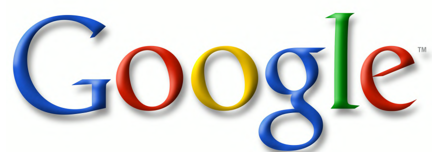

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REPORTS OF CASES

AT

COMMON LAW AND IN CHANCERY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE

OF

ILLINOIS,

FROM ITS FIRST ORGANIZATION IN 1819, TO THE END OF DECEMBER TERM, 1831.

By SIDNEY BREESE,
COUNSELLOR AT LAW.

SECOND EDITION, WITH ADDITIONAL NOTES,
By EDWIN BEECHER.

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PREFACE.

THIS Volume of Reports is submitted to the public and the profession with great diffidence. The task of preparing it for publication was undertaken with great reluctance, and at the earnest solicitations of the members of the Bar, who had, in common with myself, long felt the want of it. I fear that I have not, in the performance of it, equaled their expectations, and without making the proper allowances for the difficulties I have had to encounter, they may attribute the defects of the work, great as they truly are, more to my incapacity, than to the real causes of them. I need not here enlarge upon the great utility, to the profession, especially, of books of Reports, nor on the necessity that exists in all countries, where the law is the rule of action, that it should be certain and known. The legislature may enact laws, but it is the courts that expound them, and if their expositions remain unpublished, much mischief and litigation must be the consequence. If any apology is necessary for the court, whose decisions compose this volume, it may be found in the facts, that for the last nine years, its sessions have been held at a place remote from the means of information, where there is not even an ordinary law library and no conveniences for examination or reflection —that for several months in each year the Judges composing it, are required by law to perform circuit duties, and that at every other term of the court, they form a part, as the Council of Revision, of the Legislature, so that they are unable to bestow upon the cases coming under their revision, that care and attention they would themselves desire, and which Judges, under other more favorable circumstances could bestow.

It might, perhaps, have been desirable, that a more skillful person had undertaken this work—one who could, from the manner in which he might give their opinions to the public, do them more ample justice. It has, however, been my earnest endeavor to omit nothing, abate nothing; but to give, in the language of the court, their decisions, in every case of importance, as made by them. It is the first publication of the kind ever attempted in this State, and my first essay; and,

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though I am convinced that it will not add to my reputation as a lawyer, that I can claim no credit for anything contained in it, that it bears no evidence in my favor of erudition, research, or of that share of legal knowledge, without which a work of this kind should not be attempted; yet, I have the satisfaction to know, that the cases are faithfully and accurately reported. It is as such, I submit it to the candor of my professional brethern and the public, confident, that where they can not praise, they will not censure.

It is an unpretending volume—the author of it being, though at a great distance, only an humble follower of those distinguished lawyers of Europe and America, who have employed their time and talents on works of a similar kind, and from a similar motive—a desire to discharge, in some degree, that duty, which one of the sages of the law has said, every man owes to his profession.

SIDNEY BREESE.

KASKASKIA, November 15, 1831.

The following advertisement was published by Judge Breese in the first edition, and explains a note of his on page 36, at the close of the December Term, 1820.

ADVERTISEMENT.

Since the completion of this work, I have learned that the decisions made at December Term, 1821, were consumed in the burning of the bank house, where the records of the Supreme Court were kept. For apology for any other omission, I have to say, that every case is reported, that could, upon diligent search and inquiry, be found among the remaining records of the Court.

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PREFACE TO THE SECOND EDITION.

THE first edition of this work has long been out of print. Very few copies are to be found either in the public offices or in the libraries of members of the bar. Seeing the necessity of a reprint, the legislature, at its last regular session, passed an act authorizing the publication of a new edition. It is in accordance with that act, that this has been prepared. All the decisions contained in the original edition, together with the notes of Judge Breese, have been retained in this. References have been made in the notes to decisions of our courts of cases decided subsequent to those reported in the original volume, down to the 24th vol. Illinois Reports, inclusive. Also when any principle contained in the decisions reported by Judge Breese has been changed by statute, the change has been shown. A slight alteration will be found in the arrangement of the cases, a few having been published in the appendix, that properly belonged in the body of the work, but which were not discovered by the reporter in time to insert them in their proper order; thus, the case of *Naught* v. *Oneal*, which appears on page 29 in the appendix to the first edition, will now be found at the close of the cases decided at the December term, 1820, it having been decided at that term; and so of several other cases in the appendix, each will now be found among the cases of the term at which it was decided. The other cases in the appendix are now published as a continuation, or a part of the regular volume, they following in consecutive order. But one index, and one table of cases are inserted, instead of two, as in the first edition. No other change in the general arrangement has been made.

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It was intended that the notes of Judge Breese to the first edition should precede those of this edition; but on putting the work in type it was found that to do so, would frequently separate the notes and references, placing the references on one page, and the notes on a subsequent one; this, it was believed, would be a greater defect than in some instances to allow the notes to this edition to precede those of the former one, but whenever this could consistently be avoided it has been done; and as an apology for this defect, or apparent disrespect of Judge Breese, I would ask the reader to remember that in every case the notes referred to by letters are those of Judge Breese and were published with the first edition; while those referred to by figures have been prepared for the present edition.

EDWIN BEECHER.

FAIRFIELD, ILLINOIS, Aug. 1, 1861.

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RULES

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS.*

MOTIONS.

RULE I. Motions may be made immediately after the orders of the preceding day are read, and the opinion of the court delivered in; but at no other time, unless in case of necessity, or in relation to a cause when called in course.

RULE II. They are to be made by the attorneys, in the following order: first, by the attorney-general; next, by the oldest practitioner at the bar, and so on to the youngest; but no attorney to make a second motion until each has had an opportunity to make his motion.

RULE III. Affidavits must be made when a motion is bottomed on a matter of fact; which, according to the practice of the court, should be sworn to.

SUPERSEDEAS.

RULE IV. No supersedeas will be granted unless a transcript of the record on which the application is made, be complete, and so certified by the clerk, and the necessary bonds be entered into according to law.

RULE V. When a writ of error shall be made a supersedeas, the clerk shall indorse on the writ that it shall be so obeyed accordingly.

---

*During the time the decisions reported in this volume were made, the following rules of the court were in force.

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WRITS OF ERROR.

Rule VI. Writs of error shall be directed to the clerk, or keeper of the records of the county in which the judgment, or order complained of is entered, commanding him to certify a transcript of the record to this court.

Rule VII. When a plaintiff in error shall file in this office a record duly certified to be full and complete before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court; but such writ shall be made out, and filed by the clerk of this court, with the said record; which record shall be taken and considered as a due return to said writ.

PROCESS ON WRITS OF ERROR.

Rule VIII. The process on writs of error shall be a subpœna, issued on the application of the party to the clerk, directed to the sheriff of the proper county: or in case of interest, to the coroner, commanding him to summon the defendant in error to appear in court, and show cause, if any, why the judgment or decree, mentioned in said writ of error, should not be reversed.

Rule IX. If the subpœna be not returned executed, an *alias*, *pluries*, &c., may issue without an order of court, on the application of the party.

Rule X. When it shall appear to the satisfaction of the court, that a defendant is not an inhabitant of the state, there shall be a day fixed for his appearance, and an order to advertise; which order shall be advertised once a week, for four weeks successively, in some paper printed at the seat of government; the last publication shall be at least four weeks before the appearance day. After publication, as aforesaid, and affidavit thereof filed with the clerk, the said cause shall stand for hearing as if the party had been served with a subpœna.

DOCKETING SUITS FOR HEARING.

Rule XI. The clerk shall set the causes for trial in the order they come into the court, except the causes for or against the people, which shall be set in order at the end of the civil causes.

ASSIGNMENT OF ERROR.

Rule XII. In writs of error not operating as supersedeas,

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the plaintiff shall, within eight days after the filing of the record, assign in writing, and file with the clerk, the particular error or errors, of which he complains; no other error or errors shall be alledged or enquired into by the court.

RULE XIII. If the party fail to assign errors, as aforesaid, a rule shall be given—and if the errors be not assigned at the expiration of the rule, the case may, on motion, be dismissed.

RULE XIV. In all cases of appeals from any court to this court, the appellant shall file in open court, on or before the third day of the term succeeding the appeal, if there be thirty days between the sitting of the Supreme Court and the granting of the appeal, a copy of the record; and at the same time assign his errors, so that the appellee may, should he think proper, enter his appearance, and go to trial. Should there not be thirty days, then to file the record, and assign errors on the first day of the second term.

RULE XV. When the court grants a writ of error with supersedeas, at the same time the plaintiff shall file a copy of the record and assign his errors, so that the defendant may join in error, and go to trial at the same term of the court.

RULE XVI. When a writ of error is made a supersedeas in vacation, the plaintiff shall file in open court, on or before the third day of the next term thereafter, if there be thirty days between the granting of said writ and the sitting of the court, if not, on the first day of the succeeding term, a copy of the record duly certified, and an assignment of errors, so that the defendant may join in error, and have a trial at the same court.

REHEARING.

RULE XVII. On a petition to the court briefly stating the grounds of rehearing of a cause, and the law to support it, signed by an attorney or attorneys of the court, the court may, when there is reason for it, grant a new trial, on giving the prevailing party notice, both of the motion for a re-hearing, and the time of such new trial, if granted.

RULE XVIII. The counsel for the plaintiff in every writ of error, and the appellant in every appeal, shall furnish to each of the Justices of this court, before the argument of every such writ of error or appeal shall commence, an abstract or abridgment of such parts of the pleadings and proceedings in such case, as said counsel shall deem necessary to a full understanding of the errors relied on for a reversal of the judgment or

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decree complained of, together with the points intended to be relied on in the argument of the cause, and the authorities intended to be used in support of them.

RULE XIX. It shall also be the duty of the counsel for the plaintiff in error, or appeal, to file in the clerk's office, for the use of the defendant's counsel, a copy of said abstract or abridgment, at least one day previous to the argument, when the cause is not argued on the first day of the term; and if the two foregoing rules shall not be complied with, the cause shall be either discontinued or dismissed, at the discretion of the court.

RULE XX. The defendant's counsel shall be permitted, in case he is not satisfied with the abstracts or abridgments by the plaintiff's counsel, to furnish each of the Judges with such other abstracts as he shall deem necessary to a full understanding of the merits of the cause: and it shall also be the duty of the defendant's counsel to furnish each of the Justices of the court, at the commencement of the argument, with the authorities he intends to cite on the argument.

RULE XXI. All special motions shall be entered with the clerk at least one day before the same shall be argued; and the counsel entering said motion shall, at the same time, file the reasons on which the motion shall be predicated.

RULE XXII. No *certiorari* for diminution of the record shall be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded, shall, if not admitted by the other party, be verified by affidavit. All motions for such *certiorari* shall be made at the first term of the entering the cause or appearance of the defendant in error, otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

RULE XXIII. After the present term, no original record, or other paper on the files of this court, shall be taken from the Supreme Court room, or from the office of the clerk of this court.

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JUDGES

OF THE

SUPREME COURT OF ILLINOIS,

DURING THE TIME OF THESE REPORTS.

JOSEPH PHILIPS, *Chief Justice*, appointed Oct. 9, 1818, resigned July 4, 1822.

THOMAS REYNOLDS, *Chief Justice*, appointed August 31, 1822.

THOMAS C. BROWNE, JOHN REYNOLDS, WILLIAM P. FOSTER,* } Appointed *Associate Justices*, Oct. 9, 1818.

WILLIAM WILSON, appointed 7th August, 1819, in place of William P. Foster, resigned.

NOTE.—The tenure of office of the above named Judges was fixed by the Constitution, "until the end of the first session of the General Assembly, which shall be begun and held after the 1st day of January, 1824." At that session, the following named Judges were elected, the tenure of whose office is, during good behavior, and whose commissions bear date, January 19th, 1825, viz.:

WILLIAM WILSON, *Chief Justice*

THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, } *Associate Justices.*

ATTORNEYS GENERAL.

DANIEL P. COOK, elected by the Legislature, March 5, 1819, resigned on being elected to Congress, Oct. 19, 1819.

WILLIAM MEARS, appointed by the Governor, in the recess of the Legislature, 14th December, 1819.

SAMUEL D. LOCKWOOD, elected by the Legislature, Feb. 6, 1821, resigned December 28, 1822.

JAMES TURNEY, elected by the Legislature, and commissioned, 14th January, 1823, resigned Dec., 1828.

GEORGE FORQUER, elected by the Legislature, January 23, 1829.

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*Resigned 22d June, 1819, never having taken his seat on the Bench.

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DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1819, AT KASKASKIA.

Present, THOMAS C. BROWNE, JOHN REYNOLDS, WILLIAM WILSON, *Associate Justices.*
JOSEPH PHILIPS, *Chief Justice, absent.*

JONATHAN TAYLOR, Appellant, *v.* MICHAEL SPRINKLE, Appellce.

APPEAL FROM GALLATIN.

In all special pleas to the consideration of a note, the manner of avoiding the obligation ought to be shown; a failure to do it is error.

*Opinion of the Court.** This was an action of covenant. The fifth plea states, that the consideration failed. This plea was demurred to, and the demurrer sustained by the court. The validity of the fifth plea, is the only point before the court. The plea was filed under the statute,† which introduces a new remedy contrary to the common law, and ought not to be extended too far; and in all special pleas, the manner of avoiding the obligation ought to be shown. As the precise manner is not shown by this plea, it is insufficient, and the demurrer to it was properly sustained. The judgment of the circuit court is affirmed, with five per cent. damages and costs. (1)

Judgment affirmed.

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*Justice BROWNE having decided this cause in the court below, gave no opinion.

†Laws of 1819, page 59.

(1) The principle asserted in this case has been repeated in numerous cases since this decision was made. A reference only to them is necessary. *Cornelius* v. *Vanorsdale*, post. *Pool* v. *Vanlandingham*, *id.* *Bradshaw* v.

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ELIJAH SMITH WHO SUES FOR THE USE OF WILLIAM JOHNSON, Appellant, *v.* WILLIAM BRIDGES, Appellee.

APPEAL FROM MADISON.

Although no particular form is necessary to make a note, yet the writing must show an undertaking or engagement to pay, and to a person named in it, or to bearer or holder of the instrument.

*Opinion of the Court.** The plaintiff below, states in his petition, that he "holds notes on, &c." and the instrument on which suit is brought, has not a single feature of a note, inasmuch as it does not appear there was any undertaking by the defendant to pay any person at all.

Although no particular form is necessary to make a note, yet the writing must show an undertaking or engagement to pay, and to a person named in it, or to bearer or holder of the instrument. The judgment of the court below is reversed, and the cause remanded to the court below. (1)

Judgment reversed.

Newman, id. Sims v. *Klein, id. Swain* v. *Cawood*, 2 Scammon, 505. *Vanlandingham* v. *Ryan*, 17 Illinois Rep., 25.

A plea of failure of consideration to an action upon a note, should state particularly in what the failure consisted. General allegations are not sufficient. *Parks* v. *Holmes*, 22 Illinois Rep., 522.

Under the general issue it is not competent to show a total or partial failure of consideration of a promissory note. *Rose* v. *Mortimer*, 17 Illinois Rep., 475.

Under a plea of a *total* failure of consideration, a *partial* failure can not be given in evidence. *Sims* v. *Klein*, post. *Swain* v. *Cawood*, 2 Scam., 505.

*Justice REYNOLDS having been counsel in this cause, in the court below, gave no opinion.

(1) A promissory note is defined to be "a promise or agreement in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, *to a person therein named or his order, or to bearer.*" Chitty on Bills, 516. *Walters* v. *Short*, 5 Gilm., 259. All notes must contain the name of the payee, unless payable to bearer. Bailey on Bills, 22.

No action can be maintained on an instrument in writing for the payment of money, unless the instrument shows on its face to whom it is payable. *Mayo* v. *Chenoweth*, post.

Bills of exchange and promissory notes should be made payable to some person specified, but this may be done without inserting the name, if the payee be so certainly specified or referred to, as to be ascertained by allegations and proofs. *Adams et al.* v. *King et al.*, 16 Ills. Rep., 169.

An instrument purporting to be a promissory note, payable to one of two persons in the alternative, can not be sued on as such. *Musselman* v. *Oakes*, 19 Ills. Rep., 81.

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AMOS CHIPPS, Appellant, *v.* THOMAS YANCEY, Appellee.

APPEAL FROM POPE.

The plea of *nil debet* is not a good plea to an action of debt upon a record.

*Opinion of the Court.** This was an action of debt on a judgment rendered in the State of Kentucky. The defendant pleaded *nil debet*, to which there was a demurrer, which the court sustained. To reverse this opinion, this appeal was taken. It is considered by the court, that the judgment of the court below, sustaining the plaintiff's demurrer, to the defendant's plea, be affirmed with costs. (*a*) (1)

Judgment affirmed.

FRANÇOIS COLEEN and ABRAHAM CLAYPOLE, Appellants, *v.* DANIEL FIGGINS, Appellee.

APPEAL FROM MADISON.

The act of the General Assembly creating circuit courts, was approved on the 31st of March, 1819, and on the same day a writ issued out of the clerk's office of the circuit court of Madison county, returnable to the May term following.

The writ is void, as the act had no operation until the 1st day of April.

Appearance can not make the writ good, that and pleading, will cure voidable, but not void process.

Opinion of the Court.† It appears from the record in this cause, that the writ issued by the Madison circuit court, on the 31st day of March, 1819, and made returnable to May term following, and that the act creating circuit courts, passed on the same day the writ issued. Although it appears, that the

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*Justice WILSON having decided this cause in the court below, gave no opinion.

(*a*) *Nil debet* is a bad plea in an action of debt brought on a judgment obtained in another State. *Armstrong* v. *Carsars, exr.*, 2 Dall., 302. *Mills v. Duryee*, 7 Cranch, 480.

Nil debet is not a good plea to an action of debt on a recognizance, nor to any action founded on a record or specialty. *Bullis* v. *Giddins*, 8 Johns., 82.

(1) In an action of debt brought on a sheriff's bond, the plea of *nil debet* is bad on demurrer. Where a bond is the foundation of an action of debt, *nil debet* is not a good plea. It is otherwise where the instrument is but the inducement to the action. *Davis* v. *Burton et al.*, 3 Scam., 42. *King* v. *Ramsey*, 13 Ills. R., 622.

†Justice REYNOLDS having decided this cause in the court below, gave no opinion.

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act establishing circuit courts, passed on the 31st day of March, yet the court are clearly of opinion, that it did not take effect until the first day of April, and that the process is therefore void, as the clerk had no authority to issue the writ, and make it returnable to a court not in existence, at the time the writ issued. No appearance could make the writ good. The court below was bound to have quashed it, it differing materially, from process that is voidable merely where appearing and pleading might cure the defect.

It is unnecessary for the court, to notice any other error assigned, as the point already decided, determines the case. The judgment of the court is reversed. (*a*) (1)

Judgment reversed.

Kane, for appellants.

Winchester, for appellee.

(*a*) An appearance of the defendant by attorney, cures any antecedent irregularity of process. *Knox et al.* v. *Summers et al.*, 3 Cranch, 496.

Process returnable out of term is void, and can not be amended. *Cramer* v *Van Alstyne*, 9 Johns., 386.

(1) It can hardly admit of a doubt that an appearance cures all defects as to the manner in which a party is brought into court. If a party, without process, pleads to an action, it is too late for him then to say that no process was issued or served on him. He is then in court, and it is immaterial whether he appears in compliance with the mandates of the law, or whether he waives a right which he might have insisted on, and voluntarily places himself in a position in which he is required to make his defense. The decisions on this question are uniform. In *Easton et al.* v. *Altum*, 1 Scam., 250, the court said: "The authorities are numerous and explicit, that irregularity of process, whether the process be *void* or *voidable*, is cured by appearance without objection." And in *Mitchell* v. *Jacobs et al.*, 17 Ills. Rep., 236: "A defendant appearing without objection waives all objections thereto, although the process may be void, or there may have been no service." To the same effect is *Mineral Point R. R. Co.* v. *Keep*, 22 Ills. Rep., 9. The following cases have also been passed upon by the Supreme Court of this State, in each of which this question arose, and received substantially the same solution. *Pearce et al* v. *Swan*, 1 Scam., 269. *Vance et al* v. *Funk*, 2 Scam., 263. *Beecher et al* v. *James et al. id.*, 463. *Palmer* v. *Logan*, 3 Scam., 57. *Bowles' heirs* v. *Rouse adm'r.*, 3 Gilm., 409. *Whittaker et al* v. *Murray et al.*, 15 Ills. R., 294.

Although a *general* appearance will cure all irregularities as to the issuing or service of process, yet an appearance for the purpose of objecting to such process or service will not have that effect. *Mitchell* v. *Jacobs et al.*, 17 Ills. R., 236. *Anglin* v. *Nott*, 1 *Scam.*, 395. *Little* v. *Carlisle et al.*, 2 *Scam.*, 376.

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JAMES A. WHITESIDES AND OTHERS, Plaintiffs in Error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

ERROR TO POPE.

If an indictment does not aver the year to be the year of our Lord, and does not contain the words, "in the name and by the authority of the people of the state of Illinois," it is bad. (1)

In an indictment for a riot, the facts constituting a riot, should be clearly set forth.

Opinion of the Court. This was a criminal prosecution for a riot, against the plaintiffs in error. Three errors are assigned.

1. Uncertainty in the indictment, in not averring the year to be the year of our Lord.
2. The form prescribed by the constitution, in which criminal prosecutions shall be commenced, is not pursued.
3. There is not such a criminal offense alleged in the indictment, as will make the plaintiffs in error guilty of a riot, if committed.

On the first point, the law makes it necessary to have common certainty in every indictment, and nothing can be inferred to aid it. Without inference, the year could not be gathered from the indictment, and therefore it is defective. On the second point, when a constitution or act of the legislature, prescribes a certain form to be used in legal proceedings, it would seem that the court has no power to dispense with that form. Therefore, as the indictment does not pursue the form given in the constitution, that all indictments shall be carried on "in the name, and by the authority of the people of the state of Illinois," it is bad.

On the third point, the charge in the indictment is, that the defendants made a great noise and disturbance of the peace. This, the court considered too vague and uncertain. In criminal proceedings, the charge should be distinct and positive, and the way and manner in which the great noise and disturbance of the peace was made, should have been stated.

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(1) An indictment or complaint which states the year of the commission of the offense in figures only, without prefixing the letters "A D." is insufficient. *Commonwealth* v. *McLoon*, 5 Gray, (Massachusetts) Rep., 91. *State* v. *Lane*, 4 Iredell, 121.

In *State* v. *Hodgeden*, 3 Vermont Rep., 481, the time of the commission of the offense was stated as follows: "A. D. 1830," and was held to be sufficient. And similar was the case of *State* v. *Gilbert*, 13 Vermont Rep., 647.

In *Hall* v. *State*, 3 Georgia Rep., 18, the offense was charged to have been committed "*In the year* eighteen hundred and forty-six;" and the court said

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For this omission, the indictment is also defective. The judgment of the court below must be reversed. (*a*)

Judgment affirmed.

they would presume that to mean "In the year *of our Lord.*" The same was held by the Supreme Court of Indiana in *Engleman* v. *State*, 2 Carter, 91.

From the authorities we think an indictment which alleges an offense to have been committed "in the year," &c., would be held good, although the words "of our Lord," were omitted.

In *McFadden* v. *Fortier*, 20 Ill. Rep., 515, the court referred to the second proposition decided in the case of *Whitesides* v. *The People*, and approved of the decision in that case.

(*a*) In an indictment a day certain must be stated, so must also the year, otherwise the indictment will be insufficient, and (in England) the year of the king's reign is usually inserted; but the year of our Lord is equally unobjectionable. *Archbold's Crim. Pl.*, 11.

The criminal code of 1827, page 157, provides, that "All exceptions which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment, or writ of error shall be sustained, for any matter not affecting the real merits of the offense charged in the indictment."

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

JULY TERM, 1820, AT KASKASKIA.

Present, JOSEPH PHILIPS, *Chief Justice.*
JOHN REYNOLDS, } *Associate Justices.*
THOMAS C. BROWNE, }

JOSEPH CORNELIUS, Plaintiff in error, *v.* SIMON VANORSDALL, ASSIGNEE OF JOHN DE RUSH, Defendant in error.

ERROR TO ST. CLAIR.

A plea alleging a failure of consideration is insufficient, without setting out wherein the failure consists.

Opinion of the Court. In this case there was a plea alleging a failure of consideration, to which there was a demurrer. The demurrer having been sustained by the court below, this writ of error is prosecuted, to reverse that judgment. It is considered by the court, on the authority of the case of *Taylor* v. *Sprinkle*, decided at the last term, that the judgment of the court below be affirmed. (*a*) (1)

Judgment affirmed.

(*a*) *Taylor* v. *Sprinkle*, ante p. 17. *Poole* v. *Vanlandingham*, post p. *Bradshaw* v. *Newman*.

(1) See note to *Taylor* v. *Sprinkle*, ante, page 17

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John Y. Sawyer, Plaintiff in Error, *v.* Benjamin Stephenson, Defendant in Error.

ERROR TO MADISON.

Granting new trials, rests in the sound discretion of the court, and as a general rule, the refusal to award one should not be considered as error.

An affidavit of a juror who tried the cause, may be received to prove improper conduct on the part of the jury.

On a motion for a new trial in the court below, the defendant offered the affidavit of one of the jurors who tried the cause, setting forth, that one of the jurors, who was sworn as a witness in the cause, gave in the jury room, new, other and additional testimony, by reason of which, deponent was induced to give a verdict for the plaintiff, when, if it had not been for such testimony, so given by one of their own body, he, deponent, would have found a verdict for the defendant. The court granted the defendant a new trial. To reverse which opinion, a writ of error was prosecuted.

Opinion of the Court. Granting new trials, rests in the sound discretion of the court before which the trial is had, and as a general rule, a refusal to grant a new trial, should not be considered as error; unless it appears manifest, that justice is rendered thereby more precarious. (1)

The first question for consideration is, would the facts disclosed by the affidavit, have justified the court in awarding a new trial, if they had been sworn to by a person not of the jury? We are satisfied they would, and although new trials should be granted very cautiously for irregular and improper conduct on the part of the jurors in their retirement, when such misconduct is disclosed by an affidavit made by one of the body; yet being fully satisfied of the truth of the facts disclosed in this manner, as also that the juror has not been tampered with, and improperly influenced to swear falsely, and that no such verdict would have been found, if the jury had not listened to such improper testimony, the court would be as much bound to award a new trial on such affidavit, as if the truth of the facts therein contained, had been disclosed,

(1) At the time of the rendition of this decision this was unquestionably correct, and has been affirmed in the following cases. *Cornelius* v. *Boucher*, post. *Clemson* v. *Kruper*, *id.* *Collins* v. *Claypole*, *id.* *Street* v. *Blue*, *id.* *Adams et al.* v. *Smith*, *id.* *Vernon et al.* v. *May id.* *Littleton* v. *Moses*, id. *Harmison* v. *Clark*, 1 Scam., 131. But by the act of the legislature of 1837, Purples' Statutes, p. 824. Scates' Comp., p. 264, sec. 23, it is provided that exceptions may be taken to the opinion of the court in overruling a motion for a

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by one not of the jury. The court, therefore, not being able to discover that the case under consideration is at variance with the principles here laid down, are of opinion that the court below acted correctly in awarding a new trial on that affidavit, and the judgment must be affirmed. (*a*) (1)

Judgment affirmed.

JEHU SCOTT, Appellant, *v.* JOHN CROMWELL, Appellee.

APPEAL FROM MONROE.

Where the plaintiff amends in matters of form only, the defendant is not, for that reason, entitled to a continuance as a matter of course.

THE defendant in a court below, the appellant here demurred specially to the plaintiff's declaration, for informalities therein. The court sustained the demurrer, and gave plaintiff leave to amend, whereupon the defendant moved the court for a continuance, which motion the court overruled. To reverse this opinion, this appeal was taken.

Opinion of the Court. Where the plaintiff amends in mat-

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new trial. *Smith* v. *Shultz*, 1 Scam., 491. This, however, was held to apply only to civil cases. *Pate* v. *People*, 3 Gilm., 645. *Holliday* v. *The People*, 4 Gilm., 111. *Baxter* v. *The People*, 3 Gilm., 368. *Martin* v. *The People*, 113 Ills., 341. And there was no similar statute applicable to criminal trials until in 1857, when an act was passed, giving the same right to except for a refusal to grant a new trial in criminal as in civil cases. Laws of 1857, p. 103. Scates' Compl., p. 1216.

But the granting of a new trial even since the passage of the act making it error to refuse one has never been held a sufficient ground for an exception. *Cornelius* v. *Boucher*, post. *Hill* v. *Ward*, 2 Gilm, 292. *Brookbank* v. *Smith*, 2 Scam., 78.

(*a*) The refusal of the court to grant a new trial is not a matter for which a writ of error lies. *Barr* v. *Grats*, 4 Wheat., 213. 5 Cranch, 11 *ibid.* 187. 7 Wheat., 248.

The affidavits of jurors to impeach a verdict can not be received. *Dana* v. *Tucker*, 4 Johns., 487. *Forester &c.* v. *Guard. Siddal & Co.*, post.

(1) This, if not overruled, is very strongly doubted in the following cases. *Forester et al.* v. *Guard et al.*, post. *Browder* v. *Johnson*, *id.* *Smith* v. *Eames*, 3 Scam., 81. And we think it is now safe to say that the affidavit of a juror ought not to be admitted to show what transpired in the jury room, or by what process of reasoning they came to their conclusions.

But the affidavit of a juror, on a point entirely disconnected with his acts, or the motives for his conduct as a juror, as that he is not an alien, is not objectionable on the grounds on which it has been decided that a juror's testimony can not be received to impeach his verdict. *Guykowski* v. *The People*, 1 Scam., 482.

Affidavits of jurors can not be received to impeach their verdict, except in cases where a part of them swear they never consented to the verdict; but a verdict may be supported by such affidavits. *Smith* v. *Eames*, 3 Scam., 76 *Martin et al.* v. *Ehrenfels*, 24 Ills., 187.

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ters of form only, the defendant is not, for that reason, and as a matter of course, entitled to a continuance. He has however, the right to plead *de novo.* The judgment of the court below must be affirmed. (1)

Judgment affirmed.

JAMES S. BEAUMONT, Appellant, *v.* ——— YANTZ, Appellee.

APPEAL FROM MONROE.

A declaration in an action of trespass for taking and conveying away "four horses, the property of the plaintiff," is sufficiently certain and descriptive of the property taken.

THIS was an action of trespass *de bonis asportatis*, brought by Yantz against Beaumont in the court below, for taking and conveying away "four horses, the property, goods and chattels of the plaintiff, of the value of three hundred dollars." The defendant demurred to the declaration, and assigned as causes of demurrer, 1. That the horses were not described with sufficient particularity; and 2. That the value of each horse should have been stated in the declaration. The demurrer was overruled, and an appeal taken to this court.

Opinion of the Court. The cases cited by the appellant's counsel, do not apply to this case. It is not necessary that each horse should be particularly described. Mentioning the

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(1.) The doctrine is well settled that an amendment of a mere formal matter will not entitle a party to a continuance, while an amendment in substance will work a continuance without cause being shown therefor by the opposite party. *Rountree* v. *Stuart*, post. *Covell et al.* v. *Marks*, 1 Scam., 525. *Russel et al* v. *Martin*, 2 Scam., 493. *Webb* v. *Lasater*, 4 Scam., 548. *Ills. Marine & Fire Insurance Co.* v. *Marseilles Manufacturing Co.*, 1 Gilm., 236. *Hanks* v. *Lands*, 3 Gilm., 227. *O. & M. R. R. Co.* v. *Palmer et al.*, 18 Ills., 22.

Courts may allow amendments on the trial, if not against positive rules, to secure the ends of justice, if the opposite party is not thereby taken by surprise; if so, a continuance may be allowed. *Miller* v. *Metzger*, 16 Ills., 390

It is not error to permit clerical errors to be amended on trial. *Hargrave* v. *Penrod*, post.

Since the foregoing note was prepared, a decision of the Supreme Court has been published in which they use the following language. "By the uniform rule of practice, the court has no power to permit an amendment of the declaration, in a matter of substance, without granting a continuance if desired by the defendant; nor has the court any power, after verdict, to permit amendments of substance, except upon terms of the payment of costs, setting aside the verdict, and granting a new trial. Where such amendment is made, it becomes essentially a new declaration, which the party has a right to prepare to defend." *Brown et al.* v. *Smith et al.*, 24 Ills., 196.

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number of horses, and an allegation that they were the property of the plaintiff, is sufficient. There is no precedent to be found in the books, in which the property is precisely described, as to its shape, color, &c. A recovery in this action could well be pleaded in bar of a suit, for four black geldings, unless the plaintiff should new assign, and show them to be other and different ones, from those for which this suit is brought.

As to the second objection, it is sufficient that the aggregate value of all the horses be set forth in the declaration. The judgment of the court below is affirmed. (1)

Judgment affirmed.

JAMES MASON, Plaintiff in Error, v N. BUCKMASTER, ASSIGNEE OF P. MASON, Defendant in Error.

ERROR TO MADISON.

It is not required to make *profert* of writings not under seal.

The statute makes it necessary for plaintiff to give oyer of all writings as the maker is bound to deny their execution under oath.

In a case on an assigned note between maker and assignee, a consideration need not be averred.

THIS was an action of assumpsit brought by Buckmaster, on a promissory note executed by James Mason to Paris Mason, and by him assigned to Buckmaster. Two objections were made by defendant in the court below, to the plaintiff's declaration: 1. that there was no *profert* made of the note declared on; and 2. There was no consideration averred or stated. The court overruled these objections and gave judgment for the plaintiff, to reverse which, the defendant sued out a writ of error, and assigned the same objections as grounds of error.

Opinion of the Court. It is necessary by the common law, to make *profert* of writings under seal, so as to place them in the power of the court, to give the opposite party oyer if required, and to let the court see if the deed is fair and honest on view. From the statute, it is necessary for the party to have oyer of writings not under seal, on which suit is brought, as he is bound to deny the execution of them, under the plea

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(1) In trespass for taking and carrying away a quantity of poultry of several descriptions, it is not necessary to state how many there were of each description, the collective value of the whole being stated. *Donaghe* v. *Roudebush*, 4 Munf., 251.

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of *non est factum*, under oath. A copy of the writing on which suit is brought, must be filed with the declaration, and the court can, upon a plea of oyer, compel the production of the original, so that no inconvenience can arise from the want of *profert*. There is no error then, on this point. (1)

As to the second point, the court believe it is never necessary to state a consideration in a case on an assigned note, between the maker and the assignee. The judgment of the court below is affirmed. (*a*) (2)

Judgment affirmed.

THOMAS COX, Appellant, *v.* JOHN MCFERRON, Appellee.

APPEAL FROM RANDOLPH.

A return of two *nihils* to a *scire facias* to foreclose a mortgage, is equivalent to an actual service.

THIS was an action commenced by *scire facias* in the Randolph circuit court, by McFerron against Cox, to foreclose a mortgage executed by the latter to the former. There were

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(1) Oyer can not be demanded of a record. If there is a variance between the record declared on and the one offered in evidence, it may be taken advantage of under a plea of *nul tiel record*. *Giles* v. *Shaw*, post. *Staten* v. *The People*, 21 Ills., 28.

(*a*) In declaring upon a bill of exchange or other simple contract, no *profert* is made—so when a deed is stated only as inducement. 1 Chitty's Pl., 259.

In an action by the indorsee of a note, not void in its creation, and indorsed before it became due, against the maker, the consideration can not be inquired into. *Baker* v. *Arnold*, 3 Caine's Rep., 279.

If a note has been fraudulently obtained and put into circulation, in an action by the indorsee against the maker, it is competent for the defendant to show a want of consideration. *Woodhull* v. *Holmes*, 10 Johns., 231. (3)

(2) An action of debt may be maintained on a bill of exchange by the payee against the drawer, although no consideration be expressed on its face. *Dunlap* v. *Buckingham*, 16 Ills., 109.

(3) Section 11, page 292, Scates' Compl. Purple's Statutes, page 773, provides, "If any fraud or circumvention be used, in obtaining the making or executing of any of the instruments aforesaid, (notes and bonds,) such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee or asignees of such instrument." This statute has received a construction in the following cases. *Woods* v. *Hynes*, 1 Scam., 103. *Mulford* v. *Shepard*, id., 583. *Adams* v. *Wooldridge*, 3 Scam., 256. In all of which it was held to apply only to cases of fraud in making or obtaining the instrument, and not in the consideration. In *Woods* v. *Hynes*, it was alleged that the goods for which the note was given were less in quantity and deficient in quality, from what they were represented; but the court held that that was a fraud in the *consideration* and not in the *making* or *executing* it, and was not a defense to a suit brought by an innocent purchaser without notice.

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two *nihils* returned, upon which, the court on motion gave judgment for McFerron. The point made was, whether the return of two *nihils* on a *scire facias* was equivalent to the actual service of process, when the defendant can be personally served.

Opinion of the Court. It appears, that by the common law, all writs of *scire facias* were proceeded on in the same manner by the return of two *nihils*; this was discretionary with the party issuing the process. Our statute gives this writ to the mortgagee, and, no doubt, in giving the writ, all the attributes that belonged to it at common law, were given also. It is to have a common law operation, and possess the common law incidents.

We are of opinion that the return of two *nihils*, is equivalent to a service, and authorized the court to render judgment as in cases where there has been an actual service. The judgment is therefore affirmed. (1)

Judgment affirmed.

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(1) When the statute has provided remedies by writ of *scire facias*, or summons in the nature of a *scire facias*, which were unknown to the common law, and which are of a personal character merely, the same must be executed like any other ordinary process—by personal service on the parties. *McCourtie* v. *Davis*, 2 Gilm., 306.

Two *nihils*, in case of *scire facias* upon a record, or recognizance, are sufficient to give the court jurisdiction of the persons of the cognizors, and to authorize judgment of execution. *Choate* v. *The People*, 19 Ills. R., 63. *Sans* v. *The People*, 3 Gilm., 327. *Besimer* v. *The People*, 15 Ills. R., 440.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1820, AT VANDALIA.

Present, JOSEPH PHILIPS, *Chief Justice.*
JOHN REYNOLDS, THOMAS. C. BROWNE, WILLIAM WILSON, *Associate Justices.*

GEORGE BLAIR AND WIFE, Plaintiffs in Error, *v.* HENRY SHARP, Defendant in Error.

ERROR TO WASHINGTON.

An omission of a colloquium, in a declaration for slander in charging the Plaintiff with swearing a lie, is fatal. (1)

THIS was an action of slander brought in the Washington circuit court by Blair and wife, against Sharp. From the

(1) Such was the rule of the common law, but it is now materially changed in this state, by statute. Section 2, page 1137, Scate's Comp'l. Purple's Statutes, page 1126, provides that, "It shall be deemed slander, and shall be actionable, to charge any person with swearing falsely, or with having swore falsely, or for using, uttering or publishing words of, to, or concerning any person, which in their common acceptation, amount to such charge, whether the words be spoken in conversation of and concerning a judicial proceeding or not." And under this statute the court held that "Words which, in their common acceptation, amount to a charge of having sworn falsely, are actionable, whether spoken of and concerning a judicial proceeding or not; and are none the less actionable because the declaration avers that they were spoken in a conversation concerning a judicial proceeding." "It is not necessary that the words spoken in a conversation concerning a judicial proceeding, should be spoken under such circumstances as to impute the crime of perjury." *Sanford* v. *Gaddis*, 13 Ills., 329.

In an action of slander for words used charging false swearing, where the defendant by his pleas has based his defense on the fact that the plaintiff was guilty of perjury, he will be required to prove the fact of the perjury. He must make out the defense which he has chosen in his pleadings, even though he was not obliged to charge perjury in order to justify the words spoken. *Hicks* v. *Rising* 24 Ill., 566.

The first section of the statute above referred to also provides that "If any person shall falsely use, utter or publish words which, in their common acceptation, shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed actionable, and he, she or they, so falsely publishing, speaking or uttering the same, shall be deemed guilty of slander." And under that section of the statute the court said: "Words, which in their common acceptation, amount to a charge of fornication, are slanderous, and are actionable without colloquium or innuendo; and the latter, if used, is at most but surplusage." *Elam* v. *Badger*, 23 Ill., 498.

In an action of slander for words charging the plaintiff with fornication or adultery, no reference need be made in the pleadings to the statute on that subject. id.

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agreed case, it appears, that the only words charged in the declaration to have been spoken of the plaintiff by the defendant, were, that the plaintiff "had swore a lie." There was no colloquium showing how, or on what occasion the lie was sworn. The court below declared the declaration insufficient, and that the words as stated, were not actionable. To reverse that judgment, a writ of error was sued out by plaintiff.

Opinion of the Court. The omission of a colloquium, showing to what the words spoken, referred, so as to render them actionable, we consider fatal. The declaration is not good at common law, nor under the statute. The declaration does not bring the case within the letter or meaning of the statute. The judgment of the court below is affirmed, with costs. (*a*)

Judgment affirmed.

JOSEPH FRENCH, Appellant, v. JOHN R. CREATH, BY GEORGE CREATH, HIS NEXT FRIEND, Appellee.

APPEAL FROM RANDOLPH.

An order of the court below, appointing the next friend of an infant plaintiff is not necessary. (1.) [*Vide* Laws of 1831, entitled "An Act to amend an act, entitled an act concerning practice in courts of law," approved January 29, 1827.]

An action for slander is not taken away, though the statute creating the offense charged, be repealed, (2.)

JOHN R. Creath, an infant under the age of twenty-one years, by George Creath, his father and next friend, brought

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(*a*) To say that the plaintiff has swore false, or taken a false oath, is not actionable. 8 Johns, Rep., 109. There must be a colloquium of its being in a cause pending in a court of competent jurisdiction, and on a point material to the issue. 13 Johns. Rep., 48. 1 Caine's Rep., 347. 2 Johns., 10. The term *foresworn* is not in itself actionable. 6 T. R., 691. 8 East., 427. Vide Laws of Illinois, 1823, p. 82.

(1.) In *Robb* v. *Smith*, 3 Scam., 46, it was said by the court in argument, that where a suit was brought by an infant and the infancy was pleaded in abatement, the plaintiff might amend by inserting the name of a *prochein amy*. The same was also held in *Blood* v. *Harrington*, 8 Pick., 552. This case is cited and approved in *Heslep et al.* v. *Peters*, 3 Scam., 45. And in a recent case the court held that "It is not necessary that there should be a guardian, or *prochein amy*, for a minor at the time of suing out the process. If it were otherwise, the exception should be taken before pleading to the merits." *Stumps* v. *Kelley*, 22 Ill., 140.

(2.) An action for slander will lie for charging the plaintiff with a crime, the prosecution of which has been barred by the statute of limitations. *Von Ankin* v. *Westfall*, 14 Johns., 233.

The repeal of a statute does not affect rights acquired under the repealed statute. *Naught* v. *Oneal*, post.

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an action, in the circuit court of Jackson, and removed by change of venue to Randolph, against Joseph French, for slander. On the trial a verdict was found for plaintiff, and a motion made by defendant for a new trial, and in arrest of judgment, which were overruled, and an appeal taken to this court where it was assigned for error, 1. That there was no order of the court below, appointing the next friend of the infant plaintiff; and 2. That the slanderous words spoken, charged the plaintiff with the commission of the crime in 1815, and as the law creating the offense with which he was charged, is repealed, no words spoken in relation to that crime are actionable.

Opinion of the Court. We are of opinion, that the judgment of the court below ought to be affirmed. It is now too late to make the objection first stated, and as to the second there is no clearer principle that the action is not barred, because the statute creating the offense has been repealed. If the words spoken, had charged an offense to have been committed in another state, which is not punishable here, still they would be actionable. (*a*) *Judgment affirmed.*

Starr, for appellant.

Kane, for appellee.

JOSEPH CORNELIUS, Plaintiff in Error, *v.* JOHN BOUCHER, Defendant in error.

ERROR TO ST. CLAIR.

Granting continuances and new trials rests in the discretion of the court and a refusal of either, cannot be assigned as error.

Swearing the jury, is matter of form, and an irregularity in swearing them not objected to at the time can not be assigned as error.

THIS was an action of covenant, brought in the St. Clair circuit court, by Cornelius against Boucher; on the trial a verdict was found for the defendant, and a motion made by

(*a*) An offense against a temporary statute cannot be punished after the expiration of the act, unless a particular provision by laws be made for that purpose. 7 Wheat., 551

One guilty of perjury in proceedings under the bankrupt laws, cannot be prosecuted for the offense, after the repeal of the law. *United States* v *Passmore*, 4 Dall., 372.

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plaintiff for a new trial, which was overruled, and judgment entered on the verdict for the defendant. To reverse this judgment the plaintiff prosecuted this writ of error, and assigns for error, 1. That the affidavit of the defendant for a continuance, at the July term 1848, was not sufficient to authorize a continuance. 2. That there were three issues of fact made up, and the jury were sworn to try but one issue, and it does not appear, upon which they found their verdict; and 3. That the court erred in not granting a new trial on the affidavit of the plaintiff.

Opinion of the Court. On the first point, there is no case within the recollection of the court, in which it has been considered error, to grant a continuance. The third objection will depend very much upon the same principle, that granting continuances and new trials, is so much a matter of discretion, that an appellate court can not undertake to inquire into the proper exercise of that discretion, in a case like the present. The court, however, must not be understood as saying, that in no case would it make the inquiry. If a case was brought up, upon bill of exceptions containing all the facts, it would furnish this court with the means of forming an opinion, as to the proper exercise or abuse of the discretion of the court below. (1)

The second error assigned, is considered equally untenable. The swearing the jury, is matter of form, and if not objected to at the time, an irregularity in the manner of swearing them, can not afterwards be assigned as error. There is no judgment of the court upon the point, and the jury is presumed to take into consideration the whole matter, and if their intention is manifest, the court will set right mere matters of form. The cases of *Thompson* v. *Button*, 14 Johns. Rep., 84; and *Hawks* v. *Crofton*, 2d Burrow, 698, are authorities in support of this opinion. The judgment of the court below is affirmed. (2)

Judgment affirmed.

(1) See note to the case of *Sawyer* v. *Stevenson*, ante, page 24.

(2) The decisions are abundant that formal objections must be taken before trial, or if not they are waived. *Curtis* v. *The People*, post. *Gugkowski* v. *The People*, 1 Scam., 479. *Stone* v. *The People*, 2 Scam., 338. *Townsend* v. *The People*, 3 Scam., 329. *Conolly* v. *The People*, 3 Scam., 477.

A jury should not, at the commencement of a term, be sworn for the whole term, but should be sworn for the trial of each particular cause. *Barney* v. *People*, 22 Ill., 160.

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JOHN THORNTON AND OTHERS, Appellants, *v.* GEORGE SMILEY AND JOHN BRADSHAW, Appellees.

APPEAL FROM UNION.

If one of two administrators, loans the money of the estate, he does it upon his own responsibility, and an action to recover it back, should be brought in his own name alone.

SMILEY and Bradshaw, executed their note to Hezekiah West, as administrator of the estate of Weaver, deceased, for a sum of money, to recover which this action was brought in the name of said West and John Thornton and Mary his wife, late Mary Weaver, who were joined with West, in the administration on the estate of Weaver. The money was loaned by West alone, to Smiley and Bradshaw, and the note executed to him alone as administrator. An objection was made by defendants to the improper joinder of parties, which the court sustained, and gave judgment for the defendants. To reverse which, the plaintiffs appealed.

Opinion of the Court. The court knows of no power in the administrator, by virtue of the trust conferred on him by law, to loan the money belonging to the estate ; if he does it, he acts upon his own responsibility, and renders himself liable to the estate. The note was made to West alone, and for that reason, the suit should have been commenced in his name, and a joinder of his co-administrators was improper, as no right of action, to recover the amount of the note, existed in them. Without determining any other question, for this ground alone, the court affirms the judgment. (*a*) (1)

Judgment affirmed.

(*a*) *Vide* Toller's law of executors, page 480, where it is declared, that in equity, an executor may be compelled to pay interest, if he suffers the money of the estate to lie *idle* in his hands. This would seem to authorize a loan, or any other investment of the trust money.

An administrator is not liable to pay interest upon assets in his hands, unless under special circumstances. *Dexter* v. *Arnold, et al.*, 3 Mason, 248.

(1) Admitting that the administrator had no right to loan the money, how could the defendant take advantage of it? He executed his note to the plaintiff *as administrator*, and to him it was immaterial whether he was liable to the administrator personally, or in his representative character. Persons interested in the estate might, perhaps object that the administrator had transcended his duty, and might hold him responsible for it; but if they are content with his actions it is not easily perceived how the defendant can complain.

In *Marsh et al.*, v. *The People*, 15 Ill., 284, it was held that when three were appointed administrators, each was liable for the acts of the others. If we are right in the proposition that the defendant could not object that the note was not the property of the estate, then it would follow that each being liable for the acts of all the others, all would have a right to join in an action for the recovery of the money.

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George Brazzle and James Hawkins, Plaintiffs in Error, *v.* David Usher, Defendant in Error.

ERROR TO GALLATIN.

If parties appear and go to trial without a plea being put in, it is such an irregularity as will be cured, after verdict, by the statute of amendments.

Usher brought an action of trespass, *vi et armis*, against Brazzle and Hawkins, in the Gallatin circuit court, and recovered a verdict and judgment against them. To reverse which judgment, they sued out a writ of error, and assigned for error, that there was no plea filed in the cause, and that a trial was had without a plea. It appears from the record, that the parties, by their attorneys, were present at the trial, and made no objections to the proceedings as they were.

