the offence which he attempted; that for that purpose he pursued her; that, with the view of concealing his identity, and the more easily to overtake her, and effectuate his nefarious design, he dismounted from his horse, and, by taking the hypothenuse of the angle [161] she was travelling round, he came into the road in advance of her; that after being disappointed in his design, he returned to the place where he had tied his horse, and, after regaining him, he went to the cabin of negro Tom and enquired for his brother, Lewis; and hearing nothing of him, he then pursued his way to town, where he remained till he returned home in the morning.

These facts being true, his guilt is established, and we, therefore, affirm the judgment of the circuit court.

The questions of law raised in this case have nothing in them, and need not be discussed.

THE GOVERNOR v. ORGAN'S SURETIES.

NASHVILLE, DECEMBER, 1844.

PLEA OF COVENANTS PERFORMED—BURDEN OF PROOF. Upon a defence which admits the due and proper execution of the official bond sued on, such as the plea of covenants performed and other equivalent pleas, the necessity and duty is imposed upon the defendants of showing affirmatively the performance by the principal obligor of the liabilities arising on the covenant, and the execution of the bond is no way in question.

OFFICIAL BOND—ENTRY TOUCHING ITS EXECUTION. An entry upon the minutes of the county court which shows that the sheriff came into court, and gave his bond as sheriff and tax collector, with certain persons named, shows that he and the persons named came into court and gave the bond, that it was duly acknowledged and executed, approved and accepted by the court. (Citing Bryan v. Glass, 2 Humph., 390, which see.)

[Cited in: 3 Lea, 573; 9 Pickle, 654; 18 Pickle, 407.]

This is an action of covenant, which was instituted by the governor against Upton Organ and others, his sureties, on a bond given for the faithful discharge of his duties as sheriff of Montgomery county.

The defendants pleaded that they had performed the covenants of their bond, and an issue on this plea was

submitted to a jury of Montgomery county, Maney, judge, presiding, in 1844.

When the attorney for the State offered the official bond as evidence, it was objected to by the defendants, on the ground that there was no record evidence that it had been executed and acknowledge by the defendants, and approved by the court, as required by the statute. The court sustained the objection, and a verdict and judgment were rendered for the defendants.

The attorney general, on behalf of the governor, appealed.

[162] Attorney General, for the State.

Boyd and Garland, for defendants.

Reese, J., delivered the opinion of the court.

This is an action against the defendants, as sureties of Upton Organ, late sheriff of Montgomery county, upon his official bond.

The defendants pleaded covenants performed, and other equivalent pleas. This defence admits the due and proper execution of the bond, and imposes upon the defendants the necessity and duty of showing affirmatively the performance by their principal of the liabilities entered into and arising from the covenant. Yet the court charged the jury, in this state of the pleading, that the defendants did not appear, from the record of the county court produced on the trial, to have gone into court and properly acknowledged the bond.

The plaintiff could be turned round by no such objection. The defendants having admitted a valid obligation, and their liability under it, unless discharged by the performance, the due execution of the bond was no way in question.

But even if this had not been so, we are of opinion that the record of the county court, which was produced, sufficiently establishes that the sheriff's bond was so taken as to constitute it a good statutory bond, both as to the sheriff himself and as to his sureties. That record is as follows:

"Tuesday morning, July 3d. Upton Organ, sheriff, who had been notified to come into court, by Samuel Edmondson, to give other security, came into court and gave his

bond as sheriff and collector of public taxes, with G. Organ, Orville A. Allen, Josiah Morrison, and Andrew Vance, in place of Samuel Edmondson, released."

What is the sense and meaning of this? That the sheriff came into court, and brought a bond, signed by the persons named? By no means. He and they came into court and gave the bond; of course, when they gave the bond to the court, they [163] executed or acknowledged it; and, of course, also, if they gave it to the court, it was approved or accepted by the court.

There is no prescribed formula necessary to be used. In sense, meaning, and legal effect this is a statement that the sheriff and his sureties acknowledged the bond before the court.

We are not to strain the construction for the purpose of intending that some mode of execution, not sanctioned by law, was resorted to; but, when the words will admit of the construction, we should rather suppose that what the law requires to be done was done.

This case, in principle, is very like the case of Bryan and other v. Glass' Sureties, 2 Humph. 390, and should be governed by that case.

Let the verdict and judgment be set aside, and a new trial be had.

NOTE.—See 5 Yerg., 599.

SMITH v. THE STATE.

NASHVILLE, DECEMBER, 1844.

GAMING—PLAYING WITHOUT BETTING. A person who engages in a game of hazard, such as pitching dollars, upon which he knows others are betting, is indictable and punishable for gaming, although he may not bet anything himself, and this under an indictment which charges him with betting on the game. (See State v. Trotter, 5 Yerg., 184; Howlett v. State, 5 Yerg., 144; State v. Smith, 2 Yerg., 273; Fugate v. State, 2 Humph., 397.)
[Cited in: 11 Pickle, 478.]

Smith was indicted in the circuit court of Franklin county.

The indictment charges that "Smith did bet, wager,