4 Ark 45

McFarland Et Al. vs. The State Bank.

1842

Under the decision of the Supreme Court of the United States, in *Briscoe vs. The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, by which in this case this Court is bound, whatever may be its opinion to the contrary, Held, that the notes issued by the Bank of the State of Arkansas are not *bills of credit*, within the meaning of the Federal Constitution, and that the act incorporating the Bank is constitutional.

A plea of *non est factum*, not sworn to, in an action on a bond, is a nullity, and will be stricken from the files, on motion.

A plea of usury must allege a *corrupt agreement*, or it is defective on demurrer.

If a defendant would object that a Bank cannot discount bonds, he must do it by plea, showing the facts.

Remittitur of part of the interest adjudged, allowed to be entered in this Court.

This was an action of debt, tried in June, 1841, in the Circuit Court of Independence county, before the Hon. Thomas Johnson, one of the Circuit Judges. The Bank of the State sued upon a bond for $255, executed to her by one defendant as principal, and the others as securities, jointly and severally, payable at the Branch at Batesville.

The defendants pleaded, *First non est factum*, not sworn to; *Second*, that the bond was executed for a loan of notes of the Bank, which notes were bills of credit, and unconstitutional; *Third*, a plea of usury, omitting the allegation of *corrupt agreement*. Demurrers to the second and third pleas were sustained, and the plaintiff took judgment for the debt, and interest at the rate of ten per centum per annum, disregarding the first plea. The defendants sued a writ of error.

W. Byers and *Linton*, for the plaintiffs.

The second plea is good in form. *Commonwealth Bank of Kentucky vs. Clark et al., Missouri Pamph. R., A. T.* 1835, *p.* 59; and *Byrne vs. The State of Miss.* 8 *Pet. R.* 40.

By the Act of 1836, incorporating the Bank of the State of Arkansas, the capital is raised upon the faith and credit of the State, and becomes the property of the State; its officers are elected by the Legislature; all the funds of the State, held for specific purposes, are deposited in it and become a part of its capital; the profits of the Bank enure the benefit of the State: its losses are sustained by it; its entire

management is under the control of the State, and for its benefit, through officers elected by her General Assembly. And as it is an established principle, that *qui facit per alium, facit per se*, it follows that the bills issued by the Bank were emitted by the State. *Craig et al. vs. The State of Missouri*, 4 *Peters Rep.* 332.

If the bills are in effect emitted by the State, then they are bills of credit, within the meaning of *Art.* 1. *sec.* 10. *Const. United States.* We are aware that the decisions of the Supreme Court of the United States upon this point are in conflict; and that the case of *Briscoe vs. The Commonwealth Bank of Kentucky*, 11 *Peters*, 257, which is the latest, is against us; but we refer the Court to the cases of *Craig et al. vs. The State of Missouri*, 4 *Peters Rep.* 432; *The Commonwealth Bank of Kentucky vs. Clark et al., Pamph Rep., A. T.* 1835, *p.* 59; *Byrne vs. The State of Missouri*, 8 *Peters Rep.* 410; and the unanswerable argument in the opinion of Justice Story, in the case of *Briscoe vs. The Commonwealth Bank of Kentucky*, 11 *Peters*, 257.

The demurrer to the third plea assigns for cause that the plea does not allege that the contract was *corruptly* entered into. The plea is as broad as the statute. *Rev. St. Ark., ch.* 80, *sec.* 7, *p.* 470. It is sufficient to plead in the language of the statute. 2 *Pet. Rep.* 537.

The first was a plea of *non est factum*, and is a good plea under the statute, and puts the same facts in issue as if sworn to, except the execution of the instrument. *Bates vs. Hintan, Misso, Pamph. Rep., June Term*, 1835, *p.* 78; *Payne vs. Snell, Misso. Pamph. Rep., Oct. Term*, 1835, *p.* 238; *Rev. St. Ark.*, title *"Practice at Law," sec.* 102, *p.* 633.

A bad plea is a sufficient answer to a bad declaration; and if the plea is demurred to, the Court will look back into the declaration, and give judgment against him who commits the first error. *Gould on Pleading*, 474, 475.

The declaration is not sufficient.

1st. Because it does not set out the authority of the Bank to sue.

2d. It does not set out the writing obligatory according to its legal effect.

3d. There is a material variance between the writing described in the declaration, and the one given on oyer.