Opinion of the Court. The appearance of the parties cured the defect, if any, arising from the failure to file a plea. The statute of amendments will apply in this case, to cure the irregularity. The judgment of the court below must be affirmed. (1)

Judgment affirmed.

(1) If one of several pleas be not answered, and the parties go to trial without any objection on the part of the defendant, the irregularity is cured by the verdict. *Ross* v. *Redick*, 1 Scam., 74. *Armstrong* v. *Mock*, 17 Ill., 166. *Kelsey* v. *Lamb*, 21 Ill., 559. *Stumps* v. *Kelley*, 22 Ill., 140. *Puterbaugh* v. *Elliott et al*,. id. 157.

A declaration contained two counts, upon one of which there was an immaterial issue, and the other was wholly unanswered. After judgment for plaintiff the defendant assigned for error, that judgment was entered on the immaterial issue, and that the second count was unanswered. Upon these assignments of error the court said: "Will the non-joinder of an issue on the second count, or the immaterial issue, justify the reversal of the judgment for such causes? We think not: the statute of amendments and jeofails has provided against any error arising from such causes, and the defendant can not now assign either for error." *Graham* v. *Dixon et al.*, 3 Scam., 118 The grounds upon which this decision would seem to be based are—that going to trial without a plea was an error in favor of the defendant, and of which he could not afterwards complain. *Kitchell* v. *Bratton*, 1 Scam., 301. *Arenz* v. *Reihle et al.*, id., 340. *Bailey* v. *Campbell*, id., 47. *Clemson* v. *State Bank*, id., 45. *Thorn* v. *Watson et al.*, 5 Gilm., 27. On the count which was unanswered the plaintiff might have taken judgment by default, and the defendant was not injured by his not doing so.

In the following cases defects have been held to be cured by verdict. *State Bank* v. *Batty*, 4 Scam., 201. *Hamilton et al.* v. *Cook County*, id., 527. *Selby* v. *Hutchinson*, *adm'r*, 4 Gilm., 327. *Sullivan* v. *Dollins*, 13 Ill., 88. *Burst* v. *Wayne*, id., 599. *Spencer* v. *Langdon*, 21 Ill., 192. *Loomis* v. *Riley*, 24 Ill., 307.

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George Naught, Plaintiff in Error, *v.* Hezekiah Oneal, Defendant in Error.

ERROR TO WHITE.

The repeal of a statute does not affect rights acquired under the repealed statute.

In an action of slander, if the words were spoken within one year before the repeal of the statute limiting such actions, the old statute will be no bar.

This was an action of slander brought in the circuit court of White county, by *Naught* v. *Oneal.* The defendant pleaded the statute of limitation, "that the cause of action did not accrue within one year from the commencement of the suit." The plaintiff replied that the words were not spoken within one year previous to the commencement of the suit, but that the action was commenced within one year from the passage of the act of limitations. To this replication the defendant demurred, and the plaintiff joined in demurrer. The court sustained the demurrer, and from that judgment the plaintiff brought this writ of error.

Per curiam. If the cause of action accrued one year or more before the repeal of the statute of limitations,* still, the old statute of limitations is a good bar to the action. It is a complete bar before the repeal, and the repeal of a statute does not affect the rights acquired under the repealed statute.

If the words in this case were spoken within one year before the repeal of the statute, the old statute will be no bar. But as, in this action, it does not appear at what time the words were spoken, it can not be determined whether the old statute be a bar or not. The judgment of the court must be reversed, and the cause remanded for new proceedings to ascertain the time when the words were spoken. (1)

Judgment reversed.

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*Laws of 1819, page 351. Ib. 141, sect. 8.

(1) Where a statute is repealed, except as to transactions passed and closed, it must be considered as if it had never existed. *Ill. and Michigan Canal* v. *City of Chicago*, 14 Ill., 335.

In the construction of statutes of limitations, the rule is, that cases within the reason, but not within the words of the statute, are not barred. *Bedell* v. *Janney et al.*, 4 Gilm., 208.

A statute of limitations will not be applied to cases not clearly within its provisions. *Hazell* v. *Shelby*, 11 Ill., 9.

See note to *Mellick* v. *De Seelhorst*, post.

Note.—I have not been able to find any case decided at December term, 1821, except the case of *Moreland* v. *Pierson*, from Gallatin. There were two points made in that case, 1, as it regarded the sufficiency of the breach in the declaration; and 2, the exclusion of a deposition from the jury. The judgment of the court below was affirmed. The case is one of no importance, and is therefore not reported.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1822, AT VANDALIA.

Present, THOMAS REYNOLDS, *Chief Justice**.
THOMAS C. BROWNE,
JOHN REYNOLDS,
WILLIAM WILSON, } *Associate Justices.*

JOSEPH CORNELIUS, Appellant, *v.* DAVID COONS AND PARKER JARVIS, Appellees.

APPEAL FROM ST. CLAIR.

An appeal will lie, by consent entered of record, from an interlocutory order dissolving an injunction.

CORNELIUS exhibited his bill in chancery, in the St. Clair circuit court, praying an injunction to enjoin Coons from the collection of certain judgments which he had obtained against Cornelius, before Clayton Tiffin, a justice of the peace, and also to enjoin Jarvis, the constable, from collecting the executions issued upon those judgments. An injunction was awarded by the judge in vacation. Jarvis answered, setting forth his powers to act as constable, by virtue of the executions. Coons answered, and denied every material allegation in the complainant's bill. Upon a hearing of the cause upon bill and answers, the court dissolved the injunction. The errors assigned, question the correctness of the court below in dissolving the injunction, and in rendering that judgment in vacation.

Opinion of the Court by Chief Justice REYNOLDS. It is a sufficient answer to the second error assigned, that the judgment of the court, and this appeal, were both had by consent entered of record. Without such consent, no appeal would lie upon an order dissolving an injunction, it being an inter-

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*In place of Chief Justice PHILIPS, who resigned on the 4th day of July, 1822.

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locutory, and not a final judgment. The correctness of the judgment in dissolving the injunction, can not be questioned. If the bill contained any equity, it is completely destroyed by the defendant's answer. The judgment of the court below is affirmed. (*a*) (1)

Judgment affirmed.

(*a*) No appeal from an interlocutory decree dissolving an injunction. *Young* v. *Grundy*, 6 Cranch, 51.

(1) The general rule is well settled—that an appeal or writ of error will not lie from an interlocutory order; it must be a final adjudication or judgment to enable a party to have it reviewed by an appellate court. *Pentecost et al.* v. *Magahee*, 4 Scam., 326. *Fleece* v. *Russell et al.*, 13Il l., 31. *Hayes* v. *Caldwell*, 5 Gilm., 33. *Woodside* v. *Woodside*, 21 Ill., 207; and it is also equally as well settled that consent of parties will not confer jurisdiction on a court which has no jurisdiction of the subject matter. *The People* v. *Scates*. 3 Scam., 353. *Foley* v. *People*, post. *Allen* v. *Belcher*, 3 Gilm., 595. *Ginn et al.* v. *Rogers*, 4 Gilm., 135. *Williams* v. *Blankenship*, 12 Ill., 122. *Randolph County* v. *Ralls*, 18 Ill., 29. The rule established by the case last cited is, "That jurisdiction of the subject matter can not be conferred upon a court by consent of the parties, nor can want of it be waived; but when the law confers upon the court *original jurisdiction* of the subject matter, full appearance, without objection, confers upon the court jurisdiction of the person, and it may then adjudicate." The same distinction is taken in the other cases cited.

The jurisdiction of the supreme court in existence when this decision was made was fixed by the constitution of the state, and was as follows: "The supreme court shall be holden at the seat of government, and shall have an *appellate jurisdiction only*, except in cases relating to the revenue, in cases of mandamus, and in such cases of impeachment as may be required to be tried before it." Constitution of 1818, Article 4, Section 2. The present constitution is substantially the same. Article 5, Sec. 5.

From these principles we think it follows, that the order appealed from being interlocutory only, the supreme court had no jurisdiction over it; that that court possessing only *appellate* jurisdiction, the consent of parties could not confer jurisdiction; and that consequently the decision of the court was erroneous.

And this view, it is believed, is sustained by the reasoning of the court in subsequent cases, although the question here has never been directly before the court. In *Crull et ux.* v. *Keener*, 17 Ill., 246, in speaking of cases authorized to be certified to the supreme court from the circuit court, Caton, C. J. said: "Nothing can be more manifest than that this was never designed to allow a case to be taken to the supreme court till a final decision had been made in the circuit court, so that it could be taken up in the ordinary way by filing a complete record." And again in *Cunningham* v. *Loomis et al.* id. 555, which was attempted to be taken to the supreme court in the same manner: "However clear we might be that the circuit court decided correctly, so far as that decision went, yet, as there is no final order in the case, this court has no jurisdiction to affirm or reverse the decision. The judgment which was rendered was but interlocutory. It could not be final, till the damages were assessed. Should we affirm the judgment it would not be an end of the case. As yet, the plaintiff's judgment is for nothing. It merely determines that they are entitled to recover something. How much they are entitled to recover, is a question still pending before the circuit court, which has exclusive jurisdiction over it. That question may be tried in that court at the same time we are hearing this cause here, and by the time this decision is made, the condition of the cause may be very different from what it was when this case was brought up."

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JAMES MASON Appellant, v. ROBERT WASH, who sues for the CITY BANK OF NEW YORK, Appellees.

APPEAL FROM MADISON.

Our act making promissory notes, &c., assignable, is not to be construed in the same way as in the statute of Anne, as they are different in their provisions and objects.

Under our statute an assignor of a note is not liable, unless due diligence by suit against the maker has been used where that course will obtain the money.

The laws of another state must be pleaded or proved—this court can not *ex-officio* take notice of them.

A discharge under the bankrupt law of New York is no bar to a suit brought here on a contract made before the discharge.

THIS action was commenced against the defendant below, who is plaintiff here, upon his liability as assignor of a promissory note. The declaration averred, that the note was executed by S. S. and C. Porter, at New York, and made payable six months after the date thereof, to James Mason or order.—That on the day of the execution of the note, and before its payment, James Mason, at New York, assigned the note to Robert Wash—that on the day the note fell due, and was payable, it was presented at New York to the makers for payment, and that payment by them was refused, of which the assignor, Mason, had notice. To this declaration the defendant demurred, which the court overruled. The defendant then plead, among other pleas, his discharge under the bankrupt laws of New York, to which the plaintiff demurred, and which demurrer, the court sustained. A motion was also made by defendant in arrest of judgment, which the court overruled, but gave judgment for the plaintiff. To reverse which an appeal was granted, and the appellant assigned for error among others, 1. The judgment of the court in overruling his demurrer to the declaration; 2. Overruling his motion in arrest of judgment; and 3. In sustaining the plaintiff's demurrer, to the defendant's special plea of a discharge under the bankrupt laws of New York.

Chief Justice REYNOLDS, after stating the facts of the case, delivered the opinion of the court. In this case, the court is called upon to say, whether sufficient facts are shown in the pleadings to authorize the plaintiff below to recover. This depends, we conceive, upon the sound construction to be given to our act of the legislature, making promissory notes assignable.* We can not give to that act the same construction that

* Laws of 1819, page 1.

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is given to the statute of Anne. The provisions of the two statutes are different; the statute of Anne, places promissory notes upon the same footing with inland bills of exchange—ours does not. Ours makes notes for the payment of property assignable—the statute of Anne does not. That statute was passed for the furtherance of commerce, and to suit the convenience and interests of a greatly commercial people. Ours was enacted at a time when but few persons inhabited the country, and whose pursuits were domestic and agricultural. Our statute expressly declares that the assignor shall *not* be liable, until due diligence has been used by the holder to obtain the money from the maker. To give our statute the same construction that the statute of Anne receives, would, in the opinion of the court, defeat the intention of the legislature, and the obvious understanding of the people. Hence, we are irresistibly led to conclude that the diligence contemplated by our statute is diligence by suit, when that course will obtain the money. No suit then, having been commenced and prosecuted against the makers of this note, as appears from the pleadings, the declaration is insufficient, and no recovery can be had thereon under the laws of this state. (1)

(1) Under the statute of this state there are three contingencies in which an assignor of a promissory note may become liable: 1, where the assignee, by the exercise of due diligence, prosecutes the maker to insolvency: 2, where the institution of a suit against the maker would be unavailing: 3, where the maker has absconded or left the state when the note falls due, or when suit should be brought. *Crouch* v. *Hall*, 15 Ill., 264.

The following cases have been decided on each of these propositions:

First. Due diligence, &c.

Thompson v. *Armstrong*, post. *Tarlton* v. *Miller*, id. *Wilson* v. *Van Winkle*, 2 Gilm., 684. *Curtis et al.* v. *Gorman*, 19 Ill., 141. *Allison* v. *Smith*, 20 Ill., 104. *Sherman* v. *Smith*, id., 350. *Nixon* v. *Weyhrich*, id., 600.

The diligence required in making the collection from the maker of the note, is such as a prudent man would use in the conduct of his own affairs. *Nixon* v. *Weyhrich*, 20 Ill., 600.

If an execution is relied on, as proof of diligence used in the collection of a debt, the process should remain in the hands of the officer, for its whole life; or the fact of the uselessness of its so remaining, should be pleaded. No presumption will be indulged that the money could not be made, during the remainder of the days it had to run, after return was made. *Hamlin* v. *Reynolds, et al.*, 22 Ills., 207. *Chalmers* v. *Moore*, id., 359.

When it is designed to recover against the indorser of a note, action must be brought against the maker at the first term of any court having jurisdiction, although there may not be ten days between the time the note falls due, and the commencement of the term. *Chalmers* v. *Moore*, 22 Ill., 359.

Secondly. Where a suit would have been unavailing.

Humphreys v. *Coller et al.*, 1 Scam., 47. *Harmon et al.* v. *Thornton*, 2 Scam., 354. *Cowles et al.* v. *Litchfield*, id., 360. *Bledsoe* v. *Graves*, 4 Scam., 385. *Bestor* v. *Walker et al.*, 4 Gilm., 15. *Pierce* v. *Short*, 14 Ill., 146. *Crouch* v. *Hall*, 15 Ill., 263. *Roberts* v. *Haskell*, 20 Ill., 59.

Thirdly. Where the maker has absconded or left the state when the note falls due or suit should have been brought.

Hilborn v. *Artus et al.*, 3 Scam., 346. *Schuttler* v. *Piatt*, 12 Ill., 419. *Crouch* v. *Hall*, 15 Ill., 263.

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But here we are met by an argument, that the right of action accrued under the laws of New York, the contract having been made there, and that the laws of that state must furnish the rule of decision in this case. It is a sufficient answer to that argument to remark, that the laws of New York were neither pleaded, nor proved in the court below, and that this court can not, *ex-officio*, take notice of the laws of a foreign state. (*a*) (2) Here we might stop; but as the question which is the foundation of the third error assigned may again be raised in the court below, it will be best, once for all, to settle it, and in doing so, it will be useless, and accounted a vain boast of learning to enter into argument or reasoning upon the subject, it having been settled by the highest judicial tribunal known to our government. The contract in this case was made after the passage of the bankrupt law of New York, and the discharge obtained under that law. But as the supreme court of the United States has determined that the discharge is equally unavailing whether the contract was made before or after the passage of the act, this court feels itself bound to yield to that opinion, how much soever some of the court might be disposed to question its correctness. We presume, however, it is founded upon the fact that the power to pass bankrupt laws is delegated to the general government, and hence, the states are restricted. (*b*)

The liability of the assignor on account of the maker's absence from the state, depends materially on the question whether the note was assigned before or after maturity. If assigned *before* maturity, although the maker resides out of this state, and was so known to all the parties at the time of the assignment, still if he is out of the state when the note becomes due, or suit should have been brought, the assignor will be liable, and the assignee is not required to prosecute him to insolvency in the foreign jurisdiction. *Schuttler* v. *Piatt*, 12 Ill., 419. But if the note is assigned *after* maturity, and the maker is out of the state at the time, the assignee can only recover of the assignor by showing that he used due diligence by prosecuting a suit against the maker, or that such suit would have been unavailing. *Crouch* v. *Hall*, 15 Ill., 264.

(*a*) Foreign laws are facts which must be proved before they can be received in a court of justice. 3 Cranch, 187.

Foreign statutes can not be proved by parol, but the common law of a foreign country may be shown by the testimony of intelligent witnesses of that country. 1 Johns. Rep., 385.

(2) Such is the rule as to the statutes of other states. *Crouch* v. *Hall*, *supra*. *Merritt* v. *Merritt*, 20 Ill., 65; but in the absence of all proof to the contrary, the courts will presume that the common law prevails in the states of the Union. Id.

The common law of another state may be proved by parol. Id. Statutes of other states can not. *Hoes* v. *Van Alstyne*, 20 Ill., 201.

(*b*) A discharge under the insolvent law of another state is no bar to a suit brought by any creditor, named in the insolvent's petition, against such debtor in New York. *White* v. *Canfield*, 7 Johns., 117.

Vide King v. *Riddle*, 7 Cranch, 168. 4 Wheat., 122. Ibid, 209. *Ogden* v. *Saunders* 12 Wheat., 213. *Thompson* v. *Armstrong*, post.

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Some other questions were raised in the argument of this cause, but as they relate principally to the sufficency of the testimony to authorize the finding of the jury, are not of a character to require the interfering hand of this court. The judgment below must be reversed, the appellant recover his costs, and the cause remanded to the court below for new proceedings to be had, not inconsistent with this opinion.

Judgment reversed.

S. MOORE, Plaintiff in Error, *v.* J. WATTS, S. CROCKER AND M. WELLS, Defendants in Error.

ERROR TO ST. CLAIR.

A warrant for a felony founded upon an affidavit which stated "that A. B. entered the inclosure of C. D, and carried off her grain," is no justification to the officer who issued it, nor to the officer who executed it, as the affidavit contains no words importing a felony. All the parties to such a warrant are trespassers.

Opinion of the Court by Chief Justice REYNOLDS. This is an action of assault and battery and false imprisonment.

The defendants pleaded specially in substance, that the said Watts being a justice of the peace—that the defendant, Wells, appeared before the said justice, and made oath that the said plaintiff had entered her inclosure and carried off a quantity of her grain—that thereupon the said justice issued his warrant, upon which the plaintiff was arrested and committed. Under this proceeding the defendant justifies.

The plaintiff replied, that the assault and battery and false imprisonment was committed of the defendants' own wrong, and without any legal process, founded upon a charge of felony, sworn to before said justice. Upon this replication issue was taken. The affidavit, warrant and commitment, were read in evidence to the jury, and the court instructed the jury that they were a complete justification to the defendants. It is to this instruction the plaintiff excepts, and we are called upon to say whether it is correct. We will here remark that the plea contains an averment that the affidavit meant, that the plaintiff feloniously entered the inclosure of the said Wells, and carried off her grain. This kind of innuendo, if we may use the expression, can not alter the sense, or extend the meaning of the words. We will now consider, does the affidavit give to the justice jurisdiction? If it does, then was the officer who acted under it, justified. By the 17th section

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of the act defining the powers and duties of justices of the peace, it is provided,

That it shall be lawful for any justice of the peace, upon oath being made before him that any person hath committed, or that there are just grounds to suspect that he or she hath committed any criminal offense within his county, to issue his warrant, &c. Can this provision be construed to extend to mere civil trespasses? we think not: and the affidavit shows nothing more. Then we must say the court erred in instructing the jury that the affidavit and proceedings under it justified the defendants. If the justice had not jurisdiction, and this is apparent, both from the affidavit and warrant, the officer who acts under his process, can not thereby claim to be justified. Let the judgment of the court below be reversed, the plaintiff recover his costs, and the cause remanded for new proceedings to be had not inconsistent with this opinion. (1)

Judgment reversed.

(1) There is some conflict in the authorities as to what extent an officer is justified in serving process which is void; but we think the weight of decisions establishes this principle—that if the process is, on its face, legal, it is a full justification to the officer serving it, unless he had notice outside of the writ that it was irregular. But if the process itself contains evidence of its irregularity, or if the officer is notified in any other manner, then he will be a trespasser. Such clearly is the purport of the decisions in this state. *Barnes* v. *Barber*, 1 Gilm., 401. *McDonald* v. *Wilkie*, 13 Ill., 25. *Stafford* v. *Low*, 20 Ill., 152. In this last case the court, in speaking of a capias, said: "But like any other *void* process which is regular on its face, it would protect the officer executing it, as he need look no further than to the writ." See also the following cases. *Lattin* v. *Smith*, post. *Collins* v. *Waggoner*, id. *Flack et al.* v. *Ankeny*, id. *Hull* v. *Blaisdell et al.*, 1 Scam., 332. *England* v. *Clark*, 4 Scam., 487. *Wentworth* v. *The People*, id., 554. *Parker* v. *Smith et al.*, 1 Gilm., 414. *Bybee* v. *Ashby*, 2 Gilm., 165. *Stow* v. *Gregory*, 3 Gilm., 576. *Guyer* v. *Andrews*, 11 Ill., 496. *Cook* v. *Miller*, id., 610. *Teft* v. *Ashbaugh*, 13 Ill., 603. *Martin* v. *Walker*, 15 Ill., 378.

Though the rule is believed to be as stated, yet the decision was unquestionably correct in this case; for the plea sets out the affidavit, and shows the insufficiency of the proceedings in issuing the warrant, but does not pretend to allege a want of knowledge of such irregularity in the defendant.

Although an officer executing a *ca. sa.* upon an insufficient affidavit may protect himself by pleading the process, yet if he should refuse to execute it he would not be liable; nor would he be liable for an escape under it. *Tuttle* v. *Wilson*, 24 Ill., 553.

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WM. BEER, H. BEER, AND THOMAS BEER, Plaintiffs in Error, v. DANIEL PHILIPS, Defendant in Error.

ERROR TO ST. CLAIR.

If, after the decision of the court, overruling a demurrer, the defendant rejoins to the replication and issue is taken thereon, it is a complete waiver of the demurrer.

After abandoning a demurrer, the decision upon it can not be assigned for error.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of trespass *quare clausum fregit*, commenced by Philips against the Beers in the court below. The defendants below pleaded not guilty, and *liberum tenementum*. Upon the first plea, issue was taken, and to the second, the plaintiff replied specially—to this special replication the defendant demurred, and the court overruled the demurrer. The judgment of the court in overruling this demurrer is assigned for error. We have not deemed it material to set out the facts disclosed by the replication, because we think the case can be disposed of without a decision upon its merits. After the decision of the court, overruling the demurrer, the defendant rejoined to the replication, and took issue thereon. This we consider was a complete waiver of the demurrer. If the court below erred, the defendants in that court, to have availed themselves of that error, should have abided by their demurrer, and not traversed the replication. After abandoning the demurrer, they cannot assign the decision upon it for error. The judgment of the court below is affirmed. (1)

Judgment affirmed.

(1) Such is the rule of pleading to the merits. *Peck* v. *Boggess*, 1 Scam., 281. *Buckmaster* v. *Grundy*, id., 312. *Gilbert* v. *Maggord*, id., 471. *McFadden* v. *Fortier*, 20 Ill., 509. But it is otherwise in pleas in abatement. It was once so held in *Delahay* v. *Clement*, 2 Scam., 575; but this decision was overruled in the same case in 3 Scam., 201. And it is now settled that if a demurrer to a plea in abatement be sustained, and the defendant answer over, he is not thereby precluded from examining the decision on the demurrer in an appellate court. *Delahay* v. *Clement*, 3 Scam., 201. *Weld* v. *Hubbard*, 11 Ill., 574.

If an unanswered demurrer is on record, and the party filing it goes to trial by consent, it will not be cause for reversal of the judgment. *Parker* v. *Palmer et al.*, 22 Ill., 489.

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JAMES BELL AND JOHN BELL, Plaintiffs in Error, *v.* ZADOCK AYDELOTT, Defendant in Error.

ERROR TO GALLATIN.

The long and uniform practice in this state, has been to execute writs of inquiry of damages, in the presence of the court, and there is no irregularity in it.

AYDELOTT brought an action of assault and battery, in the Gallatin circuit court, against the Bells. Judgment was entered against them for default of a plea, and the court, on motion of the plaintiff, ordered the sheriff to impannel a jury *instanter* to ascertain the damages. The jury, *instanter*, and in the presence of the court, assessed the damages, upon which the court rendered a judgment. The error assigned was, that the court ought to have awarded a writ of inquiry to the sheriff, who should have executed it by a jury, not in the presence of the court.

Opinion of the Court by Justice JOHN REYNOLDS. The long and uniform practice in this state has been for the jury to inquire of damages in the presence of the court. This mode is the more easily given in to, when we reflect that this inquiry of damages is had, in the presence, and under the immediate care and direction of the court. If it be absolutely necessary from the old law, as it was contended, for this writ to be executed in the presence of the sheriff, this likewise is done, for generally the sheriff is in the court. This will answer the ends of form, and form it must be, as the substantial ends of justice will be answered by the assessment of damages before the Court. We are therefore of opinion, that the judgment of the circuit court be affirmed. (*a*) (1)

Judgment affirmed.

(*a*) The executing a writ of inquiry is an inquest of office, and the officer who presides, acts *ministerially*, and not *judicially*. 2 Johns. Rep., 63. If it appears that important questions of law will arise on the execution of the writ, the court will order it to be executed by a judge at the circuit. *Ibid.*, 107. Tidd's Prac., 513. 4 T. R., 275. 2 Bos. & Pull., 55.

(1) A writ of inquiry may be executed in vacation, as well as in term time. It may be executed at any place within the sheriff's bailiwick. The statute has not changed the common law in this respect. *Vanlandingham* v. *Fellows et al.*, 1 Scam., 233.

If any irregularity take place in the execution of a writ of inquiry, the proper way is to apply, upon affidavit, to the circuit court to set the inquest aside. *Id.*

A writ of inquiry may be executed before the sheriff at any place within his bailiwick, and a want of notice to the defendant, on executing the writ, can not be assigned for error; nor can the sufficiency of the writ, the proper practice being to move the court below to quash it. *Moore* v. *Purple*, 3 Gilm., 149.

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ISAAC CLARK, Appellant, *v.* JOSEPH CORNELIUS, Appellee

APPEAL FROM ST. CLAIR.

A justice of the peace has no power to investigate an account exceeding $100, though it may be reduced by credits to a sum less than $100.

CLARK exhibited to a justice of the peace for St. Clair county, an account amounting, in all the items, to $176, against Cornelius, on which account there was given a credit of $77, leaving a balance due of $99. The justice gave judgment in favor of Clark, from which Cornelius appealed to the circuit court. The circuit court decided, that the justice of the peace had no jurisdiction, and dismissed the suit; from which decision Clark appealed, and assigned that decision as error.

Opinion of the Court by Justice JOHN REYNOLDS. The act defining the duties of justices of the peace, gives the justices jurisdiction in all cases of contract for the payment of money, where the sum demanded does not exceed one hundred dollars.*

Under this act, a justice has no power to investigate any account or other claim, exceeding one hundred dollars. When the credit is applied to the claim exhibited, it reduces it below one hundred dollars, yet the justice would have to investigate the whole amount of $176, as the credit was not applied to any particular item or charge in the account, so as to extinguish it. This power, the legislature never intended to give justices of the peace. We are of opinion that the circuit court decided correctly that the justice had no jurisdiction, and we, therefore, affirm the judgment. (1)

Judgment affirmed.

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* Laws of 1819, page 185.

(1) This decision was followed and approved in the following cases. *Maurer* v. *Derrick*, post. *Ellis* v. *Snider*, id. *Blue* v. *Weir et al.*, id. But this is now changed by statute. The provisions of the statute giving jurisdiction to justices of the peace, now in force, are as follows:

"Justices of the peace shall have jurisdiction in their respective counties, to hear and determine all complaints, suits and prosecutions of the following description:

"In actions of debt on bonds, contracts, agreements, promissory notes, or other instruments in writing, in which the amount claimed to be due does not exceed one hundred dollars.

"In actions of assumpsit upon any contract or promise, verbal or written, express or implied, for a valuable consideration, in which the amount claimed to be due does not exceed one hundred dollars.

"In suits for money claimed to be due upon unsettled accounts, in which the balance claimed to be due does not exceed one hundred dollars." Scates' Comp., page 686. Purple's Statutes, page 662. There are also other provisions giving jurisdiction to justices, but these are the principal ones which relate to the decision in question.

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JOSEPH R. G. POOLE, Appellant, *v.* OLIVER C. VANLANDINGHAM, Appellee.

APPEAL FROM GALLATIN

The plea of *nil debet* is a good plea to all actions of debt upon all simple contracts.

A plea stating that the consideration has wholly failed, without saying wherein, is bad.

The plea of "no consideration" is given by statute, and throws the *onus* upon the plaintiff.

Opinion of the Court by Justice JOHN REYNOLDS. This was an action of debt, to which there were seven pleas; the five last were demurred to, and the demurrer sustained, and to reverse that opinion this appeal is prosecuted. The 3d plea states that the note in this case was given without any good or valuable consideration. 4th plea alledged that the consideration had wholly failed. 5th plea is a plea of *nil debet*. 6th plea stated that $500 were paid in discharge of the debt of $700. 7th plea states that said Poole never received any consideration from any person named in said note. The 6th plea of *nil debet* is a good plea. This is a good plea to all simple contract debts; it will put in issue all the matter contained in the second plea which was withdrawn. (1) On this ground therefore, if no other, the judgment must be reversed, and the case remanded to the court below, so the plaintiff may withdraw his demurrer and take issue on said plea of *nil debet*. Yet as there are other pleas, on which the demurrer is taken, it will perhaps be right to give some opinion on them. The 3d and 7th pleas contain the same matter, to wit: that there was not given nor received any good or valuable consideration for said note. The statute law of this state gives rise to these pleas, which show a kind of negative defense to the action, and such matter of which the plaintiff must take the affirmation; therefore there can be no necessity, although urged to the contrary, for the defendant to show in what manner the consideration was not given by one party, or received by the other,—in reality a negative can not be shown or proven. (2)

(1) In a suit where a bond is the gist of the action, *nil debet* is not a good plea; but where it is inducement merely, it is a good plea. *Davis* v. *Burton et al*, 3 Scam., 41. *King* v. *Ramsay*, 13 Ill., 622.

(2) It is said this is overruled by the cases of *Stacker et al.* v. *Watson*, 1 Scam., 207; *Vanlandingham* v. *Ryan*, 17 Ill., 25; *Topper* v. *Snow*, 20 Ill., 434; and if it was meant by the court to say that the plaintiff must take the affirmative in proving that there was a cons deration. then there can be no question but that it was erroneous. But such I apprehend was not their in-

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On these pleas it is necessary for the plaintiff to go on and allege in what manner the consideration was given and received.

Therefore those pleas are good. The 4th plea is certainly bad, as it is necessary for the defendant, when the consideration is alleged to have failed, to show in what manner it has failed. This allegation ought to have stated with as much precision, as the allegations in the declaration are set out. For this reason, the demurrer to this plea ought to be sustained. (3) The fifth plea is a kind of plea of accord and satisfaction; it is surely a novel one, yet I think it a good plea under our statute. The judgment of the court below ought to be reversed, and the case remanded to be proceeded on as above stated,—the costs to abide the event of the suit.

The judgment is reversed on the above grounds, except as to the pleas of the want of consideration; on these the court is divided—therefore as to these the judgment is affirmed. (*a*)

Judgment reversed.

WILLIAM THOMPSON, Appellant, *v.* GEORGE ARMSTRONG, Appellee.

APPEAL FROM MADISON.

The assignor of a note for the payment of money or a specific article of property, is not liable, unless due diligence has been used to recover of the maker, and a suit in June, 1818, upon a note made in August, 1814, and payable in January, 1817, which was assigned in March, 1815, is not due diligence.

A note for the payment of a certain sum of money "which may be discharged in pork," is assignable.

An averment of the insolvency of the maker, is sufficient to excuse the use of due diligence.

THIS was an action commenced by the plaintiff, the appellant, against the appellee, in the Madison circuit court, upon his liability as assignor of a promissory note. The note was executed in the state of Kentucky by one Colston O. Wallis, on the 30th day of August, 1814, for the payment of a cer-

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tention. They were passing only on the question of the sufficiency of the pleadings; and when confined to that it is not readily seen that there is any error in the opinion, Suppose a note to be given without any pretense or show of consideration, how could a defendant do more than aver that it was given without any consideration?

(3) See note to *Taylor* v. *Sprinkle*, ante page 17.

(*a*) Vide *Taylor* v. *Sprinkle*, page 17. *Cornelius* v. *Vanorsdall*, page 23. *Bradshaw* v. *Neuman*, post.

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tain sum of money in pork, at a stipulated price, made payable to the defendant on the first day of January, 1817. On the second day of March, 1815, the note was assigned by the defendant to the plaintiff. The declaration contains no averment of the place of assignment. It further appeared, that on the first day of June, 1818, the plaintiff commenced an action in the Muhlenburgh circuit court, state of Kentucky, against the maker of the note, and prosecuted him to insolvency. The second count in the declaration, contains all the preceding averments, with the addition, "that at the time the note became due and payable, the maker was insolvent, and entirely unable to pay the said note or any part thereof, and has ever since continued, and still is, insolvent, and unble to pay the same." To this declaration there was a demurrer, which the court sustained, and thereupon the plaintiff appealed, and assigns for error the judgment of the court below in sustaining the defendant's demurrer.

Chief Justice REYNOLDS, after stating the facts of the case, delivered the opinion of the court. The court is called upon to say, whether, from the state of facts as set out by the plaintiff, he has used due diligence to obtain the amount of the note from the maker. This the court can not do. It is not averred where the note was assigned. Suit then, having been commenced in Kentucky, the court can not know how many terms of the court in that state intervened, (if any) between the assignment of the note and the suing out the writ original against the maker, and for aught that appears, suit may have been commenced at the first term after the assignment. The court is inclined to think this ought to appear from the declaration, and that therefore the first count is defective as being too uncertain.

The next objection taken, and which we are called upon to decide, is that the note was not assignable. If we consider this objection, it will be by presuming a fact not averred, to wit, that the note was assigned in this state. Yielding to that presumption, and the court can not entertain a doubt, but that agreeably to the spirit and true intent and meaning of the statute authorizing assignments, the note in this case was properly assignable.* That statute authorizes the assignment of notes for the direct payment of money, or for the direct payment of a specific article of property ; a *fortiori*, then, when the note is for a stipulated sum of money to be paid in property.

The next question presented for the consideration of the

* Laws of Territory, 1807, page 48.

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court is, whether the averment of the insolvency of the maker, in the second count of the declaration, be sufficient to excuse the use of due diligence. Upon this point, it does seem to the court, that the human mind cannot be brought to doubt. If there is an utter incapacity to pay, whence the necessity of resorting to the law? The law never requires the performance of a vain and useless act, and surely, a suit would be worse than idle, against a man who is utterly insolvent, and would have no other tendency than to multiply costs and increase the party's demand. If the court is correct in this view of the subject, the court below erred in sustaining the general demurrer to the whole declaration. It is therefore considered by the court, that the judgment of the court below be reversed, that the plaintiff recover his costs, and that this cause be remanded to the circuit court of Madison, for new proceedings to be had not inconsistent with this opinion. (*a*) (1)

Judgment reversed.

JOSEPH M. STREET, Plaintiff in Error, *v.* THE COUNTY COMMISSIONERS OF GALLATIN COUNTY, Defendants in Errcr.

ERROR TO GALLATIN.

A peremptory *mandamus* will issue to a county commissioners' court to compel them to restore a clerk, the cause of whose removal is not stated on their records.

Opinion of the Court by Justice JOHN REYNOLDS. This is a *mandamus* to restore Street to the office of clerk of the county commissioners' court of Gallatin county. It is proved to this court, that the commissioners have been served with said writ and made no return thereto; but the record of the county commissioners' court, containing all the matters of fact in relation to the case, was produced by said Street, which record this court received for the return to the writ, and acted on it accordingly.

As the statute law of this state requires the cause of removal to be stated on the records of the court, and there appearing on the record returned here, no cause of removal stated, it is considered by this court, that the said county

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(*a*) Cases on assigned notes, against the assignor. *Mason* v. *Wash*, ante, page 39. *Tarlton* v. *Miller*, post. *Lusk* v. *Cook*, post.

(1) See note to the case of *Mason* v. *Wash*, ante, page 39.

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commissioners' court had no power to remove said Street and appoint another clerk to said court, therefore it is ordered that a peremptory *mandamus* issue, if necessary, to restore said Street to his office.

AUGUSTUS COLLINS and ANSON COLLINS, Plaintiffs in Error, *v.* JOHN WAGGONER, Defendant in Error.

ERROR TO MADISON.

If a replication departs from the declaration, it is error.

Upon all contracts made before the first of May, 1821, the defendant had a right to replevy for three years, unless the plaintiff indorsed on the execution, that paper of the State Bank of Illinois would be received in discharge of the execution.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of trespass for entering the defendant's close and taking and carrying away his personal goods. The plaintiffs here, who were defendants below, pleaded a judgment obtained by them before one David Moore, a justice of the peace in and for the county of Madison, against the said Waggoner. That on said judgment an execution issued, directed to any constable of Madison county, whereby such constable was commanded to levy upon the goods and chattels of the said Waggoner. That said execution came to the hands of one Isaac McMahon, then a constable of said county; that said constable, by virtue of said execution, and by the direction of the plaintiffs, entered the close and took and carried away the goods, &c., as averred in the declaration; which entering and carrying away was the same trespass complained of, and of no other were they guilty.

To this plea said Waggoner replied: That the cause of action on which the judgment mentioned in the said plea was rendered, arose before the first of May, 1821. That there was no indorsement on said execution in the plea mentioned, as is required in and by the twenty-seventh section of the act of the legislature of the state of Illinois, entitled "an act establishing the State Bank of Illinois." That said Waggoner did, at different times, before the said trespass was committed, tender to the said Isaac McMahon the full amount of the said execution, and then and there offered to pay the same in notes of the said Bank, or to replevy the same for three years, as by law he might do, all of which the said Isaac

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McMahon refused to accept, permit or suffer, and whereupon the said defendant committed the trespass as in the declaration alleged, and this he is ready to verify. To this replication there was a demurrer, and that demurrer overruled by the court below. To reverse that judgment this writ of error is prosecuted. Three objections are raised, one to the declaration, and two to the replication: 1. The action is misconceived. 2. The replication is a departure from the declaration, showing a trespass in McMahon only; and 3. There is no law authorizing a replevy of three years as averred in the replication.

And first, is the action misconceived. The injury complained of is the forcibly entering the close of the said Waggoner, and taking and carrying away his goods and chattels. Surely it can not be contended seriously that for this injury, case is the remedy. If the refusal to take bail, or to permit the party to replevy was the foundation of the complaint, then case would lie; but if, after such refusal, the officer proceeds to levy and distress, trespass can be supported. We will consider the second and third objections together, viz.: That the replication is a departure from the declaration, and shows a trespass in McMahon, the constable only, and that there is no law authorizing a replevy of three years. The first of these objections we think is well taken, and we have no doubt, if it had been raised below, (which we think was the duty of the counsel to have done, and the practice of raising objections here, which might have been urged below, this court can not but reprobate,) would have been sustained. Although the cause of action arose before the first of May, 1821, yet the plaintiffs in the execution, had their election to indorse that state paper would, or would not be received. If they did not elect to indorse that state paper would be received, we conceive from the law, the defendant had the privilege to replevy the debt for three years. The statutes upon this subject are complicated, but this seems to be the true construction, that upon all contracts entered into before the first of May, 1821, if the plaintiff in an execution, does not indorse that paper of the State Bank of Illinois, or either of its branches, will be received, the defendant will have the right to replevy for three years. It clearly appears in this case that notwithstanding the plaintiffs did not indorse on their execution, yet they had a right to direct the officer to levy, until the offer to pay or replevy was made, nor does it appear from the replication, for it is not so averred, that the plaintiffs ever had notice of the offer made by the said Waggoner to the said constable, to pay or replevy the said execu-

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tion, and until they had notice of that fact, the plaintiffs could not be liable. The replication showing a trespass in McMahon only, is a departure from the declaration, and therefore bad. (1) Let the judgment below be reversed, and the costs abide the event of the suit in the court below, and the cause remanded with leave to the plaintiff in that court to amend his replication.

Judgment reversed.

THOMAS GILL, Appellant, *v.* JAMES CALDWELL, Appellee.

APPEAL FROM CRAWFORD.

Swearing a witness by an uplifted hand, is a legal swearing, independent of the statute.

Oaths are to be administered to all persons according to their opinions, and as it most affects their consciences.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of slander commenced by the plaintiff here, against the defendant, in the court below for charging him with swearing false in a certain judicial proceeding before one Thomas Kennedy, a justice of the peace.

The declaration avers that said Gill "was sworn regularly and legally by the said justice, and then and there took his corporal oath." From the bill of exceptions taken in the cause, it appears that on the trial below, the justice of the peace, Kennedy, testified, "that there was before him the trial mentioned in the declaration, that he administered to said Gill what he conceived to be an oath, that Gill swore by an uplifted hand, that no bible was used, and that Gill was not asked how he took his oath." The defendant's counsel then moved to exclude the testimony of Kennedy, it not proving a legal oath administered, nor such an one as would support the averment in the declaration, which motion the court below sustained, and excluded the testimony, and this we are called upon to correct. If the said Gill was sworn by an uplifted hand, it surely can not be said to be a departure from the declaration; the only question to be settled is, is it that kind of oath which the law recognizes? The pure principle of common law is, that oaths are to be admin-

(1) This is a familiar rule of pleading. *Hite* v. *Wells*, 17 Ill., 88.

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istered to all persons according to their own opinions, and as it most affects their consciences.

This certianly is the best test of truth, and it was upon this ground the legislature enacted the statute which is supposed to govern this case. By their act of 1807, after authorizing oaths by uplifted hands, they declare that oaths "so taken by persons who conscientiously refuse to take an oath in the common form, shall be deemed and taken in law to have the same effect with an oath taken in the common form." We conceive that the man who swears by an uplifted hand, elects to do so, and the ceremony of refusing to swear upon the testament, or in the usual form, is perfectly idle. The statute does not vary the common law in this respect, and we conceive that the oath taken as set out in the bill of exceptions is valid, legal, and comports with the averments in the declaration. The judgment below must therefore be reversed, the plaintiff recover his costs, and the cause remanded for new proceedings to be had not inconsistent with this opinion. (*a*) (1)

Judgment reversed.

WILLIAM D. NOBLE, Plaintiff in Error, *v.* THE PEOPLE, Defendants in Error, on an indictment for Forgery.

ERROR TO ST. CLAIR.

An opinion formed, if not expressed, does not disqualify a juror.

A person whose name is forged, is a competent witness to prove the forgery, although upon conviction, he receives one-half of the fine imposed. His credibility is left to the jury.

All persons who believe in the existence of a God and a future state, though they disbelieve in a punishment hereafter for crimes committed here, are competent witnesses.

Opinion of the Court by Justice, JOHN REYNOLDS. William D. Noble was indicted for forgery, and found guilty in the St.

(*a*) By the common law, every witness is sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or the sect to which he belongs.

It was formerly doubted whether the oath must not be taken on the Old or New Testament, but it is now settled that it need not. 1 Wilson, 84. Cowper, 390.

A Jew is sworn upon the Pentateuch, and a Turk upon the Koran; and in France, anciently, the witness, if a layman, raised his right hand, or if a priest, placed it upon his breast. Phil. Ev., 20.

Vide Rev. Laws of 1827, page 308.

(1) Affirmed in the case of *McKinney* v. *The People*, 2 Gilm. Rep., 540.

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Clair circuit court. To reverse that judgment, Noble prosecuted this writ of error, and assigned four errors, to wit:

1. A juror, Moses Short, formed an opinion but had not expressed it.

2. David Rankin, the person intended to be injured by the forgery, and the person who would in case of conviction, receive a moiety of the judgment, was admitted as a witness against said Noble.

3. On account of the religious principles of said Rankin, he not believing in the doctrine of receiving punishment after death for crimes done in this life, although he believed in the existence of a God and a future state.

4. The record of a civil suit was admitted in evidence, to show the amount that said Noble intended to defraud said Rankin of.

On the first point the law and constitution provide that all men shall be tried by an impartial jury; but as the mind of man is so organized, it is almost impossible for a jury to be perfectly impartial. Slight impressions will appear on the minds of any person who will at all think of any subject—this is unavoidable. These impressions will go on step by step on the mind, until they are confirmed into complete opinions. Yet the law can not draw any distinction between the most hasty impression, and a confirmed opinion; therefore all these grades of opinion must be treated alike, and ought not to disqualify the person from acting on the jury. It is quite different when these opinions are *expressed*—every person wishes to appear to the world consistent—therefore there is a strong partiality for these opinions when expressed, so much so, that it disqualifies a person so situated from acting on a jury. This pride of opinion to act consistent, exists in every person, but as there was in this case no expression of this opinion. I think there is no error in this respect. (*a*) (1)

(*a*) Jurors must be free from all exceptions. 2 Johns. Rep., 194. The proper question to be propounded to a juryman is, "Have you made up and delivered an opinion, that the prisoner is guilty or innocent of the charge laid in the indictment?" 1 Burr's Trial, 418.

(1) The law in relation to disqualification of jurors from having formed opinions is very fully discussed in the case of *Smith* v. *Eames*, 3 Scam., 77. Breese, Justice, who delivered the opinion of the court in that case, said: "If a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the sta ements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opin on is positive and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed. If the opinion be merely of a light and transcient character, such as is usually formed by persons in every community upon hearing a current report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind and a fixed conclusion thereon, or if it be hypothetical, the challenge ought not to be allowed; and to ascertain the s ate

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The second point presents a question important to the public, yet I think one of easy solution. From necessity and public policy, the person on whom the forgery was committed must be admitted to prove it, although our statute gives such person one-half of the judgment so recovered against the accused. If this were not the law, forgeries would go unpunished. This is an exception to the general rule of an interested person being a witness. This interest must be left to his credit. If the witness be manifestly biased by his interest, the jury can detect him. With this view of the subject, I think Rankin was a competent witness; therefore in this there is no error. (*b*) (2)

The third error brings in discussion the religious principles of said Rankin. I conceive the law to be, that all persons who believe in the existance of a God and a future state, are on this account good witnesses. The witness believed in a God and a future state of existence, yet he did not believe in being punished hereafter for crimes done in this life; yet as he believed in the great essential matters as the law requires, he is considered a good witness. (*c*) (3)

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of the mind of a juror, a full examination, if deemed necessary may be allowed." The principles enunciated in this case have, ever since, been adhered to by our court. *Gardner* v. *The People*, 3 Scam., 83. *Sellers* v. *Same*, id., 412. *Vennum* v. *Harwood*, 1 Gilm., 659. *Baxter* v. *The People*, 3 Gilm., 368. *Neely* v. *The People*, 13 Ill., 687.

In *Thompson* v. *The People*, 24 Ill., 60, a person was called as a juror who, on being examined on oath as to his qualifications, said he had conversed with a witness in the case, and formed an opinion as far as he heard—that he believed what he heard, but that he had not formed an opinion as to the guilt or innocence of the prisoner. It was held by the court that he was not incompetent.

(*b*) The English rule is, that a party whose signature is alleged to be forged can not be received to testify in support of an indictment for the forgery. 2 Stark on Ev., 582. This rule is adhered to in Connecticut, Vermont and North Carolina. In New Hampshire, Massachusetts, Pennsylvania and New York, he is held to be competent. 4 Johns. Rep., 296.

(2) The present statute in relation to qualifications of witnesses in criminal trials is as follows: "The party or parties injured sha'l, in all cases, be competent witnesses, unless he, she or they shall be rendered incompetent by reason of his, her or their infamy or other legal incompetency other than that of interest. The credibility of all such witnesses shall be left to the jury as in other cases." Scates' Comp., page 377. Purple's Statutes, 361, Sec. 15.

(*c*) The proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, *and* in a future state of rewards and punishments. 1 Stark. Ev., 82, note (*r*)

The witness must believe that divine punishment will be the consequence of perjury *Ibid.*, 80.

(3) A person who has no religious belief, who does not acknowledge a Supreme Being, and who does not feel himself accountable to any moral punishment here or hereafter, but who acknowledges his amenability to the criminal law, if he foreswear himself, can not become a witness. *Central Military Tract R. R. Co.* v. *Rockafellow*, 17 Ill., 541.

The unbelief of such a person is best established by the testimony of others;

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On the fourth point I may barely remark, that the record appears to me to be the best evidence to prove the amount which the said Noble intended to defraud the said Rankin of. Therefore on all these matters I am of opinion the judgment of the court below ought to be affirmed.

Judgment affirmed.

JAMES FOLEY, Plaintiff in Error, *v.* THE PEOPLE, Defendants in Error.

ERROR TO MADISON.

The words "any other offense which by law shall not be bailable," as used in the 40th section of the act defining the duties of justices of the supreme court apply, not to the ability of an offender to procure bail, but to the character of the offense.

Larceny is an offense bailable by law.

Consent can not give jurisdiction.

Opinion of the Court by Chief Justice REYNOLDS. At a special term of the circuit court held in the county of Madison, on the 25th day of November, 1822, an indictment for larceny was found against the said Foley, upon which indictment his conviction accrued.

