STATE BANK *vs.* CURRAN.

The office of Justice of the Peace belongs to the Judicial, and the office of Sheriff to the Executive department of the State Government, are incompatible, and cannot be held by one person at the same time. *Const. Art.* 3*d. Sec.* 1, 2. *State vs. Hutt,* 2 *Ark. R.* 282.

Nor, for the same reasons, can a person hold the office of Justice of the Peace and deputy Sheriff at the same time—the acceptance of the latter vacates the former.

The acceptance of the office of deputy Sheriff is not a matter of which this court can take judicial notice.

Application to this court for supersedeas to the judgment of a Justice of the Peace, on the ground that the Justice had accepted the office of deputy sheriff before the judgment was rendered, and thereby vacated the office of Justice, and that the judgment was void. The transcript filed with the application, shows that this objection to his competency was made in writing before the judgment was rendered, and overruled by the Justice—Supersedeas denied because there is nothing in the transcript to show that the alleged cause of incompetency really existed.

Application for Supersedeas.

At the present term of this court (July 1849) the Bank of the State of Arkansas, by her attorney, D. W. Carroll, Esq., made an application for supersedeas, in the following case:

Petitioner states that on the 30th April, 1849, she was summoned to appear before John C. Peay, who was then acting as a Justice of the Peace for the township of Big Rock, Pulaski county, Ark. to answer the complaint of James M. Curran in 94 different actions of debt. That on the 12th May, 1849, the Bank appeared, by attorney, and filed an objection in writing to the authority of said Peay to act as a Justice of the Peace, on the ground that he

was deputy sheriff to the principal sheriff of Pulaski county, and that by receiving and exercising the office of deputy sheriff, he was unauthorized to act as Justice of the Peace. That the same objection was entered of record in all the cases then pending before said Peay against petitioner, as would more fully appear in the transcript of the record and proceedings in case *No.* 1, exhibited with the petition, and prayed to be taken as part thereof. That notwithstanding said objections filed as aforesaid, and not denying the facts therein set forth, the said Peay rendered judgment against petitioner in all the cases then pending against her —94 in number—all of which judgments petitioner averred to be absolutely null and void.

That transcripts of said judgments had been filed in the office of the clerk of the Circuit Court of said county, and were, until declared null and void, liens upon the property of petitioner, and she was liable to be harrassed by executions. Prayer for supersedeas to said judgments, &c.

The transcript exhibited with the petition is as follows:

"STATE OF ARKANSAS, } to wit:
County of Pulaski. }

At a monthly court holden before John C. Peay, Esq., one of the Justices of the Peace for Big Rock township, in said county, at my office in the city of Little Rock, in said township, on the second Saturday of May, (it being the 12th day of said month) A. D. 1849, the following proceedings were had, *to wit:*

James M. Curran, *Plaintiff*,
vs. } CASE No. 1.
The Bank of the State of Arkansas, *Defendant.*

Claim filed 30th April, 1849, being the notes of said Bank, 20 in number, amounting to one hundred dollars, sued on; and summons issued on same day, returnable to this day, and which is now returned duly executed. And on this day the said plaintiff appeared, by Watkins & Curran, attorneys, and the said defendant by her attorney, D. W. Carroll, also appeared; and the said defendant filed her objection in writing to the justice here sitting in this case, which objection, after argument, is overruled by the

justice. And thereupon this cause is submitted to the court here for trial, and the court having inspected the notes sued on, and heard the evidence adduced, and the arguments of counsel, and being sufficiently advised in the premises, it is therefore considered by the Justice here, that the said plaintiff do have and recover of and from the said defendant, as well the sum of one hundred dollars aforesaid for his debt, as also the further sum of fifty seven dollars for his damages by him sustained by reason of the detention thereof, *(a)* besides all his costs in this behalf expended."

"May 19th, 1849—Execution issued and delivered to Charles Ayliff, constable of Big Rock township."

"JOHN C. PEAY, J. P."

Then follows an entry of the return of the execution *nulla bona.* Then, a copy of the objection filed by the Bank attorney, to the competency of the Justice, referred to above, as follows:

"The said defendant comes and objects to the authority of John C. Peay, Esq., the supposed Justice of the Peace, before whom she is summoned to appear, and gives as a reason for her objection that the said John C. Peay, Esq., is now a deputy sheriff under Benj. F. Danley, Esq., sheriff of Pulaski county, State of Arkansas, and that by receiving the said office of deputy sheriff, he is not authorized to exercise the office of Justice of the Peace. Whereupon the defendant asks that this objection be placed on the record of this cause, and that said supposed Justice refrain from any further proceedings in this cause." CARROLL.

