."

We have thus far examined the question placing the State on the same footing of other litigants, leaving the main question to be determined as to whether the State can in any instance be

held accountable for interest upon her liabilities. This question, we confess, is entirely new, and one in which neither the research of counsel nor the examination of the court has furnished a single adjudicated case in point. We are left therefore unaided by precedent to decide it upon general principles, in view of the various statutory provisions relating to the financial system adopted by the State. In order to a correct understanding of this question we should bear in mind the true character and relative position of the parties. The State Government is vested with certain sovereign powers, necessarily conceded to it as incident to that supreme authority which the governing must possess over the governed. This supreme authority is delegated for the public good and exercised with a view to the accomplishment of that end. Its liabilities are all incurred for the purpose of defraying the expenses of the government. It has no private purposes to subserve. It incurs no responsibilities but those incident to the due administration of the law, and possesses no estate out of which to meet them but the common revenue placed in the treasury for that purpose. It is a well established rule that this supreme authority is never presumed to be exercised to the injury or prejudice of the citizen. The State is presumed to be prepared and willing to meet its liabilities and to do justice to all its citizens. This presumption is inseparably connected with the very idea of sovereignty and upon this familiar principle mainly rests the rule established by the English Courts and reaffirmed by an unbroken chain of decisions of the American Courts. *The King vs. Cook,* 3 *Term. Rep.* 521. 2 *Ld. Raym.* 1066. *United States vs. Hoar,* 6 *Peters* 666. 18 *John.* 228. *The People vs. Gillett,* 4 *Bibb* 528. *Cone vs. McGowan,* 7 *Mo. R.* 196. *Parbo vs. State,* 2 *Tenn. R.* 352; *and* 4 *Hen. & Mun.* 65; are all cases which sustain the principle that a general Statute of limitations shall not be construed to embrace the State unless specially embraced by name within its provisions; and place it upon the ground that the State is never to be presumed in default or derelict in duty. And the same principle applies with equal if not

additional force to this question of interest, as we will now proceed to show.

Interest was unknown to the common law, and the taking of any rate of interest was held unlawful. 37 *Henry* 8, *Chap.* 9, was the first Statute in England on the subject of interest. Prior to that time all interest was contrary to law. The right to recover it is therefore derived exclusively from Statutory provisions.—The language of our Statute is "Creditors shall be allowed to receive," &c. Now the question is, does this term "Creditors" embrace within its provisions the State, or shall the State be held exempt from its operation under the same rule of construction given to the Statute of limitation? The language of that Statute is equally broad and emphatic; it says: (in its legal effect) "All actions of assumpsit shall be brought within three years.". To this point the authorities are clear, that the State is not embraced within the limitation, because neglect or default is not to be presumed as against the State. The same principle applies with equal force to interest. The authorities are numerous and conclusive, as shown in investigating the first branch of the subject, that interest does not run until "after default of payment."—Therefore if it requires express language by name to bring the State within the provisions of the one act, it must necessarily require the same express enactments to bring it within the provisions of the other.

Passing from this view of the point there is still another which demands our consideration. It is this: The State has established, by law, a system of finances embracing within its provisions all her liabilities, and specifying how they are to be paid. These provisions may be found in the 7th, 9th, 10th, 12th, 16th, 17th and 22d sections Dig., under the head of Auditor and Treasurer, page 201, 204. These sections conclusively show that the State has provided a mode for the payment of all her debts out of a common fund raised by taxation for that purpose, pointed out the manner of presenting and allowing them, limited the time for their presentation, directed the warrants to be drawn in a particular manner so as to secure their payment in proper order, and

place all claimants on an equal footing. The 22d section is in the following language: "No warrant issued, or which shall be issued, shall be received in payment of debts due, or which shall become due the State, or the Bank of the State of Arkansas or its branches, nor shall any such warrants, under any circumstances, bear interest, or be received or allowed as an offset in any suit commenced, or which shall be commenced for the recovery of money due or which shall be due the State, or the Bank of the State, or any of the branches of said Bank, but such warrant shall only be received and paid by the State Treasurer." When it is remembered that by the 12th section every description of claim recognized by law, is required to be presented to the Auditor, whose warrant by the 22d Sec. is not allowed to draw interest, and that the State has made provision for suit against her for the purpose of establishing or proving such claims as are not embraced within the provisions of the 12th Section, such, we think, will be found the legal effect of the judgment. The 6th Section Digest 962, provides that "when judgment shall be rendered against the State, it shall be the duty of the Auditor of Public Accounts to transmit to the General Assembly a copy of such judgment and the proceedings thereon, and an appropriation shall be made to satisfy the same." This judgment gives the party no right to execution. The State has no property subject to be levied on and sold, greatly assimilating itself to the provision in the administration law, which provides for the allowance of claims by the administrator, or for suit in the Circuit Court.—Like the judgment there, it is in effect but the approval of the claim, and places this claim in precisely the same situation that is contemplated under the 19th Sec. Dig. 204, which says: "In all cases where the law recognizes a claim for money against the State and no appropriation shall be made by law to pay the same, the Auditor shall audit and settle the claim and give to the claimant a certificate of the amount thereof, under his official seal if demanded, and report the same to the Governor, who shall lay the same before the General Assembly." This certificate of the Auditor and this judgment of the Court stand in identically

the same situation. They are for all legal purposes the same, and both are referred to the General Assembly for an appropriation; and nothing takes the case before us out of the operation of the 12th Sec., but the fact that the claim was not recognized by law. Had it been, and no appropriation made for its payment, it would have come within the provisions of the 19th Sec., and should have been presented for certificate of approval; but not being recognized as a valid claim by law, the claimant had a right to resort to his suit against the State to establish the legality of the claim. Now it is perfectly clear that if this claim had been presented to the Auditor, interest could not have been allowed, and shall he be entitled to interest simply because he has sought a different tribunal before which to establish his claim? We think not. The State has adopted a general system of payments for all her debts, placed all her creditors upon the same footing, and we can see no reason for placing one class of claimants in a better situation than another; and whilst, from public policy or necessity, the State withholds interest from her creditors generally, that simply because the claimant has resorted to a different tribunal to establish the validity of his claim, he should receive more than he could otherwise have claimed. That delay, and consequently loss, frequently occur to claimants, we have no doubt; these are incident to the circumstances connected with the administration of law, and the relative position of the parties, and should be borne by all creditors alike.

Upon examination of the whole question, both as regards the liability of the State in her sovereign capacity, and of the several Statutes on the subject, we are of opinion that the State is not liable for interest in any case unless by express agreement she makes herself liable.

As regards the admission of the depositions in evidence, we think there was no error. From the state of the case it is very questionable whether a certified copy of the entries in the Register's Books would have furnished any evidence whatever. The plaintiff was not known upon the books, nor does his right to recover depend exclusively on the fact of his having paid the

money as taxes. If the plaintiff must prove a privity of contract between himself and the defendant, and that the money is his, this he may do by parol evidence.

The Circuit Court erred in allowing the plaintiff interest, and for that reason the judgment must be reversed. Let the judgment be reversed with costs.