There are several errors assigned; but the only one which we deem material, is, the objection to the jurisdiction. In ascertaining the jurisdiction, or what is necessary to authorize a special term of the circuit court, we must look to the 40th section of the act entitled "An act regulating and defining the duties of the justices of the supreme court." By that section it is expressly enacted, "That whenever any person shall be in the custody of the sheriff of any county, charged with any capital offense, or any other offense which by law shall not be bailable, it shall be the duty of the sheriff to give information," &c. It was contended in the argument, and indeed such is the opinion of Justice REYNOLDS, who tried the cause, that this statute ought to be construed to embrace every case where the prisoner was in custody, and unable to give bail. In consequence of this opinion, and the serious manner with which it was contended for by the counsel, we have

though he may be permitted, sworn or unsworn, to explain any change of belief, and leave the court to determine as to his competency. Id.

The authorities on this question are stated fully in the opinion of SCATES, C. J., in this case.

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given the subject the most mature consideration. In doing so, we have not been able to give to that statute such latitude of construction. The words of the statute are clear, express, unambiguous and admit of no doubtful construction.

The words of the statute are "That whenever any person shall be in the custody of the sheriff of any county, charged with any capital offense, or any other offense which by law shall not be bailable," &c. Now to ascertain when any offense is bailable, we must look to the law, and it does seem to us to be a perversion of plain language to say that we must look to the fact of the party's ability to procure bail, to ascertain whether by law he is bailable. But it is contended we must be governed by the intention of the legislature. I ask how is that intention to be ascertained? Must we seek for some hidden intention which the language of the law will not justify, or when the language is plain and admits of no construction, shall we not take it as we find it? If the statute was ambiguous in its provisions, then we might have recourse to construction to ascertain the true meaning; but when otherwise, we are satisfied to take the law as it is, and if it is defective, leave it to be remedied by the legislature, and not by strained constructions. Having settled this question, we will consider whether larceny is bailable by law; if it is, it is a case not provided for by the statute. In settling this question, we need only have recourse to the constitution to our state. By the 13th section of the eighth article of that instrument it is provided, "That all persons shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or the presumption great." Larceny, by our statute, is not made capital; the punishment is by fine and whipping. Hence it comes within the letter and spirit of the constitution. It was urged in the argument, and as the prisoner appeared below and pleaded to the indictment, he waived, or acknowledged jurisdiction.

It will only be necessary to answer that argument, that where the court has not jurisdiction of the subject matter consent will not give it. (1) We might then, after settling these questions, proceed to reverse the judgment of the court below, but believing as we do, that the court below having been called for the purpose of taking cognizance of an offense of which they had no jurisdiction, it had no legal existence, and consequently was no court. Hence we can not undertake to reserve the proceedings of that body; having no such control over it; but as an opinion was asked for by the prisoner, and

(1) See note to *Cornelius* v. *Coons et al.*, ante, page 37.

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the jurisdiction supported by the attorney general, we conceived it right to give an opinion that the law hereafter may be understood.

Bryan, Morrison, and Davidson, Appellants, v. John Primm, Appellee.

APPEAL FROM ST. CLAIR.

A *suppressio veri* in relation to any important fact affords ground for the interference of a court of equity to annul the contract. (1)

The assignee of a note, after it becomes due, takes it subject to all the equity existing between the original parties to it.

Notice of an equity, to an agent, is notice to his principal.

Though a bill for an injunction does not pray that the money be refunded, yet such relief can be granted, and a decree therefor is not erroneous.

Opinion of the Court by Chief Justice Thomas Reynolds. This was a suit in chancery, commenced by Primm, for the

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(1) In a sale of land by a guardian, a mere *suppressio veri*, does not constitute fraud in the sale; but if there was a *suggestio falsi* the question would be different. *Mason* v. *Wait et al.*, 4 Scam., 127.

Fraud may consist as well in a *suppressio veri* as in a *suggestio falsi*; for in either case, it may operate to the injury of the innocent party. *Lockridge* v. *Foster et al.*, 4 Scam., 569.

These decisions of our court are apparently conflicting, and, to a casual reader, might be calculated to mislead. Indeed the cases of *Bryan & Morrison* v. *Primm* and *Lockridge* v. *Foster et al.*, do not justify the syllabus of the reporter. In each of those cases there was a positive false affirmation which authorized the decision of the court; and in the last case the language of the opinion was as stated by the reporter; but it was not called for by the case—was a mere dictum of the court—and with all due deference to the very able judge who delivered the opinion, is not, we think, warranted by the law. How far a person is bound, when dealing with another, to communicate facts purely within his own knowledge, is a question about which great diversity of opinion has existed. Cicero held that a man was bound to communicate every fact within his knowledge, which was unknown to the one with whom he was dealing, and which might operate on the other in making the contract. Some modern jurists and moralists of eminence have adopted this doctrine. Although this may be and is true in morals, yet the courts of America have not seen fit to adopt so rigid a rule. Thus Chancellor Kent says "From this and other cases it would appear that human laws are not so perfect as the dictates of conscience; and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not, and can not undertake directly to enforce." 2 Kent's Comm., p. 490.

To constitute a *suppressio veri* such a fraud as will authorize a court to interfere and declare the contract void, there must be something more than a failure to *communicate* facts within the knowledge of the party—there must be *concealment*. Such concealment may be by witholding the information when asked for it, or by making use of some device to mislead. Or there may be cases in which such suppression would be held to be a fraud when no *act* was done by the party chargeable with it; such as where from the peculiar situation of the parties—"when the person stands in the relation of trustee or *quasi* trustee to another, as agent, factor, steward, attorney, or the like, if he

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purpose of setting aside a contract made with James W. Davidson and wife, and to enjoin a judgment obtained against himself by Bryan and Morrison upon a note executed under said contract. The bill alleges that sometime in July, 1808, Primm purchased of said Davidson and wife a certain tract of land lying in St. Clair County, which land descended to the wife of said Davidson as heir at law of one Peter Zip, deceased; that said Davidson and wife were to execute to him such deeds as would completely vest in him the same title which the said Zip, desceased, had in the premises. That, accordingly, said Davidson and wife, together with one Jane Everett, who claimed an interest in the premises, did execute to him a deed for said land—that in consideration of such purchase, he agreed to pay the said Davidson the sum of eight hundred dollars, for the payment of which, he executed his

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would purchase of his principal or employer, any property entrusted to his care, he must deal with the utmost fairness, and conceal nothing within his knowledge which may affect the price or value." 2 Kent's Comm., p. 490. Or where one party possesses a knowledge of facts which, from the situation of the property, the other can not know, a suppression of such facts would render a contract invalid.

The conclusion to which we arrive is, that unless the case comes within some of the exceptions arising from the peculiar situation of the parties, a mere *failure* to communicate facts within the knowledge of one party and unknown to the other, does not make it fraudulent; in other words, the party must *do* some act to mislead. A late writer has so fully expressed our views on this subject, that we avail ourselves of the following extract from his truly valuable work: "If the seller knows of a defect in his goods which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought perhaps on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be *active fraud*. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent—if by acts and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inqury, this becomes a fraud of which the law will take cognizance. The distinction seems to be—and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions—the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." 1 Parsons on Contr., 461. See also 1 Story's Eq., Sec. 203-8.

A mere false representation does not constitute fraud. The party must know the representation to be false, and must use some means to deceive and circumvent. *Sims* v. *Klein*, post.

Fraud can not exist without an intention to deceive. *Miller* v. *Howell*, 1 Scam., 499.

Where a party, by the use of fraud and deception, obtains a conveyance, the parties who have made it may disregard it and convey to a third party, who may establish the fraud in equity, and be protected in his rights. *Whitney* v. *Roberts*, 22 Ill., 381.

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note to the said Jane Everett for the sum of two hundred and sixty-six dollars; and for the balance of said purchase money, beside a small part paid, he executed his notes to the said Davidson. The bill further shows that at the time of making said contract, and of the execution of the deed aforesaid, the said wife of Davidson, who was the sole heir to the said Zip, was under the age of twenty-one years, and that since she has arrived at full age, has refused to execute a deed for said land, without the payment of an additional sum.

It is further shown, that after the note executed to the said Jane Everett became due, it was assigned to Bryan and Morrison, who purchased the same through their agent, William Atchison,—that said Atchison had a full knowledge of all the circumstances under which said note was executed. The said Bryan and Morrison commenced suit upon said note and recovered judgment.

The prayer of the bill is to perpetually enjoin said judgment and cancel the notes given pursuant to said purchase. An injunction to stay the collection of said judgment was granted by the judge in vacation. The bill as to Davidson and wife was taken *pro confesso.* Bryan and Morrison answered, setting forth their ignorance of all the circumstances under which said note was executed—that they are the innocent purchasers of said note—deny knowing that their agent had any knowledge of said circumstances, but do not deny that their agent possessed such information. During the progress of the suit in the court below, the injunction was dissolved and the said Bryan and Morrison proceeded and collected their judgment. Upon the final hearing of the cause, the court below decreed that the notes should be cancelled, and that Bryan and Morrison refund to the said Primm the money so collected. To reverse this decree this appeal is prosecuted. We will first consider whether the bill contains equity, if so, whether that equity attaches upon the note in the hands of Bryan and Morrison.

The knowledge by Davidson of his wife's being under age at the time of executing the conveyance, and not disclosing that fact to Primm, is surely a suppression of the truth; add to this the fact of his wife's disagreement to the contract after she arrived at full age, and I think it will not be contended that the bill contains no equity. Between Primm, then, and Davidson and wife, the decree ought to be affirmed. (1)

(1) The same defense may be set up against the assignee of a note, which was transferred after its maturity, as could be made against the original payee. *Tyler* v. *Young et al*, 2 Scam., 444; *Sargeant* v. *Kellogg et al.*, 5

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The next inquiry is, does this equity extend to Bryan and Morrison. They do not deny that Atchison, their agent, had knowledge of Primm's equity. This of itself would be notice to them. (1)

But regardless of this fact, the note was assigned to Bryan and Morrison after it became due. Under this circumstance, they took it subject to all the equity which attached in the hands of the original payee.* It was contended in the argument by the counsel for the plaintiff, that the court erred in decreeing the money to be refunded by Bryan and Morrison, when the bill did not pray for such relief.

It will be remembered, that the prayer, as to them, is for a perpetual injunction, that after the injunction was dissolved, they proceeded and collected their judgment. Could not the court then decree the money to be refunded? We have no hesitation in saying they could. Otherwise, the complainant would be turned round and compelled to seek his redress by an action at law. If the injunction had been made perpetual, without this additional relief, the same absurdity would have followed. (2) Let the judgment of the court below be affirmed and the defendant recover his costs. (*a*)

Judgment affirmed.

Gilm., 273; *Walter* v. *Kirk et al.* 14 Ill., 55. And so is the statute. Purple's statutes, p. 772, Sec. 8. Scates' Comp., p. 292.

An assignee of a note takes it subject to any defense existing between the maker and the payee which appears on the face of the note, or of which he had notice at the time of the assignment; and in such case it is immaterial whether the note was assigned before or after it became due. *Frink et al.* v. *Ryan*, 3 Scam., 324.

(1) The same is held in *Rector* v. *Rector et al.* 3 Gilm., 119, and *Doyle et al.* v. *Teas et al.* 4 Scam., 250.

* Laws of 1819, page 1.

(2) In *Isaacs* v. *Steele*, 3 Scam., 103, the court said they had no doubt that under the prayer for general relief, a court of chancery may decree that which is not specifically prayed for, and grant more than is asked. And again in *Manchester et al.* v. *McKee*, 4 Gilm., 519. "The general prayer is sufficient to authorize the granting of any relief which the statement of the bill would warrant.' See also *Alexander et al.* v. *Tams et al.*, 13 Ill., 225. *Vansant* v. *Allmon*, 23 Ill., 30.

(*a*) The complainant is not confined to the particular relief prayed for in the bill, but under the general prayer, is entitled to such a decree as the nature of the case may require. *Beebe and others* v. *Bank of New York*, 1 Johns. Rep., 529.

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JOHN BLOOM, Appellant, v. CONRAD GOODNER, Appellee.

APPEAL FROM ST. CLAIR.

The Statute in relation to forcible entry and detainer requires that all the jury should sign the verdict. A mere clerical mistake, omitting the name of one of the jurors, can not operate to reverse a judgment. Under the act of 1819, actual force is necessary to constitute a forcible detainer, and the inquisition can be held at any other place than the premises.

It is discretionary with a court to hear evidence after the argument of a cause is opened by counsel.

Opinion of the Court by Chief Justice REYNOLDS. Goodner sued out his writ of forcible detainer, under the act of the legislature, entitled, "an act against forcible entry and detainer," from two justices of the peace of St. Clair county, and obtained a verdict and judgment of restitution. To reverse that judgment, Bloom, by writ of *Certiorari*, removed the case into the circuit court. On the hearing of the cause, the circuit court affirmed the judgment of the justices. There are many errors assigned for the reversal of this judgment, and those which we deem at all material or worthy to be noticed, we will consider, as follows:

1. Eleven jurors only signed the verdict.
2. The court in their instructions to the jury did not correctly define a forcible detainer.
3. The trial before the justices was held at Belleville, when it ought to have been held at the premises.
4. The court permitted new evidence to be given to the jury after argument of the cause had been commenced by the counsel.

The statute requires that all the jurors should sign the verdict. In the record and proceedings before the justices, it appears that twelve jurors were summoned and sworn, and the verdict appears to have been entered as the verdict of the whole; hence we are bound to conclude that the omission has been occasioned by the mistake of the clerk; we are the more confirmed in that opinion, when we find that this objection was not raised in the circuit court. It being then a mere clerical mistake, can not operate to reverse the judgment.

2. Did the justices correctly define a forcible detainer? We think the justices were rather cramped and contracted in their views of this subject. Actual force is necessary to constitute this injury, and such force as is spoken of in the statute. This is the more evident, when we consider that peaceable holding over or detainers, are provided for in the

act entitled, "An act as to proceedings in ejectment, distress for rent and tenants at will holding over." However, as the jury have found that the detainer was committed forcibly, and with a strong hand, the instruction of the justices, though not sufficiently broad, has worked no injury, and ought not therefore to be cause for the reversal of the judgment. (1)

3. The trial was at Belleville when it ought to have been on the premises. It is a sufficient answer to this objection, that the law does not require that the inquisition should be on the premises; it is, therefore, discretionary with the justices.

4. New testimony was heard after argument of the cause was opened by counsel. This is at all times and before all courts matter of discretion—and before justices of the peace, much more ought that discretion to be indulged. We can not say that in this particular that discretion has been abused. (2)

Let the judgment of the circuit court be affirmed, and the defendant recover his costs.

Judgment affirmed.

SAMUEL TUFTS, Plaintiff in Error, *v.* THOMAS K. RICE, Defendant in Error.

ERROR TO MADISON.

An action of assumpsit was commenced in 1822, upon a contract made in 1812, to which the statute of limitations was pleaded. This statute was passed in 1819, and is no bar to such action.

It seems, that if the five years had run under the territorial government, it might have been pleaded in bar.

TUFTS brought his action of assumpsit, at the April term, 1822, of the Madison circuit court, against *Rice*, on a promissory note, for the payment of twenty-five dollars, executed by *Rice* to *Tufts*, at Boston, and dated the tenth day of April, 1812. To this action, *Rice* pleaded the Statute of Limitations, that he did not undertake or promise, within five years next before the commencement of the suit. To this plea, there was

(1) This is now changed by statute, Sec. 1, p. 582, Purple's statutes, Scate's Comp., 521, provides that if any person shall willfully and *without force* hold over, &c., they shall be deemed guilty of a forcible entry and detainer, or a forcible detainer, as the case may be.

(2) affirmed in *Russell et al.* v. *Martin*, 2 Scam., 495. *Welsh et al.* v. *The People*, 17 Ill., 339.

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a demurrer, and joinder, and judgment for the defendant on the demurrer. The plaintiff brought his writ of error, and assigned for error, besides the general error, that the court below gave judgment in favor of the said Rice, and against the said Tufts, on the demurrer of the said Tufts, to the plea of said Rice.

Starr, for plaintiff in error.

Smith, for defendant in error.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of assumpsit, for the non-performance of a contract. To the declaration, the defendant pleaded the statute of limitations. To this plea there was a demurrer, and the demurrer overruled by the court below.

To reverse that decision, this writ of error is prosecuted.

The statute, limiting actions in cases like the present, was approved March 22d, 1819, [*Laws of* 1819, *page* 141,] and limits the time in which actions on the case upon promises shall be commenced, to five years. As that statute has not run five years, it can not operate as a bar to this action.

It is not necessary now to decide, whether if the five years had run under the territorial government, it would not have been a bar, and might have been pleaded. It will be time enough to settle that question, when brought before us; we can only say at present, that we incline to the affirmative of that question.

Let the judgment be reversed, the plaintiff recover his costs, and the cause remanded for new proceedings to be had, not inconsistent with this opinion. (1)

Judgment reversed.

(1) As a general rule, a statute is to operate *in futuro* only, and is not to be so construed as to affect past transactions. A retrospective effect will not be given it unless it clearly appears that such was the intention of the legislature. If it is left doubtful what was the real design, the statute must be so construed as to have a prospective effect only. *Jones adm.* v. *Bond*, post. *Bruce* v. *Schuyler*, 4 Gilm., 221. *Thompson* v. *Alexander*, 11 Ill., 55. *Marsh* v. *Chestnut*, 14 Ill., 227.

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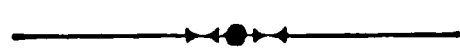
SUPREME COURT

OF THE

STATE OF ILLINOIS.

NOVEMBER TERM, 1823, AT VANDALIA.



Present, THOMAS REYNOLDS, *Chief Justice.*
JOHN REYNOLDS,
THOMAS. C. BROWNE, } *Associate Justices.*
WILLIAM WILSON,

SMITH CRANE, Appellant, *v.* WILLIAM GRAVES, Appellee

APPEAL FROM ST. CLAIR.

Where a copy of a note on which suit is brought is filed with the declaration, and an amendment of the *narr.* allowed, by changing the word "20" to "25" and adding the words "promise to pay," the defendant is not entitled to a continuance.

THIS was an action brought by Graves in the St. Clair circuit court, on a note executed by Crane to him. The defendant demurred to the declaration, which the court sustained, and thereupon the plaintiff asked and obtained leave to amend, which he did instanter, by changing the words "twenty" to "twenty-five," and adding the words "promise to pay." The defendant contended, that the amendment was a substantial one, and entitled him to a continuance, and accordingly moved for a continuance, which the court overruled, and rendered judgment for the plaintiff. According to the requisitions of the statute, a true copy of the note was filed with the declaration. The defendant appealed, and assigned for error here, the refusal of the court to grant the continuance.

Opinion of the Court by Justice JOHN REYNOLDS.—Although the amendment allowed may be one of substance, nevertheless, as a true copy of the note was set out in the declaration, it is considered that the defendant had sufficient notice of the cause of action, so that he could not be surprised

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in his defense. This being the case, there was no reason to grant a continuance. The judgment must be affirmed. (1)

Judgment affirmed.

BAYNARD WHITE, Appellant, *v.* JAMES STAFFORD, Appellee.

APPEAL FROM GREENE.

If a non-resident gives a bond for costs, after the commencement of the suit but before the trial, it is sufficient.

STAFFORD, who it appears was a non-resident, brought a suit in the circuit court of Greene, against White, to which White pleaded an abatement, that the plaintiff was a non-resident, and that he had not given a bond for the costs, as the law required. The plaintiff replied to this plea, that although he had not executed a bond at the time of the commencement of the suit, yet at a certain day afterward, and before the trial, he gave bond with security, which the clerk approved. To this replication the defendant demurred, which the court overruled—from which decision the defendant appealed.

Opinion of the Court by Justice JOHN REYNOLDS. The question presented by the pleadings in this case is, was the security given by the plaintiff, a sufficient compliance with the statute requiring a bond to be filed by a non-resident, for the costs, before the commencement of the suit? The filing of this bond, can not be said to be a literal compliance with the statute, but surely it answers the object which was intended by it—the ends of justice are answered. The defendant can not complain. In some cases, neither the clerk or attorney may know the plaintiff to be a non-resident when the suit is commenced; in such cases, it would be hard to turn

(1) Upon principles universally sanctioned by our courts, we think this decision can not be sustained. The doctrine in every case where the question has arisen is, that if the amendment is a mere formal one, it does not entitle the opposite party to a continuance; but if it is of substance it works a continuance when applied for, without any other cause being shown. See note to *Scott* v. *Cromwell*, ante. p. 25. Questions frequently arise as to whether an amendment is one of form or substance; but here it is admitted by the court that this is a substantial amendment. The fact that a copy of the note sued on was filed with the declaration can not affect the question; for it has been repeatedly decided that the copy of the instrument sued on, filed with the declaration, is no part of the declaration. *Sims* v. *Higby*, post. *Bogardus* v. *Trial*, 1 Scam., 63. *Harlow* v. *Boswell*, 15 Ill., 56. The copy of the note not being a part of the declaration, and without it the declaration being admitted substantially defective, the case ought to have been continued. *Brown* v. *Smith*, 24 Ill., 196.

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the plaintiff out of court, to answer no good purpose. In construing statutes, the intention of the legislature must be gone into. 6 Bacon, 384. The object of the legislature was to secure all parties in their costs, when a non-resident commenced a suit; this is answered in the present case, and the judgment must therefore be affirmed. (*a*) (1)

Judgment affirmed.

ROBERT M. TARLTON, Appellant, *v.* GEORGE MILLER, Appellee.

APPEAL FROM GALLATIN.

To excuse due diligence, an averment in the declaration that "at the time the note became due and payable, diligent search was made at the said county for the maker, for the purpose of demanding payment thereof, but that he could not be found," is insufficient.

THIS was an action commenced in the Gallatin circuit court, by Miller against Tarlton, upon his liability as assignor of a promissory note, executed at the county of Gallatin by one Squire Brown, to Tarlton, and by him assigned to Miller. The

(*a*) *Vide* Rev. Laws of 1827, title, "Costs."

(1) The statute in force when this decision was made was as follows: "No suit shall hereafter be commenced in any court within this state, by any person who is non-resident, or who is not a freeholder in this state, or householder, until he shall file in the clerk's office, a bond with security, who shall be a householder and resident in the state, conditioned for the payment of all costs that may accrue in consequence thereof, either to the opposite party, or to any of the officers of such courts, which shall be in the form, or to the purport following," &c. Laws of 1819, p. 150. The present statute, after providing substantially as above so far as relates to non-residents, adds: "If any such action shall be commenced without filing such instrument of writing, the court, on motion, shall dismiss the same, and the attorney of the plaintiff shall pay all costs accruing thereon. Purple's Statutes, p. 275, sec. 2. Scate's Comp., p. 244. Under this statute it has been held in the following cases, that where an action was commenced by a non-resident without giving security for costs, the suit must be dismissed, *Hickman* v. *Haines*, 5 Gilm., 20. *Ripley* v. *Morris*, 2 Gilm., 381. In the last case a cross-motion was made for leave to file a cost bond at the time of entering the motion to dismiss, which was refused.

A motion to dismiss for want of security for costs is a dilatory motion, and must be made at the earliest opportunity. *Edwards et al.* v. *Helm*, 4 Scam., 142. *Robertson et al.* v. *County Com'rs.*, 5 Gilm., 559. *Adams* v. *Miller*, 12 Ill., 27. Id. 14 Ill, 71.

If a bond for costs is objected to as insufficient, it is incumbent on the party presenting it to satisfy the court by competent proof that it is sufficient. *Buckmaster* v. *Beamer et al.*, 3 Glim., 97.

On an application for security for costs, the affidavits of the respective parties may have equal weight. *Hamilton* v. *Dunn*, 22 Ill., 259.

The pendancy of a motion for security for costs in a suit pending on mechanic's lien, will not necessarily excuse a party for not filing an answer; nor will such motion prevent the rendition of a decree *pro confesso*. Id.

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first count of the declaration averred that, "at the time the note became due, diligent search was made at the said county, for the said Brown, for the purpose of demanding payment of the said note, but that said Brown could not on such search be found—that the said note remains unpaid, of which the said Tarlton had notice, whereby an action has accrued," &c. There was also a count for money had and received. On the trial, the defendant moved the court, in conformity with a statute of this state, to instruct the jury to disregard the first count, on the ground of its being defective, which motion the court overruled, and gave judgment for the plaintiff, from which judgment the defendant appealed.

Opinion of the Court by Chief Justice REYNOLDS.* The question to be decided in this case is, is the first count sufficient? I suppose the counsel who drafted the declaration intended to present a case which would excuse the use of due diligence; but surely, it can not be seriously contended, that because the maker of the note does not reside, or can not be found in the county in which the note was made, that therefore the assignor becomes liable. It may be, that he may reside in the next adjoining county, or some other part of the state; if so, I conceive it to be the duty of the assignor to seek him. The question of due diligence having been settled by this court to be *by suit*, that course can not be dispensed with, where the process of the law can reach the maker, and prove availing.

It has been contended by some, that where the maker has absconded or left the state, the assignor is not liable until suit by attachment is prosecuted. This question is not now necessary to be settled, as the declaration contains no averment of the absence of the maker from the state. But it is said that the facts disclosed on the trial show such absence. My answer is, that this is showing facts not averred in the declaration, and can not be regarded upon a motion to instruct the jury to disregard a faulty count—such motion standing upon the same grounds as a general demurrer. We are therefore of opinion, that the judgment of the court below be reversed, and the cause remanded for new proceedings to be had, not inconsistent with this opinion.

Separate opinion of Justice J. REYNOLDS. The record shows this case. That one Squire Brown made his obligation to Tarlton for a sum of money. Tarlton assigned the same to George Miller, the plaintiff below, for value received. That Brown left the county before the bond became due, so

* Justice BROWNE having decided this cause in the court below, gave no opinion.

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that no diligence by suit could be used at the time the bond became due to get the money of Brown. The declaration states, that the bond was made and assigned in the county of Gallatin. The question is, was Brown's absence equivalent to due diligence by suit, in order to obtain the money? I think it was. Diligence is now explained by the court to mean a suit at law, yet when the person against whom the suit is to be brought is not in the county, it would be useless to commence it. This allegation is contained in the declaration, and it is the same as if a suit was prosecuted without getting the money. There can be no necessity for stating the place of residence of the maker of the note, as was contended by plaintiff in error, to show that he had left it—stating the place where the bond was made is sufficient. A person having no permanent residence at any particular place, may make a note, and it would therefore be impossible to show his residence. A transient person may make a note, and leave the place where it was made immediately; it would then be unreasonable that the assignee should lose his action against the assignor, because the maker had no residence at the place where the note was made.

There are other errors assigned, but I deem them not of such importance to justify a reversal of the judgment. The matter mostly contained in the bill of exceptions was proper for the jury to pass upon. I am therefore of the opinion that the judgment of the circuit court ought to be affirmed. (*a*) (1)

Judgment reversed.

Starr, for appellant.

Lockwood, for appellee.

NINIAN EDWARDS, Plaintiff in Error, *v.* WILLIAM A. BEAIRD, Defendant in Error.

ERROR TO ST. CLAIR.

A bill may be dismissed in all cases on motion, when the court is satisfied there is no equity in it.

The act of 1819, laying a tax on certain property, makes no distinction between residents and non-residents—the lien attaches on the property, and not on the person.

EDWARDS filed a bill in chancery against Beaird, as sheriff of St. Clair county, in the circuit court of that county, stating

(*a*) Vide *Mason* v. *Wash*, p. 39: *Thompson* v. *Armstrong*, p. 48; *Lusk* v. *Cook*.

(1) See note 2 to the case of *Mason* v. *Wash*, ante, page 39.

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that he was not a resident of St. Clair county, and that the county court of said county has levied a tax on town lots, the property of complainant, from which he prayed to be relieved, and that Beaird might be enjoined from collecting the tax assessed upon them. The defendant appeared, and moved the court to dismiss the bill, which motion the court sustained and dismissed the bill; to reverse which opinion, Edwards prosecuted a writ of error.

Opinion of the Court by Justice JOHN REYNOLDS. The act of the 27th March, 1819,* on the subject of laying a tax on certain property, makes no distinction between residents and non-residents. The whole tenor of the statute shows that the lien is created on the property to be taxed, and not on the owner of the property. All property of a certain description, in which town lots are included, is subject to be taxed by the county court. It is objected that the bill was dismissed on the defendant's motion. This may be done in all cases where the court is satisfied there is no equity in the face of the bill. The judgment of the circuit court must be affirmed. (1)

Judgment affirmed.

WILLIAM B. WHITESIDE, Plaintiff in Error, *v.* JOHN BARTLESON, Defendant in Error.

ERROR TO MADISON.

A sheriff was sued for money had and received, and the court assessed the damages without the intervention of a jury. This is error.

Opinion of the Court by Chief Justice REYNOLDS, *and Associate Justice* JOHN REYNOLDS. This was an action of *assumpsit*, containing only a common count for money had and received. The court below rendered judgment against Whiteside, in favor of Bartleson, and assessed the damages without the intervention of a jury, and it is to reverse this judgment that this writ of error is prosecuted. The liability of Whiteside arose upon his return of an execution as sheriff of Madison county, and this return being reduced to writing, and remaining upon file in the clerk's office of said county: It was therefore contended that this makes his liability certain,

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* Laws of 1819, page 313.

(1) Affirmed in *Fisher* v. *Stone*, 3 Scam., 68; *Parkinson* v. *Trousdale*, id., 371; *State Bank* v. *Stanton*, 2 Gilm., 352; *Puterbaugh* v. *Elliott et al.*, 22 Ill., 157.

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and authorizes the court to assess the damages. If this argument be yielded, it would follow, that in every case where a fact could be made certain, the court, and not a jury, should try the cause. The consequences which would flow from such a proposition would be too absurd to admit the principle. The right of trial by jury would be thereby destroyed, and the interference of the court regulated, not by the certainty of the matter contained in the declaration, but by matter *dehors.*

The execution, with the return of the sheriff, when that return shall be proved, would certainly be evidence—but evidence for a jury and not for the court.

A jury should have been impanneled to assess the damages—this not having been done, it is error, for which the judgment ought to be reversed. Let the judgment be reversed, and the cause remanded for new proceedings not inconsistent with this opinion. (*a*)

Judgment reversed.

Starr, for plaintiff.

Smith, for defendant.

SAMUEL L. WHITE, Plaintiff in Error, *v.* THOMAS THOMPSON, Defendant in Error.

ERROR TO GALLATIN.

It is error in the court to render a judgment by default when a plea is filed and unanswered.

Opinion of the Court by Chief Justice THOMAS REYNOLDS, *and Associate Justice* JOHN REYNOLDS. This was an action of trespass commenced by the defendant here in the court below. To which action White pleaded the pendency of a former suit for the same cause of action, in abatement. Notwithstanding which plea, and without replying thereto, the plaintiff proceeded to take judgment by default, and a jury were impanneled who assessed the damages.

(*a*) Post *Rust* v. *Frothingham & Fort.* As to writs of inquiry, see Tidd's practice, 513. 4 T. R., 275. 2 Bos. & Pull., 55. *Bell* and *Bell* v. *Aydelotte*, ante, page 45.

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The error assigned, and the one relied upon, questions the legality of these proceedings.

The court certainly erred in rendering judgment by default after the plea was filed, and while the same remained upon record unanswered. For this error the judgment must be reversed, and the cause remanded for new proceedings to be had not inconsistent with this opinion. (1)

Judgment reversed

Lockwood and *Blackwell*, for plaintiff.

Starr, for defendant.

JESSE ROUNTREE, Plaintiff in Error, *v.* WILLIAM STUART, Defendant in Error.

ERROR TO MADISON.

Where a party amends his *narr.* by setting out the bond on which suit is brought as the statute requires, it is error in the plaintiff to take judgment at the same term if a continuance is prayed for by defendant.

Where a statute declares that in a certain case a continuance shall be granted, it is error in the court to refuse it.

Opinion of the Court by Justice REYNOLDS. Rountree filed a demurrer to the declaration of Stuart in the court below—the demurrer was sustained. The plaintiff amended his declaration by setting out the original bond. The question then presents itself—ought the cause to have been continued under the third section of the "act regulating the practice at law and in chancery?"

In this case it is not necessary to decide the question, if the continuance or non-continuance of a cause be such a judgment upon which a writ of error will lie, as the statute in this case is peremptory. It requires the declaration and writing on which the action is founded to be filed ten days

(1) Affirmed in *Semple* v. *Locke*, post. *Lyon* v. *Barney*, 1 Scam., 387. *Manlove* v. *Bruner*, id., 390. *Covell et al.* v. *Marks*, id., 39[illegible]. *McKinney* v. *May*, id., 534. *Chapman* v. *Wright*, 20 Ill., 120. *Moore* v. *Little*, 11 Ill., 549.

When the record shows that a plea was filed and a judgment by default rendered on the same day, the judgment will be reversed. The court will not presume that the plea was filed after the judgment was entered. *Lyon* v. *Barney*, *supra.*

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before the return of the writ, or if not the case shall be continued.

This is positive. There is some reason in this. The party has not then ten days before the court to prepare for his defense. The plaintiff erred in taking judgment at the same term at which he got leave to amend his declaration. Therefore the judgment ought to be reversed, but as the court is divided in opinion, it is therefore affirmed. (1)

Judges Browne and Wilson, not hearing the argument, gave no opinion.

Forester and Funkhouser, Appellants, *v.* Guard, Siddell & Co., Appellees.

APPEAL FROM GALLATIN.

The statements of jurors ought not to be received to impeach their verdict.

An affidavit, setting forth the discovery of new testimony, should state the name of the witness, and also the facts he can prove.

Opinion of the Court by Chief Justice Reynolds. In this case the only error relied upon is, that the court below erred in granting a new trial. There were four reasons assigned for a new trial: 1. The verdict was against law and evidence: 2. The discovery of new testimony: 3. The verdict of the jury was predicated upon the statements of the jurors in relation to the controversy while in the jury room: 4. One of the jurors separated from the jury while deliberating.

The fact that the verdict was predicated upon the statements of the jurors after they withdrew, is disclosed by the affidavit of one of the plaintiffs below, founded upon the confessions of one of the jurors. This the court think im-

(1) This decision has frequently been humorously criticised on account of the last expression in the opinion: "Therefore the judgment ought to be reversed; but as the court is divided in opinion, it is therefore affirmed." This, perhaps, is not the most classical expression that might have been used, but it amounts to simply this—that in the opinion of *Justice* Reynolds the decision of the court below ought to be reversed; but as the members of the court who were present were equally divided, it follows that it must be affirmed. It is not a decision of *the court;* and possibly ought not to have been reported by Judge Brees . Four Judges at that time composed the court, only two of whom were present, and they differed in opinion; but still there can be very little doubt that the views of the judge, whose opinion it was, were in substance correct. The case certainly ought to have been continued. See note to *Crane* v. *Graves*, ante, p. 66. *Scott* v. *Cromwell*, ante, p. 25.

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proper. The statements of jurors ought not to be received to impeach their verdicts. (*a*) (1)

The affidavit, disclosing the discovery of material testimony, does not state the name of the witness, nor the facts he could prove. It is therefore insufficient. An affidavit should state the facts, that the court may judge of their materiality. If the new trial had been granted upon the affidavit alone, the court would say it was improperly granted, but as there were other grounds, to wit, that the verdict was against evidence, the court can not say there was error—on the contrary, the facts in the case seem to have warranted the interposition of the court. The judgment is therefore affirmed.

Judgment affirmed.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK, Plaintiffs in Error, *v.* JOHN KAIN, Defendant in Error.

ERROR TO FAYETTE.

The receipt of the cashier of the State Bank, for money received of an individual, is evidence of a deposit by that individual, and the cashier had a right to receive such deposits.

Opinion of the Court by Justice WILSON. The only question presented in this case for the opinion of the court is—whether the receipt of Kelly, the cashier of the Bank, is evidence of a deposit in the Bank. It is said that it is not, because he was not authorized by the letter of the law, nor by any order of the Board of Directors of the Bank, to receive money on deposit. It is conceded that he might receive state paper on deposit, but not gold or silver, because the language of the law is, that "the *Bank* shall at all times receive money on deposit," &c. The word *Bank* is not made use of here to designate the house, the cashier, or the directors, but the institution generally; and the cashier is the officer or agent of the institution, with authority derived from the law, and the nature of this, as well as of every other Bank is, to receive money on deposit, receipt for the same, enter it upon the books of the Bank, and pay it out again when called for, without compensation. The question whether the directors

(*a*) Contra, *Sawyer* v. *Stevenson*, ante, page 24.

(1) See note 2, to the case of *Sawyer* v. *Stevenson*, ante, page 24.

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can control the cashier is not involved in this case. From this view of the case, the court is of opinion that the judgment below ought to be affirmed. (*a*)

Judgment affirmed.

Blackwell, for plaintiffs.

Kane and *McRoberts*, for defendant.

RICHARD ACKLESS, Appellant, *v.* TIMOTHY SEEKRIGHT, ex dem. of the heirs of GEORGE LUNCEFORD, deceased, Appellee.

APPEAL FROM MONROE.

By the ordinance of 1787, but two of the subscribing witnesses to a will are required to prove it, and a will attested by three, one of whom is a devisee in the will, is valid.

M. devised and bequeathed by will, all his estate to his daughter, R., but if she died before she became of age, then to his friend G. S. R. died before she came of age, and G. S. died before R. It was held that the devise to G. S. was a good executory devise, and that the estate passed to *his* heirs.

Opinion of the Court by Chief Justice REYNOLDS. This was an action of ejectment, commenced by the defendant here in the court below, to recover the possession of certain lands lying in the county of Monroe. The ability with which this case was argued, and the magnitude of the claim, has induced this court to bestow more time on its investigation than in any ordinary case. Four errors have been assigned as causes for reversing this judgment, and if either of them is well taken, the plaintiff in error must prevail.

1. The will set out in the record was not legally attested by three witnesses, one of the witnesses being a devisee.
2. The will was not proved according to law.
3. By the will, George Lunceford took nothing.
4. The contingency upon which the devise was to take effect did not happen.

We will consider these questions in the order in which they are presented: and 1. The will was not legally attested by three witnesses, one of the witnesses being a devisee. Without deciding how far this would affect the validity of a will where it was required that three "subscribing" witnesses

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(*a*) The acts of a cashier of a Bank, done in the ordinary course of the business actualy confided to such an officer, are *prima facie* evidence that they were within the scope of his duty. *Fleckner* v. *Bank of United States*, 3 Wheat., 338.

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should prove it, it is a sufficient answer, that by the law which governs in this case, but two of the subscribing witnesses are required to establish the execution of a will, and when thus proven, is good to all intents and purposes: 2. The will was not proved according to law. In answer to this objection, the court need only add, that the will was proven by two competent witnesses, (the said devisee not being one of them) before the proper officer, and in such manner as comported with the statute. Having disposed of the two first errors assigned, the court will consider the two last together. Daniel McCann, by his last will and testament, dated the 27th day of January, 1806, after ordering his legal debts to be paid, devised his estate as follows:

"I give and bequeath all my residue and remainder of my personal and real estate, goods, chattels and credits, and lands and tenements, and hereditaments of what kind and nature soever, to my beloved daughter, Rebecca and it is my further will and desire, that should the Almighty take away my said beloved daughter, Rebecca, before she comes of age to receive the said legacy, then and in that case the same personal and real estate to return to my beloved friend George Lunceford, to whom I bequeath the same on the proviso above mentioned."

George Lunceford, the executory devisee, by the said will appointed one of the executors, and died in the year 1808. The testator died in possession of the premises in the year 1806. Rebecca McCann, the devisee, died in the year 1815 or 1816, and under the age of twenty-one years. It was contended for by the counsel for the plaintiff in error, that by the devise to Rebecca McCann, she took an estate in fee simple, and that therefore the limitation over to George Lunceford was void, being repugnant to the previous estate granted, and in support of this position the case of *Jackson* v. *Robbins*, 16 Johns. Rep., p. 537, was cited and relied upon. We have examined this case minutely, but can not say it will warrant this conclusion. One of the principles there decided, grew out of the effect to be given to lord Sterling's will. He devised his estate to his wife, and then said, "in case of the death of my wife without giving, devising, and bequeathing by will or otherwise, selling or assigning the estate or any part thereof, he doth give and devise all such estate as should so remain unsold, undevised, or unbequeathed, to his daughter, lady Catharine Duer." This limitation over was there adjudged (whether considered as a remainder or as an executory devise) bad. The case differs materially from the one before the court. In the first, an express power was given

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to lady Sterling to dispose of the estate in such manner as she should think proper. In the latter no such power is given to the first taker, but the interest of the executory devisee is made to depend entirely upon the contingency of the first taker dying before she "becomes" of age to receive the legacy. This power of disposing of the estate given to the first taker, has been considered even from the time of lord Coke, as carrying the absolute fee, except when coupled with a life estate; then it is said, that a power to sell creates no greater interest. If the power of absolute disposal had been given to Rebecca McCann, we might well question the validity of the limitation over, for the very essence of an executory devise, consists in the inability of the first taker to destroy it by disposing of the estate devised. In the emphatic language of the books, it can not be created, and it can not live under such a power in the first taker.

Hence, and hence only, do we account for the decision in the case refered to in 16 Johns. Rebecca McCann surely took a fee, but a fee conditional, subject to be defeated upon her dying before she arrived at full age, and not as was supposed by the counsel, a fee absolute.

There is no doctrine better settled than that a fee may be limited after a fee, and this happens, says justice Blackstone in his second Vol. Com., p. 172, "when a devisor devises his whole estate, in fee, but limits a remainder thereon to commence on a future contingency, as if a man devises land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs, his remainder, though void in a deed, is good by way of executory devise." See 12 Mod., 287. 1 Vern., p. 164.

Another very strong case is reported in second Wilson, p. 29, *Goodright*, ex. dem, &c., v. *Searle and wife*. The devise was to P., his heirs and assigns forever, but if he should die before he should attain the age of twenty-one years, leaving no issue at the time of his death, then the same was devised to C., her heirs and assigns forever. This the court held to be a good executory devise, and surely the words of inheritance are equally as strong as in the case before the court. Having disposed of this branch of the subject, we will next inquire whether the circumstance of George Lunceford dying before the contingency happened upon which he was to take, destroyed his interest, and if not, whether he had such an interest as would descend to his heirs at law. As evidence that at common law, contingent remainders and executory devises are transmissible and will descend to the heirs of the person to whom they are limited, although he chance to die

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before the contingency happens, (without further reasoning) the court refer to Pollexfen, 54; 1 Rep., 99; Cas. Temp. Talbot, 117; 7 Cranch, 469; P. Williams, 564; 2 Munford, 479. Let the judgment below be affirmed and the defendant recover his costs. (a)

Judgment affirmed.

Kane, for plaintiff.

Starr and *Baker*, for defendant.

DAVID EVERETT, Appellant, *v.* WILLIAM MORRISON, Appellee.

APPEAL FROM ST. CLAIR.

An undertaking by parol by which a third person obtains credit, is collateral, within the statute of frauds and perjuries, and not binding.

THIS case came into the circuit court of St. Clair county by appeal from the judgment of a justice of the peace in favor of Everett against Morrison. The circuit court reversed the judgment of the justice and gave judgment in favor of Morrison, and from which Everett appealed to this court. The bill of exceptions taken on the trial in the circuit court, presents the following state of facts: William Padfield, a witness sworn on the part of Morrison, stated that in August, 1817, he was selling goods as agent for Morrison, at witness' house in St. Clair county—that Bailey applied to witness to purchase goods on credit, which was refused. Bailey then produced Everett, who agreed to go Bailey's security for the amount of goods Bailey wanted, with which agreement witness was satisfied, and sold to Bailey goods out of the store to the amount of the account sued on, to wit:

"*August* 9, 1817.

ISAAC J. BAILEY, Dr.

To WILLIAM MORRISON,

For goods delivered by WILLIAM PADFIELD—DAVID EVERETT, security. $46.50

WILLIAM PADFIELD, sen'r.

Witness told Everett that he would charge the goods to Bailey, and set him, Everett, down as security, which he accordingly did by charging the goods to Bailey in a book, and placing the name of "David Everett, security," at the top of

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(a) 4 Kent's Comm., 257 to 275, as to the history, variety, qualities, &c., of executory devises.

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the account. Witness stated that he would not have given credit to Bailey for the goods, but sold them on the credit of Everett. The goods were sold on a credit of four or six months. Bailey remained in the county about eighteen months after the sale, but no attempt was made by Morrison to coerce payment from him. On the part of the defendant it was proved that sometime in the summer of 1819, at the house of Padfield, Everett told Padfield that Bailey was then in St. Clair county, and had property enough to pay the debt, and desired Padfield to coerce payment; and Robert Thomas proved that early in that summer he was at Padfield's and saw Bailey there with a valuable horse, which witness knew to be the property of Bailey, and that Bailey also had a wagon load of flour, &c. Everett also offered in evidence this receipt:

"*August* 23, 1819.

Received of DAVID EVERETT, $16.25, the amount of his account in the store at my house.

WILLIAM PADFIELD,
for WILLIAM MORRISON."

The witness, Padfield, testified that the receipt embraced only Everett's private account. This was all the evidence in the cause; upon which Everett insisted that his undertaking being by parol, was within the statute of frauds and perjuries, and not binding. The court, however, gave judgment for Morrison, to reverse which Everett appealed, and assigned for error of misdirection of the court in deciding that he was liable on the undertaking as above set forth.

Opinion of the Court by Justice WILSON. The judgment of the court below is reversed, because it appears that the undertaking of Everett was only collateral, and as such, came within the statute of frauds and perjuries.

To this opinion of the court, Justice JOHN REYNOLDS *dissents*, and delivers the following *opinion*.

The bill of exceptions in this case presents a state of facts not very satisfactory. It is really difficult to know if Everett be the scurity of Bailey or the principal in this transaction. But from the best consideration I am capable of bestowing on this case, I conclude that Everett was the person to whom the credit was given, and therefore liable. The witness states expressly that he would not give credit to Bailey, but that the credit was given to Everett, yet in the same disposition he says, Everett was the security of Bailey, and the charge is so made. There being no writing in the case, it was contended that Everett was not liable, as it was within the statute of frauds

and perjuries. I am of opinion, according to the whole state of facts as shown, that Everett is liable. (a) (1)

Judgment reversed.

Blackwell, for appellant

Kane, for appellee.

(a) Where t.ie promise is an original undertaking it eed not l·e in writing. 2 Johns. cas., 52. Where the promise to pay the debt of another is made at the same time with the contract .o which it is collateral, it is incorporated into it and becomes a part of it—the whole is one entire contract, and the want of consideration, as between the plaintiff and the guaranty can not be alleged. 8 Johns., 29. If the whole credit is given to the ⌐erson who comes in t· answer for another, his undertaking is not collateral. Ibid. Per. K NT, Ch. Just.

(1) Parties may make valid contracts, though not in writ ng, to pay he debt of another; but the new or original contract must be dec'ared on: and this must be founded on a new and original consideration moving to the party making the promis , and the debt of the original debtor must not be the consideration for the promise. *Hite* v. *Wells*, 17 Ill., 88. See *Scott* v. *Thomas*, 1 Scam., 59.

A promi e made by A. to B. to pay a debt which B. owes to C. is not within the st tute of frauds. *Prather* v. *V neyard*, 4 Gilm., 40. *Eddy* v. *Roberts*, 17 Ill., 505. *Brown* v. *Strait et al.*, 19 Ill., 88. *Bristow et al* v. *Lane et al.*, 21 Ill., 194.

A verbal contract, not to be performed within a year, will not sustain an action. *Comstock* v. *Ward*, 22 Ill., 248.

The statute of frauds is presumed to hav been pleaded in an action before a justice of the peace. Id.

The statute of frauds in reference to parol contracts fo· the sale of lands, if relied on as a defense, must be pleaded, otherwise it will be held to be waived. *Lear* v. *Choteau et al.*, 23 Ill., 39.

SUPREME COURT

OF THE

STATE OF ILLINOIS.

NOVEMBER TERM, 1824, AT VANDALIA.

Present, THOMAS REYNOLDS, *Chief Justice.*
THOMAS. C. BROWNE, }
JOHN REYNOLDS, } *Associate Justices.*
WILLIAM WILSON, }

CHARLES W. HUNTER, Plaintiff in Error, *v.* SAMUEL GILHAM, Defendant in Error.

ERROR TO MADISON.

Under the practice act of 1819, bail bonds should be taken to the sheriff and suits on them should be brought in his name. The act gives him no power to assign t..em to the plaintiff in the action.

HUNTER brought an action of debt in the Madison circuit court, against Gilham, on two bail bonds executed by Gilham to the sheriff of Madison county, in cases in which Hunter was plaintiff. The defendant demurred generally to the declaration, which the court sustained, and Hunter brought his writ of error to reverse that judgment, assigning for error, the sustaining the demurrer.

Opinion of the Court by Chief Justice REYNOLDS. The thirty-fourth section of the act entitled "An act regulating the practice in the supreme and circuit courts of this state, and for other purposes," approved March 22d, 1819,* authorizes the sheriff to take bail bonds to "himself." Such was the fact in this case. The bail bonds were taken in the name of the sheriff. The sheriff and the defendant were the legal parties to the bonds, and there being no law of this state authorizing the sheriff to assign such bonds to the plaintiff in the judgement, the action should have been commenced in the name of the sheriff, and not in the name of Hunter, who was

* Laws of 1819, p. 148, sec. 34.

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no legal party to the bonds. The judgment below must be affirmed, and the defendant recover his costs. (1)

Judgment affirmed.

Starr, for plaintiff.

Smith, for defendant.