"The same objection as above set forth is made, and is to refer to the cases from No. 2 to No. 94, inclusively, now depending against the said Bank before said supposed Justice."

CARROLL.

"Filed this 12th day of May, 1849. J. C. Peay, J. P."

Then follows copies of all the bills sued on in this case, the summons, execution and return, &c.—authenticated by the Justice, &c.

Note (a). I think Mr. Justice PEAY, allowed interest on the bills of the Bank from the date of her general suspension of specie payments.

REPORTER.

CARROLL, for the motion.

WATKINS & CURRAN, contra.

MR. JUSTICE WALKER, delivered the opinion of the court.

This is an application to supersede a judgment rendered by John C. Peay, who it is admitted, was duly elected, commissioned and qualified to act as Justice of the Peace in and for the county of Pulaski; but who, as is alleged, has, since his acceptance of the office of Justice, been appointed a deputy sheriff of the county aforesaid and has accepted that office also, and entered upon the duties thereof.

The defendant voluntarily enters his appearance and contends, 1st. That the offices of Justice of the Peace and deputy sheriff are not incompatible under the constitution, 2d. That if incompatible the acts of the Justice are nevertheless valid until the office is declared void, 3d. That the defendant has not by plea or otherwise presented the question to this court in such a manner as to enable it to determine whether the Justice has vacated his office or not.

In regard to the first point, this court has already decided in the case of *The State vs. Hutt,* 2 *Ark. Rep.* 282, that the office of Justice of the Peace is a judicial office and that the office of sheriff is an executive office, and that they are incompatible with each other and cannot be held by the same person, being prohibited by the first section of the 3d Article of the Constitution, which ordains that the powers of the State government shall be divided into three distinct departments, each of them to be confided to a separate body of Magistracy, the Legislative, Executive and the Judicial. The second section ordains that no person or collection of persons, being of one of these departments shall exercise any power belonging to either of the others, unless in certain enumerated cases. The decision in the case of *The State vs. Hutt* we think well sustained upon principle and authority and fully settles the principle involved in this case.

A distinction is attempted to be drawn between the office of

sheriff and deputy sheriff which we think untenable. It is true that the deputy derives his authority to act by the appointment of the principal with the approval of the court, and that the principal is responsible for the faithful discharge of the duties of the office. But then the power which is conferred upon the deputy is co-extensive with that of sheriff, and it is the exercise of that power which is prohibited by the constitution. The framers of the constitution evidently intended to keep these departments in the hands of a "distinct body of magistracy," so that there might be no temptation or inducement to depart from a faithful, impartial and honest discharge of the duties confided to each. The duties and powers of the sheriff and his deputies are the same, and the inducements and temptations are alike held out to either to depart from an impartial and faithful discharge of official duty. The two offices of justice and sheriff are intimately connected, touching subjects of general and vital importance. The county courts are composed of Justices; that court levies the tax, the sheriff collects it: that court makes settlement with the sheriff for the revenue collected, and passes to his credit various claims and allowances. It orders and directs process, the sheriff executes them, and in all these his influence may be exercised directly or indirectly so as to gratify his feelings or advance his interests. Private arrangements may, and do most frequently exist between the sheriff and his deputy, which make the compensation of the deputy depend on the amount of business transacted which as totally unfits him to act in both offices as if he were the sheriff.

This question was brought directly before the Supreme Court of Maine and it was there expressly decided that the office of Justice of the Peace is incompatible with that of deputy sheriff or coroner. 2 *Greenl.* 484. *Barnford vs. Melvin* 7 *Greenl.* 14. We are therefore of opinion that the offices are incompatible, and that the acceptance of the second vacated the first.

The next question is how is this fact to be ascertained. The acceptance of the office of deputy sheriff is not a matter of which this court can take judicial notice. The facts therefore must

either be brought before some competent tribunal and a forfeiture declared, or it must be made by some legal means to appear that such forfeiture has taken place. Upon examination of the record before us we find a motion objecting to the jurisdiction of the justice for this cause. But then this is a mere motion without proof to sustain it, and for what we know the facts do not exist. The record presents no defect or irregularity, nor are there any facts from which we may infer that the justice has forfeited his office. The mere motion to that effect is not sufficient, this might be interposed in every case: the proof of the facts set forth in his motion are not to be found in this record, nor are they such as this court can take judicial notice of.

The motion is denied.