JAMES & PARIS MASON, Plaintiffs in Error, *v.* CHRISTIAN EAKLE, Defendant in Error.

ERROR TO MADISON.

A contract to pay a sum of money with twenty per cent. interest, is merged in the judgment rendered upon such contract, and the judgment is then controlled by the statute and not by the contract.

An execution issued upon such judgment for "twenty per cent. interest from its rendition," will be quashed.

Opinion of the Court by Chief Justice REYNOLDS. The only error assigned in this case is, that the court below erred in refusing to set aside an execution which had issued in favor of the defendant, against the plaintiffs. It was agreed upon the argument, that the note upon which judgment was rendered, stipulated for the payment of twenty per cent. interest.

The judgment was rendered for the amount of the principal, with the twenty per cent. interest to the time of the rendition of such judgment, but was silent as to any rate of interest thereafter to be recovered. The execution commanded the sheriff to make the amount of the judgment with twenty per cent. interest from the rendition of the judgment. The court are of the opinion that the court below erred in refusing to set aside the execution. The statute, it is true, makes legal any rate of interest for which the parties contract, but the statute also declares, that judgments shall bear but six per cent. interest. When a judgment is obtained upon a contract, that contract ceases to be, and is merged in the judgment, and the judgment is operated upon, and controlled, not by the contract, but by the statute.

The judgment must be reversed, the cause remanded with

(1) The statute now provides that when a bond is taken to the sheriff as in this case, the bail "may be proceeded ag inst by an acti n of debt, in the name of the plaintiff in the original action, as in the case of a recognizance of bail." Purple's Statutes, p. 124, sec. 4. Scates' Comp., 237.

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instructions to the court below to set aside the execution. The plaintiffs must recover their costs. (1)

Judgment reversed.

Starr, for plaintiff in error.

Smith, for defendant in error.

JOHN T. LUSK, Appellant, *v.* DANIEL P. COOK, Appellee.

APPEAL FROM MADISON

In a suit by the assignee, against the assignor, seeking to recover on the ground that he has used due diligence to recover of the maker, the rule is, that he must show that he brought his action against the maker, at the first term of the court after the note fell due.

A general demurrer to a *narr.* containing several counts, some of which are bad, and one good, ought not to be sustained.

So too, when a count contains two distinct averments, one good and the other bad, the bad averment should be disregarded, as it does not vitiate the whole count—the rule is, "*utile, per inutile non vitiatur.*"

THIS was an action commenced by the appellant, the plaintiff below in the Madison circuit court, against Cook, upon his liability as assignor of two promissory notes. The declaration contained but one count, and avers, 1. That the maker of the note was, at the time it became due and payable, insolvent and unable to pay it, and so continued to the commencement of the suit: 2. A showing of due diligence by suits to enforce payment, and the prosecution of the maker to insolvency. There was a general demurrer to the declaration, which the court sustained, and gave judgment thereon for the defendant. The only error assigned is that which questions the correctness of the judgment of the court below, sustaining a general demurrer to the declaration.

Opinion of the Court by Chief Justice REYNOLDS. The second averment in the declaration, is an attempt to show the use of *due diligence* by suits to enforce payment of the maker, and prosecuting him to insolvency. This averment can not be considered sufficient, for the reason that the plaintiff has not availed himself of the earliest means which the law afforded him, but suffered himself to sleep until one or two terms of the court had elapsed after the notes became due,

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(1) Affirmed in *Pearsons* v. *Hamilton*, 1 Scam., 415.

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before prosecuting his suits against the maker. The law is, that where the assignee seeks to recover of the assignor, on the ground that he has used due diligence to obtain the money of the maker, but has failed, he must show that he commenced his action against the maker, at the first term of the court, which happened after the note became due, provided there be proper time for the service and return of the writ. (1)

As to the first averment, the court has nothing further to say, that what was said in the case of *Thompson* v. *Armstrong*, ante., page 48.

They have neither seen or heard any thing that has induced them to disturb that opinion. The two cases are entirely opposite. The first averment then, must be deemed to contain a good cause of action, and the demurrer being a general one, ought to have been overruled. There is no principle in pleading better settled than when a declaration contains several counts, one of which is good and the others bad, that a general demurrer to the whole declaration can not be sustained. So too, where a count contains two distinct averments, one of which gives a cause of action and the other does not, the bad averment must be regarded as immaterial, and does not vitiate the whole count or declaration, and a general demurrer thereto ought not to be sustained. (2)

We have shown that the second averment in the declaration does not constitute a sufficient ground of action, and therefore is not, according to the technical doctrine of the law, double. It must be esteemed as *surplusage*, and wholly immaterial, and the defendant below should have disregarded it and taken issue upon the first averment, which is the substantive cause of action, as determined in the case before cited, (*a*) the rule being that *utile per inutile non vitiatur.* The judgment below must be reversed and the cause remanded,

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(1) See note to the case of *Mason* v. *Wash*, ante, p. 39.

(2) Affirmed in *Stacy* v. *Baker*, 1 Scam., 421. *Cowles* v. *Litchfield*, 2 Scam., 356. *Fitch* v. *Haight*, 4 Scam., 52. *Prather* v. *Vineyard* 4 Gilm., 40. *Young* v. *Campbell et al.*, 5 Gilm., 82. *Israel* v. *Reynolds*, 11 Ill., 218. *Governor of Illinois* v. *Ridgway*, 12 Ill., 15. *Stout* v. *Whitney*, id. 231. *Walter* v. *Stephenson*. 14 Ill., 77. *Anderson* v. *Richards*, 22 Ill., 217. *Tomlin* v. *T. and P. R. R. Co.*, 23 Ill., 429.

(*a*) Where there is a demurrer to the whole declaration, but one count is good, the plaintiff must have judgment. *Whitney* v. *Crosby*, 3 Caine's Rep., 89, id. 263.

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with liberty to the defendant to withdraw his demurrer and take issue upon the first averment in the declaration. (*b*)

Judgment reversed.

Smith and Starr, for appellant.

Lockwood, for appellee.

The ADMINISTRATORS, WIDOW, and heirs of T. ERNST, deceased, Plaintiffs in Error, *v.* The PRESIDENT and DIRECTORS of the STATE BANK of ILLINOIS, Defendants in Error.

ERROR TO FAYETTE.

A debt due the State Bank secured by mortgage, is a debt due the state, which the state can release.

FERDINAND ERNST, in his lifetime, on the 31st day of August 1821, and Mary Ann his wife, made their mortgage to the defendants, to secure the payment of eight hundred dollars, twelve months after the date, according to the tenor of a certain note made by Ernst on that day, for the use of the people of the state of Illinois. This mortgage not being satisfied, nor the money secured thereby paid, the defendants in error sued out of the circuit court of Fayette county, a writ of *scire facias* on the mortgage. At the return term of the *scire facias*, the plaintiffs in error appeared and pleaded a release of the mortgage debt, by an act of the general assembly of the state, entitled "An act to authorize the administrators of F. Ernst to sell certain real estate."

To this plea there was a demurrer and sustained, and judgment for the mortgage debt.

Starr, for the plaintiff in error contended, first, that it was competent to the legislature to release and discharge the mortgage debt; and second, the bank was nothing more than a trustee for the people, and the *cestui que trust* may release a debt due to the trustee.

Blackwell, contra.

(*b*) Vide *Thompson* v. *Armstrong*, v. 48. *Mason* v. *Wash.* p. 39. *Tarlton* v. *Miller*, p. 68.

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Opinion of the Court by Justice JOHN REYNOLDS. This was a *scire facias* upon a mortgage. Ernst, in his lifetime, loaned from the state bank of Illinois, eight hundred dollars, and to secure the payment of that sum, executed the mortgage deed, as alleged in the *scire facias*. The bank obtained judgment in the circuit court of Fayette county against the plaintiffs in error, to have the mortgaged premises sold, and to reverse that judgment this writ of error is prosecuted.

In the court below the plaintiffs in error pleaded a statute passed Feb. 18, 1823,* by the general assembly of this state, in bar of this demand. To this plea there was a demurrer, which presents to the court the statute above referred to.

On a full and correct examination of the above recited act, it appears to the court to embrace this case. It was the intention of the legislature to release the estate of Ernst, from all debts due the state. The above debt is due the state. The judgment of the court below must be reversed at the costs of the defendants in error. (*a*)

Judgment reversed.

* Laws of 1823, page 177.

(*a*) The part of the act of 1823 referred to, is as follows: "And the estate of the said F. Ernst, deceased, is hereby released from the payment of any debt due by said estate to this state." Laws of 1823, page 178.

The act establishing the state bank, at page 85, (laws of 1821) requires that the notes and mortgages shall be made "payable to the president and directors" of the bank, "for the use of the state."

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

JUNE TERM, 1825, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice*,
THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, *Associate Justices.*

RICHARD W. CHANDLER, Plaintiff in Error, *v.* JOHN H. GAY, Defendant in Error.

ERROR TO ST. CLAIR.

The circuit court can not arrest or interfere with the proceedings on an award where the submission has been by bond or rule of court, except for the causes expressly stated in the statute, to wit: that the award was obtained by "fraud, corruption, or undue means."

It is error for the circuit court to enter up a judgment on an award. The proper course is, under the statute of 1819, for a rule of court to be entered up on filing the submission and award, requiring parties to abide by the award. A disobedience to this rule would be a contempt. (See act of 1827, Rev. Laws, p. 64.)

Opinion of the Court by Justice SMITH. This was a proceeding under the statute of this state, authorizing and regulating arbitrations, approved 25th February, 1819. The plaintiff in error applied, in the court below, by his counsel, to set aside the award made in this case, on the ground of uncertainty, want of mutuality, as not embracing the matter submitted, and as not final.

He gave the defendant here, notice in the court below, of his intention to make such application. It appears that the circuit court entertained this motion, though after hearing it overruled the same, and directed the bond and award to be filed; confirmed the award, and made it a judgment of the court, and that Gay should recover the sum of thirty-eight dollars and seventy-five cents.

The statute under which these proceedings were, as it is

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contended, correctly taken, provides "that the submission of the parties may be made a rule of court, and after making an award, a true copy thereof shall be delivered to each of the parties, and if either of the parties refuse or neglect to obey the award or umpirage, the other party may return the same with the submission or arbitration bond, and the same award or umpirage so returned shall be entered on record and filed by the clerk, and a rule of court thereupon made, and after such rule is made, the party disobeying the same shall be liable to be punished for a contempt of court on motion, and that process shall issue accordingly, which process shall not be stayed or impeded by order of any court of law or equity, until the parties shall in all things obey the award or umpirage, or unless it shall be made to appear on oath, that the umpire or arbitrators misbehaved, and that such award or umpirage was obtained by fraud, corruption or other undue means: *provided*, that before such rule shall be granted, the party moving therefor shall produce to the court satisfactory evidence of the due execution of the arbitration or submission bond, and that the party refusing or neglecting to obey the award or umpirage, hath been furnished with a true copy thereof."

It is alleged for cause of error, that the court below erred in not setting aside the award for the reasons set forth in the notice of the plaintiff of his motion, and in rendering judgment for the plaintiff in error on the award, before deciding on the said motion of the plaintiff in error.

The force of the reasoning of the counsel, is not perceived, as to the error of the court below, in deciding on the application to file the arbitration bond—and award, before pronouncing an opinion on the motion of the counsel in the court below to set aside the award; nor can it be perceived why the judgment can be erroneous, if warranted by the statute, because of the order of precedence given to it over a motion clearly *coram non judice*. It is very apparent that the application by notice and motion, before the filing of the submission or arbitration bond and award, was wholly irregular, there being no record or evidence in the court below of any proceedings upon which to base such notice and motion.

The statue in question has very clearly provided the mode and order of proceeding, and had the present plaintiff desired to have resisted the filing of the bond and award, he could have done so at the time of the application to file it, and have shown to the circuit court the causes on which he predicated such resistance.

If the reasons assigned came within the causes of objection

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recited in the statute, it would have been the duty of the court to have suspended the entry of the rule on the submission and award, and if satisfied by evidence, that the award had been produced by fraud, corruption or other undue means, to have arrested the proceedings or quashed the award.

The language used in the act forbids the idea that the circuit court could arrest the proceedings, or interfere therewith, except for the causes expressly therein stated, and the same prohibitions extend equally to this court unless for manifest error appearing in the record.

Thus far then, it is not perceived but what the proceedings on the part of the defendant in error were correct, but it is an important inquiry in this case to ascertain the nature and extent of the order taken and entered upon filing the submission or arbitration bond and award.

The circuit court, it appears, confirmed the award, declared it to be a judgment, overruled the motion to set aside the award, and adjudged that Gay should recover against Chandler thirty-eight dollars and seventy-five cents, as awarded.

Is this entry of the judgment in conformity with the provisions of the statute? If not, was the court authorized to enter such judgment? Will it be contended that the judgment is the one contemplated by the statute? The statute, it will be seen, directs a rule of the court to be entered on filing the submission and award, leaving it uncertain, it is true, as to the precise form of that rule, or its extent.

For in the sentence immediately following, it declares that the party disobeying such rule, after it is made, shall be liable to be punished for a contempt. The only rational construction then, of the terms of the statute, must be, that the rule to have been made, should have been one directing a compliance with the award, leaving the party to his remedy in case of refusal, by attachment for contempt.

The court are therefore of opinion that the decision of the court below confirming the award be affirmed, and that so much thereof as declares it to be a judgment of the court directing the recovery of the sum of thirty-eight dollars and seventy-five cents, being erroneous and not warranted by the statute, be reversed. The cause is remanded to the circuit court with leave to the defendent in error to perfect his proceedings agreeable to the provisions of the statute, and that each party pay one-half of the cost of the proceedings in this court. (*a*) (1)

(*a*) *Duncan* v. *Fletcher*, p st. *Cromwell* v. *March*.

(1) By the statute now in force in this state i is enacted (after providing the

ABRAHAM TAYLOR AND BENJAMIN PARKER, Plaintiffs in Error, *v.* THOMAS KENNEDY, TREASURER, &c., Defendant in Error.

ERROR TO CRAWFORD.

A variance between the instrument declared on, and the one set out on oyer, is fatal on demurrer.

Opinion of the Court by Justice SMITH. This was an action on a security bond, given for the faithful performance of the duties of Taylor, one of the defendants, as a constable for the county of Crawford.

It is unnecessary to notice more than one of the several causes assigned for error. The declaration, in setting forth the bond, does not allege that the bond was executed on any particular day or month, but generally in the year 1819. Oyer of the bond being prayed and given, shows the bond to have been executed on the day of 1825.

The defendant in the court below, after reciting the bond given on oyer, demurred to the declaration as insufficient. The question of variance is then the simple and only question to be *decided.* Was this omission of the recital of time in the declaration fatal? On this point the court can not entertain a doubt.

The court need not enter into the reasoning which governs

manner in which arbitrations may be entered into,) that the parties "may in such submission, agree that a judgment of any court of record competent to have jurisdiction of the subject matter, to be a name in such instrument, shall be rendered upon the award made pursuant to such submission." Purple's statutes, p. 88, Sec. 1. Scates, Comp., p. 209.

By virtue of this statute if the submission and award are in pursuance of it, and the submission so provides, a judgment may be entered on the award. *Low* v. *Nolte*, 15 Ill., 368; *Thorpe* v. *Starr*, 17 Ill., 199.

A judgment on an award can only be entered by a justice of the peace when it is on a suit pending before him, and is by the parties referred to abitrators. *Weinz* v. *Dopler*, 17 Ill., 111; *Shirk* v. *Trainer*, 20 Ill., 301.

A parol submission and award are binding in all cases except where a writing is required to pass the title to the thing in controversy. *Smith* v. *Douglass*, 16 Ill., 34.

If there is neither fraud or misconduct on the part of the arbitrators, the award is final. *Merritt* v. *Merritt*, 11 Ill., 565; *Root* v. *Renwick*, 15 Ill., 461; *Ross* v. *Watt*, 16 Ill., 99.

Unless the submission requires it, it is not necessary that an award should be published, or that notice of it should be given to the parties. Nor need it be in writing. *Denman* v. *Bayless*, 22 Ill., 300.

An award must be so certain that it can be easily comprehended, and be carried into execution without the aid of extraneous circumstances. *Howard* v. *Babcock*, 21 Ill., 2 9.

A court of equity may rectify a mistake of arbitrators, in omiting the name of the person from an award to whom certain land was to be conveyed, if the proof is clear and explicit as to what was intended by the arbitrators. *Williams* v. *Warren*, 21 Ill., 541.

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decisions on the subject of variance between the instrument set out in the declaration and the one offered on oyer, nor is it necessary to elucidate by comparison, that this was one essential in its character, and might be important in its bearing on the ultimate liability of the parties and in the decision of the cause.

The court are therefore of the opinion that the court below erred in overruling the demurrer, and that the judgment below ought to be reversed and that the plaintiffs recover their costs. (*a*) (1)

Judgment reversed.

JOHN JOHNSON, Appellant, *v.* RICHARD ACKLESS, Appellee.

APPEAL FROM ST. CLAIR.

The statute regulating appeals from a justice of the peace, in providing that no continuance shall be allowed to either party after the second term, was not intended to prohibit the court from taking such cases under advisement after the trial.

In appeal cases, where the judge acts both as court and jury, a bill of exceptions taken after the judgment of the court is rendered, is regular and in time.

THIS was originally a suit brought before a justice of the peace by Ackless against Johnson, and taken by Johnson by appeal to the circuit court of St. Clair county. From the bill of exceptions taken in the cause, it appears that the suit was brought before the justice to recover the sum which Johnson received of one Divers, for a certain tract of land, over and above the sum of four hundred dollars, and it was proved by the testimony of John Divers, that about three years ago Johnson had sued Ackless before Divers for a part of the purchase money which Ackless owed Johnson for a certain tract

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(*a*) *Connally* v. *Cottle; Rust* v. *Frothingham and Fort; Prince* v. *Lamb.*

(1) As to craving *oyer*, see *Sims* v. *Hugsby*, post; *Bogardus* v. *Trial*, 1 Scam., 63: *Collins* v. *Ayers*, 13 Ill., 362; *Harlow* v. *Boswell*, 15 Ill., 57; and note to *Mason* v. *Buckmaster*, ante, p. 27.

A note was described in the declaration as being payable "on or before," &c., the note offered in evidence was payable *on* the day named, and not *on or before*. Held that this did not constitute a variance between the declaration and the proof. *Morton* v. *Tenny*, 16 Ill., 494.

Where a note offered in evidence differed in amount a half cent from the one declared on it was held to be a variance, and that it could not be received in evidence. *Spangler* v. *Pugh*, 21 Ill., 85.

When an instrument is not truly described in its material parts, it can not be read in evidence under a special count. *Higgins* v. *Lee*, 16 Ill., 495.

See also, *Baxter* v. *Knox*, 19 Ill., 367: *Crittenden et al.* v. *French*, 21 Ill., 598; *Van Court* v. *Bushnell et al.*, id., 624; Freeman's Digest, p. 1317.

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of land, for which land Ackless had before agreed to pay Johnson $800, and had paid $400, and that $400 remained unpaid. That at the trial before Divers, Ackless stated that he was unable to pay for the land, and would give up to Johnson what he had paid if Johnson would take the land and release him from paying the residue; that after some conversation Johnson agreed to Ackless' proposition, and delivered up to Ackless the notes which Johnson held on him for the $400, the residue of the purchase money for the land, and Ackless delivered up to Johnson the bond he held on him for the title to it, and the contract of purchase was fully rescinded. Afterwards, and before the company separated, Johnson offered to sell the land, and called on the company to take uotice that it was his intention to give Ackless all he could get for the land over and above the sum of $400, and that Divers afterwards purchased the land of Johnson for $453, one hundred and fifty of which was paid in cash, and the balance in horses. On this evidence, Johnson insisted that the testimony showed a naked contract, without any consideration to support it, but the court was of a different opinion and rendered judgment for Ackless. The attorney for Ackless protested against any bill of exceptions being presented at that term (August term, 1824,) for the reason that the evidence upon which the judgment was rendered was heard at August term, 1823; but this objection the court overruled.

Opinion of the Court by Justice LOCKWOOD. This is an appeal from the circuit court of St. Clair county. The cause originated before a justice of the peace, and was brought into the circuit court by appeal, the appeal was tried at the second term after taking of the appeal, but was not decided until the fourth term. The record states that the continuance after the trial was at the instance of the court, and because the court was not sufficiently advised what judgment to give. It is objected on the part of the appellee that the court had no power to continue this cause after the trial. This objection can not be entitled to any weight. The statute could only have intended to restrict continuance at the instance of one party when opposed by the other. And such has been the practice of the circuit courts ever since the state courts have been established. The plaintiff in the appeal had regularly brought and prosecuted his appeal, and it would consist neither with law nor common sense, that the delay of the court should defeat his appeal. Should, however, the objection prevail, the consequence would be that the judgment of the circuit court must be reversed. But for the reasons above given, the court do not consider it to be erroneous for the court

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to take cases under advisement after two terms have elapsed since the taking an appeal from the decision of a justice of the peace. The appellee also objects that the bill of exceptions was irregularly taken. The bill of exceptions was taken at the term judgment was pronounced. The appellant had no opportunity of taking it sooner, for until the decision he could not know that he should have any ground of exception. The court in the decision of appeals perform the duty both of court and jury, and until the case is decided it can not be known whether it will be necessary to except. The trial of appeals in the circuit court is an anomaly in the law, and the rules of taking bills of exceptions in ordinary trials by jury, can not apply. It therefore appears to the court that the bill of exceptions was properly taken. The only question on the merits of this case is, whether there was any consideration for the promise of the appellant. On this point the court can not for a moment entertain a doubt. The promise given in evidence was entirely gratuitous, it was a *nude pact.* The judgment therefore must be reversed. (1)

Judgment reversed.

Blackwell, for appellant.

Cowles, for appellee.

MORE and BATES, Appellants, *v.* BAGLEY, BORER and ROBBINS, Appellees.

APPEAL FROM GREENE.

If a party neglects to make his defense at law, a court of chancery will not relieve him.

Opinion of the Court by Justice LOCKWOOD. It appears from the bill exhibited in this cause, that an action was commenced before a justice of the peace on a promissory note, and that on the trial of the cause, the defendants offered to prove by their own oaths the fact, and called on plaintiffs

(1) The cases of *Swafford* v. *Dovenor*, 1 Scam., 165, and *White* v. *Wiseman*, id., 169, are cited in Freeman's Digest, p. 1178, Sec 13, as conflicting with this case; but in the first of those cases the court refer to this case, and expressly say the question here decided is not the one presented there. But it is now settled by the act of 1837 in accordance with this decision. Purple's Statutes, p. 824, Sec. 22; Scates' Comp., p. 263. *County of Crawford* v. *Spenney*, 21 Ill., 290; *Stevenson* v. *Sherwood*, 22 Ill., 238.

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below to disprove, that the consideration of the note was for the sale of an improvement on public lands. The bill also states that the justice overruled this defense, and gave judgment for the plaintiffs. Without intending to decide whether this defense ought to have availed the defendants if they had proved it, it is sufficient for this court to say, that the complainants have mistaken their remedy. The defense set up by the complainants before the justice was purely a legal one. Their only remedy, in case the justice decided erroneously, was to appeal to the circuit court. The complainants having neglected to avail themselves of this remedy, can not now ask the interposition of a court of equity. The allegation in the bill, that complainants could only prove the facts in what the consideration of the note consisted, either by their own oath, or the oath of the plaintiff, can be no reason for not prosecuting an appeal from the justice's decision. Had an appeal been taken, the complainants could, by filing a bill of discovery, have obtained the necessary proof. In the case of *Duncan & Lyon*, 3 Johnson's Chan. cases, 351, chancellor KENT says, that "it is a settled principle that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report (of referees) by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." The decree below must therefore be reversed. (*a*) (1)

Decree reversed.

McRoberts, for defendants in error.

(*a*) The court of chancery will not relieve a party on the ground of his having proceeded to trial at law without sufficient evidence, when it was in his power to have obtained that evidence by a bill of discovery. 4 Johns. Rep., 510.

(1) It was said by the court in *Propst* v. *Meadows*, 13 Ill., 169, that "It is within the ordinary jurisdiction of this court to grant relief against judgments at law, either by granting new trials, or by perpetual injunction, if it shall appear that the judgment complained of was obtained by fraud, or resulted from inevitable accident, and that the courts of law can not grant adequate relief." See *Beaugenon* v. *Turcotte*, post; *Hubbard* v. *Hobson*, id.; *Beames et al.* v. *Denham et al.*, 2 Scam., 58; *Wierich* v. *DeZoya, et al.*, 2 Scam., 388; *Scott* v. *Whitlow*, 20 Ill., 310.

A party who seeks to set aside a judgment by a proceeding in chancery, so as to obtain a new trial, must show himself clear of all *laches*, and also that every effort on his part was made to prevent the judgment against him. *Ballance* v. *Loomis, et al.*, 22 Ill., 82.

The rule that equity will not relieve against the neglect of a party in a suit at law, who has not made a proper defense, or to move for a new trial, will depend upon the fact that he knowingly had a day in court. *Owens* v. *Ranstead*, 22 Ill., 161.

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JONATHAN BROWDER, Appellant, *v.* JEREMIAH JOHNSON, Appellee.

APPEAL FROM WASHINGTON.

This court can not and will not look at things the clerk may, without authority and irregularly, incorporate into the record.

Opinion of the Court by Justice SMITH. This was an action of covenant for rent, and a verdict was rendered against the appellant in the court below, who applied to the court for a new trial, on the grounds that the verdict was against law and evidence, that the damages were excessive, and that the jury acted under mistaken impressions as to the right of the parties. This application was refused. The imperfect state of the pleadings and the record, render it extremely difficult to say what ought to be done in reviewing the cause. It seems, by looking into the pleas and replications, that a perfectly immaterial issue has been made between the parties, and is in some measure the cause of the novel manner in which the record recites the proceedings had in the cause. Whether the court ought to look into a question which would naturally present itself in this state of the pleadings when it is not assigned for error, and was not noticed in the argument, is a matter on which they will not now decide, nor what effect it might have had in determining this cause. The only question which the counsel on both sides have presented for the consideration of the court is, whether the court below acted correctly in refusing the application for a new trial. From the state of the record, as the evidence on the trial has not been embodied in a bill of exceptions, and the affidavit of one or more of the jurors could only have been regularly brought before this court by being also incorporated in the exception of the counsel to the decision of the court in refusing a new trial; on that ground, the court can not perceive the most distant means of ascertaining whether the court could have erred, in its refusal to grant the new trial. It becomes therefore impossible, from the manner in which the question is presented, to inquire into the causes of error. It is true, the clerk has, without authority, and very irregularly, incorporated the affidavit in the record, but still the court ought not, and can not notice it, though if they were disposed to overlook the irregularity in the present case, they could not say that the court below ought to have received the affidavit of

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the jurors, to impeach or set aside their verdict. (*a*) There then being no point regularly before the court, and being in this instance not disposed to examine into causes of error not assigned nor noticed in the argument, (though if injustice were likely to happen, they do not say that they would not feel it their duty to examine and decide points of importance which may have escaped the examination of counsel,) they must affirm the judgment of the court below with costs. (1)

Judgment affirmed.

Starr, for plaintiff in error.

McRoberts, for defendant in error.

(*a*) See *Sawyer* v. *Stephenson*, ante, page 24. *Forester*, &c. v. *Guard, Siddell & Co.*, page 74.

(1) In relation to an affidavit, copied into the record but not preserved by a bill of exceptions, the court used the following language: "We have often and uniformly held, that to entitle papers and proceedings of this character to notice in this court they must either be copied into, or so specifically referred to by the bill of exceptions, as to leave no doubt of their identity, and that the party intends to rely on them in support of his case." *Hatch* v. *Potter*, 2 Gilm., 725. And to the same effect are *Rust* v. *Frothingham, et al.*, post. *Sims* v. *Hugsby*, id. *McLaughlin* v. *Walsh* 3 Scam., 185. *Cummings* v. *McKinney*, 4 Scam., 59. *Saunders* v. *McCollins*, id., 419. *Corey* v. *Russell*, 3 Gilm. 366. *Edwards* v. *Patterson*. 5 Gilm., 126. *Petty* v. *Scott*, id., 20[illegible]. *Holmes* v. *The People*. id., 480. *Mann* v. *Russell*, 11 Ill., 586. *Magher* v. *Howe*, 12 Ill., 379. *McBain* v. *Enloe*, 13 Ill., 78. *Moss* v. *Flint et al.*, id., 572. *McDonald* v. *Arnout*, 14 Ill., 58.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1825, AT VANDALIA.

Present* THOMAS. C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, } *Associate Justices.*

JOSEPH CORNELIUS, Appellant, *v.* ROBERT WASH, Appellee.

APPEAL FROM ST. CLAIR.

Where the relation of client and counsel is created, the counsel must contribute his own legal knowledge and assistance in the suit, and aid in conducting it to a final determination.

The confidence reposed in counsel is of a personal nature, and can not be delegated to another without the consent of the client. The client is entitled to receive the identical legal services he contracted for.

WASH sued Cornelius before a justice of the peace in St. Clair county, for his services as attorney and counsellor, and recovered a judgment against him, from which judgment Cornelius appealed to the circuit court of said county. Trial and verdict in the circuit court for Wash for $59 in damages. A motion was made by defendant for a new trial, which was overruled, and thereupon a bill of exceptions was taken, from which it appears, that on the trial of the cause in the circuit court, the plaintiff, Wash, read in evidence to the jury, the following obligation, viz.:

Belleville, Nov. 9, 1819.

Whereas, I have employed R. Wash in the suit instituted by George, a black man, against Robert Whiteside and F. Bradshaw, for the recovery of his freedom, I hereby promise and oblige myself to pay to said R. Wash or order, the further sum of fifty dollars, as witness my hand and seal.

JOSEPH CORNELIUS. [SEAL.]

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* **WILSON, C. J., was absent the whole of this term.**

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as the foundation of his action, and proved by H. Starr, that the suit in the obligation mentioned, had been removed to the Randolph circuit court, and was there tried in the fall of 1820, and decided in faver of George, the black man in the obligation mentioned, and his right to his freedom thereby established; but the plaintiff did not prove that he rendered any service in said suit as counsellor or attorney for said George. This was the evidence on the part of the plaintiff. The defendant, by his counsel, then moved the court to instruct the jury as in case of a nonsuit, because the plaintiff's evidence did not show that he had rendered any service in said suit as attorney for George, and was not entitled, therefore, to recover on the obligation. The court refused to give the instructions asked for, but instructed the jury that if they believed that the obligation imposed on Wash the duty of rendering services in the action as attorney, they should find for the defendant; but if they believed that by the contract specified in the obligation that Wash was to have the fifty dollars on George's recovering his freedom, whether Wash rendered services in the cause or not, then they must find for the plaintiff; and the court left the construction of the contract thus far, to the jury. Mr. Starr was then cross-examined by the defendant, and stated that the suit in question was tried in the St. Clair court at the June term, 1820; that he had no recollection that Mr. Wash was at court, or had any thing to do with the management of the cause, but that Mr. Peck appeared for George and managed the cause with ability; that a verdict was rendered for George for more than four hundred dollars, and that the verdict was set aside and a new trial awarded, and that the cause was removed to Randolph county, and there tried as above stated; that he appeared for George as attorney there, that George employed him, and that Mr. Wash was not there. It was further proved that the suit in the obligation mentioned, was commenced in the St. Clair court in July, 1818, by the late Mr. Mears, and in all the steps taken in the cause, Wash's name no where appeared as attorney. It was further proved by D. Blackwell and J. Turney. that on the trial in June, 1820, on calling the cause, that Mr. Wash did not appear on being called, and that Mr. Peck and Mr. Carr, both lawyers, voluntarily told the court that they would attend to the cause for Mr. Wash, and they did attend to it at that time. It was further proved that Mr. Carr became the partner of Mr. Wash in the spring of 1820, but there was no proof that either Mr. Peck or Mr. Carr, was employed by Mr. Wash to represent him in the cause. The defendant proved by his own oath, that Carr

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exacted a fee from him for those services of twenty-five dollars, which he had paid, and said nothing about his being concerned with Wash as a partner. The plaintiff then gave in evidence the following writing under seal, viz.:

Belleville, Nov. 9, 1819.

Three months after date I promise to pay R. Wash, or order, sixty dollars for value received, as witness my hand and seal,

JOSEPH CORNELIUS, [SEAL.]

and proved that it had been given to him by defendant at the same time, to secure a fee in the same suit for his services as attorney, &c., and that at the last term of the St. Clair court an action was tried on the note between the present parties, and that defendant relied on a failure of consideration on the ground that Wash did not render any services, and the jury found a verdict for him, Cornelius. Here the evidence closed, and the court instructed the jury further, that although the plaintiff did not in person attend to the suit for George, yet if Peck and Carr did attend to it for him as well as Wash could have done, Wash would have a right to recover, and they ought to find for him. The defendant excepted to this opinion, and appealed to this court.

Opinion of the Court by Justice LOCKWOOD. Two questions are presented in this case: 1. What is the true construction of the obligation made by the plaintiff in error to the defendant in error? 2. Ought the instructions prayed for to have been given to the jury? On the first point, the court are of opinion that by the true construction of the contract of the parties, the relation of client and counsel was created, and that it became necessary for Mr. Wash either to have contributed his legal knowledge and assistance in the suit of George against Witeside and Bradshaw, or have been ready and willing at the trial to have aided and conducted the suit to its final termination. The confidence reposed in counsel is of a personal nature, and can not be delegated without the consent of the client. The evident object of the party in making this contract being to obtain the legal services of Mr. Wash in prosecuting the suit, the court ought to have instructed the jury that, unless they believed Cornelius had dispensed with the personal services of Mr. Wash, they ought to find for Cornelius.

In relation to the second charge given to the jury, to wit: "that although the plaintiff did not in person attend to the suit for George, yet if Peck and Carr did attend to it for him, as well as he, Wash, could have done, Wash would have a right to recover." If the court is right in their construction

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of this contract, this instruction was clearly wrong. In the employment of counsel to manage a cause, the client is governed by a variety of considerations which relate to the character, learning and skill of the lawyer, and whether the client exercises a sound judgment in his selection, is a matter in which he alone is interested, but he is entitled to receive the identical legal services he has contracted for. It may, with propriety, be asked, by what rule could a jury decide whether Peck and Carr did render the same services that Wash might have done, had he been present? It is only sufficient to state the question to show the utter impracticability of its being determined by a jury. They can have no data on which to predicate an opinion. The judgment must be reversed with costs, with permission to the defendant in error to have the cause remanded to the circuit court for further proceedings, not inconsistent with this opinion. (1)

Judgment reversed.

Blackwell, for plaintiff.

Starr, for defendant.

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(1) If attorneys who are co-partners, accept a retainer, the contract is joint, and continues to the termination of the suit, and neither can be released from the obligations or responsibilities assumed, either by a dissolution of their firm, or by any other act or agreement between themselves. *Walker* v. *Goodrich*, 16 Ill., 341.

An attorney agreed with a father to institute proceedings for the division and sale of land held by the father and his daughter in common, and the father agreed to pay for such services five hundred dollars when the land should be sold and the purchase money become due, or the usual fee in case the attorney should fail to procure the division. The father died after an order for the sale had been entered by the court, but before the sale had taken place; and the guardian of the daughter had the suit dismissed. Held, that the attorney was only entitled to the usual fee for his services. *Bunn et al.* v. *Prather*, *et al.*, 21 Ill., 217.

Contingent fees to attorneys are not against law or public policy. *Newkirk* v. *Cone*, 18 Ill., 449.

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JAMES C. WRIGHT, Plaintiff in Error, *v.* THE PEOPLE, Defendants in Error.

ERROR TO MADISON.

It is not an indictable fraud to seperate the condition from the penalty of the bond—it is not such an act as common prudence can not guard against.
The act of 1819, respecting crimes and punishments, has fully provided for cases of this description.

Opinion of the Court by Justice SMITH.* The early adjudication in England on indictments for frauds, appear, from the reports of the cases, to have been unsettled and contradictory. The leading case, which seems to have settled the doctrine, and to have established a channel through which the difficulties and perplexities arising from those decisions might be avoided, is the case of *The King v. Wheatley*, decided in February, 1761, and reported in 2d Burrow, 1125.

The distinction laid down in that case, between public and private frauds, has, it is believed, been the great criterion which courts of justice have adopted, by which to judge of the criminality of the act, and whether the perpetrator was liable to indictment and punishment, under the common law. The very lucid opinion of Lord Mansfield in that case, and unanimously concurred in by all the judges present, although not obligatory on this court, will yet certainly be respected, when the elevated characters and great legal attainments of the persons who composed that tribunal are considered. The opinion of Lord Kenyon was, that that case established the true boundary between frauds that were, and those that were not, indictable at common law. That case required that the fraud should be of such a nature as would affect the public, or that it should be a deception that common prudence and care could not guard against, or that false tokens should have been used, or a conspiracy entered into to cheat. The offense, in the language of Lord Mansfield, to be indictable, must be such an one as affects the public; as, if a man uses false weights and measures, and sells by *them*, to *all* or to *many* of his customers, or uses them in the general course of his dealing. So if a man defrauds another under false tokens—for these are deceptions that common prudence and care are not sufficient to guard against. So if there be a conspiracy to cheat—for ordinary care and caution is no guard against this.

* LOCKWOOD, justice, having prosecuted the defendant in the court below while attorney general, gave no opinion.

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The cases here put are certainly more than mere private injuries, they are public offenses. This doctrine has been fully recognized by the supreme court of New York, in the case of *The People* v. *Babcock*, 7th Johns., 201.

In the present case it is a mere private injury—the public could in no way be affected by the act; nor is it a case of false tokens, which is necessary to be shown in a fraud on a private individual. The act of separating the condition written underneath the obligation, which was to determine the time of payment and liability of the parties to it, can not be considered as an act which common prudence might not have guarded against. It might have been avoided in various ways. By taking from Wright an instrument expressive of the condition upon which the obligation was given, instead of having it underwritten, or by having the condition inserted in the body of the obligation, according to the most common and usual method in practice.

The form of the obligation and defeasance, serves only to show with reference to the present case, that the obligors reposed great confidence in the person to whom they gave it. I feel more confirmed in the general view taken of the case, upon an examination of the sixth section of the acts of the legislature of this state of the 23d March, 1819, respecting crimes and punishments, which has fully provided for the defacing of instruments, obligations, &c., to which class of cases the present one might safely be arranged. The judgment of the circuit court must therefore be reversed. (*a.*)

Judgment reversed.

(*a* The sixth section of the act respecting crimes and punishments, approved March 23d 1819, p. 215, provides, "That whoever shall forge, deface, corrupt or embezzle any charters, gifts, grants, bonds," &c., shall be deemed guilty of forgery, and shall be fined, put in the pillory, and rendered infamous.

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THE PEOPLE, on the relation of WM. L. D. EWING. *v.* GEORGE FORQUER, Secretary of State.

On a motion for a *Mandamus.*

The governor can not make an appointment in the recess of the general assembly, unless the vacancy occurred since the adjournment of that body. (1)

The secretary of state is not obliged to countersign and seal a commission which the governor has no power by law to issue, and he may rightly refuse to do it.

The court will not grant a *mandamus* to a person to do an act where it is doubtful whether he has the right by law to do such act or not.

Where a person is in office by color of right and exercising the duties thereof, a *quo warranto* is the proper remedy for another person claiming the same office, and not a *mandamus.* (2)

The governor has no right to fill an office though created by law, during the recess of the general assembly, where there never has been an incumbent. The word "vacancy" as used is contradistinguished from "filled" or "occupied."

When the return upon a rule to show cause why a *mandamus* should not issue, contradicts the facts set out in the affidavit upon which the rule is granted, it seems that this court has no power to ascertain the real facts, as the legislature have provided no mode by which they are to be tried and determined.

Opinion of the Court by Justice LOCKWOOD. A rule was granted by this court requiring the secretary of state to show cause why a *mandamus* should not be awarded against him, requiring him to countersign and seal a commission appointing Wm. L. D. Ewing, paymaster-general of this state. This rule was granted on an affidavit made by Adolphus F. Hubbard, which affidavit states in substance that said Hubbard

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(1) The subject of appointments to and removal from office by the governor, is very fully discussed in the case of *Field* v. *The People*, 2 Scam., 79.

(2) This rule is very generally adhered to, if not universally. See *People* v. *Fletcher*, 2 Scam., 487. *Wilmans* v. *Bank of Illinois*, 1 Gilm., 671. *Clark* v. *The People*, 15 Ill., 217. *Attain* v. *Matteson*, 17 Ill., 167.

Where the parties have commenced proceedings in another tribunal, to obtain an adjudication of the question, the Supreme Court will not (except in extraordinary cases interfere by *mandamus. The People* v. *Warfield*, 20 Ill., 159.

A writ of *mandamus* should show that the relator has no other remedy. It is only granted in extraordinary cases, where, without it, there would be a failure of justice. If the party has sought, or may seek, other means of redress, this writ should be denied. *School Inspectors, &c.* v. *The People*, 20 Ill., 525.

A *mandamus* is not the proper remedy to try the question of the location of a public highway, as between the public and the landholders over whose land it is to be laid out. The court has a discretion in granting or refusing it. *The People* v. *Curyea et al.*, 16 Ill., 547.

Where a circuit judge refuses to sign a bill of exceptions, the proper remedy is by *mandamus. The People* v. *Pearson*, 2 Scam., 189. *Weatherford* v. *Wilson*, id. 256.

A *mandamus* confers no new authority, but only issues to compel a party to act where it was his duty to act without it. *The People* v. *Gilmer*, 5 Gilm., 249.

See also the following cases: *The People* v. *Pearson*, 1 Scam., 460. *Same* v. *Rockwell*, 2 Scam., 3. *Same* v. *Cloud*, id., 362. *Same* v. *Pearson*, 3 Scam., 271. *Same* v. *Scates*, id., 35 . *Maxcy* v. *Clabaugh*. 1 Gilm., 29. *County of Pike* v. *The State*. 11 Ill., 203. *Insane Hospital* v. *Higgins*, 15 Ill., 185. *The People* v. *Kilduff*, id. 501

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received a letter from Edward Coles, then being governor of this state, that he intended to be absent from the state for a period of time, and that in consequence of such absence, the duties of governor would devolve on the said Hubbard, he being the lieutenant governor of the state. The affidavit further states, that Coles absented himself from the state, and that he, the lieutenant governor, entered on the duties of governor. The affidavit further says, that on the second of November, 1825, he, the said Hubbard, did appoint the said Ewing paymaster general, said office being then vacant, by filling up and subscribing his name to a commission for that purpose. That on the said second November, said Hubbard still being the acting governor, did in the office of secretary of state, present to the said Forquer, he being secretary of state, said commission, and requested him to countersign and affix the seal of state to the same, which the said secretary of state failed and refused to do. The letter referred to in the affidavit, and a commission appointing said Ewing paymaster-general until the end of the next session of the general assembly, were annexed to the affidavit. To the rule granted as abovementioned, the secretary showed for c use why a *mandamus* ought not to be awarded against him, the following reasons, to wit: because Edward Coles was, on the day of presenting of said commission, and had been from the 31st of October, 1825, and has ever since remained in the administration of the office of governor of the state of Illinois. He states as a further reason why the *mandamus* should not be awarded, "that it does not appear from the records of his office, that said office of paymaster had ever been filled by any previous appointment." The secretary then admits that the lieutenant governor entered on the discharge of the duties of the office of governor, and continued in the discharge thereof, until the 31st of October, 1825, on which day he alleges, "that said Edward Coles re-entered upon the discharge of the duties of said office of governor, and has remained therein ever since." Upon the affidavit and accompanying documents, and the reasons, in writing as above given by the secretary of state, it has been contended by the counsel for the relator, that a *mandamus* ought to be granted. The facts stated by the secretary of state were not disputed but conceded to be true.

The questions supposed to grow out of this application have been elaborately argued, and the discussion has occupied several days, yet it is expected that this court will, in less time than was employed in the argument of the case, make up and deliver an opinion, which in its consequences may determine the question, whether Edward Coles or A. F.

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Hubbard is, according to the constitution, the governor of this state. A question of such immense importance, whether we regard the interest and dignity of the persons interested in the result, or the right of the people to have the government administered by the person to whom they have delegated so important a trust, would seem to require that the court ought to have more time for deliberation and examination, than the remainder of the present term. As, however, a decision has been anxiously pressed upon the court, they have determined to give to the subject all the investigation which the shortness of the time, and the almost total absence of law books and other sources of information, will permit. If the court, laboring under such great disadvantages, together with the unprecedented nature and novelty of the case, should err in the conclusions to which they shall arrive, they have no doubt that the error will meet, in the bosoms of the intelligent and the honest, with a ready and satisfactory apology. In the great case of Marbury and Madison, secretary of state for the United States, in the supreme court of the United States, (a tribunal filled with as enlightened and as able jurists as ever graced the judgment-seat in this or any other nation,) the questions which, in some respects, are similar to those in this case, were pending before that court for two years. Yet the opinion delivered in that case, although conspicuous for its luminious displays of deep research and constitutional learning, has not given universal satisfaction. Can it then be reasonably expected, that this court, without any pretension to the great and distinguished talents of the judges of that court, and destitute of even the ordinary means of forming an opinion, will be able to arrive at a determination that will be universally satisfactory? But to come to the case before the court. It was contended on the argument, that governor Coles, by absenting himself from this state, had abdicated and forfeited the office of governor, and could not, on his return into the state, resume its functions. But before the court can enter into this question, it will be necessary for them to inquire, 1. Whether the relator has a right to have the commission countersigned and sealed? And, 2. If he has such right, do the laws of this state afford him the remedy he asks? It appears from the answer filed by the secretary of state, that the office of paymaster-general had never been filled. This office was created by the fourth section of the act passed 8th February, 1821, amending the militia act. A question of much importance here arises, whether the incumbent in the office of governor can make an appointment in the recess of

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the general assembly, when the vacancy did not occur since the adjournment of that body? The answer to this question is only to be found in the true construction of the 8th section of the 4th article of our constitution, which reads as follows: "When any officer, the right of whose appointment is, by this constitution, vested in the general assembly, or in the governor and senate, shall, during the recess, die, or his office by any means become vacant, the governor shall have power to fill such vacancy, by granting a commission which shall expire at the end of the next session of the general assembly." If any doubt existed as to the meaning of this section, reference might be had to the practice of the government, had such practice been acquiesced in. Only one case, however, is within the knowledge of the court, and in that case, the governor determined that he had not the power to make the appointment, although it was a case that loudly called for its exercise, if the power existed. This solitary precedent, however, can not be considered as settling the question. The words, however, of this section, appear so clear, and so devoid of ambiguity, that it seems a useless waste of time to look further than to the clause itself, for its true meaning. It only authorizes the governor to fill the vacancy when it shall occur during the recess of the general assembly, whether that vacancy be occasioned by death, or any other means. The vancancy must happen during the recess. Can it then for a moment be pretended, that the contingency had happened, which authorized the appointment of the relator? It appears to me, that it would require a total perversion of the language used, to contend that it had. But as this question is one of vital importance to the correct and wholesome administration of this government, I have examined the constitution of the United States, and the construction that has prevailed on this subject. By the 2d section of the second article, "The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session." In an able work recently published on constitutional law, I find the construction that has been given to this clause of the constitution of the United States, which so strikingly resembles our own, that I trust I shall be excused for making a long extract from the work. In pages 373—4, of Sergeant's Constitutional Law, the subject is noticed as follows:

"In the year 1814, president Madison granted commissions to ministers to negotiate a treaty of Ghent, in the recess of the senate. The principle acted on in this case, however, was not acquiesced in, but protested against, by the senate at

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their succeeding session. And on a subsequent occasion, April 20, 1822, during the pendency of the bill for an appropriation to defray the expenses of missions to the South American States, it seemed distinctly understood to be the sense of the senate, that it is only in offices that become vacant during the recess, that the president is authorized to exercise the right of appointing to office, and that in original vacancies, where there has not been an incumbent of the office, such a power, under the constitution, does not attach to the executive. An amendment that had been proposed, providing that the president should not appoint any minister to the South American States, but with the advice and consent of the senate, was therefore withdrawn as unnecessary. And in a report of a committee of the senate, made on the 25th of April, 1822, it is declared, that the words 'all vacancies that may happen during the recess of the senate,' mean vacancies occurring from death, resignation, promotion, or removal. The word 'happen' has reference to some casualty not provided for by law. If the senate be in session when offices are created by law, which were not before filled, and nominations be not then made to them by the president, the president can not appoint after the adjournment of the senate, because, in such case, the vacancy does not happen during the recess. In many instances where officers are created by law, special power is given to the president to fill them in the recess of the senate. And in no instance has the president filled such vacancies without special authority by law."

Here, then, we find a practical exposition of the constitution of the United States, adhered to for a series of years, and the concluding fact stated in the extract, speaks much on this subject. There can be but little doubt, that since the organization of the general government, many cases must have arisen where the public interests would have been promoted by the exercise of this power; yet the president has carefully abstained from stretching his authority, even for useful purposes, to cases not authorized by the constitution. In the appointment of the relator, it can not even be pretended, that any state necessity existed for filling the vacancy. The office had been vacant since 1821, and yet, I am not aware that any complaint had ever been made. I therefore come to the conclusion, that the lieutenant-governor, admitting him fully clothed with all the functions of governor, had not the constitutional power to fill the vacancy in the office of paymaster-general. This conclusion would seem to settle the question whether the *mandamus* ought to be awarded or not. But the counsel for the relator contended on the argu-

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ment, that whether the lieutenant-governor had the constitutional right or not, to make the appointment, still the secretary was compelled to countersign the commission and affix the seal. Can this proposition be sustained? By the 4th section of the act defining the duties of secretary of state, it is enacted, "That all commissions required by law to be issued by the governor, shall be countersigned by the secretary of state." In this section, is to be found the duties of the secretary. Had the legislature intended to require the secretary to countersign every commission that the governor should present to him, whether authorized by law, or the constitution, its phraseology would have been, that the secretary should countersign *every* commission presented to him by the governor. The secretary is, however, *only* required to countersign those commissions "required to be issued by law." Must he not, then, look into the law to see if the commission is required by law? Would he be required to sign a commission for an office that does not exist?

The secretary of state is a constitutional officer as well as the governor, and his duties are pointed out by law. I think he may refuse to sanction an unconstitutional or illegal act. Should I, however, be wrong in this opinion, still the court might well doubt the propriety of granting a *mandamus*. If the lieutenant governor had not the power to make the appointment, what benefit would the relator derive from possessing the commission, although duly signed and sealed? Would it confer the office on him? I think not. But if any doubt rests on this subject, the court ought not to grant the *mandamus*. I refer to the following authorities on the subject. "The court will not grant a *mandamus* to a person to do any act whatever where *it is doubtful whether he has by law a right to do such act or not*, for such would be to render the process of the court nugatory, as if the person had no rights he might so return it." Esp. N. P., page 665. "The court will not grant a *mandamus* to a person commanding him to do anything which he is not under a *legal* necessity of doing; that is, if the law has left a discretion in him the court will not control it." *Ibid.*, 668.

But another and still more important question arises, from the reasons shown by the secretary, why the *mandamus* should not be granted. He informs the court that on the day of presenting the commission, and before and ever since, Edward Coles is, and has been in the administration of the office of governor of this state, and contends that he has no right to recognize any other person as governor. On the other hand, the counsel for the relator contended that Edward Coles having absented himself from the state had no right to resume

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the functions of the office, and that he was to be regarded as an usurper.

Here then is distinctly represented to the court the question whether Edward Coles or A. F. Hubbard has the right to administer the government.

It was conceded on the argument, and such no doubt would be the effect, if the *mandamus* should be granted, that Coles would be completely stripped of the executive functions. For if a *mandamus* can be awarded in this case, it could to every officer of the government who should refuse to recognize Hubbard as governor; and Coles, without being before the court, or entitled to be heard on the subject, would be deposed from the highest station in the government; a station, too, conferred on him by the suffrages of the people. Does not the mere statement of the consequences that will flow from such a decision, imperiously call on the mind to reflect, to ponder well the subject before so great and decisive a measure is resorted to? Nay, does not the bare statement of the consequences that will result to a person not before the court, admonish them that they have no power to award the *mandamus?* It was urged by the counsel for the relator, that the secretary had boldy marched up to the real question, to wit: who is the governor by the constitution? and it was intimated that it was also the duty of the court to decide this question. It is a sufficent answer to this intimation that the secretary can not, by his own act, bring into discussion the rights of others, unless they necessarily arise in the case. His consent can not give this court any right to decide questions not properly before them. When such a question comes directly and properly before them; it is to be presumed they will not shrink from the performance of their duty, let the consequences be what they may. But does the question, who is the constitutional governor, necessarily arise? It is a principle of common justice, common law and common sense, that no person shall be condemned without being heard. That no person can be deprived by courts of justice of even a dollar's worth of property without first having been summoned to show cause against it. It must be kept in mind that when this court is called upon to decide who is governor, that the question is no longer between the relator and the secretary of state, but between Hubbard and Coles, neither of whom are strictly parties to this controversy; consequently, neither of them ought to be affected by the decision of this case. In this point of view, the remedy sought in this case is entirely misconceived. Hubbard should have filed an information in nature of a *quo warranto* against Coles, then the question would come up directly and not collaterally before the court, and the

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controversy might be tried by a jury, should there be an issue of fact. Whether an information in nature of a *quo warranto*, would lie, to try such a question, the court are not now called upon to decide. One of the counsel for the relator, very emphatically called this a *political* question. If the counsel was right, the legislature would seem to be the proper forum for its discussion. But when the question arises in this court it will be time enough to decide it. "Sufficient unto the day is the evil thereof." I am however of opinion, if Hubbard has any *legal remedy* to try his right to fill the executive chair, that it is *only* by an information in the nature of a *quo warranto*. On this subject the court are, fortunately, not entirely without the aid of authority. In the case of *The People* v. *The Mayor, Aldermen, &c., of the city of New York*, 3 Johns. Cas., 79, the court says: "Where the office is already filled by a person who has been admitted and *sworn*, and is in by *color* of right, a *mandamus* is never issued to admit another person, because the corporation, being a third party, may admit or not at pleasure, *and the right of the party in office may be injured without his having an opportunity to make a defense.* The proper remedy in the first instance is by an information in the nature of a *quo warranto*, by which the rights of the parties may be tried."

In the above case the relators swore that they had been duly elected to the offices to which they asked to be admitted. But it appeared from the case that other persons were executing the duties. This case, it is conceived, is directly applicable, and points out the remedy that ought to have been pursued by Hubbard. Again, in the case of *Rex* v. *Bankes*, 3 Burr., 1412, which was an application for a *mandamus*, the court of king's bench held "That the mayor *de facto* must be made a party to the rule to show cause." In 4 Bac. Ab., 515, title *mandamus* (E) the law is thus laid down: "But though the court of king's bench be entrusted with this jurisdiction of issuing out *mandamuses*, yet they are not obliged to do so in all cases wherein it *may seem proper*, but herein may exercise a discretionary power, as well in refusing as granting such writ, as where the end of it is merely a private right, where the granting it would be attended with *manifest hardships and difficulties*," &c. Is it not apparent that *manifest hardship and difficulty* would ensue, if this writ should be granted? Would it not have the effect to depose and eject from the office of governor, a person who now fills it, and to which he had been duly elected by the people, and regularly qualified and inducted into office? And without his having had an opportunity *to show cause* why so great a degradation

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should be meted out to him? and would not a great constitutional question be decided, although brought before the court collaterally, and without all the light that might be shed on the subject? and would not a great principle of natural justice be violated? I am clearly of opinion that the *mandamus* ought not to be awarded.

Separate opinion of Justice SMITH. The affidavit of Adolphus F. Hubbard, on which this application is based, sets forth, that Edward Coles, on the 18th day of July, 1825, being then governor of the state of Illinois, absented himself from the said state, having first signified his intention so to do, by a letter bearing date the 22d June, 1825, and which letter is in the words following:

SIR:—*You will recollect that I made known to you last winter, and again repeated the subject, when I saw you in May, that I should have occasion to go to the Eastward about the middle of July. The object of this letter is to notify you that* AFTER THE 18TH OF JULY, *I shall be absent, and that the duties of the executive will devolve, in pursuance of the constitution, on you, as the lieutenant governor of the state, during my absence, which I expect will not be longer than about three months.* *I am, very respectfully,*

EDWARD COLES.

A. F. HUBBARD, ESQ. *lieutenant governor of the state of Illinois, Shawneetown.*"

The affidavit further recites, that in consequence of the absence from the state, of said Coles, and by virtue of the 18th section of the third article of the constitution of the state of Illinois, the duties of the office of governor of said state, did devolve upon the deponent, he then being the lieutenant governor of said state, and that therefore, he did enter upon and assume the administration of the government of said state, and did do and perform all the duties and requisitions of the said office of governor; and that on the 2d day of November, next after the said 18th of July, 1825, the deponent, still being and continuing the acting governor of said state, and in the performance and discharge of the duties thereof. And further, that the office of paymaster-general of the militia of said state being then vacant, did appoint William L. D. Ewing to the said office of paymaster-general; and did fill up and subscribe with his own proper hand, a commission of that date, as an evidence of said appointment to the said office, and to complete the said appointment on the 2d November, 1825, the deponent still being the acting governor of said state and in the discharge

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of the duties thereof, did, in the office of secretary of said state, present to George Forquer, Esq., then and there being such secretary, and the keeper of the seal of said state, the said commission, and requested him to affix the seal thereto, and countersign the same, as such secretary; and that the said secretary did then, and still refuses to do said acts; upon this deposition, with the letter and paper purporting to be the commission, and an affidavit of the service of a notice of the intended application for a rule to show cause, being filed, a rule was granted, requiring the said Forquer to show cause why a *mandamus* should not issue against him, and for cause he returns the following, as facts: 1. The commission was signed by A. F. Hubbard, as acting governor, on or about the 5th of November, 1825, and on the same day presented to him, as secretary of state by said Hubbard, who required him, as such secretary, to countersign and affix the seal of said state, which he refused to do: 2. Because, on the 5th of November, 1825, Edward Coles was then, and had been, from the 31st of October, 1825, and has ever since remained, in the administration of the office of governor of said state of Illinois: 3. That it does not appear from the record of the office of said secretary of state, that the said office of paymaster general has ever been filled by any previous appointment thereto, since the creation of the office: 4. Because, although the said Coles did inform the said Hubbard, that after the 18th day of July, 1825, he would be absent from the state, and that the duties of the office of governor would devolve upon him, said Hubbard, as the lieutenant governor, until the return of him, the said Coles, to the state, and that, although the said Hubbard did enter upon the duties of said office, and remaining in the discharge thereof, until the *31st day of October*, 1825, yet the said Coles did, on the said 31st October, 1825, re-enter upon and discharge the duties appertaining to the office of governor, and has ever since remained therein."

In describing the state of the case, I have adhered almost literally to the language used in the affidavit, and the answer to the rule, to prevent the least possible misconception. On the state of facts here presented, it is urged that it is the duty of this court to award a *mandamus*, to compel the secretary to affix the seal of the state to the paper purporting to be a commission. Before entering into an examination of the question presented, it may not be improper to remark, that it is closely connected with other questions of no ordinary import, delicate in their nature, and involving in their

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examination, points of deep and serious consideration. Questions, which, if it becomes the duty of this court to decide, might affect the official acts and conduct of the highest officer known to the constitution of this state. Questions, which, from their very nature, would require a decision on the relative right subsisting between the people and the executive. Before this court, then, will assume a jurisdiction of such great extent, and reaching to cases of such magnitude, it will look seriously to the source from whence it derives its power, and be satisfied beyond a doubt, that it not only possesses that power, but that it is required, in the present case, for the purposes of justice, and a due administration of the law, to exercise it.

The occasion must not be one of an equivocal character; and the right of the party claiming the interference of this court to restore him to, or yield to him such rights, through the exercise of its powers, must be clear and certain, absolute and positive, perfect and complete; and he must have no other remedy by which he can obtain it. Such are the uniform decisions which have invariably governed courts of justice in granting writs of *mandamus.*

The ability with which the case has been argued before the court, the novelty of the questions presented, and the importance attached to them, connected with many difficulties in the points made, require an exposition of the principles which govern my decision in this case.

The following questions are then to be considered:

1. Whether the applicant has a legal right to the office of paymaster-general, and if so, can he require the commission to be countersigned and sealed by the secretary of state?

2. If he has a perfect legal right, and that right has been violated, do our laws afford him a remedy by *mandamus*, and is this court bound to award it? I shall consider the questions in the order they are stated.

1. Has the applicant a legal right to the office of paymaster general, and if so, is the secretary bound to seal and countersign the commission.

This question involves in its consideration, independent of the latter member of it, two points of importance, "to wit:" 1. Was he appointed to the office by a power acting at the time within the legitimate scope of its authority: 2. Has such appointment been made by a power competent to exercise the right of appointment at the time of making it?

The authority under which he claims his right is derived from an act entitled "An act amending an act entitled an

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act organizing the militia of this state," approved February 8th, 1821. The fourth section of this act declares "that there shall be an adjutant-general, a quarter-master general, and a paymaster-general, to be appointed by the commander-in-chief." It appears from the affidavit, as will be seen in the case as stated, that Adolphus F. Hubbard, on the second day of November, 1825, claiming to have been in the due and legal exercise of the office of governor, did appoint the said Ewing to the said office, and make out a commission, and require the secretary to countersign and seal it, which he refused to do. This leads to the inquiry propounded by the first question, viz: "Was he appointed to the office by a power acting at the time within the legitimate scope of its authority?"

The twenty-second section of the third article of the constitution declares that "the governor shall nominate, and by and with the advice and consent of the senate, appoint all officers whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for." Has this appointment been made agreeably to the provision of the constitution? If it has not, the office being one established by law, unless it can be shown to have been made under some other provision of the constitution justifying it, was altogether unauthorized, and consequently the applicant would have no legal right to the commission. It is however urged that the appointment is fully justified under the eighth section of the third article of the constitution, which is as follows: "When any officer, the right of whose appointment is by this constitution, vested in the general assembly, or in the governor and senate shall, during the recess, die, or his office by any means become vacant, the governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the general assembly." Under this section it is contended the appointment was made, and was authorized.

To have authorized the appointment under this section of the constitution, it seems to me to be very clear that one of the contingencies named in the section must have happened after the office had been filled. There must be a vacancy created by the death of the incumbent, or his office must have become vacant by other means.

The word "vacancy" is here used as contradistinguished from "filled" or "occupied." It does not imply, as it is here used, an original vacancy. But it must be considered that it is alone, the office of some person who has already filled the

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office and shall die, or whose office shall by other means become vacant which is to be filled during the recess. If we ask the question, what office is here said shall be filled ? is it not plain that the answer must be, it is the office of him who, during the recess of the legislature shall die, or by any other means become vacant, if the right to such appointment is by the constitution vested in the general assembly, or in the governor and senate. Can the right then to fill an office where there never was an incumbent, attach ? Surely not. There has, however, been decisions on a similar provision of the constitution of the United States, which is by no means as plain and explicit as ours, and we are not left to ingenious speculations, and to abstruse philological discriminations. We have practical illustrations of the rule, and the evident justice and propriety of it is, I think, not now to be questioned.

The third member of the second section of the second article of the constitution of the United States declares that "the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." Under this article the president commissioned ministers to negotiate the treaty of Ghent during the recess of the senate. The senate, however, so far from acquiescing in the correctness of the principle, protested against it at their succeeding session. The sense of the senate was again expressed to the same effect on the 20th of April, 1822, when a bill was before that body making an appropriation to defray the expense of missions to the South American States; and it was then distinctly understood to be their opinion that it is only in offices which become vacant during the recess, that the president is authorized to exercise the right of appointing to office, and that in original vacancies where there has not been an incumbent of the office, such power does not attach to the executive; and on that occasion an amendment which had been proposed, providing that the president should not appoint any minister to the South American states, but with the advice and consent of the senate, was therefore withdrawn and unnecessary. Again, in a report of a committee of the senate of the 25th of the same month, 1822, it was distinctly declared that the words "all vacancies that may happen during the recess of the senate," mean vacancies occasioned from deaths, resignations, promotion or removal. It was asserted that if the senate were in session when offices are created by law which were not before filed, and nominations be not then made to them by the president, the president could not appoint after the adjournment of the senate, because such vacancy

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does not happen during the recess. The report may be found in Niles' Register, 29th August, 1822.

Can there then be a doubt that the executive has neither the power nor right to make a recess appointment where the vacancy is an original one? Or rather, where there has never been an incumbent of the office; and would it not be an assumption of power not delegated by the constitution nor warranted by law?

If this be true, then, whatever may be the fact as it regards the person making the appointment, the applicant in the present case has not shown a clear legal right to the office. But it is said that this court has no power to inquire whether the appointing officer had the right or not, nor whether he kept within the pale of the constitution when he did the act. That having determined it to be an appointment which he might make, this court is precluded from looking to the exercise of the power under which it is done, and must consider it as legally and constitutionally done. Cases which it is said are analogous, have been put and relied on with apparent earnestness and confidence. I think that in those cases a distinction, which is an apparent and important one, was not noticed. The distinction is between the power given to do an act within the judgment and discretion of the person to whom the power is absolutely confined, and the limitation of the power to do it in a particular manner, and at a particular time. The question in the case before the court is, not whether the officer has discreetly exercised his appointing power, but whether he possessed such a power, or rather, whether there was not a total absence of such a power, it never having been conferred on him by the constitution.

The question may be readily solved, if it be borne in mind that unless there was a vacancy created by one of the contingencies named in the eighth section of the third article of the constitution, the executive of this state, be he whom he may, had no power to make the appointment. That it was not such a case, has been, I think, already satisfactorily shown. But can it, with a shadow of reason, be said that this court shall not be permitted to judge, whether the person making the appointment, had a constitutional or legal right so to do, when it is called upon to cause by its mandate; an act to be done which it is declared necessary to give effect and validity to the act of that very person; or is it to be the humble and blind instrument by which error is to be sanctified, and meekly lend its authority to prostrate that instrument which it is

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bound by the most solemn obligation which can bind man to man and his Creator, to support and preserve.

As to the remaining branch of the question, if the appointment was void, because not constitutionally made, whatever might have been the secretary's duties, he can not be called on now to affix the seal of state to a void commission, which disposes of that part of the question proposed. The second point under the first division of the question, is now to be considered.

Has such appointment been made by a power competent to exercise the right of appointment, at the time of making it? In the examination which might be given to it, the construction of the eighteenth section of the third article of the constitution of this state, is to be considered.

That declares, that "in case of an impeachment of the governor, his removal from office, death, refusal to qualify, resignation or *absence from the state*, the lieutenant governor shall exercise all the power and authority appertaining to the office of governor, until the time pointed out by this constitution for the election of governor shall arrive, unless the general assembly shall provide by law for the election of a governor to fill such vacancy."

On the argument, the question, so far as it regarded the construction of this section of the constitution, was declared to be a political one, and it was said that it was really a question between the people, and one who having laid down his office, could not, under the constitution, re-enter upon it. If this be the true state of that part of the case, and it be in fact, purely a political question between the people and their executive, this court, I am constrained to say, can not interfere and decide it. This court was not created for such a purpose, nor can its jurisdiction ever be properly extended to it. I know of no principles nor precedent which could justify this court in settling such a controversy. Its jurisdiction is confined to judicial questions arising under the laws and constitution of this state.

But whether this be a political question or not, it will not be necessary now to decide. If the appointment was not made conformably to the provisions of the constitution, (and I am clearly of opinion that it was not,) or, it should appear that a question of magnitude, and one directly affecting the rights of third persons who are not made parties to the proceedings, are in a collateral way to be decided, this court will not give a decision, which in its results is to produce such consequences. The question to be decided under this view of the second point considered, if it were decided, is no less an one than this,

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whether the executive of this state, did, on or after the 18th of July, 1825, absent himself from the state, and whether he has by any act of his, declared that absence to be of such a character, that the duties of the executive did constitutionally devolve upon the lieutenant governor, and whether, in pursuance thereof, the lieutenant governor did enter upon such duties, and having so entered, for what period of time, he shall, under the constitution, remain in the exercise thereof.

If I felt it to be the duty of this court, in the present case, to decide a question of so much moment, and it was placed before the court in an attitude unsurrounded by the embarrassments, which at present seem to cover it, I should as a member thereof, feel no great hesitation in arriving at what I should deem a correct conclusion; and no consideration of consequences which might result from such a decision, if it were correct, would impede me for a moment from pronouncing what I really believe to be the right and the law which governed the case. The considerations as to its results, would not weigh with me, and however unfortunate it might be, that an occasion had arisen in which a question of so much moment had to be decided, affecting the right of individuals claiming to exercise the highest office in the gift of a free people, and whatever might be its results, as to the one or the other, it could form no just reason for avoiding the responsibility of a decision. But when it is perceived that great and highly important interests of persons who are not parties to the proceedings, would be affected by the decision, and that too where the decision of the real question before the court does not render it necessary, I ought surely to pause before I should give an opinion which might have the least tendency to prejudge the rights of those individuals. If the real question thus asked to be decided, in a collateral manner, did not involve a question of the highest consideration, and which it may be supposed, the people have by their constitution, provided another forum to settle, there might be some reason for pressing on this court a decision on that point. But when it is recollected that these means exist, and that all the parties interested would have an ample opportunity to assert their respective rights, it is thought that a question involving no less a decision, than who is the governor of this state, is one of that character, that this court can not, (if it ever could,) in the shape in which it is presented, determine.

Let us examine, however, what are the additional difficulties in this case. The return states two important facts: 1. That Edward Coles did return to this state, on the 31st day of October last, and did thereupon enter upon and discharge

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the duties of the office of governor of this state: 2. That from that time to the present, he has continued in the discharge of the duties thereof. The commission is dated on the second of November, 1825, when the appointment is said to have been made by the lieutenant governor, and he also swears that at this time *he was the acting governor of the state.*

The return *contradicts this fact* and states that Coles was then in the exercise of the duties of the office of governor. If this return had been demurred to, or an issue been made upon the affidavit and return, as made, how would the court have proceeded? There is no statute of this state regulating the mode of proceedings upon a *mandamus*—what course could then have been pursued?

Here is an evident embarrassment of much consideration, and would seem to require legislative interposition, as to the mode of proceeding, such as has been provided in other states.

The statutes of Great Britain are thought not to be in force here, respecting such proceedings. If the court had been compelled to decide on all the facts set out in the affidavit, and in the return, to which ought they to give credit? or which should they reject? But there are still other difficulties. A decision might affect the acts of the lieutenant governor, while exercising the duties of governor, if he has not exercised the executive duties by virtue of the provisions of the constitution; and are those acts to be affected, and their validity determined in this collateral way? This brings me to the consideration of the second point. "If he has a perfect legal right, and that right has been violated, do our laws afford him a remedy?" If the right had been established as a perfect legal right, and it has been violated, our laws must afford a remedy. But in the case of a *mandamus*, there are cases where this may have been shown, yet the court will not grant the writ. It is certainly a sound legal principle, that cases may arise where the court will not grant a *mandamus*, when the granting thereof will, in a collateral manner, decide questions of importance between persons who are not parties to the proceedings, and have had no notice and opportunity to interpose their defense; or where it will be attended with manifest hardships and difficulties. And it has been further decided in the court of king's bench, that courts are not bound to grant writs of *mandamus*, *in all cases* where it may seem proper; but may exercise a discretionary power as well in granting, as refusing, as where the end of it is merely a private right. See Bacon's abridgement, 515. Courts will

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not grant a *mandamus* to a person to do any act, where it is doubtful whether he ought to do it. The real question then, is, on this part of the case, that although it were certain the party applying had a legal right, and that it has been violated, and that the law would afford him a remedy, and which remedy is conceded to be a *mandamus*, whether it is not such a case as would be attended with manifest difficulties and great hardships, but also involving in a collateral manner the right of these parties who have no opportunity of defending their interests. It certainly would; and I am moreover satisfied, that there are insuperable difficulties which could not be remedied, arising out of the facts set forth in the affidavit and return, which would not be properly disposed of, as there is no mode by which this court could ascertain the real facts in the case, provided by the laws of this state ; and I very much doubt whether the court would be authorized to prescribe one itself, which must comprise the impanneling of a jury.

Upon the whole case, and from the best consideration I have been enabled to bestow upon it, during the limited time afforded for making up an opinion, I have come to the following conclusions :

That the applicant has not a perfect legal right to the commission, on the ground that it was an original vacancy, and could not be filled in the recess, by the governor, by an appointment to expire at the end of the next session of the general assembly, and that the secretary, on that ground alone, was justified in withholding his signature and the seal of state. That it is a case attended with great difficulties, both as to the rights to be ascertained and decided, that it involves in a collateral manner the right of both the real parties in the controversy who are not before the court, and whose rights to the executive power could alone be determined, if at all in this court, by a writ of *quo warranto*, and that on the state of facts presented, no mode has been provided by which this court could assume a data to arrive at a correct conclusion.

And as *it*, *therefore*, does not become necessary to give an express opinion on the other points stated in the case, I do not do it. I am therefore of the opinion—the rule must be discharged. (*a*)

Rule discharged.

Hopkins, *T. Reynolds*, *Blackwell* and *Eddy*, for relator.

Forquer, for secretary of state.

(*a*) The leading case in this country in relation to *mandamus*, is the case of *Marbury* v. *Madison*, when secretary of state under President Jefferson, reported in 1 Cranch, 137. There it is decided that,

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WILLIS HARGRAVE, Plaintiff in Error, *v.* THE BANK OF ILLINOIS, Defendant in Error.

ERROR TO GALLATIN.

Where a private corporation sues to recover real property, or upon a contract, it must, under the general issue, produce the act of incorporation.

The act of indorsing a bill to a bank, does not admit that the bank is a corporation.

Opinion of the Court by Justice SMITH. This case comes before the court on a re-hearing. It is not intended to review the opinion which has heretofore been given by this court under its former organization, nor is it deemed necessary to enter into an examination of all the points which were there presented. Indeed, it will be sufficient to a correct determination, to ascertain whether any one of the points made on the argument by the counsel for the plaintiff in error, contains within itself sufficient cause for reversing the judgment of the court below. That which seems to be most important, and to me conclusive is, whether the plaintiffs on the trial were bound to have produced legal evidence of the act of their incorporation? This point has been for a long time well settled by a series of adjudications, both in England and the United States, and so generally acquiesced in that on the argument it was thought the counsel for the defendant in error sought to avoid the force of those decisions, by attempting a distinction more ingenious and specious than solid. He assumed as a position, which is certainly very true, that what is admitted, need not be proved. That by the act of indorsing the bill given to the bank, the plaintiff in error has admitted the existence of the corporation, therefore it was unnecessary to prove what was thus conceded.

This reasoning is calculated to mislead, rather than to enlighten the judgment.

It would not, however, certainly follow, to give the greatest latitude to the position assumed, that the act of indorsement admitted any thing more than that the person to whom the bill was indorsed, assumed the corporate name. It could not establish the fact of their legal corporate existence; be-

To render a *mandamus* a proper remedy, the officer to whom it is directed must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without *any other* and specific remedy.

A *mandamus* to the secretary of state is a proper remedy to enforce the delivery of a commission or a copy of it from the record, to an officer who has been *regularly appointed*, and whose commission has been received from the president by the secretary of state for the use of such officer.

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cause, if such an act amounted to such an admission, *a fortiori*, it would, for all judicial purposes, in this case, make them a corporation—although they should have no existence in fact. However we might admire the ingenuity which presented the syllogism of the defendant's counsel, I can not admit the correctness of the minor part of it. The premises assumed are incorrect, and consequently, the conclusion is unsound. The rule, as is well settled, is this, that where a corporation sues either to recover real property, or on a contract, it must at the trial, under the general issue, prove that it is a corporation. 2 Ld. Raymond, 1535. 1 Kyd on Corporations, 292, 293. Buller's Nisi Prius, 107. 8 Johns., 378.

The instruction of the court below, prayed for by the defendant's counsel on the trial, that this was necessary, was, as the bank is a private corporation, incorrectly withheld, and I am therefore of the opinion that the judgment ought to be reversed, and that the cause be remanded to the circuit court for further proceedings. (*a*) (1)

Judgment reversed.

Eddy, for plaintiff in error.

Starr, for defendant in error.

(*a*) Where a corporation sues either on a contract, or to recover real property, they must, at the trial, under the general issue, show that they are a corporation, or be nonsuited. 8 Johns., 378, *Jackson* v. *Plumbe*.

Before any corporate act can be given in evidence, the charter of incorporation must be produced. *United States* v. *Johns*, 4 Dallas, 412.

Public corporations are such as exist for public political purposes only, such as counties, cities, towns and villages. They are founded by the government, for public purposes, and the whole interest in them belongs to the public. But if the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution.

A bank created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation.

But a bank whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature. 2 Kent's Com., 222.

(1) In suits brought by corporations, the defendants, by pleading the general issue, admit the capacity of the plaintiff to sue. If he would deny the existence of the corporation, he must put in a plea for that purpose. *McIntire* v. *Preston*, 5 Gilm., 48: *Spangler* v. *Ind. & Ill. Central R. R. Co.*, 21 Ill., 277. The authorities on this question seem considerably conflicting; but the court in the first case cited (and where most of the authorities are collected,) said: "Such has been held to be the law by the Supreme Court of the United States, and the courts of several of the states, and the decisions of those states are the best supported by reason and authority."

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MICHAEL JONES, Plaintiff in Error, v. THE BANK OF ILLINOIS, Defendant in Error.

ERROR TO GALLATIN.

Private incorporations must prove their corporate character, under the general issue in an action of *assumpsit*.

Opinion of the Court by Chief Justice LOCKWOOD. A number of errors have been assigned in this cause; the court, however, deem it unnecessary to decide but one of them, The Bank of Illinois brought an action of *assumpsit* in the court below, on a bill of exchange, against Jones, as an indorser. Jones pleaded *non assumpsit*. On the trial, no evidence was given that the bank was a corporation. The defendant below moved the court to instruct the jury, that the plaintiffs could not recover unless the incorporation was proved, which instruction the court refused to give. It was conceded on the argument, that if the plaintiffs below have been incorporated, that the act of incorporation is a private act. The court are of opinion that the rule is well settled, that private incorporations must prove their corporate character upon the plea of *non assumpsit*. See 8 Johnson's Rep. 378, and the cases there cited.

The refusal of the court below to give the instructions asked for is error. The judgment must be reversed and the cause remanded to the circuit court of Gallatin county for further proceedings. As the court deem another trial necessary upon this point, they think it unnecessary to decide the other questions arising in the case. They however suggest, for the consideration of the counsel on both sides, whether a protest is necessary in this case. And whether, in case the striking out the name of one of the indorsers, would be a bar to the action, if such fact should not be pleaded, *Puis darrein continuance*.

Judgment reversed.

Eddy, for plaintiff in error.

Starr, for defendant in error.

(a) *Hargrave* v. *The Bank of Illinois*, ante, page 122.

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John Giles, Appellant, v. John Shaw, Appellee.

APPEAL FROM MADISON.

A variance between the record declared on and the one produced in evidence is fatal. (1)

An indorsement of the costs on the back of the record, though signed by the clerk, is no part of the record.

The certificate of the judge, omitting to state that "the attestation is in due form," is insufficient. (2)

Opinion of the Court by Justice Lockwood. This is an action of debt, brought on a judgment recovered in Missouri, to which the defendant pleaded *nul tiel record.* On the trial, the plaintiff introduced a record of the circuit court of St. Louis county in the state of Missouri, with an attestation of the clerk under the seal of the court. The defendant on the trial, objected to the record on two grounds: 1. Because there was a variance between the record and declaration, in this, that it did not appear from the record what amount of costs had been awarded plaintiff: 2. That the certificate of the judge did not state that the attestation of the clerk was in due form. The court below sustained the objections, and gave judgment for the defendant, to reverse which judgment, the cause is brought into this court.

On the first point, the court are of opinion that the court below decided right in rejecting the record on account of the variance.

It appears by an inspection of the declaration, that the plaintiff in Missouri recovered 115 dollars, for damages, and 19 dollars and 15 cents for costs; the aggregate of which sums is the debt sued for in the court below; but upon the production of the record, it did not appear what sum had been awarded for costs. It however appeared, by an indorsement on the back of the exemplification of the record, that the costs in the suit amounted to the sum mentioned in the declaration. This indorsement did not make the costs a part of the record. Nothing can be considered a part of the record that is altogether detached and separate from it.

(1) As to variances generally, see note to the case of *Taylor et al.* v. *K n-nedy*, ante. p. 91.

(2) A judgment rendered by a justice of the peace of Wisconsin, was offer [illegible] in evidence. The clerk's certificate set forth that the person, before whom the judgment purported to have been recovered, was, at the date of the certificate, a justice of the peace, but did not show that he was when the jud ment was rendered, and was therefore held to be inadmissible. The certificate of the presiding judge that the clerk's certificate was in due form of law, would not aid it. *Morrison* v. *Hinton*, 4 Scam, 457.

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From any thing that appeared, this indorsement might have been made by a person who was not clerk, although his name is signed to it. The seal of the court is always an indispensable requisite to the authentication of all records, out of the court where the judgment is rendered.

On the second point, the court are of opinion, that the certificate of the judge is insufficient. The act of congress has dispensed with the common law mode of proving foreign judgments, and has prescribed a particular form. This form must be pursued. In the case of *Smith* v. *Blagge*, 1 Johnson's cases, 238, the same objection was taken to the exemplification, as in this case. The court there say, that they "can not officially know the forms of another state, and therefore they ought to be proved. The act of congress directs the mode of proof, and requires that the presiding judge of the court from which the copy is obtained, shall certify that the attestation *is in due form.* This not being done, the record is not sufficiently proved." See also the cases of *Ferguson* v. *Harwood*, 7 Cranch, 408, 412; and *Drummond and others* v. *Magruder & Co.*, 9 Cranch, 122, 125.

The judgment below must be affirmed with costs. (*a*)

Judgment affirmed.

Cowles, for appellant.

Blackwell and J. Reynolds, for appellee.

ARTHUR MORGAN, Plaintiff in Error, *v.* JOHN HAYS, Defendant in Error.

ERROR TO ST. CLAIR.

After a final judgment is entered, the court has no power at a subsequent term to set it aside and direct a nonsuit to be entered; and if the court had power to set aside the judgment it ought to have directed a new trial and not a nonsuit.

Opinion of the Court by Justice SMITH. In this case it is not deemed necessary to decide more than one of the points presented for consideration.

(*a*) Vide *Taylor & Parker* v. *Kennedy*, ante, page 91. *Connolly* v. *Cottle*. *Rust* v. *Frothingham and Fort*. *Prince* v. *Lamb*.

No paper writing ought to be admitted as testimony unless it possesses those solemnities which the law requires; its authentication must not rest upon probability but must be as complete as the nature of the case admits. 1 Burr's Trial. 98.

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That one is the decision of the court below in setting aside the final judgment entered in the cause, at a term subsequent to the one at which such judgment was entered, and directing a nonsuit. On the trial of the cause, the plaintiff below, who is plaintiff here, offered to give in evidence a record of a cause determined in one of the circuit courts of this state. This the defendant's counsel objected to, but the court overruled the objection and permitted the record to be given to the jury as evidence.

The jury found a verdict for the plaintiff and a final judgment was entered thereon. The court then continued the cause to the next term, when it set aside the final judgment and directed a judgment of nonsuit to be entered. Two questions arise here for consideration: 1. Had the court the power at a term subsequent to the one at which the judgment was *regularly* entered, to set it aside? 2. If so, was a judgment of nonsuit warranted? That courts have not, as a general proposition the right, at a term subsequent to the one at which judgment is entered, to set it aside, we have no doubt.

The power to re-adjudicate causes finally disposed of at one term, where the proceedings are regular, at another and subsequent one, would produce consequences too embarrassing and lead to endless and contradictory decisions. If a judge could review the final opinion given at one term at the next, why may it not be imagined that he might be equally dissatisfied with the second opinion and reverse that, and continue to vascillate as often as the parties might desire to present their case before him. If, on the trial, either party is dissatisfied with the decision of the court, the remedy for a correction is by excepting to this opinion, or by application afterwards for a new trial. Appellate courts are established for the purpose of correcting the errors of inferior tribunals; but if inferior ones possessed the power at all times to review their own decisions, the creation of the appellate jurisdiction was vain and useless. The court was therefore wrong in setting aside the judgment; but as the court, from the confused state of the record, may be supposed to have considered that the case had been reserved for a review at a future term, and as we are by no means satisfied that the plaintiff ought, from the evidence contained in the bill of exceptions, to have recovered, we do not feel disposed to interfere with that part of the decision. On the second point we are clearly of opinion that after the judgment was vacated the court ought to have directed a new trial. On principle and precedent a nonsuit could not be directed.

The judgment must therefore be reversed, a new trial

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granted, with directions to the court below to award a *venire de novo*, and that the plaintiff in error recover his costs (1)

Judgment reversed.

JOSEPH OWEN AND OTHERS, Plaintiffs in Error, *v.* SHADRACH BOND, Defendant in Error.

ERROR TO GALLATIN.

The agent of the Gallatin county saline has no power to substitute another person in place of the original lessee in case of a violation of the covenants; he should enter upon the demised premises, advertise them, and lease them to the highest bidder.

IN this case, the plaintiffs in error, defendants below, were sued upon a lease alleged in the declaration of defendant in error, plaintiff below, to have been made by S. Bond, as governor of the state of Illinois, on the one part, and the defendants on the other part. The defendants, except Forester and Funkhouser, plead *non est factum*, and the plaintiff admitted the plea to be sustained. As to Forester and Funkhouser, it was admitted by the parties that they did not sign the lease at the time of the making of the same. That after the appointment of Willis Hargrave as superintendent of the saline in the year 1821, the said Owen being likely to prove insolvent, Hargrave agreed, without the knowledge of governor Bond, that his lease should be transferred to Funkhouser and Forester, and thereupon Funkhouser and Forester signed the lease, and affixed their seals, and their names were inserted in the body

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(1) Where an attorney enters an appearance of a party without authority and judgment is rendered against him, such judgment will be set aside on motion. *Lyon* v. *Boilvin*, 2 Gilm., 635.

At the May Term, 1837, a judgment was rendered against Sloo & McClintock, partners, on a power of attorney executed by McClintock alone. At the next term of the court Sloo entered a motion to set aside the judgment as to him. Held by the supreme court that the motion should have been sustained. *Sloo* v. *State Bank*, 1 Scam., 429.

It was also held in *Truett* v. *Wainwright*, that a judgment rendered against a person who has not been served with process, nor authorized his appearance to be entered, may be set aside by a bill in chancery, or by a motion in the court where the judgment was rendered. 4 Gilm., 418.

After a term has expired, a court has no discretion or authority at a subsequent term to set aside a judgment, but may amend it in mere matter of form after notice has been given to the opposite party. *Cook* v. *Wood et al.*, 24 Ill., 295. This decision I apprehend does not conflict with the decision cited above. Those cases were set aside for the reason that the parties were not properly in court; while in the last case the defendants had been duly served with process, but it was vacated by the circuit court on equitable grounds, but which decision was reversed in the supreme court for the reason, among others, that the motion came too late.

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of the lease; they then entered into partnership and proceeded to manufacture salt at the salt works granted to Owen, as above stated under the lease, and paid the rent for a time, until they became in arrears for six months' rent, for which the suit was brought. On this state of facts, it was agreed that the court should try the case against Funkhouser and Forester, and if it is considered by the court that they are legally bound to comply with the terms of the lease, judgment is to be rendered against them for $538.33. But if it was the opinion of the court that the conditions of the lease were not binding upon Forester and Funkhouser, a nonsuit was to be entered. It is stipulated in the lease that if the rents are not paid for the space of thirty days after the time they are payable, that the governor or his duly authorized agent, may re-enter upon the demised premises, &c.

Upon this state of facts, the circuit court gave judgment by default, against Forester alone for $583.33, and the cause is brought to this court by a writ of error.

Opinion of the Court by Justice LOCKWOOD. The questions arising in this case are, whether the agent of the saline had the power to substitute the defendant for the original lessee? And whether, if he had such power, the judgment can be sustained under the agreement of the parties? On the first question, the court are of opinion that the superintendent had no power to make Funkhouser and Forester lessees, in the place of the original lessee. His duty required him, in case of a violation of the covenants contained in the lease, to have entered into possession of the demised premises, and then have advertised them for five weeks, and on the day fixed to have leased the premises for the residue of the term to the highest bidder. Here has been a total departure from the provisions of the law.

The court also erred in rendering judgment against Forester *only*. The stipulation, if it conferred any authority, gave the court power to render judgment against Funkhouser and Forester.

Judgment reversed.

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JAMES TAYLOR, Plaintiff in Error, v. J. D. WINTERS, Defendant in Error.

ERROR TO JACKSON.

A party can not, on motion, quash his own execution if it be regular.

An execution indorsed that "state paper" would be received in discharge of it, can not on motion of the plaintiff, be quashed so as to enable him to take out another execution without such indorsement.

Opinion of the Court by Justice LOCKWOOD. The error assigned in this case is, that the court below had no right to quash an execution on the motion of the plaintiff, and at his expense, when the execution appears regular on its face.

In answer to this error, it was suggested by counsel for defendant in error that the plaintiff in error had sustained no injury. The execution had been issued, and the plaintiff had indorsed that he would receive state paper in discharge of it. On this execution the defendant caused the debt to be replevied for sixty days. It is presumed that the object to be effected by quashing the execution must have been to enable the plaintiff below to take out another execution without such indorsement. If such was the object, there was clearly an injury to the defendant. Whether a party on sueing out a second execution, is bound to make a similar indorsement, is not necessarily before this court; the court are, however, inclined to think he would be, unless special reasons were shown why he should not.

It is fairly to be presumed that when this indorsement is made, and the sixty days replevin is taken, that the defendant obtains this time to enable him to raise the state paper. And if the plaintiff in the execution has it in his power subsequently, to refuse to take the paper without showing any cause, he may occasion a serious loss to the defendant. In 4 Bibb, 471, and 1 Bibb, 147 these questions were considered, and there decided, that a party can not quash his own execution if it be regular. The judgment quashing the execution must be reversed with costs.

Judgment reversed.

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JOSEPH CORNELIUS, Appellant, v. THOMAS COHEN, Appellee.

APPEAL FROM ST. CLAIR.

An indenture by a free negro woman entered into in 1804, and not signed by the master is void. The thirteenth section of the act of 1807 does not embrace cases where the master and servant did not agree upon the time of service before the clerk.

Opinion of the Court by Justice LOCKWOOD. This is an action of replevin brought in the circuit court of St. Clair county, for the recovery of Betsey, a negro girl. The facts of the case are, that on the 6th of October, 1804, Rachael, a free negro woman aged twenty-three, entered into a writing (purporting to be an indenture) with the plaintiff, by which she binds herself in the common mode of apprenticeship, to serve the plaintiff for fifteen years. In the indenture, the master binds himself to allow the apprentice meat, drink, lodging, and wearing apparel fit for such an apprentice. The indenture is signed and sealed by Rachael only. It was admitted on the trial that Rachael was the mother of Betsey, who was born in the fall of 1805.

On the trial of this cause the defendant moved the court to instruct the jury that the plaintiff had no right to the negro girl by virtue of the indenture.

2. That if the plaintiff had a right to her services by virtue of the indenture that replevin would not lie.

3. That the indenture was void because it was not executed by plaintiff. These instructions the court refused to give, with the reservation that if the court should, after the trial, be of opinion that they ought to have been given, that a nonsuit should be entered.

The circuit court subsequent to the trial, decided that the instructions prayed for ought to have been given to the jury, and ordered judgment of nonsuit to be entered, from which decision the plaintiff prayed an appeal.

From the view taken of this case it will only be necessary to examine whether the indenture given in evidence was a valid one. This indenture was executed the sixth of October, 1804, and on the 17th September, 1807, the territory of Indiana passed an "Act concerning the introduction of negroes and mulattoes into this territory." The first section of this act authorizes the owners or possessors of slaves to bring them into the territory. The second section authorizes the master to go with the slave before the clerk, and agree with the slave for the term of years the slave shall serve, &c, and the clerk

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shall make a record &c. The thirteenth section of this act was the only one relied on in the argument as securing the services of Betsey to the plaintiff. That section is as follows:

"That children born in this territory of a parent of color owing service or labor by indenture according to law, shall serve the master or mistress of such parent, the male until the age of thirty, and the female until the age of twenty-eight years."

The first and second sections of this act are clearly prospective, and can have no application to this case. Whether the legislature, by the thirteenth section, intended by the words "by indenture according to law," to provide for the children of slaves bound to serve for a limited period under the second section, it is difficult to determine; but whether such was their intention or not, the result will be the same. If it be admitted that such was the intention, the children of Rachael can not by any construction be embraced by it. Because Rachael and the plaintiff did not go before the clerk and agree for her services as the act directs, and the indenture admits that she was free before the passage of the act.

The claim to the services of Betsey under the thirteenth section is equally inadmissible. The indenture was not executed according to law. The indenture to have been valid, as between Rachael and the plaintiff, ought to have been executed by plaintiff. It is therefore void.*

The judgment must be affirmed with costs.

Judgment affirmed.

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* 16 Johns. Rep., 47.

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Thomas Bradshaw, Plaintiff in Error, v. John Newman, Defendant in Error.

ERROR TO MADISON.

The laws of the country where the contract is made, must govern its construction, and determine its validity. (1)

A plea stating "that the consideration of the note was for an improvement on public land in Arkansas," without averring that by the laws of that territory such improvements were not permitted, is bad.

A plea of failure of consideration, without setting out how it has failed, is bad. (2)

Opinion of the Court by Justice Lockwood.* This action was commenced in the Madison circuit court, on a sealed note made on the 31st of October, 1818, in the then territory of Missouri. The defendant pleaded three pleas, to wit:

1. That the consideration of the note was for the sale of an improvement made upon the public land of the United States, situate in the territory of Arkansas;
2. That the consideration has wholly failed; and,
3. That the note was executed for an improvement right in the Arkansas territory, on land belonging to the United States, and that the plaintiff is, and has been for some time past, in the possession of said improvement, without purchase or lease from the defendant, wherefore the consideration has failed.

To which pleas the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the pleas, and gave judgment for defendant. To reverse which decision, a writ of error has been brought to this court. The first plea in this case is extremely inartificially drawn, and it is difficult for the court to ascertain what is the precise point intended to be presented for decision. The question argued upon this plea was, that a note executed as the consideration

(1) The general principle adopted by civilized nations is, that the nature validity, and interpretations of contracts, are to be governed by the laws of the country where the contracts are made, or are to be performed; but the remedies are to be governed by the laws of the country where the suit is brought. *Humphreys* v. *Powell*, post. *Stacy* v. *Baker*, 1 Scam., 417. *Forsyth et al.* v. *Baxter et al.*, 2 Scam., 12. *Holbrook et al* v. *Vibbard et al.*, id., 465. *Chenot* v. *Lefevre*, 3 Gilm., 642. *Sherman et al.* v. *Gassett et al.*, 4 Gilm., 521. *Strawbridge* v. *Robinson*, 5 Gilm., 470. *Schuttler* v. *Piatt*, 12 Ill., 419. *Crouch* v. *Hall*, 15 Ill., 264. See also to the same point, *Bank of U. S.* v. *Donally*, 8 Peters, 361. *Cox et al.* v. *The United States*, 6 Peters, 172. *Green* v. *Sarmiento*. Peters' C. C. R., 74. *Webster* v. *Massey*, 2 Wash. C. C. R., 157. *Am[illegible]n* v. *Sheldon*, 12 Wend., 439.

It is a well-settled principle, that the statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. *McClany* v. *Silliman*, 2 Peters, 270. *Ruggles* v. *Keeler*, 3 Johns., 268.

The courts of one country will not enforce either the criminal or penal laws of another. *Sherman* v. *Gassett*, 4 Gilm., 535.

(2) See note to *Taylor* v. *Sprinkle*. ante, page 17.

* **Justice Smith having been counsel in this cause, gave no opinion**

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of a sale of an improvement made on the lands of the United States, can not be recovered in the courts of this state, upon the principle that "all contracts which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void." The pleadings in this case do not, however, present any such question. The declaration states the contract to have been made in the territory of Missouri, and for any thing that is alleged in the plea, the contract may be sanctioned by the laws of Missouri. No principle is better settled, than that the laws of the country where a contract is made, shall govern its construction and determine its validity. (*a*)

The first plea is therefore clearly bad. The second plea has frequently been decided to be bad by this court, because it does not set forth in what the failure of the consideration consisted.

The third plea is similar to the first, with this addition, that the plaintiff "is, and has been for some time past, in the possession of the said improvement, without purchase or lease from this defendant." This allegation is doubtless introduced for the purpose of showing that the defendant has not received from the plaintiff what he contracted for, as the consideration of the note.

It does not, however, appear from the pleas, but that the defendant received the possession of the improvement right, or that the plaintiff has ever prevented him from taking and enjoying the possession; and from aught that appears, the defendant may have sold his possession to some third person, who again may have transferred his claim to the plaintiff. The plea is too imperfect to bar the plaintiff's action. It may also be observed in relation to the first and third pleas, that the defendant is guilty of a singular inaccuracy in stating that the consideration of the note was for an improvement in the territory of Arkansas. The note was dated in 1818, and Arkansas was not formed into a territory until some time after that year. The judgment must be reversed with costs, and the proceedings remanded to the Madison circuit court, and the defendant permitted to amend his pleas. (*b*)

Judgment reversed.

Starr, for plaintiff in error.

Cowles, for defendant in error.

(*a*) *Lodge* v. *Phelps*, 1. Johns. Cas., 139. *Smith* v. *Smith*, 2 Johns. Rep., 235. *Ruggles* v. *Keeler*, 3 Johns. Rep., 263.

(*b*) *Taylor* v. *Sprinkle*, ante, page 17. *Cornelius* v. *Vanarsdall*, 23. *Poole* v. *Vanlandingham*, 47.

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ALEXANDER CONLEY, Appellant, v. EZEKIEL GOOD, Appellee.

APPEAL FROM MADISON.

Any defence of a dilatory character must be taken advantage of on the trial before the justice of the peace. (1)

If one of several partners promise individually to pay a debt, he will not be allowed to show that it was due jointly from himself and his co-partner. (2)

An appeal is assimilated to a suit in equity, and in equity, partners are jointly and severally liable, and therefore, proof that another person was the partner of the defendant, if offered by the defendent, is inadmissible in such case.

Opinion of the Court by Justice LOCKWOOD.* This is an appeal from the Madison circuit court, and brought into that

(1) This proposition is universally sustained by the authorities. *Greer* v. *Wheeler*, 1 Scam., 554. *Bines et al.* v. *Proctor et al.*, 4 Scam., 177. *Duncan et al.* v. *Charles*. id., 569. *Ross* v. *Nesbit*, 2 Gilm., 253. *Adams* v. *Miller*, 12 Ill., 27. *Wilson* v. *Nettleton*, id., 61. *Moss* v. *Flint*, 13 Ill., 570. *Adams* v. *Miller*, 14 Ill., 71. *Walker et al.* v. *Welch et al.*, id., 277. *Holloway* v. *Freeman*, 22 Ill., 197.

(2) The principle of this decision—that a dormant partner need not be joined, is unquestionable. *Page et al.* v. *Brant*, 18 Ill., 37. Collyer on Partnerships. 662. But as to the doubt expressed by the court, that objections which do not go to the merits of the case can not be made in proceedings before a justice of the peace, we can not think there is any question. It is true that the objection, that some of the partners are not sued, can be taken advantage of only by plea in abatement. *Shufeldt* v. *Seymour et al.*, 21 Ill., 524, *Puschel* v. *Hoover et al.*, 16 Ill., 340, Collyer on partnership, 658. In equity, also, partners are held both jointly and severally liable on their contracts. Collyer on partnerships, p. 554. 1 Story's Eq. Jur., Sec. 676. 3 Kent's Comm., 634. It is not so, however, at law. But it does not follow, that if the fact were known at the time of making the contract that there were other partners who are not joined as defendants, because the suit is brought before a justice of the peace instead of the circuit court, that the defendant can not avail himself of this objection. It is true that the legislature have intended to do away with many technicalities in proceedings before justices of the peace, and wisely; for if they were expected to conform to all the niceties required in higher courts, few, especially in a new country, would be found qualified to hold the office; and the benefits expected to be derived from this species of courts, would be lost. They have dispensed with written pleadings. *Crews* v. *Bleakley*, 16 Ill., 21. They have provided in certain cases that parties may be made witnesses, without the expense and delay of a bill of discovery. *Webb* v. *Lasater*, 4 Scam., 543. Purple's Statutes, 667, Sec. 39. Scates' Comp., 699. But they have nowhere provided that objections which do not go to the merits, if made at the proper time, shall not avail the defendant. The decisions have been otherwise. *Orr* v. *Thompson*, 4 Gilm., 451. *Adams* v. *Miller*, 12 Ill., 27. Same case, 14 Ill., 71. *Robertson et al.* v. *County Commissioners*, 5 Gilm., 559. And the reasons for this are manifest. That slight and trivial objections ought not to be allowed in proceedings before justices of the peace is reasonable; but many objections, though not strictly of substance, are yet so nearly allied to it as to demand that they shall be allowed to a defendant, no matter in what court he is sued. If a defendant is sued on a *joint* contract, he has a right that his co-contractor shall be joined with him, in order that each may bear his proportion of the joint liability. If the doctrine I am endeavoring to combat is true, it follows that it depends entirely in what court a defendant is sued as to what are his rights. If sued in the circuit court, he may show that others ought to have been joined with him—that he is sued by the wrong name—and many other kindred defenses. If sued before a justice of the peace on the same demand,

* Justice SMITH having been counsel in the cause, gave no opinion.

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court by appeal from the decision of a justice of the peace. The action was brought to recover the value of a quantity of wool delivered to Good to be carded, and which had not, on demand, been returned to Conley. On the trial of the appeal in the circuit court, after Conley's witnesses had been examined and cross-examined by Good, Good introduced his brother as a witness to prove that he, the witness, was a partner in the carding machine. It was conceded on the trial of the appeal, that no such defense was made before the justice of the peace, and that the wool was delivered to Good, the defendant, who promised to card it. It was also proved on the trial, that the partnership was not known by the neighbors and persons frequenting the carding machine.

The circuit court, however, decided that the partnership thus proved, was a bar to the action, and gave judgment for the appellee. One of the questions presented in this case is, whether, in proceedings before justices of the peace, a party is bound to avail himself of the first opportunity to take advantage of a defense which is of a dilatory character. The defense relied on in the circuit court, could have no other effect than to abate the suit; it had nothing to do with the merits of the case. The general rule in case of dilatory pleas is, that if the party does not avail himself of it the first opportunity, he waives the objection. It is, however, contended, that this rule can not be applied to proceedings before a justice of the peace. The court can not accede to this proposition. The object of the legislature in organizing justices courts, would be entirely defeated, if parties were permitted to conceal mere technical objections, and then, after the trial has began, raise them. The justices' law requires the justice to decide the case according to law and equity, and dispenses with written pleadings. The object of the legislature in establishing these courts was, to dispense with technical forms and pleadings, and requires causes to be disposed of with as little delay and expense as possible. The court thinks it doubtful whether the legislature intended that objections which do not go to the merits of the case, could be made to proceedings before a justice of the peace. With-

(and in many cases circuit courts and justices of the peace have concurrent jurisdiction.) he is denied any such right. Can it be that justice depends merely on the tribunal in which it is sought? Except in cases of partnership, a joint liability, even in equity, is never treated as joint and several; and so far as it is carried, that if a joint obligor who is only security, dies, his estate can not, in any manner, be made liable. *Powell et al.* v. *Kettelle,* 1 Gilm., 491, How then, because the legislature has sought to remove technical objections, can proceedings be sustained before inferior tribunals, which a court of equity could not? The statement of the proposition, to my mind, shows its fallacy.

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out intending definitely to settle this question, they are of opinion that such objections must be made in the order of pleadings.

In this case, Good never made the objection till Conley had adduced his proof in the circuit court, and Good had cross-examined his witnesses. To suffer a party, at such a stage of the proceedings, to raise objections in the nature of a plea in abatement, would not only be a palpable departure from every legal principle, but be at war with the statute regulating trials of appeals, which directs that the circuit courts shall "hear and determine the same, in a summary way, without pleadings in writing, according to the justice of the case," and that the court shall "admit any amendment of the papers or proceedings, that may be necessary to a fair trial of the cause upon its own intrinsic merits."

Here has not been a trial on the intrinsic merits of the cause, and a decision according to the justice of the case. In equity, partners are both jointly and severally liable for their contracts.

The court below, therefore, in receiving the testimony of a partnership, erred, and if one of several partners promise individually to pay a debt, he will not be allowed to show that it was due jointly from himself and his co-partners. *Murray* v. *Sommerville.* Sittings after Hilary term—by Lord Ellenborough.

The judgment must be reversed. The court did not think it necessary to decide the question, whether a suit ought to abate, when a dormant partner is not sued. They are, however, inclined to think, that a plea in abatement in such a case would not lie. In the case of *Clark* v. *Holmes*, 3 Johns. Rep., 148, it was decided, that when one partner makes a warranty on the sale of goods, an action may be maintained on the warranty against that partner, without joining the other.

The judgment reversed and proceedings remanded. (*a*)

Judgment reversed

McRoberts, for appellant.

Cowles, for appellee.

(*a*) That other persons jointly indebted, or jointly responsible, have not been made defendants, must be pleaded in abatement, and can not be taken advantage of on the trial. *Ziele* v. *Exrs. of Campbell*, 2 Johns. Cas. 382.

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JAMES NOWLIN, Plaintiff in Error, v. JOHN BLOOM, Defendant in Error.

ERROR TO ST. CLAIR.

Where the record is not the foundation of the action, a variance between the description of it in the *narr.* and the one produced is immaterial. *e. g.* if the *narratio* describes it as a record in a case of *forcible* entry and detainer, and it is a record in a case of *peaceable* entry, and forcible detainer, the variance is immaterial.

Opinion of the Court by Justice BROWNE. The plaintiff below, being a witness in an action of forcible entry and detainer, between one John Goodner and the said John Bloom which was tried before Edward P. Wilkinson, and James Mitchell, Esq., justices of the peace for St. Clair county, the said John Bloom charged the said James Nowlin with having sworn false on the said trial.

The defendant below filed three several pleas to the plaintiff's declaration: 1. Not guilty: 2. The statute of limitations: 3. Justification. To which pleas, the plaintiff took issue. At the trial, the plaintiff below offered as evidence a record of *peaceable* entry and forcible detainer. The record corresponded in every other particular with the one referred to in the plaintiff's declaration, which record, the court below decided ought not to have been received in evidence, and set aside the verdict and directed a nonsuit on account of the variance.

This record was not the foundation of the action, but was only brought in collaterally to prove another fact, and for that purpose, was sufficiently described in the declaration.

The court below, therefore, erred in setting aside the verdict on that ground, because the record was properly before the jury.

For which reason, the judgment of the court below is reversed and sent back to render judgment on the verdict. (*a*) (1)

Judgment reversed.

Cowles, for plaintiff in error.

Blackwell, for defendant in error.

(*a*) In an action for a libel the plaintiff gave notice of justification with the general issue, stating that he would give in evidence at the trial a record of the trial before the sessions of the term of June, 1810; the record produced was of June, 1809; but the variance was immaterial. *Brooks* v. *Bemis*. 8 Johns., 455.

(1) See note to *Taylor et al.* v. *Kennedy*, ante, p. 91.

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HENRY CURTIS, Plaintiff in error, *v.* JOHN DOE, *ex. dem.* DANIEL SWEARINGEN, Defendant in Error.

ERROR TO WASHINGTON.

A sheriff's deed which does not state the land was appraised, and unsupported by proof that it was appraised, is insufficient to entitle the lessor, claiming under it, to recover in an action of ejectment.

Opinion of the Court by Justice LOCKWOOD. This was an action of ejectment, brought to recover the undivided moiety of a tract of land in the county of Washington. A number of errors have been assigned, but from the view we have taken of the case, it will be unnecessary to decide more than the following question:—Was the sheriff's deed to the lessor sufficient to convey Ryan's interest in the premises? The objection taken to the deed is, that it does not appear from the deed, (and the plaintiff below did not prove by parol,) that the premises were appraised, and sold for two-thirds of the valuation. This question is one of great importance to the interests of the community, and deserves the most serious and attentive consideration of the court. Its decision will form a highly important rule in the transfer of real estate, that may affect the rights of a great number of individuals. The transfer of real property by a judicial sale, is unknown to the common law, but is authorized by the statutes of this state.

The legislature, in subjecting real estate to sale on execution, have clearly the right to prescribe the terms on which such sale may be made, and any material departure from the rules prescribed by the statute, will render the sale void. What, then, are the rules prescribed by our statutes in relation to sales on execution?

It must be confessed that the court find some difficulty in reconciling the 2d, 8th, and 22d sections of the act entitled "An act subjecting real estate to execution for debt, and for other purposes," passed 22d March, 1819. But whatever uncertainty might grow out of the attempt to reconcile the conflicting provisions of these sections, yet the court have no doubt that the legislature intended, by the 22d section, to require that all real estate should be valued before sale. This section is as follows:

"That *all real estate* that shall be ordered to be sold under the *provisions of this act*, shall be valued by three disinterested freeholders of the county in which the same may be

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situated, who shall be appointed by the sheriff or other officer, and sworn to take into consideration the true value of such estate in cash, and the said sheriff or other officer shall then proceed to sell the same: *provided*, that the said land, or freehold, shall bring the amount of its valuation as aforesaid, or at least two-thirds thereof; but in case the said land or freehold shall not bring the amount of its valuation, or two-thirds thereof, then the said sheriff or other officer shall continue the sale until the same shall have been offered on three different days, allowing the space of twenty days between each day of sale, giving due notice thereof as before directed, unless the person in whose favor the execution issued, shall agree to take the same at the valuation made as aforesaid." *

This statute was amended by an act passed the 15th February, 1821, which seems to have escaped the notice of the counsel on both sides. By the third and fourth sections of the amended act, the legislature assume the fact that real estate can not be sold on execution, unless it will bring two-thirds of its valuation. The third section is intended to authorize lands that have been already valued and not sold for want of bidders, at two-thirds of the valuation, to be sold for one-half of the valuation.

The fourth section of the amended act is:—"That when any real estate shall hereafter be levied upon, by virtue of *any* execution hereafter to be issued, and shall have been twice offered for sale under the provisions of the act to which this is an amendment, and has not brought the amount of its valuation, or two-thirds thereof, upon the third, or any subsequent offering, the sheriff, or other officer, shall proceed to sell it to the highest bidder for what it will bring in ready money, having first given fifteen days' notice as aforesaid." My conclusion is, that the sheriff was bound to proceed on the execution mentioned in this case, according to the directions of the 22d section of the original act, as modified by the fourth section of the amending act. From which it will result, that the sheriff's duty was to have had the premises valued by three disinterested freeholders, on oath, and advertised for twenty days, when, if two-thirds was not bid, he should again have advertised for twenty days, and then if two-thirds was not bid, he could, according to the above recited fourth section, sell the premises for what they would bring in ready money, having first given fifteen days' notice of the sale. Can the court presume that the sheriff complied

* Laws of 1819, p. 183.

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with these express provisions of the law? I think not. Would not every lawyer be startled at the proposition, whether the court would not presume in favor of a sheriff's deed, that the sheriff had an execution? And that the execution was based on a judgment? Yet these presumptions appear as reasonable as the presumption that the sheriff has obeyed the mandates of the statute, without showing the fact. Every agent, whether public or private, must act within the powers delegated to him, and must show that in all essential particulars he has not varied from them. If a party is to be deprived of his property without his consent, the law that authorizes him to be dispossessed must be obeyed, and he has a right to call for proof that he has not been illegally divested of his estate. The argument that good policy requires that public sales shall be supported, whether the provisions of the statute have been substantially complied with or not, does not appear to be entitled to much weight.

Whether the land has been appraised or not, (and it is to this point that we confine our attention,) can be very readily ascertained, by the bidders calling for the valuation. (1) We have hitherto considered this case with reference to our statutes, and upon general principles. We are, however, not without authorities on the very point. In the case of *Patrick* v. *Gideon Oosterout*, 1 Ohio reports, 27, two questions were submitted to the court; 1. Was it necessary under a sheriff's deed to exhibit the appraisement? 2. Was the appraisement sufficient? The objection to the appraisement was, that it did not appear to have been made on oath. The court, consisting of Judges McLean and Burnet, held that a sale without an appraisement was void, and rejected the sheriff's deed, because it did not appear that the appraisement was *on oath.*

They refused to presume that the oath had been taken. It has also been decided in Connecticut, (1 Day's Repts. 109,) that in order to make out a title to land, by the levy of an execution, it must be shown that the appraisers were disinterested freeholders, and that they *were sworn according to law.*

In the case of *Parker* v. *Rule's lessee*, 9 Cranch, 64, the supreme court of the United States decided, that, under the land tax act of the 14th July, 1798, c. 92, before the collector could sell the land of an unknown proprietor for non payment of taxes, it was necessary that he should advertise the copy of the lists of lands, &c., and the statement of the amount due for the tax, and the notification to pay, for sixty days, in four Gazettes of the state, if there were so many

(1) This is now changed by statute.

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printed therein. Again, in the case of *Stead's executor* v. *Course*, 4 Cranch, 403, and which arose under the tax laws of Georgia, the supreme court decided that an officer selling land for taxes, must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. In the case of *Williams* v. *Peyton*, 4 Wheaton, 77, the same court held, that in the case of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it. That the party who sets up a title, must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record, on which the validity of the deed might depend. And in this last case the court decided that the collector's deed was not *prima facie* evidence.

The court have examined the cases decided in the Kentucky courts, referred to in plaintiff's argument, but think they have but little application to this case. One of the cases was a sale of personal property, which for obvious reasons, is governed by different rules from those of real property. Another of the cases referred to, was the sale or land for taxes. The facts of the case are, however, so imperfectly stated, that it is impossible to extract from the case any rule applicable to the decision of this case.

The last case cited, was a case of the sale of land on execution, and the court are perfectly willing to accede that the case was rightly decided under the Kentucky statute.

This court can not, however, accede to the argument of the court, as to what true policy dictates on this subject. We cannot regard the question as altogether a question of policy, but as more a question of positive law. In relation to the cases cited from New York, the court are of opinion that they can have no application here, because, in New York, they have a positive statute, making sheriff's sales valid, however palpable may be his departure from its provisions. The court feel themselves constrained to say, that the sheriff's deed, unsupported by any proof that the land had been valued, was insufficient to entitle the lessor to recover. The judgment must be reversed with costs. (*a*)

Judgment reversed.

McRoberts, for plaintiff in error.

T. Reynolds, for defendant in error.

(*a*) The party who sets up a conveyance, must furnish the necessary

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DANIEL GREGG, Plaintiff in Error, v. JAMES AND PHILIPS, Defendants in Error.

ERROR TO MONROE.

Debts to be set off, must be mutual, and between the parties t› the record. (1)

A debt due individually by one co-partner, can not be set ‹ ff in an action to recover a debt due the co-partnership.

A payment to one partner is payment to both, unless strictly forbidden. (2)

Opinion of the Court by Justice SMITH. This was an action of debt, on a sealed note, payable to James and Philips. Gregg, who was defendant in the court below, pleaded three pleas:

1. Payment generally.

2. That Philips and himself were mutually indebted to each other before the execution of the note; that prior to the making of the note, they attempted a settlement of their respective claims, but Gregg, being unable then to establish his against Philips, executed the note in question to James and Philips, who had become partners in trade, it being given for the amount of Philips's claim against him, leaving his, against Philips unadjusted.

3. That the note was given to James and Philips to secure a debt due to Philips only, and that before the commencement of the suit, he paid it to Philips.

To the first and third pleas, the plaintiff took issue, and de-

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evidence to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity might depend. *Williams et al.* v. *Peyton's lessee*, 4 Wheat., 77

(1) A separate demand can not be set off against a joint one, nor can a joint de t be set off against a separate one. A demand to be set off must be owing from the plaintiffs to all the defendants. The demands must be mutual and between all the parties to the action. *Hinckley* v. *West*, 4 Gilm, 136. *Burgwin* v. *Babcock*, 11 Ill., 30. *Hilliard* v. *Walker*, id., 645. *Ryan* v. *Barger*, 16 Ill., 28. *P. & O. R. R. Co.* v. *Niel*, *id.*, 269. *Walker* v. *Chovin*, id., 489. "There may be an exception to this rule arising out of the agreement of the parties." *Wal er* v. *Chovin*, *supra*.

(2) Payment to one partner is payment to the firm. *Major* v. *Hawkes*, 12 Ill., 299. Coll. on Part., sec. 638.

The giving a note payable to one of the partners individually, or the payment of a debt of an individual partner by a debtor of a firm, is not such a payment as is binding on the other partner, but is good as to the one to whom it is made. *Granger* v. *McGilvra*, 24 Ill., 152.

After a dissolution of a partnership, either partner may receive a debt due the firm, notwithstanding an agreement between the partners, of which the debtor has notice, that one of their number or a third person, shall alone collect and pay the debts. *Gordon* v. *Freeman*, 11 Ill., 14.

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murred to the second; to which demurrer the defendant filed his joinder. The court below sustained the demurrer. On the trial, Gregg offered to give in evidence, an account of his against Philips, which existed anterior to the making of the note given to James and Philips, which the court refused to permit.

To this decision an exception was taken. Two points are presented for the consideration of the court: First, that on the issues joined, it was competent for Gregg to give in evidence any debt due to him from Philips: Second, that the second plea was a bar to the action, and the demurrer should have been overruled.

We have no hesitation in saying that on both the points, the court below decided correctly. Nothing is better settled than that debts to be set off, must be mutual and between the parties to the record. If the issue on the third plea had been what the counsel for Gregg supposes it is, it might, perhaps, vary the question. But it will be seen that his allegation, that the consideration of the note was for a debt originally due to Philips *only*, is not noticed in the replication, and issue is taken on the single point of payment only. That part of his plea is treated as a nullity, and must be considered as surplusage. The only inquiry is, was the debt alleged to be due by Philips, a debt which could be set off.

The note is payable to co-partners, and the debt offered to be given in evidence, is due, if at all, by only one of the co-partners. This rule is, that a debt due individually by one co-partner can not be set off in an action to recover a debt due the co-partnership. It is not a mutual debt, nor is it between the parties to the record. The offer, therefore, to prove a debt due by one of the co-partners, and that confessedly created before the making of the note, was foreign to the issue before the court. It was in no way pertinent thereto: it was not what the parties had made the issue, viz.: had Gregg paid the note to Philips, for a payment to one was a payment to both, unless strictly forbidden. This reasoning is directly applicable to the second plea. It was not competent for Gregg to plead a state of facts, which in themselves amounted to no more than a right of setting off a debt due by Philips alone.

This plea was certainly not good, for he could not plead that, which in law, could be no defense. The court have examined the authorities quoted by the plaintiff's counsel to support the positions assumed by him, but they are found to be in no way analogous. The demurrer was properly sustained. The

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judgment of the court below must be affirmed, and the defendants in error recover their costs. (a)

Judgment affirmed.

NOMAQUE, AN INDIAN, Plaintiff in Error, v. THE PEOPLE, Defendants in Error.

ERROR TO PEORIA.

It is necessary, in order to give the court the right to try a prisoner, "that the bill of indictment found by the grand jury, should be indorsed "a true bill," and signed by the foreman; an indictment without such indorsement is a nullity. (1)

It is an act of great indiscretion in a court to permit the jurors to go at large after they are sworn, as well before the trial, as after.

On the production of affidavits going to prove that one of the jurors had made up his mind against the prisoner, though he swore that he had not formed an opinion, if the fact is discovered after the trial, a new trial ought to be granted.

A prisoner in a capital case is considered as standing on all his rights, and waiving nothing on the score of irregularity; an agreement therefore between his counsel and the counsel for the people that the jury, if they agree, may deliver their verdict to the clerk, is irregular, and a verdict delivered in court under such an agreement, in the absence of the jury, ought be set aside for such irregularity.

A prisoner has a right to the presence of the jury when they deliver the verdict, as he is entitled to have them polled, and a verdict is not final, until pronounced and recorded in open court.

Opinion of the Court by Justice SMITH. It appears from the record that the plaintiff in error was tried at a circuit court at the November term, 1825, in the county of Peoria,

(a) Dealings between the parties to the record only, can be set off. 1 Johns Cas., 169.

(1) Although this decision has been generally followed on the circuits of this state, and seems in one case to be approved by the supreme court, yet I am unable to see any good reason for it, and believe the current of modern authorities in other states is against it. The statute of this state on this subject is as follows:—"After the grand jury is impanneled, it shall be the duty of the court to appoint a foreman, who shall have power to swear or affirm witnesses to testify before them; and whose duty it shall be, when the grand jury, or any twelve of them, find a bill of indictment to be supported by good and sufficient evidence, to indorse thereon 'a true bill;' and when they do not find a bill to be supported by sufficient evidence, to indorse thereon 'not a true bill;' and shall, in either case, sign his name as foreman, at the foot of said indorsement." Purple's statutes, p. 654, Sec. 3. Scate's Comp., 681. The English law is nearly the same. 4 Black. Com., 305-6. The origin of this requirement is found in the practice in England of first preparing all bills that are submitted to the grand jury, they acting on no other offenses than those for which bills are so prepared; and such as they find to be true bills, they so indorse; but such as were not so found, were indorsed "*ignoramus*," or "*not found.*" And while such practice existed, there was an evident propriety in so indorsing them. With us, although the letter of the statute would seem to require that bills of indictment should first be prepared and submitted to the grand jury before they act on the offense charged, the practice has always been not to draw the bill until the jury hear the evidence and agree to find an

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on a charge of having murdered a man by the name of Pierre Londri. From an inspection of the record, it also appears that the indictment, as set forth, was never found by the grand jury of that county; no finding of any kind is made

indictment; the prosecuting attorney is then instructed to prepare it, and it is by them then returned into court in open court. The only object sought to be attained by indorsing an indictment "*a true bill,*" was to distinguish it from such as were "*not found*" by the jury: and if the reason for this practice has ceased, why continue it? It is a maxim that when the reason of a law ceases, the law itself also ceases. Broom's legal maxims, 118. Until a bill is returned into court in open court, by the grand jury, and is received by the court as such, it is not an *indictment*, although every juror may have voted for it, and it is indorsed by the foreman "a true bill;" and unless the records of the court show that it was so received by the court in open court, it will be void. *Gardner et al.* v. *The People*, 3 Scam., 84. *McKinney* v. *Same*, 2 Gilm., 540. *Rainey et al* v. *Same*, 3 Gilm., 71. *Gardner* v. *The People* 20 Ill., 430. Our legislature have endeavored to do away with technical objections. "Every indictment or accusation of the grand jury, shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this code, or so plainly that the nature of the offense may be easily understood by the jury." Purple's statutes, p. 398, Sec. 208. Scates' Comp., 403. And again: "All exceptions which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment, or writ of error, shall be sustained, for any matter not affecting the real merits of the offense charged in such indictment." Purple's statutes, p. 398, Sec. 209. Scates' Com., p. 403, Sec. 163. But we are not without authorities on this question. In the case of *Gardner et al.* v. *The People*, 3 Scam., 84, the record of the indictment contained an indorsement "*a true bill,*" but it did not appear to have been signed by the foreman. The opinion of the court was delivered by JUDGE DOUGLAS, who said: "All that is necessary to appear on the record is, that the grand jury returned the indictment, in open court "*a true bill.*" The indictment, in this case, having been received by the circuit court, and entered of record *as a true bill*, and neither the prisoner nor his counsel making any objection at that or any other time during the progress of the trial, we feel constrained, in the absence of all evidence to the contrary, to give full faith and credit to the record." In the case of *The State* v. *Freeman*, 13 N. H. Rep., 488, after a full investigation of all the authorities, the court held such indorsement was not indispensable. In the case of *The State* v. *Davidson*, 12 Vermont Rep., 300, an indorsement "*True bill*" was held to be a compliance with the statute which required it to be indorsed "A true bill." In a late case, *Commonwealth* v. *Smyth*, 11 Cushing's Rep., 473, the court, in a very able opinion, came to the same conclusion. They said: "These words obviously constitute no part of the description of the offense charged in the indictment. They are not indispensable to the due and legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential, does not exist in our practice; and therefore this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant."

If I am right in the assumption that the reason for this rule has long since ceased to exist—if a change in the practice has superseded the necessity or propriety of the requirement in question, unless the provision of the statute is imperative, I can see no propriety in adhering to it. If an indictment has been fairly and legally found, if the offense is charged in the manner required by the laws, if the court has received it from the grand jury *as a true bill*, and so entered it on its records, the omission of a useless form, the reason for which has, long since, become obsolete, ought not to intervene to prevent a fair and impartial trial on the merits.

An indictment was indorsed "A true bill, George S. Rice. Foreman," while the records showed that another person was appointed foreman of the grand jury. In the absence of anything on the record to negative the supposition, this court will intend that the first foreman was discharged, and another appointed in his place. *Mohler* v. *The People*, 24 Ill., 26.

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on the bill. It further appears, that on the 15th of October, 1825, being the day of the commencement of the trial, nine of the petit jurors were impanneled and sworn, and permitted to go at large until the next day, when the panel was completed. After the trial had closed, an agreement in the following words was entered into, between the public prosecutor and the prisoner's counsel, viz.: "It is agreed by the attorney-general and the counsel for the defendant, that if in case the jury should agree on their verdict between this and to-morrow morning, that they may deliver their verdict to the clerk." In pursuance of this agreement the clerk, on the morning of the 18th of October, 1825, as the record recites, presented to the court the following verdict, which had been handed him by the jury, viz:

State of Illinois, Peoria county circuit court, November term, 1825. We, the traverse jury, in and for the county aforesaid, do find Nomaque, an Indian of the Pottawattomie tribe, guilty of the murder of Pierre Londri, November 17, 1825.

A motion was thereupon made for a new trial, on the ground of partiality in Dumont, one of the jurors, who, as is established by the oath of two persons, declared before he was sworn on the jury, that Nomaque was a damned rascal, and all those who took his part, and he would give five dollars to H. M. Curry, to appear and assist to convict Nomaque of the crime charged, and pay it in surveying, or hunting land.

The court below refused to grant a new trial, and an exception was taken to that decision. There are other objections which were made on the trial of the cause, but as they are not deemed important, we pass them by. No exception is taken in this court to the manner in which the proceedings come before the court, nor do we mean to say that any valid one could have been stated or urged.

From the preceding statement, which embraces, substantially, all the facts of importance in the case, the points which present themselves for consideration are, first, whether the prisoner could have been legally tried at all in the court below, it not appearing that there had been a finding of the grand jury, on the paper purporting to be an indictment; and whether he can now avail himself of the objection in this court, the question appearing not to have been made in the court, below: Secondly, whether permitting the nine jurors impanneled and sworn, on the first day of the trial, to separate and go at large before the trial, would have formed sufficient cause for the circuit court to have arrested the judge-

ment, or granted a new trial: Thirdly, whether the evidence offered to show that Dumont had, previously to the trial, expressed his belief of the guilt of the prisoner, or of his hatred to him, and was therefore not an impartial juror, was sufficient to establish either point, and authorize a new trial: Fourthly, whether the consent that the jury might deliver their verdict to the clerk, could have been legally made by the prisoner's counsel; and whether that agreement dispensed with the personal appearance of the jury, and the rendering of their verdict in open court.

On the first point, we are of opinion, that it was necessary, in order to give the court the right to try the prisoner, that the grand jury should have indorsed their finding on the bill of indictment, verified by the signature of their foreman. This was indispensable, and as it appears not to have been done, the proceedings were *coram non judice.* This objection going to the power of the court to try the prisoner on that indictment, may, although not noticed or urged below, be now urged as cause of error. (*a*)

On the second point, we give no positive opinion, but it certainly was an act of great indiscretion in the court, to permit the jurors to go at large after they were sworn; because the reason of the rule, in keeping jurors together and apart from every other person, is as applicable, after they are chosen and sworn, and before the trial, as after they are charged with the prisoner. The object certainly is, to keep them from receiving any other impressions in regard to the prisoner, than those which shall be made by the testimony given on the trial; if suffered to go at large at any time after they are elected to try the prisoner, the object might be wholly defeated. (*b*)

As to the third point, it is very apparent that the prisoner has been tried by one who, so far from standing perfectly indifferent between the parties, as the law emphatically requires, was in a condition the very opposite. The state of his mind must have led him to look on the testimony against the prisoner with every view to a conviction, and his feelings, it would seem, could alone have been pacified with the surrender to him, by his fellow jurors, of his victim. We are

(*a*) In strict legal parlance an indictment is not so called, until it has been found "a true bill" by the grand jury; before that, it is named a bill, merely. Arch. Crim. Pl., 33.

(*b*) If a jury separate, after a case is committed to them, and before they have agreed upon their verdict, and afterwards return a verdict, a new trial will be granted. *Lester* v. *Stanley*, 3 Day, 287. *Howard* v. *Cobb*, *ibid.*, 309. 4 Johns., 293

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therefore constrained to say, that the circuit court ought to have awarded a new trial on the production of the affidavits, as they show sufficient grounds discovered after the trial. (*c*) (2)

The fourth point is, we think, easily settled. The prisoner, in a capital case, must be considered as standing on all his rights. He can not be considered as waiving any thing, nor could his counsel do it for him. They possess neither the power nor right, and if ever there was a case in which an observance of the rule should be required, the present is one. (3) The case of *The People* v. *McKay*, 18 Johns. Rep., 212, is conclusive on this point. The supreme court of New York, in that case say, that a paper purporting to be a *venire*, but without the seal of the court, is a nullity, and they declared that the prisoner in that case, who had been convicted of murder, and although he had challenged some of the jurors, who had been summoned under the supposed *venire*, did not thereby waive his right to object to the want of a *venire*. It is further said in that case, "that it is a humane principle, applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing on all his rights, and waiving nothing on the score of irregularity"; and in that very case, the judge who delivered the opinion of the court relates a case analogous to the present. In Ontairio county, New York, in 1814, a woman of color was indicted, tried, and found guilty of murder. The jury had separated after agreeing on a verdict, and before they came into court, and on that ground a new trial was granted, and she was tried again. On the present occasion, this precise point is not necessary to be decided. The agreement extends no farther than to depositing the verdict with the clerk. It

(*c*) When one of the jurors, in a trial for treason, had previously made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, manifesting a bias or predetermination, a new trial will be awarded. *United States* v. *Fries*, 3 Dall., 515.

(2) As to the misconduct of jurors, or disqualifications, see *Sawyer* v. *Stevenson*, ante., p. 24. *Sellers* v. *The People*, 3 Scam., 413. *Vennum* v. *Harwood*, 1 Gilm., 659. *Guykowski* v. *The People*, 1 Scam., 480. *Greenup* v. *Stoker*, 3 Gilm., 222.

If the parties choose to have their cause tried by a prejudiced juror, it is not for the court to refuse them that right. *Van Blaricum* v. *The People*, 16 Ill., 364.

If an officer having charge of a jury permits any member of it to drink spirituous liquors after he is sworn, (but before the case is submitted,) he may be punished for it, but the verdict will not be vitiated. *Davis* v *The People*, 19 Ill., 74.

(3) In the case of *The People* v. *Scates*, 3 Scam., 351, in speaking of the case of *Nomaque* v. *The People*, the court said: "This case means nothing more than this—that a prisoner, in a capital case, is not to be presumed to waive any of his rights; but that he may, by his express consent, admit them all away, can be neither doubted nor denied. He may certainly plead guilty,

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did not dispense with the personal appearance of all the jurors in court, and a rendition of the verdict by them. It can only be considered as authorizing the jury to separate when they agreed on their verdict until the next day, for their personal convenience. The prisoner had a right to have the jurors polled: this right could not have been exercised where the presence of the jurors was dispensed with. For a confirmation of the soundness of this doctrine, see the case of *Blackley* v. *Sheldon*, 7 Johns. Rep., 32, and 6 Johns. Rep., 68. *Root* v. *Sherwood*, where it is said, "a verdict is not valid and final, until *pronounced* and recorded in open court; and before it is *recorded*, the jury may vary from their first offering of their verdict, and the verdict which is recorded, shall stand; and if the parties agree that a jury may deliver a sealed verdict, it does not take away the right of either to a public verdict." If this be law, in a civil case, is it not important, under our system of jurisprudence, that it should be adhered to in a criminal case affecting life? In the present case, the verdict was not even sealed; it was liable to alteration, and besides, the court had no legal evidence that it was the verdict of the jury. (4)

While on this part of the case the court feel it their indispensable duty to reprobate the tolerance of a practice which might lead to the most dangerous consequences, in that case affecting the life of an individual, and to express their disapprobation of it, in the present instance.

The judgment of the circuit court of Peoria must be reversed, and a *supersedeas* awarded; and as a flagrant crime has no doubt been committed, and possibly by the prisoner, and in order that public justice may not be evaded, the court make this additional order, that the prisoner remain in custody for thirty days from this day (21st December instant) in order to enable the local authorities to take measures to bring him again to trial.

Judgment reversed.

Starr and *Blackwell*, for plaintiff in error.

James Turney, attorney general, for defendants in error.

and thus deprive himself of one of the most valuable rights secured to the citizen—that of a trial by jury."

(4) At common law, in all capital cases, the verdict must be received in open court, and in the presence of the prisoner. In misdemeanors, it may be received in his absence. *Holliday* v. *The People*, 4 Gilm., 114.

The prisoner should be personally present when the sentence is pronounced, in cases where corporeal punishment is a part of the sentence. *Perry* v. *The People*, 14 Ill., 500.

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JAMES M. DUNCAN, Appellant, *v.* ROBERT MORRISON and MATTHEW DUNCAN, Appellees.

APPEAL FROM FAYETTE.

An injunction ought not to be allowed for more of the judgment than the complainant shows to be unjust. (1)

A party to a negotiable note, where there is no fraud, can not impeach it, either at law or equity. (2)

If either the maker or assignee of a note is to suffer a loss, natural equity points to the maker as the party on whom the loss should fall.

Where an injunction upon a judgment at law is dissolved, it is erroneous to enter a decree for the amount of the judgment at law

Opinion of the Court by Justice LOCKWOOD. The bill filed by the complainant, states that he executed his note to M. Duncan, and that by inadvertence or mistake, it was omitted to be inserted in the note, that it was to be paid in "state paper," although it was agreed by the parties that it was to be discharged in that currency. The bill also states, that before the note became due, it was assigned to Morrison, who has brought suit, obtained judgment, and intends to exact specie. There is no allegation of fraud on the part of M. Duncan, or notice to Morrison that it was to have been paid in state paper. On this bill, an injunction was granted, and subsequently dissolved in the circuit court of Fayette county, and a decree rendered against complainant and his security in the injunction bond, for the whole amount of the debt, together with six per cent. damages and costs, and the bill dismissed. To reverse this judgment, an appeal has been brought to this court.

The injunction granted in this case was clearly wrong. It ought only to have been allowed for such portion of the judgment, as the complainant showed by his bill to have been unjust. (Laws of 1819, page 173.) The bill is also defective, in not showing the value of the state paper, and the extent of the discount he claimed. But the main question is, whether such a case is presented by the bill, as to call for the equitable interference of a court of chancery?

(1) Such is now the provision of our statute. "No injunction shall be granted to stay any judgment at law, for a greater sum than the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs." Purple's Statutes, p. 769, sec. 21. Scates' Comp., 147.

(2) This is the provision of the present statute of this state. Purple's Statutes, p. 773, secs. 9, 10, 11. Scates' Comp., p. 292; and has been sustained by numerous decisions. *Wood* v. *Hines*, 1 Scam., 103. *Mulford* v. *Shepherd*, id., 583. *Adams* v. *Wooldridge*, 3 Scam., 256. *Mobley* v. *Ryan*, 14 Ill., 51. *Harlow* v. *Boswell*, 15 Ill., 56.

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Morrison, in this case, is to be viewed as the innocent indorsee for a valuable consideration. Can such a negotiable instrument, where there is no fraud, be impeached, either at law or in equity? This question must depend upon the nature of such instruments, and our statutes making them negotiable. A party, when he subscribes his name to such instrument, knows that by the law he authorizes the payee to sell it to whomsoever will buy, and the purchaser has a right to believe, from the act of the maker, that there exists no latent equity, to prevent a recovery of the full amount. If either drawer or indorser is to suffer under such circumstances, which of these parties does natural equity point out as the proper party? We have no hesitation in saying, that if a loss is to be sustained in this case, that equity would decide that it ought to fall on the maker of the negotiable instrument. But in this case, the court is not left to speculation to settle the merits of the cause. The statute making notes, &c., negotiable,* declares that the sum of money mentioned therein shall be due and payable to the person to whom the said note, &c., is made, and that the indorsement shall absolutely transfer and vest the property thereof in the assignee. The second and third sections of the act point out the cases where the maker can defend, as against the indorsee. The complainant has not brought himself within either of these provisions. It is hardly to be presumed, if the legislature, while they were legislating on this subject, had believed that a latent equity, as between maker and indorsee, ought to be a defense between them, but that they would have so declared. Nor does this case come within the provisions of the act regulate the practice in certain cases;† because here was not either a total want of consideration, or a total or partial failure of consideration. Whether on a total want of consideration, or a failure of consideration of a negotiable note, such facts can be set up as a defense, the court are not called on to give an opinion, nor do they intend to do so.

The court are, therefore, of opinion, that the injunction was rightly dissolved, and the bill properly dismissed, and affirm the decree so far, and for costs of the suit.

With regard to the construction of the 17th section of the act regulating the practice of courts of chancery,‡ the court has met with considerable difficulty; but as the counsel for Morrison appeared willing, on the argument, that the decree for the amount of the former recovery, together with the

* Laws of 1819, p. 1 † Ibid., p. 59. ‡ Ibid., p. 273.

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six per cent. damages, should be reversed, it is deemed unnecessary, at this time, to settle the true construction of the statute, except that the court are clearly of opinion that the decree for the amount of the judgment at law, is erroneous. The court further order, that the decree be reversed, as to the former judgment, and the six per cent. damages, and that each party pay one-half of the costs of this appeal. (*a*)

Blackwell, for appellant.

Baker, for appellee.

(*a*) A party to a negotiable note or instrument, which he has made or indorsed, is not competent to impeach its validity, although uninterested in the event of the suit. *Winton* v. *Saidler*, 3 Johns. Cas., 185. *Coleman* v. *Wise*, 2 Johns. Rep., 165. *Walton* v. *Shelly*, 1 T. R., 296.

This rule extends only to negotiable instruments, and can apply only where the paper has been negotiated. *Blagg* v. *Phœnix Ins. Co.*, 3 Wash. Cir. Court Rep., 5.

That it is error to render a decree for the amount of judgment at law, see *Hubbard* v. *Hudson*, post.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

JUNE TERM, 1826, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice*,

THOMAS C. BROWNE, } *Associate Justices.*
SAMUEL D. LOCKWOOD, }

SMITH, *Justice, was absent during the whole of this term.*

EDWARD COLES, Plaintiff in Error, *v.* THE COUNTY OF MADISON, Defendant in Error.

ERROR TO MADISON.

The legislature have the power, by an act of their own to release a penalty accruing to a county, after verdict but before judgment. Such an act is not unconstitutional, it being neither an *ex post facto* law, or law impairing the obligation of contracts, and it can be pleaded, *puis darrien continuance.*

Counties are public corporations, and can be changed, modified, enlarged, restrained, or repealed, to suit the ever varying exigencies of the state— they are completely under legislative control.

Opinion of the Court by Chief Justice WILSON.* This is an action of debt brought by the county commissioners of Madison county, for the use of the county, against Edward Coles, for $2,000, as a penalty for bringing into the county, and setting at liberty, ten negro slaves, without giving a bond, as required by an act of the legislature of 1819. To this action, Coles plead the statute of limitations, which plea was demurred to, and the demurrer sustained by the court, and the parties went to trial upon the issue of *nil debet.* A verdict was found against Coles, at the September term, 1824, of the Madison circuit court, but no judgment was rendered upon it, till September, 1825, the cause having been continued till that time, under advisement, upon a

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* Justice LOCKWOOD having been counsel in this cause, gave no opinion.

motion for a new trial. In January, 1825, the legislature passed an act releasing all penalties incurred under the act of 1819, (including those sued for,) upon which Coles was prosecuted.

This act Coles plead *puis darrien continuance*, and renewed the motion for a new trial, but the court overruled the motion, and rejected the plea, and rendered judgment for the plaintiffs.

There are several causes assigned for error, but the one principally relied upon is, that the court rejected the defendant's plea, (as a bar to the further prosecution of the suit,) alleging a compliance on his part with the act of January, 1825.

The only question for the decision of the court, from this statement of the case, is, was the legislature competent to release the plaintiff in error from the penalty imposed for a violation of the act of 1819, after suit brought, but before judgment rendered? or in other words, could they, by a repeal of the act imposing the penalty, bar a recovery of it? If the legislature can not pass an act of this description, it must be because it would be in violation of that provision of the constitution of the United States, (and which has in substance been adopted into ours,) which denies to the state legislatures the right to pass an *ex post facto* law, or law impairing the obligation of contracts. This is the only provision in that instrument, that has any bearing upon the present question.

Is the law of 1825, then, an *ex post facto* law, or does it impair the obligation of a contract? The term *ex post facto* is technical, and must be construed according to its legal import, as understood and used by the most approved writers upon law and government. Judge Blackstone says, "an *ex post facto* law is where, after an action (indifferent in itself) is committed, the legislature then, for the first time, declare it to have been a crime, and inflict a punishment upon the person who committed it." This definition is familiar to every lawyer, and I am not aware of any case in either the English or American courts, in which its correctness is denied.

It appears from the Federalist, a work which has been emphatically styled the text-book of the constitution, that the term was understood and used in this sense by the framers of that instrument. The authors of this work were among the ablest statesmen and civilians of the age,—two of them were members of the convention that framed the con-

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stitution, and would not have been mistaken in the meaning of the terms used in it. Judge Tucker, in his notes on the Commentaries of Blackstone, also adopts it as the true one, and it is evident from the tenor of his comments upon the principles contained in that work, that if there had been any doubt of the correctness of this one, that it would not have been passed in silence, much less would it have received his approbation.

But that the term *ex post facto* is applicable only to laws relating to crimes, pains and penalties, does not rest upon the bare acquiescence of the courts, or the authority of elementary writers. It has received a judicial exposition by the highest tribunal in the nation. The decision of the Supreme Court of the United States, in the case of *Calder and wife*, v. *Bull and wife*, 3 Dallas, 386, must be considered as having put this question to rest. The point decided in that case was, as to the validity of an act of the legislature of Connecticut, which had a retrospective operation, but which did not relate to crimes. All the state courts, through which that case passed, decided in favor of the validity of the law. It was then taken up to the supreme court of the United States, where the judgment was affirmed. The court was clearly of opinion, that the prohibition in the United States constitution was confined to laws, relating to crimes, pains and penalties. Judge Chase, in delivering his opinion, says, "every *ex post facto* law must, necessarily, be retrospective, but every retrospective law is not an *ex post facto* law; the former, only, are prohibited by the constitution." Patterson, Justice, said, "he had an ardent desire to have extended the provision in the constitution to retrospective laws in general," and concludes his remaks by saying, "but on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed." Sergeant's Constitutional Law, 347. No higher evidence, I believe, can be adduced, of the existence of any principle of law, than is afforded by these authorities, that the law under consideration is not an *ex post facto* one. It is considered that it is retrospective, and that as a general principle of legislation it is unwise to enact such laws; yet it is not the province of a court to declare them void. No prohibition to the exercise of such a power by the legislature is contained in the constitution of the United States or of this state, and it is an incontrovertible principle, that all powers which are not denied them by one or other of those instruments, are granted. The next inquiry is, does this law violate the obligation of a contract?

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This question is easily answered. A contract is an agreement between two or more, to do, or not to do, a particular act—nothing like this appears in the present case. If a judgment has been obtained, the law might, by implication, raise a contract between the parties; but until judgment, the defendant is regarded as a *tort feasor;* he is prosecuted upon a penal statute for a *tort;* the action would die with him, which would not happen in the case of a contract. It is idle, therefore, to talk of a contract between the plaintiff and defendant, and it is only between the contracting parties that the legislature is prohibited from interfering. But in this case there is no contract between any parties, and all reasoning founded upon the idea of a contract, is nugatory. But it is said, the legislature could not pass this law, because the plaintiffs have acquired a vested interest in the penalty, by commencing suit, which can not be taken away.

The authorities relied upon to support this position, are not apposite. The decisions in those cases, turned on the construction of the laws, and not on the authority of the legislature to pass them. In the case of *Coleman* v. *Shower*, (2 Show.,) which was an action brought after the passage of the statute of frauds and perjuries, upon a marriage promise made by parol, the judges said, they believed the intention of the makers of that statute was only to provide for the future, and not to annul parol promises which were good and valid in law, at the time they were made. In the case of *Couch qui tam* v. *Jeffries*, (4 Burrow, 2460,) lord Mansfield placed his opinion on the intention of the legislature, which, he believed, was not to do injustice to the plaintiff, by subjecting him to costs. So, too, in *Dash* v. *Van Kleeck*, 7 Johns., 577, the same ground was assumed. The court did not intend to decide that the legislature could not pass a retrospective law, but that the one under consideration was not necessarily retrospective, and therefore ought not to receive that construction. In this opinion, the court was divided three to two. But had the plaintiffs a vested interest in the penalty before judgment? a vested right is one perfect in itself, and which does not depend upon a contingency, or the commencement of suit. Suit is the means of enforcing, or acquiring possession of a previously vested interest, but the commencement of suit does not of itself, even in a *qui tam*, or popular action, vest a right in the penalty sued for. The only consequence that results from the commencement of a popular action is, that it prevents another person from suing, and the executive from releasing the penalty. Blackstone,

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(vol. 2, p. 442,) in speaking of the means of vesting a right in chattel interests, says, "and here we must be careful to distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit or action, and property, to which a man before had no determinate title, or certain claim, but he gains as well the right, as the possession, by the process and judgment of the law. Of the former sort, are debts and choses in action." In these cases the right is vested in the creditor by virtue of the contract, and the law only gives him a remedy to enforce it. "But," continues he, "there is also a species of property to which a man has not any claim or title, whatsoever, till after suit commenced and judgment obtained in a court of law, where before judgment had, no one can say he has any absolute property, either in possession or in action; of this sort are, first, such penalties as are given by particular statutes, to be recovered in an action popular." Here is an authority directly in point. In the present case no judgment had been rendered previous to the passage of the law releasing the penalty, consequently, no right to the penalty had vested in the plaintiffs, which this law directs. The right which the plaintiffs had acquired by the commencement of the suit was, according to Blackstone, "an inchoate, imperfect degree of property," which required the judgment of the court to consummate, and render it a vested right. Before judgment in a popular action, the property in the penalty is imperfect and contingent, liable to be destroyed by a repeal of the statute upon which suit is brought. This principle is settled in a variety of cases; in that of *Seaton* v. *The United States*, 5 Cranch, p. 283, Judge Marshall, in delivering the opinion of the court says, "That it has been long settled upon general principles, that after the expiration or repeal of a law, no penalty can be imposed or punishment inflicted, for violations of the law committed while it was in force." The same point was decided in the case of the *Schooner Rachael* v. *The United States*, 6 Cranch, 329; and in the case of the *United States* v. *Ship Helen*, 6 Cranch, 203, the doctrine is fully settled that, even after judgment of condemnation *in rem* for a breach of the embargo laws, provided the party appeals, or obtains a writ of error, he may avail himself of a statute repealing the penalty enacted subsequent to such condemnation. In *The People* v. *Coleman*, the court unanimously awarded a new trial, in order that the defendant might avail himself of a defense given by a statute passed subsequent to the commission of the offense; and in the case

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of the *Commonwealth* v. *Duane*, 1 Binney, 601, the defendant had been indicted at common law for a libel: after a verdict, and before judgment, the legislature passed a law that, "after the passage of this act no person shall be prosecuted criminally for a libel." The supreme court refused to give judgment on the verdict. The terms of this act were not retrospective, yet the court considered it so, and must necessarily have acknowledged the power of the legislature to pass such laws. (See also Sergeant's constitutional law, 348; 1 Cranch, 109, and 3 Dall., 279.) These cases require no comment. They are directly on the point under consideration, and have settled the doctrine, that a repeal of a law imposing a penalty, after verdict for the penalty, is a bar to a judgment on the verdict. The court has no longer any jurisdiction of the case. There is no law in force upon which they can pronounce judgment. If then, the legislature can, by a total repeal of the law of 1819, defeat a recovery for an infraction of it before judgment, can they not by the act of 1825, release all penalties incurred anterior to its passage? There is no rule of law which denies them the power of doing that indirectly, which they may do directly. In effect and in principle, there is no difference, and the power to do the greater act, includes the less.

It is said that the king can not remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true that the parliament can. It is not pretended that the executive could remit the penalty in this case, but that the legislature may. Neither the constitution of the United States, or of this state, contain any prohibition to the exercise of such a power by the legislature, and their powers have no limits beyond what are imposed by one or other of those instruments, nor is it necessary that they should. They form an ample barrier against tyranny and oppression in every department of the government, and secure to the citizens every right in as perfect a manner as is compatible with a state of government. If they should, by mistake, or from any other cause, attempt the exercise of a power incompatible with the constitution, the obligation of a court to resist it is imperative. But "it is not in doubtful cases, or upon slight implications, that the court should pronounce the legislature to have transcended their powers. In the present case, I am clearly of opinion, they have not done so. The law under consideration is not an *ex post facto* law, because the generally received and well settled import of the term is not applicable to a law of this

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character. It impairs the obligation of no contract, for the conclusive reason that no contract ever existed, and for the same reason it can not be said to destroy a vested right. 2 Dall., 304. 1 Cranch, 109.

The objection that this law works injustice to the county, is not well founded. All the rights of the county, contemplated to be secured by the law of 1819, are secured by this.

The object of the law of 1819 was to compel persons bringing slaves into this state for the purpose of emancipation, to give bond for their maintenance. This law requires the bond to be given, which has been done, and all costs of suit and damages incurred in any case to be paid, which the defendant has also offered to do in this case. The county, then, is secured, not only against prospective injury, but against all damages heretofore sustained. There is no ground of complaint, then, on the part of the county; they are secured in their rights, and lose nothing. In another point of view which this case is susceptible of, I am satisfied that the law under consideration is not unconstitutional. On an inquiry into the different kinds of corporations, their uses and objects, it will appear that a plain line of distinction exists between such as are of a private and such as are of a public nature, and form a part of the general police of the state. Those that are of a private nature, and not general to the whole community, the legislature can not interfere with. The grant of incorporation is a contract. But all public incorporations which are established as a part of the police of the state, are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed, to suit the ever varying exigencies of the state. Counties are corporation of this character, and are, consequently, subject to legislative control.

Were it otherwise, the object of their incorporation would be defeated. It can not be doubted that Madison county, as a county, might be stricken out of existence, and her interest in a popular action thereby defeated. Upon what principle, then, can it be contended, that the legislature can not remit a penalty in a popular action brought for her benefit? Every view I have been able to take of this interesting and important subject leads to the conclusion that the legislature have the constitutional power to pass the act of 1825, releasing Coles, upon the terms prescribed in that act.

The judgment of the court below must be reversed, and the proceedings remanded, with directions to the circuit

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court to receive the defendant's plea upon his paying costs, &c. (*a*) (1)

Judgment reversed.

Starr, for defendant in error.

Turney and Reynolds, for defendant in error.

ADAM W. SNYDER, Appellant, *v.* THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, Appellees.

APPEAL FROM ST. CLAIR.

The debtors to the state bank can not raise the objection that the bank is unconstitutional. (2)

An averment in the *scire facias* issued to foreclose a mortgage given to the state bank, that "S." made his note to plaintiff for $760, is sufficient to show that he borrowed and received that amount.

Judgment will be rendered against him who commits the first error in pleading. (3)

Opinion of the Court by Justice LOCKWOOD. The plaintiffs below brought a *scire facias* in the St. Clair circuit court, on a mortgage, executed to them under the act incorporating

(*a*) In the case of *Fletcher* v. *Peck*, 6 Cranch, 138, the supreme court of the United States say, that an *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable at the time it was committed. This definition, says Kent in the 1st volume of his Comm., page 382, is distinguished for its comprehensive brevity and precision, and it extends equally to laws inflicting personal or pecuniary penalties, and to laws passed after the act, and affecting a person by way of punishment, either in his person or estate.

The legislature is competent to relieve from a forfeiture after judgment, and where the money goes to a county. *Conner* v. *Bent*, Missouri Rep., 235.

(1) In the case of *The People* v. *Wren*, it was said by the court, (approving of the case of *Coles* v. *County of Madison*,) "As the constitution of this state contains no restrictions, either express or implied, upon the action of the legislature in such a case, we hold that it has absolute control over municipal corporations—to create, change, modify, or destroy them at pleasure." 4 Scam., 273. The same principle is held in *Bradley* v. *Case*, 3 Scam., 585. *Bush* v. *Shipman*, 4 Scam., 186. *County of Richland* v. *County of Lawrence*, 12 Ill., 8. *Trustees of Schools* v. *Tatman*, 13 Ill., 30. *Gutzweller* v. *The People*, 14 Ill., 142.

Under the constitution of 1818, the governor had the power to grant a pardon to one convicted of a crime, and thereby not only release him from imprisonment, but also from a fine, which otherwise would have belonged to the county. *Holliday* v. *The People*, 5 Gilm., 216. And it is believed the present constitution does not lessen the power of the governor in this respect. Constitution of 1818, art. 5, sec. 8.

(2) This is overruled by the case of *Linn* v. *State Bank*, 1 Scam., 87, which see and notes.

(3) *Phœbe* v. *Jay*, post. *Davis* v. *Wiley*, 3 Scam., 236. *McDonald* v. *Wilkie*, 13 Ill., 22. *The People* v. *M. & A. R. R. Co.*, 13 Ill., 66. *P. & O. R. R. Co.*, v. *Neill*, 16 Ill., 269.

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the state bank. The defendant below pleaded that the consideration of the mortgage was the paper of the state bank, and that the incorporation of said bank was in violation of the constitution of the United States, and that therefore he is not bound to pay said mortgage. To this plea, the plaintiffs below demurred. The circuit court sustained the demurrer, and rendered judgment for the amount due on the mortgage. From which judgment the defendant below has appealed to this court.

The errors assigned are, 1. That the incorporation of the bank, and issuing the paper, are contrary to the constitution of the United States: 2. That there is no averment of money received by Snyder: 3. That there is no breach set out in the *scire facias*. As to the first point, the court are of opinion that the debtors of the bank can not raise the objection that the charter of the bank is a violation of the constitution. After having borrowed the paper of the institution, both public policy and common honesty require that the borrowers should repay it. It is, therefore, unnecessary to decide whether the incorporation of the bank was a violation of the constitution or not. As to the second assignment of error, the court are of opinion that the averment that Snyder made his note to plaintiffs for $760, is sufficient to show that he borrowed and received that amount.

The court, however, are of opinion that no breach has been assigned, and that the plaintiffs below by demurring to defendant's plea, have opened the pleadings, so as to authorize the court to decide who committed the first error. For want then of a sufficient assignment of a breach of the note or mortgage, the judgment must be reversed with costs, and the cause remanded, with directions to permit an amendment of the *scire facias*, *&c.* (*a*) *Judgment reversed.*

Reynolds, for appellant.

Cowles, circuit attorney for appellees.

But the rule that a demurrer must be carried back and sustained to the first defective pleading, does not apply to a plea in abatement. If a plea in abatement is bad, although the declaration may also be defective, the demurrer will be sustained to the plea, and the defendant ruled to answer over. *Ryan* v. *May*, 14 Ill., 49.

A demurrer to a special plea can not be carried back to the declaration, after a direct demurrer to it has been overruled, and the general issue pleaded. *Brawner* v. *Lomax*, 23 Ill., 496.

(*a*) Vide *Craig* v. *The State of Missouri*, where the constitutionality of the loan office of Missouri is discussed. 4 Peter's Rep.

Borrowers of loan office certificates are liable to pay the sum contracted for, and it is no defense to say that they are bills of credit. Missouri Rep., 452. *Mansker et al.* v. *The State of Missouri.*

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DAVID RANKIN, Plaintiff in Error, *v.* WILLIAM A. BEAIRD, Sheriff, Defendant in Error.

ERROR TO ST. CLAIR.

The legislature can by an act release a person from imprisonment who has been convicted of forgery, though one-half of the fine impo ed against him, goes to the person attempted to be defrauded by the forgery. The sheriff releasing the convict, under such an act, it is not liable for an escape.

Opinion of the Court by Chief Justice WILSON. This action is brought against Beaird, as sheriff of St. Clair county, for $1000, for the escape of William D. Noble, who was committed to his custody upon a conviction of forgery, at the May term of the circuit court of St. Clair county, by which he attempted to defraud Rankin of $1000. The judgment of the court was, that he should be fined $2000 one half to Rankin, and stand committed till the fine and costs were paid. In January, 1823, the legislature passed an act requiring the sheriff of St. Clair county, who was Beaird, the defendant in error, to discharge Wm. D. Noble out of custody, which he accordingly did. On the trial of this cause, Beaird plead the act aforesaid in bar of the action, to which plea Rankin demurred, and the demurrer was overruled by the court, and judgment rendered for defendant. It is said that the statute relied upon by Beaird, is unconstitutional, because, by discharging Noble out of custody, it destroyed a vested interest which Rankin had in the judgment against him. It is unnecessary to inquire what interest Rankin had in the fine imposed on Noble, because, whatever interest he originally had in that, he has yet. It would be absurd to contend that he had a vested right in his imprisonment, and this act has no other effect than to discharge him from imprisonment.

It may be questioned whether Rankin had any vested interest in the fine till it was collected; but if it is admitted that he had, this act does not destroy it, but leaves him to his action. See the authorities referred to in the case of the *County Commissioners* v. *Coles*, to which this is in some respects analogous.*

The judgment of the court below is affirmed. (1)

Judgment affirmed.

Blackwell, for plaintiff in error.

T. Reynolds, for defendant in error.

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* Ante. page 154.

(1) If a third person had acquired a vested interest in the fine, or in the

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ISAAC GILHAM AND OTHERS, Appellants, v. CALDWELL CAIRNS, Appellee.

In chancery, all the parties in interest and whose rights may be affected, ought to be made parties to the bill, and if the court is called upon to dispense with the proper parties, some reason therefore ought to be disclosed in the bill.

Opinion of the Court by Justice LOCKWOOD. This was an appeal from the Monroe circuit court, sitting as a court of chancery, on a bill filed against the heirs of Gilham, deceased, for a specific performance of a contract executed by their ancestor to one Jacob A. Boyce, for the conveyance of a tract of land lying in Monroe county. The third error assigned is the want of proper parties to the suit, inasmuch as Boyce should have been a plaintiff or defendant, his interest being affected by the decree. The omission to make Boyce a party, is clearly erroneous. 2 Bibb's Rep., 316, 184. There is, no doubt, some discretion vested in a court of chancery, as to whom must be made parties, but where a court of chancery is called upon to dispense with the proper parties, some reason ought to be disclosed in the bill. In this case, for aught that appears, Boyce is alive, or if dead, has left heirs capable of protecting their rights. The court ought not to exercise a discretion in dispensing with parties who are interested, without sufficient cause being shown. For this cause, the decree must be reversed with costs. The court are also of opinion, that costs ought not to have been decreed against the defendants, admitting the decree to have been correctly made, as it does not appear that the defendants have ever refused to convey the premises, or that they have ever been requested to do it.

The court see no objection to the circuit court of Monroe county entertaining jurisdiction in this case, but on the contrary, they think there is a manifest propriety that the suit should be instituted there. They formed this opinion upon the effect given to decrees in chancery, by the 14th section of the act regulating the practice in chancery.*

The other errors assigned, do not appear to be of sufficient importance to require an examination by this court. The decree of the circuit court is reversed, with costs, and the

costs of the suit, neither the legislature nor the Governor had power to divest him of it. *Holiday* v. *The People*, 5 Gilm., 216. *Rowe* v. *State*, 2 Bay, 565. *Exparte, McDonald*, 2 Wharton, 440. *United States* v. *Lancaster*, 4 Wash. C. C. R., 64, 5 Bac. Abr., 288.

* Laws of 1819, page 172.

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case remanded with permission to amend the bill by constituting Boyce a party. (*a*) (1)

Decree reversed.

Starr, for appellants.

J. Reynolds, for appellee.

JOSIAH T. BETTS, and SAMUEL SMITH, adm's OF MICHAEL JONES, dec'd, Plaintiffs in Error, *v.* JESSE FRANCIS and MARY ANN HIS WIFE, and FINLEY RIPPY, BY W. C. GREENUP, his Guardian, Defendants in Error.

ERROR TO RANDOLPH.

The words, "and the plaintiff doth the like," can not be taken as a traverse of a plea of payment.

A plea of payment is a good plea in an action of *assumpsit*, and without it evidence of counter demands can not be received.

THIS was an action of *assumpsit* for money had and received, &c., brought by the defendants in error, as administrators of M. Jones, deceased. The defendants below pleaded *non assumpsit*, and payment, without concluding the plea with a

(*a*) The want of proper parties is not a sufficient ground for dismissing the bill. It ought to stand over to make new parties. 3 Cranch, 320.

The supreme court, in an equity cause, will not make a final decree upon the merits, unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court. 7 Cranch, 69. 9 Wheat., 733. 10 Wheat., 152.

All persons materially interested in the subject, ought to be parties to the suit. *Hickock* v. *Scribner*, 3 Johns. Cas. in error, 311.

(1) The general rule in equity requires all persons materially interested in the subject or object of the suit, however numerous, to be made parties, complainants or defendants, that all may be provided for and protected by the decree. *Greenup* v. *Porter*, 3 Scam., 65. *Scott* v. *Moore*, id., 315. *Elstone* v. *Blanchard*, 2 Scam., 420. *Willis* v. *Henderson*, 4 Scam., 20. *Spear* v. *Campbell*, id., 426. *Montgomery* v. *Brown*, 2 Gilm., 581. *Hoare* v. *Harris*, 11 Ill., 24. *Webster* v. *French*, id, 254. *Whitney* v. *Mayo*, 15 Ill., 255.

Where the parties are numerous, and it would be very inconvenient to make all persons interested parties, bills are allowed to be filed on behalf of the complainants and all others interested. *Martin* v. *Dryden*, 1 Gilm., 209. *Whitney* v. *Mayo*, 15 Ill., 255. *County of Pike* v. *The State*, 11 Ill., 202. 4 Scam., 20.

Courts will take notice of the ommission of proper parties, though no demurrer be interposed for that purpose, where it is manifest that the decree will affect the interest of such as are not joined. *Herrington* v. *Hubbard*, 1 Scam., 573

In *Scott adm'r*, v. *Bennett*, 1 Gilm., 647, the objection of want of proper parties was first made in the supreme court, and was held to be in time.

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verification, simply stating that the intestate in his life time had fully paid and satisfied, &c. Issue was joined upon the first plea, and to the plea of payment the plaintiffs added a *similiter*. Jury, and verdict and judgment for the plaintiffs below. To reverse that judgment a writ of error was prosecuted to this court.

Opinion of the Court by Justice LOCKWOOD. Several errors have been assigned in this cause which do not appear to merit consideration, except the fourth, which is, "That no issue was joined on the plea of payment." The words, "and the plaintiff doth the like," can not be taken as a tr averseof a plea of payment. 1 Littell's Rep., 64.

A plea of payment is a good plea in an action of *assumpsit*, in order to enable the defendants to set off any demand they may have against the plaintiffs; and without such a plea, evidence of counter demands could not be received.

From the record, this court cannot intend that the defendants were permitted to give evidence under the plea of payment. The judgment must therefore be reversed with costs, and the cause remanded with permission to the parties to amend their pleadings in the court below. (1)

Judgment reversed.

T. Reynolds, for plaintiffs in error.

Starr, for defendants in error.

(1) Although never expressly overruled by our court, yet at this time this decision can hardly be sustained. That a plea of payment is a good plea is true; but that evidence of payment could not be given under the general issue is, we think, incorrect. In *Crews* v. *Bleakley*, 16 Ill., 21, the court said that evidence tending to prove payment may be given under the general issue. And this is now the settled doctrine. 2 Greenl. Ev., p. 423, sec., 516.

We apprehend the court was also in error in saying, "From the record, this court can not intend that the defendants were permitted to give evidence under the plea of payment." Because the plaintiff had failed to reply to the plea, the defendants could not be prejudiced thereby. If the parties go to trial without filing a replication, it will be cured by the verdict. See note to *Brazzle et al.* v. *Usher*, ante, p. 35, where the authorities are collected on this subject. See also *Parmelee et al.* v. *Fischer*, 22 Ill., 212. *Stevenson* v. *Sherwood*, id., 238.

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NICHOLAS BEAUGENON, Appellant, v. FRANÇOIS TURCOTTE and FRANÇOIS X. VALOIS, Appellees.

APPEAL FROM ST. CLAIR.

A party who asks equity must do equity: and where a party signed a note for specie, supposing it to be for state paper, though no fraud was practised, and a judgment was entered against him for the specie value of so much state paper as the note called for, chancery will not relieve against such judgment as it is equitable.

If a defendant neglects to avail himself of a legal defense, a court of equity will not relieve him.

Opinion of the Court by Justice LOCKWOOD. This is an appeal from the equity side of the circuit court of St. Clair county. The bill filed in this cause alleges that the appellant when he executed the note, was deceived as to the kind of money in which it was payable, and was also deceived as to the language in which it was written. When the appellant executed the note, neither Turcotte or his agent was present, and there is no ground to charge either of them with any knowledge that any fraud or misrepresentation had been used in obtaining appellant's signature to the note. The court below, however, acting under the impression that the appellant supposed that in executing the note he had made himself liable only to pay its amount in state paper, have reduced the judgment to the value of state paper at the time it became due. This is all that justice requires, for the appellant was willing, and agreed, according to his own showing, to become the security of Valois for the amount of the note in state paper. It perhaps might well be doubted, whether the testimony was altogether sufficient to establish the fact that any imposition was practised in obtaining the appellant's signature to the note. But the court do not intend to disturb the decree of the court below, as we are satisfied that the appellant has received all the relief that he is entitled to, upon the most favorable view of the case. It is a well settled principle in equity, that a party who seeks relief in a court of chancery, must first do equity. In this case, neither Turcotte or his agent practised any fraud or deception. Turcotte was delayed in collecting his debt against Valois, in consequence of the appellant's signature being by him affixed to the note, and the bill acknowledges his willingness and agreement to execute the note, supposing it to be payable in state paper. It is then no more than equitable, that he should pay the value of state paper when the note became due. The imposition supposed to have been practised, in representing the note to have

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been written in English, could produce no injury; the real imposition, if any, consisted in representing the note to be payable in paper instead of specie, for which relief has been granted. Strong doubts are entertained by the court whether the appellant was entitled to any relief. The object in a court of law in serving the process on the party, and filing a declaration ten days before court, is to apprize the defendant of the precise nature of the appellant's demand against him, and if the defendant neglects to avail himself of the means thus furnished him, of ascertaining the cause of bringing the suit, courts of equity will seldom interfere to protect parties from the effects of such negligence, when the defense is a legal one. The authorities to this point are numerons. 1 Bibb., 173. 2 Bibb., 192.

Chancellor Kent, in delivering his opinion in the case of *Duncan* v. *Lyer*, 3 Johns. Ch. Rep. 356, says: "It is a settled principle, that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." As Turcotte has not appealed, and as the court are satisfied, although the testimony is loose, that justice has been done, they will not disturb the decree, as pronounced in the court below. The decree must be affirmed with costs. (*a*) (1)

Decree affirmed.

Blackwell, for appellant.

Starr, for appellee.

(*a*) Where a party, in an action at law, had notice of a defense in time to avail himself of it, but neglected to do so. he will not be allowed to liti ate the matter in chancery, but is forever concluded by the judgment. 1 Johns. Cas., 436.

There may be cases in which relief ought to be extended to a person who might have defended, but has omitted to defend himself at law; but such cases do not frequently occur. 7 Cranch, 332. *Mar. Ins. Co., of Alexandria* v. *Hoopor.*

See *Hubbard* v. *Hobson*, and the cases there referred to.

(1) See note to *Moore et al.* v. *Bagley et al.*, ante, p. 94.

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Peter Kimmel, Plaintiff in Error, *v.* Conrad Shultz, Frederick Konig, and Lewis Mayer, Defendants in Error.

ERROR TO JACKSON.

Where a suit is brought against several joint debtors, a recovery must be had against all or none, unless one or more of the defendants interpose a defense which is personal to himself, such as infancy or bankruptcy. (1)

A judgment rendered in a sister state, is to be regarded in the same light here, as it would be in the state where it was rendered. (2)

The court can not notice a judgment record on which suit is brought, unless it is made a part of the record by bill of exceptions.

Opinion of the Court by Justice Lockwood. This is an action of debt brought on a judgment obtained in the state of Pennsylvania against the plaintiff in error, and Henry G. Pius, and

(1) In an action of debt or assumpsit against several, when all are served with process, the judgment must be against all or none, unless some of them interpose a defense personal to themselves, such as infancy or bankruptcy; and it is immaterial whether the liability is joint, or joint and several. *Owen et al.* v. *Bond*, ante, p. 128. *Russel* v. *Hogan*, 1 Scam., 552. *Hoxey* v. *County of Macoupin*, 2 Scam., 36. *McConnell* v. *Swailes*, id., 571. *Tolman* v. *Spaulding*, 3. Scam., 14. *Frink et al.* v. *Jones*, 4 Scam., 170. *Wright et al.* v. *Meredith*, id., 361. And if a writ is issued against several and served on part only of the defendants, the plaintiff must show a right of action against all, or he can not recover against such as are served with process.

A judgment against several is a unit, and if erroneous as to one, must be reversed as to all. *Brockman* v. *McDonald*, 16 Ill., 112.

(2) Under the constitution of the United States, and the laws of Congress, the judgments *in personam* of the different states, are placed on the footing of domestic judgments; and they are to receive the same credit and effect, when sought to be enforced in different states, as they have by law or usage in the particular state where rendered. A judgment fairly and duly obtained in one state, is conclusive between the parties when sued on in another state. *Bimeler* v. *Dawson et al.*, 4 Scam., 542. *Welch* v. *Sykes*, 3 Gilm., 199. *Buckmaster* v. *Grundy et al.*, id., 626. *Fryrear* v. *Laurence*, 5 Gilm., 325. *McJilton* v. *Love*, 13 Ill., 491. The cases of *Mills* v. *Duryee*, 7 Cranch, 481, referred to in the opinion of Justice Lockwood, and *Hampton* v. *McConnel*, 3 Wheaton, 234, are to the same effect.

The defendant may show, in bar of an action on the record of a judgment, in another state, that the judgment was fraudulently obtained, or that, the court pronouncing it had neither jurisdiction of his person, nor of the subject matter of the action. If he succeed in establishing any one of these defenses, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action. See the cases cited above: also *Harrod* v. *Barretto*, 2 Hall, 302. *Shumway* v. *Stillman*, 6 Wend., 447. *Starbuck* v. *Murray*, 5 Wend., 148.

In an action on a record which shows that the appearance of the defendant was entered by an attorney, the authority of the attorney will be presumed; but it may be shown by the defendant that the attorney had no such power, and thereby defeat a recovery. *Thompson* v. *Emmert*, 15 Ill., 415. And the same opinion is intimated in *Welch* v. *Sykes*, 3 Gilm., 197.

The record of a judgment is used as evidence on the trial; and when introduced, affords conclusive evidence of the facts stated in it. Thus, if the record shows affirmatively that the defendant was personally served with process, or personally appeared to the action, it furnishes conclusive evidence of the fact stated, and the defendant can not controvert it. *Rust* v. *Froth-*

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Henry A. Kurtz. The writ and declaration in this suit, are also against all of the judgment debtors, but this judgment is rendered against Kimmel only. It appears from the sheriff's return, that the writ was executed on all the defendants, and no reason is assigned why the judgment was not rendered against the whole.

Several errors have been assigned, but it will be unnecessary to take notice of more than the second error, which is, that judgment was given against Kimmel, on the plea of *nul tiel record.* This was clearly erroneous. The rule is well settled, that where a suit is brought against several joint debtors, you must recover against all the defendants or none, unless one or more of the defendants interpose a defense which is personal to himself, such as infancy or bankruptcy. *Robertson* v. *Smith and others*, 18 Johns. Rep., 459.

In this case it does not appear that Pius and Kurtz made any defense, consequently judgment ought to have been taken against them by default. The judgment for this error must be reversed with costs, and the cause remanded, with liberty to both parties to amend their pleadings.

As difficulty may arise in the further prosecution of this suit, the court think proper to remark, that according to the decision of the supreme court of the United States, in the case of *Mills* v. *Duryee*, 7 Cranch, 481, the plea of *nil debet* is not a good plea in an action of debt founded on a judgment recovered in any of the courts of the several states, and upon the principles assumed in that case, the third plea would be bad. Such judgments, according to that case, are to be regarded in the same light they would have been, had they been sued upon in the courts of the state where they were originally recovered. No other defense can here be made, but what could have been made in Pennsylvania, and if the common law doctrine in relation to judgments prevails in that state, the question in relation to the partnership of Kimmel, Pius and Kurtz, must be considered as conclusively settled, so far as regards this suit, by the judgment in Pennsylvania.

The decision in the case of *Mills* v. *Duryee*, has by courts

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ingham, post. *Welch* v. *Sykes*, 3 Gilm., 197. *Thompson* v. *Emmert*, 15 Ill., 415. *Hall* v. *Williams*, 6 Pickering, 232. 6 Wend., 447.

In *Owens* v. *Ranstead*, 22 Ill., 161, the reasoning of the court is apparently in conflict with the cases above cited. They there held that the return of an officer to a writ, is only *prima facie* evidence of the facts stated in it; and in a proper case equity would relieve against the effects of it. Perhaps the better reason is, and consistent with the various decisions on the subject, that although, in an action at law on the record, the defendant can not controvert it, yet if it be untrue in fact, he may obtain relief in equity.

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of great respectability, in several of the states, been regarded as a harsh decision, and may lead to many oppressive consequences if adopted in extenso. The court, in delivering that opinion, seemed to be aware that there was a description of judgments, such as judgments obtained on attachments without notice, that ought to be an exception to their rule, and they appear to lay stress on the fact that in the case under consideration the defendant *had notice and appeared in the suit.*

It is therefore suggested by the court to the counsel for the defendants in error, whether it ought not to appear from the declaration what the notice in the original suit was, and what is the effect of the judgment in Pennsylvania. The laws of the several states are to be considered as facts, and in general, like other facts, ought to be averred and proved. If the law, however, presumes that the judgment was obtained upon sufficient notice of the pendency of the suit, it would probably be proper for the defendant, by plea, to allege such facts as would be sufficient to show that the judgment ought not to be clothed with its conclusive character as at common law.

The court would also remark that in case this suit should be brought again before them in regard to the effect and nature of the record produced in evidence, that the record ought to be brought up by a bill of exceptions. As it is presented to them in this case, they could not notice it. From any thing that appears on the record, it was received as evidence in the court below, without objection. (*a*)

Eddy, for plaintiff in error.

Cowles, for defendants in error.

(*a*) See *Browder v. Johnson*, ante, page 96.

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JOSIAH WRIGHT, Plaintiff in Error, v. JOHN ARMSTRONG, Defendant in Error.

ERROR TO MADISON.

To maintain the action of replevin there must be an unlawful taking from the actual, or constructive possession of the plaintiff.

ARMSTRONG, the plaintiff in the court below, sued out a writ of replevin against Wright for a horse, to which Wright pleaded *non cepit;* secondly, property in one Elihu Mather; thirdly, property in himself; and lastly, the statute of limitations. On the trial a bill of exceptions was taken, from which it appears that the plaintiff proved that the horse in question was the property of his wife,—before her intermarriage with him, and while she was a minor, the horse strayed from her, and was not in her actual possession for five years before the commencement of the suit. The defendant proved that the horse in question was in the possession of Philip Creamer for about three years, who sold and delivered him to one Lock, who sold and delivered him to Elihu Mather, who sold and delivered him to the defendant. It was claimed that the horse had strayed from the plaintiff more than five years previous to the commencement of this suit, during a part of which time the plaintiff's wife was a minor. No other taking was proved on the part of the defendant than the aforesaid sale and delivery, except that it was proved that Creamer took the horse into his possession after it strayed from plaintiff's wife. The jury found the property in the plaintiff. A motion was made, on this proof, to direct a nonsuit, which the court overruled, but gave judgment on the verdict for the plaintiff, to reverse which judgment a writ of error was taken to this court, where it was assigned for error, that the court ought to have directed a nonsuit, for the reasons, first, because no actual taking of property in the plaintiff's declaration mentioned, was proved to have been done on the part of Wright, the defendant; second, that no tortious taking of the said property was shown on the part of said Wright; and third, that no taking was proved from the plaintiff's possession by any person.

Opinion of the Court by Justice BROWNE. This was an action of replevin, brought against the plaintiff in error for the unlawful taking of a horse. The defendant pleaded, besides property in himself and property in a third person, *non cepit,* and the statute of limitations. On the trial before the circuit court of Madison county, the defendant in error,

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the plaintiff below, proved the horse was claimed to belong to plaintiff's wife. That it was also claimed by Philip Creamer, who sold the horse to one Lock, who sold it to one Elihu Mather, who sold it to the defendant. This was all the evidence of taking by the defendant.

To maintain the action of replevin, there must be an unlawful taking from the actual, or constructive possession of the plaintiff, which has not been proved. The judgment must therefore be reversed. (*a*) (1)

Judgment reversed.

Starr and *Cowles*, for plaintiff in error.

Blackwell, for defendant in error.

(*a*) Replevin lies for any unlawful taking of a chattel, and possession by the plaintiff and an actual wrongful taking by the defendant, are necessary to support the action. *Pangburn* v. *Patridge*, 7 Johns. Rep., 140.

The action of replevin is grounded on a tortious taking, and sounds in damages like an action of trespass. *Hopkins* v. *Hopkins*, 10 Johns. Rep., 369.

At common law, a writ of replevin never lies, unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*. *Meany* v. *Head*, 1 Mason, 319.

The plea of *non cepit* puts in issue the fact of an actual taking; and unless there has been a wrongful taking from the possession of another, it is not a taking within the issue; and a wrongful detainer after a lawful taking, is not equivalent to an original wrongful taking. *Ibid.*

A mere possessory right is not sufficient to support this action; there must be an absolute, or at least a special property in the thing claimed. 5 Dane's Dig., 516.

(1) The present statute in relation to replevin is as follows: "Whenever any goods or chattels shall have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery of such goods or chattels, by the owner or person entitled to their possession." Purple's Statutes, p. 868, Sec. 1. Scates' Comp., p. 266.

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ALSWORTH BAKER, Appellant, *v.* SAMUEL WHITESIDE, Appellee.

APPEAL FROM MADISON.

As a general rule, the *terms* of a written agreement can not be changed by parol, but the *time* of its performance may be extended. (1)

To a declaration on a contract to convey a lot of ground by deed, if one hundred and twenty-five dollars was paid at a certain time, a plea, that no demand was made for the deed, and that defendant was always ready and willing to execute it, and that the defendant offered to make the deed according to his covenant, and the plaintiff objected and said when he wished the deed he would apply for it, is good. (2)

Opinion of the Court by Chief Justice WILSON.* This is an appeal from the Madison circuit court, in an action of covenant on a writing obligatory, executed by S. Whiteside to A. Baker, in the penalty of two hundred dollars, that if he, the said Baker, should pay to the said Whiteside one hundred and twenty-five dollars, on or before the first day of October next ensuing, he, the said Whiteside, would execute and deliver to the said Baker, a deed in fee simple, for a lot in the town of Edwardsville.

Baker avers in his declaration, that he did pay the sum of one hundred and twenty-five dollars, according to agreement; nevertheless, the said Whiteside did not, on the first day of October, or at any time before or since, execute and deliver to the said Baker, a good and sufficient deed, although often requested so to do. To this declaration, the defendant pleaded two pleas:

1. That the plaintiff made no demand of the said defendant, for the deed specified, and that the said defendant was always ready and willing to execute the same.

2. That the said defendant offered to make the deed according to his covenant, and the said plaintiff objected, and said, when he wished the deed he would apply for it.

(1) The time of performance of a contract may be extended by a subsequent parol agreement, and no new consideration is necessary, where there are mutual acts to be performed by the parties. *Wadsworth et al.* v. *Thompson*, 3 Gilm., 423.

It is a familiar principle, that you may give evidence to explain, but not to vary, add to, or alter a written contract. This is a general rule. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application, it may be explained and properly directed. *Lane* v. *Sharp*, 3 Scam., 573. *Doyle et al.* v. *Teas et al.*, 4 Scam., 257. *Scott, administrator* v. *Bennett*, 3 Gilm., 254. *Scammon* v. *Adams et al.*, 11 Ill., 577. *O'Reer* v. *Strong*, 13 Ill., 689. *Harlow* v. *Boswell*, 15 Ill., 57.

(2) In case of bond to convey land, the purchaser is not bound to prepare and tender a deed to the vendor to execute, unless such obligation can be fairly inferred from the term of the contract. The rule may be different in England. *Buckmaster* v. *Grundy*, 1 Scam., 314. 2 Randolph, 20.

* Justice SMITH having been counsel in this cause, gave no opinion.

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Both these pleas are demurred to, and the question, presented for our determination is, whether or not, the court below erred in overruling the demurrers.

As the second plea presents the strongest ground of defense, we will consider it first. If it is a correct principle of law, and that it is, the court is fully satisfied, that he who prevents a thing from being done, shall not avail himself of the non-performance he has occasioned, the demurrer was correctly overruled. The plaintiff's conduct can be considered in no other light than a waiver of the condition of the bond so far as related to the time of its performance. As a general rule, it is true, that the terms of a written agreement can not be changed by parol, but that the *time* of its performance may be extended, is settled by a variety of cases; that of *Keating* v. *Price*, 1 Johns. Cases, 22, is directly in point. In that case, the defendant promised in writing, to deliver a quantity of staves, on or before the first day of May, 1796. The defendant, on the trial, proved, that in January, 1796, the plaintiff agreed to extend the time until the spring following. The court said, that an extension of time may often be essential to the performance of contracts, and there can be no reason why a subsequent agreement for that purpose, should not be valid, and proved by parol evidence.

The first plea, the court is of opinion, is also good. According to the true construction of the contract, no time is fixed for executing and delivering the deed; a demand by the plaintiff was therefore necessary, and as no such demand is averred specially, the demurrer to the plea was correctly overruled. The judgment of the court below is affirmed, and the cause remanded, with leave to the plaintiff to withdraw his demurrer, and take issues on the pleas filed. (*a*)

Judgment affirmed.

Starr, for appellant.

Cowles, for appellee.

(*a*) 3 Durnford and East's T. R., 591. Philip's Evidence, 439. The time of the performance of the condition of a bond may be enlarged by a parol agreement between the parties. *Fleming* v. *Gilbert*, 3 Johns. Rep., 528. See also *Thompson* v. *Ketchum*, 8 Johns. Rep., 189.

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THE PRESIDENT AND DIRECTORS OF THE STATE BANK, Plaintiffs in Error, *v.* NATHANIEL BUCKMASTER, Defendant in Error.

ERROR TO MADISON.

The omission in a writ, of the words, "The people of the state of Illinois to the coroner," &c., is a mere misprision of the clerk and is amendable. (1)

THIS was a *scire facias* brought by the plaintiffs in the circuit court of Madison county, against the defendant, then sheriff of said county, to foreclose a mortgage executed by him to the State bank. A motion was made by defendant's counsel, to dismiss the suit on the ground of irregularity in the *scire facias*, the words, "the people of the state of Illinois to the coroner of Madison county," having been omitted. A motion was also made by the plaintiffs' counsel to amend the *scire facias*, which the court overruled, and sustained the motion of defendant to dismiss. The errors assigned are, in dismissing the *scire facias* and in disallowing the amendment.

Opinion of the Court by Justice L CKWOOD. The only question submitted in this case is, whether the court ought to have suffered the amendment asked for. The mistake committed in the *scire facias* is clearly a clerical error, and upon the principle assumed by late cases, that the court will amend all such errors, the court below ought to have permitted it. The mistake in this case could not lead to any misapprehension or in the least tend to surprise the party. The doctrine of amendments is well calculated to advance justice and prevent delay. The constitution requiring* that writs, &c., shall run "in the name of the people of the state of Illinois," seems to be directory to the clerk or person issuing the process, and the omission of the words is a mere misprision of the clerk and

(1) The present constitution is identical with that of 1818, so far as relates to this case. Article 5, sec. 26, of Constitution of 1848. In *McFadden* v *Fortier*, 20 Ill., 515, which was a demurrer to a *scire facias*, the defendant objected that it did not run in the name of "The People of the State of Illinois;" but the court said: "It has, however, been decided by this court, (*State Bank* v. *Buckmaster*,) in precisely such a case as this, that the omission of these words in a writ of *sci. fa.* is a mere misprision of the clerk, and is amendable after a motion is made to dismiss on account of the omission. Here no motion was made to amend."

A fee-bill is a process, and must conform to the requirement of the constitution, that "All process, writs and other proceedings, shall run in the name of "The People of the State of Illinois," or it is void. *Ferris* v. *Crow*, 5 Gilm., 96.

The precept under which the sheriff makes sale of lands for non-payment of taxes, is not a process, and therefore need not run in the name of "The People." *Scarritt* v. *Chapman*, 11 Ill., 443. *Curry* v. Hinman, id., 420. See also *Harris* v. *Jenks*, 2 Scam., 475.

*Article 4, section 7.

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ought not to work an injury to the plaintiffs. The court therefore erred in dismissing the *scire facias* and entering judgment against plaintiffs for the costs. The judgment is reversed with costs, and the cause remanded to the circuit court of Madison, for further proceedings. (*a*)

Judgment reversed.

Cowles, states' attorney, for plaintiff in error.

J. Reynolds, for defendant in error.

THOMAS REYNOLDS, Appellant, *v.* JAMES MITCHELL AND OTHERS, Appellees.

APPEAL FROM ST. CLAIR.

Where judgment is rendered by a justice of the peace, for a greater amount than the defendant owes, his remedy is not by application to a court of equity, but by appeal to the circuit court.

It is right to dissolve an injunction and dismiss the bill, without compelling an answer from all the defendants.

THIS was a bill in chancery, filed by Reynolds against Mitchell and others. The bill states that Reynolds made his note in 1821, to one Wm. Small, for one hundred state paper dollars, or bills of the State Bank of Illinois, which Small assigned in the same year to Mitchell, who is made defendant to the bill, and that said Mitchell, as assignee of said Small, afterwards brought his action on said note, before one Edmund P. Wilkinson, a justice of the peace for St. Clair county, on the 21st of September, 1822, and obtained a judg-

(*a*) Generally, all amendments are within the discretion of the court, and are allowed in furtherance of just ce, under the particular circumstances of the case. 6 Dane's Dig., 280. A writ amended by adding the clerk's name on paying costs. Id., 295.

A *ca. sa.* on which the defendant had been taken was allowed to be amended by adding the *testatum* clause. 3 Johns. Rep., 144. 5 Johns. Rep., 163. 2 Term. Rep., 737. 5 Johns. Rep., 100. 1 Johns. Cas., 31. 3 Johns. Rep., 443.

Amendments are reducible to no certain rule. Each particular case must be left to the sound discretion of the court. The best principle seems to be that an amendment shall or shall not be permitted, as it will best tend to the furtherance of justice. 1 Bin., 369. Clerical errors may be amended in a criminal as well as in a civil case. 2 Bin., 514. Mistakes and misprisions of the clerk may be amended at any time. *Hanley* v. *Dewes*, Miss. Rep., 17. *Vide*, 2 Tidd's Prac., 1036. 2 Bos. & Pull., 2,5. 9 Johns. Rep., 386. 1 Bos. & Pull., 31, 137, 329. 5 id., 103.

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ment on said note for 99 dollars and 99 cents, and that said Wilkinson, who is also made defendant, combining and confederating with the said Mitchell to defraud said Reynolds, rendered judgment on said contract for so much specie, when the said paper, when the note became due, was worth only 40 cents to the dollar, and that the justice had no power to give judgment for the nominal amount of the note in specie. The bill further alleges that Reynolds, at the time the judgment was rendered, offered to the justice the amount of the note in bills of the State Bank, which were refused—that an execution has issued on said judgment for specie which Reynolds replevied for three years, after the expiration of which, another execution issued for specie, which was levied on the personal property of Reynolds. The bill prays for an injunction, and the defendants to answer, &c. Mitchell alone answered the bill, admitting the purchase of the note from Small, and the rendering judgment thereon, and the replevy, &c., but denies that Reynolds ever offered to the justice the amount of the note before the judgment, averring his willingness to take it before the judgment, but not after, and contended that as Reynolds did not pay the note in State Bank paper before the judgment, and when it was due, that he was entitled therefore, to recover the value of the amount of said state paper, at the time the note fell due, and that said justice had a right to determine judicially what that value was, and that he did determine it to be 99 dollars and 99 cents, as stated in the bill. He also pleads the judgment and replevy in bar of all equity—denies that state paper was not worth more than 40 cents to the dollar, and all fraud, combination, &c. Upon filing this answer, a motion was made to dissolve the injunction and dismiss the bill, which was sustained by the court, and an appeal taken to this court. It was assigned for error that the court erred in dismissing the bill and dissolving the injunction, for the reason, First, because the justice had no right, by law, to render a judgment for specie, on the note; and Second, because a decree was made, and the injunction dissolved, when the parties in interest, and charged in said bill, had not answered, to wit, the justice Wilkinson.

Opinion of the Court by Justice LOCKWOOD. The court are of opinion, that the appellant has misconceived his remedy. If the judgment before the justice was rendered for too great an amount, the remedy was an appeal to the circuit court. The plaintiff having neglected to take an appeal, can not now be relieved in equity. The court has a right to dismiss the bill, and dissolve the injunction, without compel-

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ling an answer from all the defendants. The judgment is affirmed with costs. (1)

Judgment affirmed.

Cowles, for appellant.

Blackwell, for appellee.

(1) In *Sims* v. *Hugsby*, post, a default was entered against the defendant and the clerk ordered to assess the damages. The clerk, in making the computation, overlooked a credit indorsed on the note sued on, and thereby entered the judgment for more than was due. The supreme court, in that case, said: "If the clerk, in the discharge of that duty, (assessing damages,) should allow either too much or too little, the court, under whose direction it is made, will, upon motion, correct it. To that court, then, and not to this, the application should be made." And again in *Wilcox* v. *Woods et al.*, 3 Scam., 51, "It is alleged that the court erred in rendering judgment for a larger amount than the note, as set out in the declaration, shows the plaintiff entitled to recover. This can not be assigned for error. The proper remedy of the party was by motion in the court below, where the error could have been corrected." This was again repeated in *Smith* v. *Lusk*, 3 Scam., 411. But I can not satisfy myself that the principle intended to be established by these cases is correct. In the cases referred to, the decisions were correct so far as they related to those particular cases, because the notes not being a part of the declaration, and not being preserved in any manner in the record, the court could not see that the assessments were too large. But suppose a note is set out in *hæc verba* in the declaration, thereby making it a part of the declaration, and the record shows the judgment to be for more than the plaintiff sued for, why is it not error that the supreme court can reform? Suppose a verdict to be found by a jury; the evidence is preserved by a bill of exceptions; and from that the court sees the plaintiff has obtained a verdict to which he was not entitled, and will set it aside without hesitation. And why? Because the *record* shows the verdict is too large. Now if the clerk, instead of a jury, assess the damages, and commits an error, and the record shows the error, why is it not the duty of the appellate court to correct it as well as if it had been the fault of a jury? Can there be any reason why the court will interpose to correct the errors of a jury, and not of a clerk, when the record in both cases shows the error?

In a late case, *Sexton* v. *School Com'r*, 19 Ill., 51, the court in fact decided in accordance with these views, although the report does not show that this question was raised. The action was on a note executed to the school commissioner. A default was entered, and the clerk in assessing damages included twelve per cent. interest, and this was reversed, although the error was not preserved in the record, in any other manner than the statement made in the declaration, and the judgment. See also, 6 Mass. Rep., 272. 2 Wash. Rep., 173.

An injunction may be dissolved, on motion, before answer, where there is no equity on the face of the bill. *Richard et al* v. *Prevo*, post. *Puterbaugh* v. *Elliott et al.*, 22 Ill., 157. *Beaird* v. *Foreman*, post.

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HENRY HAYS, Adm'r. Appellant, v. JOHN THOMAS AND OTHERS, Appellees.

APPEAL FROM ST. CLAIR.

The computation of the civilians is adopted to ascertain who are next of kin to an intestate.

Where a person dies leaving no issue or father, but mother, brothers and sisters, the mother is the heir to her son's whole estate.

If the court, in looking into the whole record, find a decree has been entered in favor of persons not entitled to it, this court is bound to reverse it.

An entire judgment against several defendants can not be affirmed as to one, and reversed as to the others, and the same rule should prevail as to plaintiffs.

THIS was a suit in chancery, brought by the appellees against the appellant for a share of the estate of an intestate to whom they claimed to be the heirs at law.

Opinion of the Court by Chief Justice WILSON.* The first question presented in this case is, who are the next of kin in equal degree to the intestate. It appears from the bill, that the intestate died without issue, but that he left a mother, brothers and sisters.

According to the computation of the civilians, the father and mother are related to their children in the first degree, and brothers and sisters in the second. According to the rule of *Hilhouse* v. *Chester*, 3 Day's Rep., 166, 210, the computation of the civilians is adopted, to ascertain who are next of kin, and this rule prevails, whether the expression is used in relation to the descent of real or personal estate. The court thinks that the civil law mode of ascertaining who are next to kin, ought to be adopted in construing our statute, as being more agreeable to the nature of things, and more conformable to adjudged cases. The mother is therefore to be considered the next of kin to the intestate, and entitled to the whole of her son's estate. (1) It is, however, objected, that it is now too late to take the advantage, that persons are complainants in the bill in whose favor a decree has been made, who are not by law entitled to such decree, because no

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* LOCKWOOD, J., having been counsel in this cause gave no opinion.

(1) This is now changed by statute, which provides, that when there are no children of the intestate, nor descendants of such children, and no widow, the estate shall go to the parents, brothers and sisters, in equal parts among them; and if one of the parents be dead, the survivor shall take a double portion. The same statute also provides that the computation among collateral relations shall be according to the rules of the civil law. Purple's Statutes, p. 1200, sec. 46. Scates' Comp., p. 1199.

A posthumous child will inherit directly from the parent, with the same effect as if it had been born at the time of the decease of the parent. *Detrick* v. *Migatt*, 19 Ill., 146. *McConnel et al.* v. *Smith, Adm'r, etc.*, 23 Ill., 611.

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objection was taken below to the improper joinder of parties who have no interest in the suit. This objection can not prevail, however much the court may regret that so much expense has been incurred before the discovery of the error. The court is bound to look into the whole record, and if they find a decree has been made in favor of persons who are not entitled to it, they are bound to reverse it. 4 Hen. and Munf., 200. 16 Johns. Rep., 348.

A further question arises here, whether the decree may not be reversed in part, and affirmed in part. This may be done where the decree or judgment is in distinct parts, but in this case, the decree is for an aggregate sum to all the complainants. It has been decided that an entire judgment against several defendants can not be affirmed as to one, and reversed as to others, 14 Johns. Rep., 417; and the same rule should prevail as to plaintiffs. The decree must therefore be reversed. The court, have, however, a discretion as to costs, and inasmuch as the defendant did not avail himself of the error below, and the mistake appears to be mutual, the court order that each party pay his own costs, both here and in the court below. (*a*) *Decree reversed.*

Cowles, for appellant.

Blackwell, for appellee.

(*a*) The next of kin are those who are so determined by the civil law, by which the intestate himself is the *terminus a quo* the several degrees are numbered. Under that rule the father stands in the first degree, the grandfather and grandson in the second, and in the collateral line, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person. According to that rule, the intestate and his brothers are related in the second degree, the intestate and his uncle in the third degree. 2 Kent's Comm., 339.

The court of king's bench declared in the case of *Blackborough* v. *Davis*, 1 P. Wms., 41. 2 Vesey, 215, that the father and mother had always the preference before the brothers and sisters, in the inheritance of the personal estate, as being esteemed nearer of kin.

Under the statute of distribution, claimants take *per stirpes* only when they stand in unequal degrees, or claim by representation, but when they are all in equal degree, as three brothers, three nephews, &c., they take *per capita*, or each an equal share. 2 Kent's Comm., 342.

Our statute of distributions passed in 1829, (Laws of 1829, page 206,) declares that where there shall be no children of the intestate, nor descendants of such children, and no widow, then the estate goes to the parents, brothers and sisters of the deceased person and their descendants, in equal parts among them; if there be a widow and no child, or descendants of a child, then the one-half of the real estate, and the whole of the personal estate shall go to the widow as her exclusive estate forever. If there be no children or descendants of children, and no widow, no parents, brothers or sisters, or descendants of brothers and sisters, then the estate descends in equal parts to the next of kin to the intestate, in equal degree, computing by the rules of the civil law.

From this law it will be perceived that the rule of distribution as declared in the case of *Hays* v. *Thomas*, is now altered.

Where a judgment is entire, there must be a total affirmance or reversal. 12 Johns. Rep., 434.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1826, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice.*
THOMAS C. BROWNE, }
SAMUEL D. LOCKWOOD, } *Associate Justices.*
THEOPHILUS W. SMITH, }

LADD AND TAYLOR, Plaintiffs in Error, *v.* NINIAN EDWARDS, Defendant in Error.

ERROR TO POPE.

If a suit is brought against three or more obligors in a bond, on some of whom process is not served, the regular course is, to take judgment against those on whom process has been served, and by *sci. fa.* against those not served.

Where a party defendant appears and pleads by attorney, without process, it is error to proceed to judgment against those who have been served, without also taking judgment against him who thus appeared by attorney.

If such defendant should die after plea filed, and before judgment, his death should be noticed on the record.

Opinion of the Court by Justice SMITH.* This is an action against three joint and several obligors.

The principal error relied on by the counsel for the plaintiff in error is, the discontinuance of proceedings as to one of the defendants on whom process was not served, but who appeared by attorney. Several decisions of the supreme court of Kentucky are cited as supporting the objections urged. Those decisions are inapplicable to the present case, because they relate to cases of a different character from that before the court. The 31st section of the act of 22d of March, 1819,† regulating the practice in the supreme and circuit courts of this state, provides that the plaintiff may

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* LOCKWOOD, J., having been counsel in this cause, gave no opinion.
† Laws of 1819, page 147.

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proceed to judgment against those on whom process is served; and by *scire facias* against those on whom it may not be served. There is, however, a discontinuance after the appearance of the defendants, which can not be cured, and which is clearly error. The statute can afford no means of curing it. One of the defendants was not served with process, yet he appeared by attorney and pleaded. Against him no judgment has been entered. As this court must presume this appearance to have been authorized, and as no proceedings have been had against him after his appearance and plea, and the judgment has been entered against the other two defendants only, it is most evidently erroneous. If, as was remarked in the argument, he died after plea filed, and before the entry of the judgment, the suggestion of his death should have appeared on the record. The court can not pass beyond the record to ascertain the fact. Let the judgment be reversed with costs, and the cause remanded to the court below, with leave to the plaintiff to proceed anew. (1)

Judgment reversed.

Starr, for plaintiffs in error.

Cowles, for defendant in error.

THOMAS MASON, Appellant, *v.* THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, Appellees.

APPEAL FROM EDWARDS.

To authorize an inquiry by the sheriff into the right of property, it is necessary there should be a taking of personal property by a writ of execution regularly issued at the suit of a plaintiff against a defendant, and a claim interposed by a third person. And in case of an appeal to the circuit court, all the proceedings before the sheriff are to be transmitted; if they are not, the circuit court can not exercise jurisdiction.

Opinion of the Court by Justice SMITH.* The extremely imperfect state in which this cause is presented to the court by the record, has led to some embarrassment as to the course which ought to be adopted in the disposition to be made of it. Whether from its manifest imperfections and omissions it ought not to be dismissed as presenting no absolute question for the determination of this court, or whether by deter-

(1) See note (1) to the case of *Kimmel* v. *Shultz*, ante, p. 169.

* LOCKWOOD, J., having been counsel in this cause, gave no opinion.

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mining from the record itself that no case is presented of which the court below had jurisdiction, to reverse the judgment of the court below for that cause.

It is alone by inference that this court can imagine what the real cause of inquiry and adjudication was intended to have been in the circuit court. It would seem to relate to an appeal from some inquiry had before a sheriff as to the right of personal property taken in execution at the suit of some one under the act of 10th of January, 1825,* amendatory of an act prescribing the mode of trying the right of property in certain cases, approved the 7th of February, 1823. But whether or not such was the case, we are, from the record, left entirely to conjecture.

By the second section of this act, it is made the duty of the sheriff, whenever property is taken by him under execution, and shall be claimed by a person not a party to the writ of execution, to ascertain the right of property through the intervention of a jury of twelve men, before whom the respective parties may exhibit their evidence, reserving to either party the right of appealing from such decision to the circuit court of the county where such decision may be had. In case of an appeal from the decision had before the sheriff, it is made the further duty to transmit to the clerk of the circuit court of the county of which he is sheriff, ten days before the first day of the term of the court next following the time of such inquiry had before him, all the proceedings by him had in such case, and the circuit court may review the same in such manner as it shall direct.

From the provisions of the law it clearly follows that there must have been a taking of personal property under a writ of execution regularly issued at the suit of a plaintiff against a defendant, and a claim interposed by a third person to authorize an inquiry by the sheriff, and that in case of appeal, all the proceedings are to be transmitted to the circuit court in the manner directed by the act. In the present case, nothing appears to show that the sheriff could assume jurisdiction of the inquiry, if it be admitted by the proceedings set forth by the record, (which is certainly very doubtful,) that such an inquiry was ever made.

For aught that appears to this court, no writ of execution ever issued at the suit of any one, no personal or other property was ever taken from the possession of the defendant, or third person, nor have proceedings relative to such an inquiry ever been returned into the circuit court of Edwards

* Laws of 1825, page 69.

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county. How then could the circuit court of Edwards county ever assume jurisdiction of the supposed controversy, when none appears to have existed before the sheriff? The circuit court could alone entertain jurisdiction of the matter of inqury before the sheriff, as an appellate court, and in proceeding to review the inquiry before the sheriff, is it not indispensable that the proceedings had before him should have been returned to the court to enable it to exercise jurisdiction in the case? It is urged, that the parties, by their appearance, have given the court jurisdiction. This to a certain extent is true, if the court had jurisdiction of the subject matter; but that subject matter must be presented to the court in a form sufficiently definite for it to judge whether or not it has such jurisdiction. Here the difficulty arises, that although the parties did appear and proceed to a hearing, no cause or subject matter appears to have been presented, upon which the court would give a judgment. It is the want of this that vitiates the whole proceedings in the circuit court. The irregularity in omitting to show the character of the proceedings before the sheriff, and the entire absence in the record of any description of complaint which could form the subject of a judicial investigation, is too manifest to warrant a doubt of the want of jurisdiction in the circuit court, notwithstanding the appearance of the parties.

I am therefore of opinion that the judgment be reversed and that the plaintiff in error recover his costs. (1)

Judgment reversed.

Eddy, for plaintiff in error.

Robinson, circuit attorney, for defendant in error.

(1) On the trial of the right of property, levied on under an execution, the claimant objected to the execution on the ground that it was a nullity, having been issued by a court not having jurisdiction. It was held, that if the execution was a nullity, the claimant ought to have brought an action of trespass, replevin, or trover, for the goods, against the officer, and not have required a trial of the right of property. By requiring such trial, he admitted the validity of the execution and only claimed that it had been levied on his property, and not on that of the defendant in the execution. *Harrison* v. *Singleton*, 2 Scam., 21.

An officer, after having levied an execution, may have a controverted title tried by a jury, whose verdict will be a guide and warrant for his future action. *Wentworth* v. *The People*, 4 Scam., 555.

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ANSON COLLINS, Appellant, *v.* JOHN WAGGONER, Appellee.

APPEAL FROM MADISON.

Trespass will lie if the process is abused, or if after it has done its office, the officer proceeds to act under color of it by direction of the plaintiffs, they become both liable as trespassers.

Opinion of the Court by Chief Justice WILSON.* The only question presented by this case for the decision of the court is, whether the proper form of action has been adopted.

The facts in the case are, that Waggoner sued Collins in replevin for a cow, upon which issue was taken, and a verdict and judgment for Waggoner. Collins also pleaded a judgment against Waggoner on which an execution issued, by virtue of which a constable took the cow and sold her, and he became the purchaser. To this plea Waggoner replied that the cause of action upon which the judgment was rendered, accrued before the first of May, 1821, that there was no indorsement on the execution to take the notes of the state bank; that before and after the cow was taken by the execution, he offered to pay it in notes of the state bank, or replevy it for three years, and that Collins would not permit it to be done, but directed the constable to levy. To this replication there was a demurrer which was overruled; the case was then tried upon the issue of *non cepit*, and a verdict and judgment for Waggoner. It is contended that trespass will not lie for any act done under a process regularly issued from a court having competent jurisdiction. This rule is true as regards acts in conformity with the authority conferred by the process, even though there should be malice in the manner of executing it. But if the process is abused, trespass will lie, or if, after having done its office, the officer proceeds to act under color of it by the direction of the plaintiffs, they both become liable as trespassers.

In this case before the justice, the statute permitted the defendant to discharge the execution in the notes of the state bank, or replevy it for three years, which he offered to do, but the plaintiff in the execution refused to permit it to be done. If he had stopped here he would not have been liable as a trespasser, but he became so by the consequent levy of the execution by the constable, under his directions, because it had spent its force and was officially dead. The taking of the

* Justices LOCKWOOD and SMITH having been counsel in this cause, gave no opinion.

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cow, therefore, was tortious and no more authorized by the execution than the taking property of a third person. The judgment of the court below is affirmed. (*a*) (1)

Judgment affirmed.

Starr, for appellant.

Cowles, for appellee.

JOHN FLACK and ROBERT B. JOHNSON, Plaintiffs in Error, *v.* JOHN ANKENY, Defendant in Error.

ERROR TO JACKSON.

A warrant which states in substance, that A. B. had made complaint on oath that C. D. and others had violently assaulted and beaten him, and the officer required to arrest them and bring them before the justice, contains every thing essential to a valid warrant.

At common law, a justice may authorize any person he pleases to be his officer, and under the act of 22d March, 1819, a magistrate can appoint a constable in a criminal case, where there is a probability that the criminal will escape.

Where a justice has jurisdiction, but proceeds erroneously, he is not a trespasser, but where he has not jurisdiction, he is.

Opinion of the Court by Justice LOCKWOOD. This is an action of trespass and false imprisonment, brought by Ankeny against Flack, a justice of the peace, for illegally issuing a warrant, and against Johnson for executing it. The defendants below demurred to the plaintiff's declaration, on which demurrer, judgment was given for the plaintiff, and his damages assessed by a jury of inquiry. The only question presented in this case is, whether the plaintiff below has set out a sufficient cause of action in his declaration.

The declaration states that Flack, as justice of the peace, unlawfully issued a warrant in substance as follows, to wit: "Commanding any constable of Jackson county, to take the body of Ankeny and others, and bring, &c., to answer the

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(*a*) If a sheriff levy an execution after the return day, by the direction of the plaintiff and his attorney, they are all trespassers. *Vail* v. *Lewis*, 4 Johns. Rep., 4`0.

An execution, after the expiration of the time within which it is made returnable, is of no force, and an arrest under it is a trespass. *Stoyel* v. *Lawrence & Adams*. 3 Day's Rep., 1.

(1) See note to *Moore* v. *Watts et al.*, ante, p. 42, where the decisions on this question are fully referred to.

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complaint of Edward Valentine in a case of assault and battery, and threats of his life, on the night of the 18th of this instant, wherein he has this day personally appeared before me, and solemnly swore that they struck, kicked, and whipped him, so as to mangle his body most cruelly," and given under the hand and seal of the justice. The declaration further states, that "on said warrant is the following indorsement, to wit: "I depute Robert B. Johnson, constable." which warrant so unlawfully issued as aforesaid, was by the said Flack directed to, and handed over to the said Johnson, deputed as aforesaid, and that Johnson executed the same, by arresting the said Ankeny. This is the substance of the complaint.

This warrant contains every thing that is essential to a valid warrant. It states, in substance, though perhaps not very formally, that Valentine had made complaint, on oath, that he had been violently assaulted and beaten, by Ankeny and others, and the officer was required to arrest the offender and bring him before the justice. See 1 Ch. Crim. Law, 38 to 64. The justice had jurisdiction over the offense charged against Ankeny, and he seems to have fully complied with the 27th section of the act entitled "An act to regulate and define the duties of justices of the peace and constables," approved 18th Feb., 1823.* So far, then, as issuing the warrant is concerned, the justice acted within the pale of his authority, and the court do not see any thing very objectionable in deputing Johnson to serve it. At common law, a justice may authorize any person whom he pleases, to be his officer, 1 Ch. Crim. Law, 38; and by the fourth section of the act providing for the appointment of constables, approved March 22d, 1819,† it is provided, "that nothing in this act shall be so construed as to prevent any magistrate in the state from appointing any suitable person to act as constable in a criminal case, where there is a probability that the criminal will escape," &c. The only possible objection that is perceived to the appointment of Johnson, is, that in the deputation, it is not stated that "there is a probability that the criminal will escape." If magistrates were always held liable for every trifling mistake they commit in the performance of their various official duties, few persons would be found willing to accept an office of so little profit, and attended with such great risk. Courts, therefore, from necessity, are bound to view their acts with reasonable indulgence, and if they are governed by good faith, and act within their

* Laws of 1823, p. 184. † Laws of 1819, p. 163.

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jurisdiction, they ought not to be held liable for errors of judgment in matters of mere form. The justice had power, at common law, to make the appointment in the manner he did, but if it should be supposed that the statute has impliedly taken away this power, still, as the justice has the power to make the appointment on a certain contingency, it seems no unreasonable presumption that the contingency existed that gave him the power to appoint in the manner he has done.

The rule, applicable to cases of this kind, is well laid down by the supreme court of New York, in the case of *Butler* v. *Potter*, 17 Johns. Rep., 145. The court there say, "we have decided that where a justice has jurisdiction to issue an attachment, but proceeds erroneously in doing so, he is not, therefore, a trespasser. The distinction is this: where the justice has no jurisdiction, and undertakes to act, his acts are *coram non judice*, but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable, only." The declaration does not negative the idea, but that the justice acted upon the belief of "the probability that the criminals would escape." For any thing that appears in the declaration, the justice acted perfectly right in deputing Johnson to serve the warrant, but if he erred in this respect, still it can not be said but that he had jurisdiction over the question, and this is sufficient for his justification. If the justice is not liable, there can be no pretense for sustaining the action against Johnson. The judgment must be reversed with costs. (*a*) (1)

Judgment reversed.

Cowles, for plaintiffs in error.

Young and *Hall*, for defendant in error.

(*a*) No action of false imprisonment lies against the judge of a court of record for any act done by him *as judge*, or in the execution of his office, nor for any error in judgment. 5 Dane's Dig., 586. Nor a *judicial* officer, 3 id., 60.

It is incomprehensible to say that a person shall be considered as a trespasser, who acts under the process of the court, *per* Ld. KENYON, Ch. Just., in the case of *Belk* v. *Broadbent*, 3 D. & E., 185.

It is a general rule, the plaintiff is liable to false imprisonment, if the court exceed, or pursues not its jurisdiction, and any power to commit must be strictly pursued. So it lies if a magistrate has power to commit, and proceeds *irregularly*. 5 Dane's Dig., 587.

If the court has no jurisdiction, its warrant, when given, affords no excuse to the officer for the arrest. Ibid., 589. The jurisdiction of courts and magistrates is a part of the law of the land, and this, the officer, and everybody else, is bound to know. 3 Dane's Dig., 65.

It is a clear rule, that if a court not having jurisdiction order an officer to do an act, and the officer obeys the order, his act is not justified. Ibid., pp. 66, 68, 69.

(1) See note to last case.
The following is the provision of the present statute in relation to the ap

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Adolphus F. Hubbard, Appellant, *v.* Jonathan Hobson Appellee.

APPEAL FROM GALLATIN.

As a general rule, a court of equity will not interfere to relieve a defendant who has neglected to make his defense at law. But if he did not know of his defense until after the judgment, a court of equity will relieve.

It is erreneous to enter up a decree against the security in the injunction bond for the amount of the judgment at law and the costs in that suit, and interest on the judgment, and six per cent. damages, and the costs of the suit in equity.

Opinion of the Court by Justice Smith. Hubbard filed his bill in the court below for relief against a judgment at law obtained by Hobson in the Gallatin circuit court, on a record of a judgment against Hubbard in the Warren circuit court, in the state of Kentucky. The court below, on a hearing, dissolved the injunction, and dismissed the complainant's bill, and also decreed that Hobson should recover the amount of the judgment at law, with interest and costs, and six per cent. damages from Hubbard and his security. To reverse this decree the present appeal is prosecuted.

The counsel for the appellant, on the argument, assumed four grounds on which they contended that a reversal ought to be had:

1. That Hubbard being only a co-security with Hobson, in the note which Hobson had been compelled to pay, no more than a moiety could be recovered from Hubbard.

2. That by the conveyance to Hobson, by Gatewood, of 200 acres of land, to which Hubbard had an equitable interest for a moiety, the claim had been liquidated as far as Hubbard could be liable to Hobson as a co-security.

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pointment of constables: "Any justice of the peace may appoint a suitable person to act as constable in a criminal or other case, where there is a probability that a person charged with any indictable offense will escape before application can be made to a qualified constable; and the person so appointed shall act as constable in that particular case, and no other; and any temporary appointment so made as aforesaid, shall be made by a written indorsement, under the seal of the justice deputing, on the back of the process, which the person receiving the same shall be deputed to execute." Purple's Statutes, p. 676, sec. 86. Scates' Comp., 714.

There is also the further provision: "Whenever there shall be no constable in any precinct, any justice of the peace in such precinct may appoint one, who shall be qualified as in other cases, and hold his office until superseded by an election. Purple's Statutes, p. 662, sec. 16. Scates' Comp., 686.

In *Gordon* v. *Knapp*, the justice appointed a constable *pro tem.* to serve a summons; the appointment was not on the back of the summons, but on a separate paper. The court held the appointment not to be a compliance with the statute, and said: "As a justice is an officer of inferior and special powers, the existence of the causes which would justify him in deputing an officer to execute process, should be shown; and the kind of process, and the mode of appointing the officer to execute it, should be in strict accordance with the statute, otherwise the appointment is void, and the service of the process a nullity." 1 Scam., 489.

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3. That Hobson had, previously to the rendering of the judgment in the Gallatin circuit court, received full satisfaction for his claim against Hubbard, even if Hubbard should be considered as the principal in the note which Hobson had been compelled to pay by the acceptance of 200 acres of land from Gatewood in discharge of his claim against Hubbard and Gatewood.

4. That in dismissing the bill, and subsequently rendering a decree against the complainant and his security in the injunction bond, the court exceeded its powers.

To this it was replied that the answer of the defendant in equity, was conclusive, and that the complainant not having availed himself of the matters set forth in his bill by way of defense in the trial at law, was now precluded from offering them in equity, and that that court would not interpose to relieve him.

From a very deliberate and minute examination of this case, three propositions arising out of the third and fourth points made by the appellant's counsel, naturally present themselves as the only important grounds for consideration; the first and second points being deemed untenable and unsupported by the facts embraced in the case; first, has the claim of the appellee been released or discharged by his acceptance of property from Gatewood in satisfaction, or has he indemnified himself out of the avails of the property of Gatewood which may have come to his possession?

Second, ought the appellant, if Hobson accepted property in discharge, or indemnified himself out of the property of Gatewood, to have made this a defense to the action at law, and can he now, not having done so, assert it in equity?

Third, is the form of the entry and character of the judgment warranted?

In order to arrive at a correct conclusion as it regards the first proposition, I have examined the allegations of the bill, and the denials in the answer, with great care, nor has the evidence of the several parties which has been adduced, been less diligently or cautiously observed. I confess there is much obscurity and want of precision in many parts of the testimony, but from the best analysis I have been enabled to make of it, I have been led to consider it as establishing pretty clearly that Hobson accepted from Gatewood the surrender of two hundred acres of land lying on the Nashville road, in Kentucky, for the purpose of either enabling him to create a fund out of which he might indemnify himself for the liability he had incurred by joining in the note given by Gatewood, Hubbard, and himself, to Hays, or as a satisfaction for the respon-

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sibility he had incurred in that transaction. That he subsequently came into possession of the land, and conveyed it to one Shackelford, for what consideration does not appear, but its value is established at the time of such sale, to have been of a greater amount than Hobson's claim, and that he allowed Gatewood seven hundred dollars for it, the exact amount of the note he had joined in as a co-security, and had received the land on account of that transaction.

It also appears that Hobson admitted to one of the witnesses that the claim in question had been settled out of the property and effects of Gatewood, and that when charged with having received the two hundred acres of land in satisfaction of that claim, he did not deny it. It is true, the appellee in his answer, denies most positively that the claim had been paid out of the effects of Gatewood, or that he had ever received any tract of land to secure or discharge him from his liability created by his securityship, and one of the appellant's witnesses stands manifestly impeached, if his testimony were not clearly supported in most of its material parts, by three other witnesses. The rule of evidence in equity is too well settled, and the reason of it too well founded, to lead to the least embarrassment in this state of the case, in deciding, that notwithstanding the positive denial of the appellee, and even admitting the witness alluded to should be considered as impeached and his testimony consequently rejected, that the testimony of three of the other witnesses, so far as it regards the point under consideration, must prevail. This being the state of the evidence, it must be conceded that the first point is affirmatively established, and that the appellant has made out a case requiring the interposition of this court, unless, indeed, he is precluded by his own acts of negligence or folly; which leads us to the consideration of the second point. It is no doubt a well settled general principle in courts of equity, that they will not relieve, where the party might have availed himself of the same matter in defense in the suit at law, but to this general rule it is conceived there are some exceptions.

It is not understood that if the matter offered as ground for relief in equity might have been admitted in a trial at law as a defense, that *therefore* a court of equity will not interpose its jurisdiction and power, but that the party must also have been in a situation to have made such defense, and that through negligence, inattention, or some other cause which he might have controlled, he has omitted to do so.

By the establishment of the general principle, it surely was not intended to preclude a party from interposing a defense in equity, of the knowledge of which he only became

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possessed, since the determination of the suit at law, or the truth of which, he had only found himself capable of establishing since such determination. Believing that this exposition of the rule requires only to be stated to be admitted, I proceed to inquire whether the appellant comes within the rule as it is interpreted. In the bill, he alleges that he only came to the knowledge of the transfer of the land by Gatewood to Hobson, since the judgment in the suit at law, and that not until after such judgment was rendered, did he become possessed of the means of establishing the fact. It does not appear that this statement is in any way discredited or denied. Can it then be said that here is not a case precisely within the just interpretation of the rule, and that the facts, as they are presented, do not furnish just cause for allowing to the appellant the right of offering, as a ground for relief, that which, true it is, would have been matter of legal defense in the suit at law, but of the existence of which and the means of establishing, he only became possessed at a period when, in such suit, it was wholly unavailing and could not be heard?

It is then clear that he was in a state of moral incapacity to make such defense in the court below, and the reasoning that he ought to have done so and can not therefore now be relieved, is too unsound to need further illustration, and if it be at all necessary to refer to authorities in support of the correctness of the construction I have given to the rule, among the numerous ones which may be found, reference may be had to two of very modern date—*Holt's executors* v. *Graham*, 2 Bibb, 192, and *Cunningham* v. *Cadwell*, Hardin, 123. It is apparent that the appellant could not have made the matter now presented the basis of the relief he asks, or a subject of defense in the court below, and that he has therefore in no way deprived himself of the right of asserting it in equity. The remaining question regards the form of entry and character of the decree.

It appears from the record that the court below dissolved the injunction, *dismissed* the bill, and then rendered a decree in the same cause against the appellant here and his security in the injunction bond, who was no party to the suit, for the amount of the judgment and costs in the suit at law, with interest thereon, and six per cent. damages, and the costs of the suit in equity. The entry of this decree, after the court had adjudicated the cause and dismissed the bill, is thought to be an anomaly in the history of judicial proceedings, and has doubtless arisen from a natural misconception of the provisions of the statute under which the entry is supposed to

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be authorized, and is, very probably, an error in the clerk. From an examination of the 17th section of the act of 22d of March, 1819,* regulating the practice of the courts of chancery in this state, which is the statute referred to, and the uniform rule of proceedings in courts of equity, it is not perceived, where the complainant's bill is dismissed as not affording sufficient ground for the interposition of the court, that he can be amerced in any other way than being adjudged to pay the costs of the suit, for, (as it it is technically said,) his false clamor. What the precise form of the proceedings ought to have been after the dismissal of the bill, under the statute, is, perhaps; not so easily settled. It is provided in the statute quoted, that on the dissolution of the injunction, the complainant shall pay six per cent., exclusive of legal interest, besides costs, and that judgment shall be given against the sureties in the injunction bond, as well as the complainant, and that the clerk shall issue an execution for the same when he issues an execution on said judgment; meaning, doubtless, the judgment at law. Now, if this admits of any interpretation, it must clearly sanction the idea of two separate judgments, or why provide for two separate executions? If one judgment would embrace the whole, it could not be necessary to have separate executions. If the court is authorized to enter a judgment on the bond, in a summary manner, against the obligors in that bond without notice, which I am rather inclined to doubt, it should at least form a separate proceeding from the order or decree in the suit in equity; as it now stands, there are two distinct orders or decrees in the same cause of directly opposite characters; one dismissing the complainant from the presence of the court, and which is supposed to have terminated all proceedings in the cause, and put him beyond the power of the court; and the other rendering on the other hand a large decree in the same suit against him, in favor of the defendant who has never prayed for it. Whether a judgment is authorized to be entered up without notice, or whether the clerk is authorized to issue an execution, without even entering the common form of a judgment, as has been sometimes practised in this state on replevin bonds, it is not necessary now to determine; but that the form and character of the decree is incorrect, and that two decrees or orders, so opposite in their nature and consequences, can not be made in the same case, nor justified in practice, or warranted by the forms of law, I can not doubt. Again, if this decree is to stand, in what situation does it leave the complainant?

* Laws of 1819, p. 173.

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Upon a review of the whole case, I feel constrained to say, that the claim of Hobson has been extinguished by the receipt and disposition of the property of Gatewood, if the whole current of the testimony in the cause is to be credited. That the attempt to compel the appellant to pay it again, is, to say the least, against the clearest principles of moral justice, and the soundest rules of equity; and that putting out of view the evidently erroneous entry of the decree of the circuit court, the judgment of that court ought to be reversed, and a perpetual injunction awarded, enjoining the plaintiff in the action at law from proceeding on that judgment, and that the appellant recover his costs. (*a*)

The judgment at law stands open, unsatisfied and in full force and effect against him.

In equity, the court have made a decree against him for the identical amount of this judgment with the interest on that judgment, the six per cent. damages and costs of suit. Is this monstrous absurdity and injustice of subjecting him to satisfy these two judgments to be countenanced for a moment? Undoubtedly not. The erroneous entry of the decree is then, from this view alone, too manifest to require further exposition. The decision in this court, in the case of *Duncan* v. *Morrison,** is, as it relates to this irregularity, directly in point, and has settled the question. (1)

Decree reversed.

Eddy, for appellant.

McLean, for appellee.

(*a*) Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, or of which he could have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. 7 Cranch, 332, 336.

*Ante, p. 151.

(1) See note to the case of *Moore et al.* v. *Bagley*, ante, p. 94.

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R. Blackwell & Co., Appellants, v. The Auditor of Public Accounts, Appellee.

APPEAL FROM FAYETTE.

Where a contract is made with the state to print the laws, &c., for so much in state paper "at its specie value, when the same shall become due and payable," the amount to be paid by the state is not to be ascertained by an arbitrary valuation of the paper, made by the officers of the state, under a law passed subsequent to the contract, but by a market or current value of the paper.

Opinion of the Court by Justice Lockwood. This is an action of *assumpsit*, brought by the plaintiffs on a special contract to print the laws and journals at a specified rate.

The only question in the case is, whether the plaintiffs were bound to receive state paper at an arbitrary valuation fixed upon it by the legislature, subsequent to the making of the contract. In the contract made with plaintiffs, the state agreed to pay them state paper, "at its specie value, when the same shall become due and payable."

The facts in the case show that plaintiffs had in all respects performed their part of the contract, and that had they failed, they would have been liable to a heavy penalty. The case also shows that state paper was only worth thirty cents on the dollar when the contract was completed and the money became due, and that the auditor, under a statute passed subsequent to the making of the contract, paid plaintiffs the paper at the rate of thirty-three and one-third cents on the dollar. As the contract appears to have been entered into in good faith, and in the ordinary manner of making such contracts, the court can not believe that it was the intention of the legislature to violate the contract. The law requiring state paper to be issued out of the treasury at a fixed rate, does not necessarily apply to this contract, inasmuch, as the plaintiffs were to be paid out of the contingent fund, a fund over which the governor has exclusive control, and could have paid the plaintiffs their demand according to the contract, and, no doubt, the legislature supposed the plaintiffs would be paid, in that manner, the full sum they were entitled to. The officers of government have, however, put a construction upon the law, by which the plaintiffs have not received the amount stipulated to be paid them.

This being a case not foreseen by the legislature, and which, had they foreseen, they would have provided for; the court feel constrained to say, that justice and good faith require that the plaintiffs should recover the difference between the

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value of the paper and the rate they received it at. The judgment must therefore be reversed.

Judgment reversed.

Blackwell, for appellants.

Cowles, circuit attorney for appellee.

ANDREW MAURER, Appellant, *v.* JOHN DERRICK, Appellee.

APPEAL FROM CLINTON.

Although the accounts of the plaintiff may originally have amounted to more than 100 dollars, yet, if the defendant admits a balance to be due to plaintiff of less than 100 dollars, and promises to pay it, a justice of the peace has jurisdiction.

Opinion of the Court by Justice LOCKWOOD. This action was originally commenced before a justice of the peace and brought into the circuit court of the county of Clinton, by *certiorari*. On the hearing of the cause the circuit court decided that the judgment below should be reversed, because the justice of the peace had not jurisdiction of the cause. The action before the justice was commenced on a contract or account, specified as follows, to wit:

"JOHN DERRICK,

To ANDREW MAURER, Dr.

March 4, 1826, } To 67 dollars which you owed to me—and specially promised to pay."

This debt was acknowledged to be due on account of horses before that time by said Maurer, sold to said Derrick. On the trial in the circuit court, it was proved that the defendant had promised to pay plaintiff sixty-four dollars. It further appeared in evidence that the promise of defendant was made in consideration of a note held by plaintiff against defendant, for upwards of 100 dollars, and that the note had subsequently came to the hands of defendant without payment in full, leaving a balance of sixty-four dollars.

A jury impanneled in the circuit court brought in a verdict for plaintiff for that amount. The circuit court granted a new trial, because the justice had not jurisdiction, and then gave judgment for defendant. The question is, whether the justice had jurisdiction. The only case decided in this court, on this subject, is the case of *Clark* v. *Cornelius*, page 46. In

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that cause, the plaintiff exhibited a charge before the justice of 176 dollars, and admitted a credit of seventy-seven dollars, and this court decided that the justice had not jurisdiction. The present case is, however, different. The plaintiff here sues on a balance acknowledged to be due, and the proof supports the *assumpsit*. There was no necessity for the justice to investigate the accounts of the plaintiff beyond the specific sum acknowledged to be due, and which the defendant, upon sufficient consideration, promised to pay. The statute giving the justice jurisdiction, is, that he shall have it "over all debts and demands not exceeding 100 dollars, where the amount or balance is claimed to be due, on any contract, specialty, note or agreement, or for goods, wares and merchandise sold and delivered, or for work or labor done, or on account of any sums of money not exceeding 100 dollars." The court are of opinion that the justice had jurisdiction in this case. The judgment below must be reversed. (1)

Judgment reversed.

Cowles, for appellant.

Blackwell, for appellee.

BIGGS AND OTHERS, Appellants, *v.* POSTLEWAIT AND OTHERS, Appellees.

APPEAL FROM ST. CLAIR.

A judgment can not be rendered against the security in an administration bond, nor is he liable to an action, until a *devastavit*, by suit, has first been established against the administrator.

Opinion of the Court by Chief Justice WILSON. This action is brought for the use of Joseph Payne, one of the heirs at law of John Payne, deceased, against the administrator of the estate of said Payne, deceased, and his securities, upon an administration bond taken in pursuance of a territorial statute. The administrator and his securities are both declared against, but one of the securities only is brought into court. The breaches assigned in the declaration are, that the administrator had not returned an inventory or sale bill —that he had not administered, but wasted the assets, &c.,

(1) See note to *Clark* v. *Cornelius*, ante, p. 46.

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and avers, that goods and chattels to a large amount, came to the hands of the administrator, but does not aver any judgment against the administrator. To this declaration there is a demurrer and joinder, which was sustained by the court. The question is, as to the correctness of the decision of the court upon the demurrer.

The statute, that requires the bond to be taken, upon which this action is brought, is intended for the security of the intestate's estate, and the benefit of heirs and creditors; but they must bring themselves within its object and intent, before they can claim its benefit. A person claiming to be an heir, and entitled to a distributive share of the intestate's estate, must show himself to be thus entitled, in the ordinary course of law, by a judgment, or decree against the administrator, establishing the amount of his demand, and a *devastavit* by the administrator. Until these facts are established, the security is not liable—his undertaking, as regards claims against the intestate's estate, is collateral, and can only be enforced, upon its being made to appear that the administrator has failed to do that, which by law, he was required to do. See 1 Wash., 31.

There is no averment in the declaration, that any judgment has ever been obtained against the administrator. This, I think, is essential, in order to support the present action. It would be unreasonable, and against principle, to make a third party liable in an action for a default, which it is not pretended he has committed. The judgment of the court below is affirmed. (*a*) (1)

Judgment affirmed.

Blackwell, for appellants.

Cowles, for appellees.

(*a*) It is necessary, after a judgment against an executor or administrator, *as such*, to establish a *devastavit* by means of a second suit, before an action can be maintained on the administration bond. *Gordon's administrators* v. *The Justices of Frederick*, 1 Munford's Rep., 1.

It *seems* that the executor or administrator must be convicted of a *devastavit* by a verdict in a second suit, finding that he has wasted the assets, or has eloigned, disposed of, and converted the same to his own use, before an action can be sustained against the sureties. *Catlet and others* v. *Carter's executors*, 2 Munford, 24.

(1) This decision was followed in the cases of *Greenup* v. *Woodworth*, post, and *same* v. *Brown*, post. But the act of 1829, (Purple's statutes, 1218, Sec. 126. Scates' Comp., 1207.) dispenses with the necessity of first establishing a *devastavit* before the administrator or executor, or his securities can be made liable. *The People* v. *Miller et al.*, 1 Scam., 86.

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JONATHAN MAYO, Appellant, *v.* JOHN CHENOWETH, Appellee.

APPEAL FROM EDGAR.

No action can be maintained upon an instrument of writing for the payment of money, unless the instrument shows upon its face to whom it is payable.

Opinion of the Court by Justice BROWNE. This was a suit originally brought before a justice of the peace of Edgar county by John Chenoweth against Jonathan Mayo, on an instrument of writing of the following description: "This shall oblige me to pay thirty-five dollars on a judgment in the hands of Lewis Murphy, Esq., against Mark A. Sanders, in favor of John Chenoweth, with interest from this date till paid. JONATHAN MAYO."

April 18, 1823.

A judgment was obtained against the said Jonathan Mayo by the said John Chenoweth, before a justice of the peace, for the sum of thirty-five dollars, from which judgment the said Jonathan Mayo appealed to the circuit court of Edgar county, in which court the judgment of the justice of the peace was affirmed, and from the judgment of the circuit court of the aforesaid county, Jonathan Mayo takes an appeal to this court.

The court below erred in rendering judgment below for the then plaintiff, John Chenoweth, against the defendant, Jonathan Mayo, in this, that it is not shown by the said instrument of writing upon which the action was founded, to whom it was made payable. For which reason, the court is of the opinion that the judgment below be reversed. (*a*) (1)

Judgment reversed.

Robinson, for appellant.

Cowles, for appellee.

(*a*) Vide *Smith* v. *Bridges*, ante, page 18.

(1) See note to *Smith* v. *Bridges*, ante, p. 18.

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Fail and Nabb Appellants, v. Goodtitle, *ex dem.*, Hay and Lagow, Appellees.

APPEAL FROM LAWRENCE.

A purchaser's right under a sheriff's deed is not affected under the act of 1819, by its not being acknowledged in court. It is well acknowledged, if it be acknowledged before the circuit court of the county of which he is sheriff, and where the land lies.

A certificate of the register of a land office is not evidence. (a)

Opinion of the Court by Justice Lockwood. This is an action of ejectment tried at the Lawrence circuit court. On the trial a verdict was found for the plaintiff below, and judgment rendered thereon. Several errors have been assigned, but on a careful inspection of the record, the court are of opinion that the record does not present facts on which to found most of the errors assigned. The bills of exceptions taken on the trial, furnish all the causes of error that can be assigned, and they are either so inartificially drawn as not to present the points intended to be relied on by the counsel for the defendants below, or such points do not exist in the case.

The court can not but regret that they are so frequently called upon to adjudicate on cases that are so imperfectly presented, that they are unable, with all the sagacity they possess, to ascertain from the record the real questions decided below. In the case now under consideration, the court however, have this satisfactory reflection, that in case they should be so unfortunate as not to decide on the real matter in dispute between the parties, their decision will not be final. Another action may be commenced, in which the rights of the parties may be presented in such a manner as, eventually, to obtain a decision on the merits. On the trial below, the plaintiff offered in evidence a sheriff's deed, to the reception of which the defendants below excepted. The exception is in these words: "which was opposed and objected to by the defendants, by their counsel, because it was acknowledged before the Lawrence circuit court and not before the Crawford circuit court which objection was overruled by the court, to which opinion the defendants, by their counsel, object and except," &c.

The only question here presented is, whether the reason given why the deed should not be read in evidence, is a valid one. The objection is not general but special.

(a) See Rev. Laws of 1827, page 199.

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The parties are therefore confined to the identical objection which they made. Had other objections existed, it is fairly to be presumed, that the objection would have been general, or that the other objections would have been specified. As the bill of exceptions does not purport to give all the testimony in the case, it is also fairly presumable, that the objections taken in the assignment of errors to the reception of this deed in evidence, were either waived or obviated by proof on the trial. The court can not, therefore, inquire any further than as to the correctness of the decision on the point raised on the trial, as it is found in the bill of exceptions, and that is, whether it were essential to the validity of this deed, that it should have been acknowledged by the sheriff of Lawrence county before the Crawford circuit court? The only statute that requires a deed to be acknowledged in court, is the statute of 22d of March, 1819.* The second section says, "that upon such sale, the sheriff or other officer shall make return thereof indorsed or annexed to the said writ of execution, and give the buyer a deed, duly executed and acknowledged in court, of what is sold," &c. The legislature doubtless intended this requisition to the sheriff, for the benefit of the purchaser. In this view of the subject, the acknowledgment may be dispensed with altogether, without affecting the purchaser's right under the deed. (1)

It would be attended with great inconvenience and expense to compel the sheriff to go to a distant county, to acknowledge the execution of a deed for lands lying in the county of which he is sheriff; and as the statute does not designate the court, we are also of opinion that there has been a sufficient compliance with the statute. The second and third bills of exceptions are to the rejection of the deed of the executors of T. Dubois, deceased, and the certificate of the register of the land office at Vincennes. The objections taken to the reception of these papers in evidence are general, and were sustained by the court. In relation to the deed, the ground of objection does not appear, but, taken in connection with the offer to prove the location made of the premises by the certificates of the register of the land office, which were rejected, it is presumable, that the rejection of the deed was

* Laws of 1819, page 177.

(1) The following is the statute now in force in relation to acknowledgment of deeds by sheriff. "All deeds which may be executed by any sheriff or other officer, for any real estate sold on execution, upon being acknowledged or proven before any clerk of any court of record in this state, and certified under the seal of such court, shall be admitted to record in the county where the real estate sold shall be situated." Purple's statutes, p. 160, sec. 29. Scates' Comp., 975.

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founded upon the ground that no title was proved to exist in the executor's testator.

As the objection was general, and it does not appear that there was any offer to prove the execution of the deed, the deed was also properly rejected on that account. In relation to the certificate of the register of the land office, the court are of opinion, that it was properly rejected. The signature of registers of land offices can not be known, officially, to the court. They have no public seal to authenticate their signature; proof ought therefore to have been given of the hand writing of the register. The court have strong doubts whether the certificate of a clerk of the register can be received at all, but if received, it ought to be accompanied with proof, that the person who gave the certificate is clerk, and of his hand writing. As these bills of exception present all the grounds that can be assigned for error, and from the view taken of them, they do not furnish sufficient reasons to reverse the judgment of the court, the judgment is therefore affirmed with costs. (2)

Judgment affirmed.

Robinson, for appellants.

Eddy, for appellee.

(2) Certificates of the Register of the Land office are made admissible as evidence by the following provision: "The official certificate of any register or receiver of any land office of the United States, to any fact or matter on record in his office, shall be received in evidence in any court in this state, and shall be competent to prove the fact so certified. The certificate of any such register, of the entry or purchase of any tract of land, within his district, shall be deemed and taken to be evidence of title in the party who made such entry or purchase, or his heirs or assigns, and shall enable such party, his heirs or assigns, to recover the possession of the land described in such certificate, in any action of ejectment or forcible entry and detainer, unless a better legal and paramount title be established for the same." Purple's statutes, p. 541, sec. 4. Scates' Comp., p. 255. This is substantially the provisions of the act of 1827, cited in the note of JUDGE BREESE; but in 1839, the following additional act was passed: "A patent for land shall be deemed and considered a better legal and paramount title in the patentee, his heirs or assigns, than the official certificate of any register of a land office of the United States, of the entry or the purchase of the same land." Purple's statutes, 541, Sec. 5. Scates' Comp., 255.

Under these statutes we have had the following decisions:

The receipt of a receiver of a land office, of the receipt of the purchase money, for a tract of land, is not evidence of title. *Carson et al.* v. *Merle et al.*, 4 Scam., 363.

The register having the custody of all the record books, and plats relating to the sales of land in his district, is the only officer whose certificate could be safely received as evidence of title, and is made so by statute. *Roper* v. *Clabaugh*, 3 Scam., 166.

The receiver's certificate is made evidence of any fact or matter on record in his office, but the register's certificate is made evidence of title, id.

The official certificate of the register of a land office, is made evidence, by the express terms of the statute. *Turney* v. *Goodman*, 1 Scam., 185.

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Where a record shows that the certificate of the register of a land office was received in evidence the court will presume that proof of his official character and hand writing were previously made, unless a contrary statement contained in the bill of exceptions. *Russell* v. *Whiteside*, 4 Scam., 7.

In *McConnell* v. *Wilcox*, 1. Scam., 344, it was held that "the certificate of the register of the land office, of the purchase of a tract of land from the United States, is of as high authority as a patent." This was decided before the passage of the act of 1839, referred to above, and was taken to the Supreme Court of the United States, and by that court reversed, which caused the passage of the act of 1839. 13 Peters, 498. In that court, among other things, the court held:

Nothing passes a perfect title to public lands, with the exception of a few cases, but a patent. The exceptions are, where Congress grants lands in words of present grant.

The act of the legislature of Illinois, giving a right to the holder of a register's certificate of the entry of public lands, to recover possession of such lands in an action of ejectment, does not apply to cases where a paramount title to the lands is in the hands of the defendant, or of those he represents. The exception in the law of Illinois, applies to cases in which the United States have not parted with the title to the land, by granting a patent for it.

A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her courts; and to regulate the disposition of the property of her citizens, by descent, devise or alienation. But Congress is invested. by the constitution, with the power of disposing of the public land, and making needful rules and regulations respecting it.

Where a patent has not been issued for a part of the public lands, a state has no power to declare any title, less than a patent, valid, against a claim of the United States to the land; or against a title held under a patent granted by the United States.

Whenever the question in any court, state or federal, is, whether the title to property which had belonged to the United States, has passed, that question must be resolved by the laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

In another case the same court held the following:

Congress have the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands, declares the patent to be the superior and conclusive evidence of legal title. Until it issue, the fee is in the government; which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.

When the title to the public land has passed out of the United States by conflicting patents, there can be no objection to the practice adopted by the courts of a state to give effect to the better right, in any form of remedy the legislature or courts of the state may prescribe.

No doubt is entertained of the power of the states to pass laws authorizing purchasers of lands from the United States, to prosecute actions of ejectment upon certificates of purchase, against trespassers on the lands purchased; but it is denied that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect. *Bagnell et al.* v. *Broderick*, 13 Peters, 439.

Upon the effect of the register's certificate, see also the following cases: *Bruner* v. *Manlove et al.*, 1 Scam., 157. *Whitesides et ux.* v. *Divers*, 4 Scam., 337. *Delannay* v. *Burnett*, 4 Gilm., 454.

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SHADRACH BOND AND PIERRE MENARD, Plaintiffs in Error, *v.* JOSIAH T. BETTS, adm'r, Defendant in Error.

ERROR TO RANDOLPH.

In a declaration on a note of the following form: "Six months after date I promise to pay Shadrach Bond and Pierre Menard, agents for Warren Brown, the sum of nineteen dollars and twenty-five cents, for value received. Witness my hand and seal," &c.; the plaintiffs described themselves "as agents for W. B." It was held to be merely a descript on of the persons, and that those words "as agents," &c., might be rejected as surplusage.

Opinion of the Court by Justice SMITH. This case is presented to the court on a judgment on a demurrer to the plaintiff's declaration. The demurrer is general, and therefore every inquiry is precluded, whether causes which might have proved fatal, might not have been specially assigned for causes of demurrer. Equally untenable are the objections to the jurisdiction, no plea to the jurisdiction of the court having been pleaded. The declaration shows complete jurisdiction.

The real and only question is, whether the action on the note can be sustained in the manner and form set forth in the declaration. The note is in the following words, viz.: "Six months after date I promise to pay Shadrach Bond and Pierre Menard, agents for Warren Brown, the sum of nineteen dollars, and twenty-five cents for value received. Witness my hand and seal this 20th day of February, 1823." The promise to pay is directly to the plaintiffs, and the consideration, by the note itself, is, by every fair and grammatical construction of language, expressed to be received of them.

The addition to the names of the plaintiffs of the words, "agents for Warren Brown," in the note, is mere description of the person; it is therefore surplusage, and can not affect the promise. It is evident the words were only used for the purpose of showing, to whose use the money was to be received, and would not control the express promise to pay it to the plaintiffs. The contract and the consideration are expressed without ambiguity or doubt. The language is not susceptible of any equivocal meaning. The distinction taken by the defendant's counsel in error, in the use of the words "agent of," and "agent for," is really not understood, nor where the difference lies, which could alter the sense of the language and meaning of the parties. It is supposed that to describe a person as agent of, or agent for another, is synonymous in language and import. The various cases cited by the defend-

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ant's counsel have also been examined. They are considered altogether inapplicable.

The general principle, in cases of the description within the range of which the present case seems to fall is, that the words thus used, are mere description of the character or person of the obligee or promisee, and can in no way control, or alter the obvious import of the contract, and intent of the parties to it. This principle is very clearly illustrated in the case of *Buffin* v. *Chadwick*, 8 Mass. Rep., 103. The declaration in that case recited the plaintiff's name, and as suing in the character of "*Agent of the Providence hat manufacturing company*," and the defendant, by the note, promised to pay to the plaintiff *as agent* of said company, and expressed the value to have been received of the *company*. Yet the court held that the action was rightly brought, and that the plaintiff, styling himself agent in his declaration, was merely descriptive of the person. The present case, then, is clearly much stronger than that, and the correctness of the principle more apparent. In that case, the consideration is admitted to have proceeded from the company, in this, from the obligees themselves.

The promise, in the case before the court, being directly to the plaintiffs, the consideration therefor, being expressed to have been received of them, there can be no doubt that the action ought to be sustained.

The addition of "agents," is mere description and surplusage, and can not affect the right to recover. The judgment on the demurrer must therefore be reversed, and the proceedings remanded to the circuit court of Randolph. (1)

Judgment reversed.

T. Reynolds, for plaintiffs in error.

Baker, for defendant in error.

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(1) The payee of a note which has been assigned, may sue on it in his own name, without a re-assignment. And if he describes himself in the declaration as assignee, that may be rejected as surplusage. *Brinkely* v. *Going*, post.

A declaration on a note stated that it bore date "on the twenty-seventh day of April, one thousand *eighteen* hundred and thirty-seven." *Held*, that the words "*one thousand*" were mere surplusage, and no ground for arresting the judgment. *Bequette* v. *Lasselle*, 5 Blackford, 443.

If a plaintiff states, in his writ, "that he sues by a conservator," and if his appearance is recorded in the usual form, and nothing appears from the record that he is under any disability, those words may be rejected as surplusage, and judgment in his favor will not be erroneous. *Woodford* v. *Webster*, 3 Day, 472.

The principle of law relative to immaterial averments extends alike to all the pleadings in a case; and a declaration, plea, or replication, will be sustained, rejecting mere surplusage, if the pleadings would be substantially good without it. *Boone* v. *Stone et al.*, 3 Gilm., 537.

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HENRY CURTIS, Appellant, *v.* DANIEL S. SWEARINGEN, Appellee.

APPEAL FROM CLINTON.

Joint tenants may make a subdivision of time for the exclusive occupancy of the whole of a tract of land.

The certificate of the sheriff, of the sale of land, without producing the judgment, and proving the regularity of the sale, is no evidence of title in the purchaser.

THIS was an action of trespass *quare clausum fregit*, commenced in the Clinton circuit court by Swearingen against Curtis. The *locus in quo* is described in the declaration, as the south-east quarter of section 11, in township 2 north, of range 4, west of the 3d principal meridian, and ten acres from the north-west corner of the south-west quarter of section 12 adjoining, on which was a grist and saw-mill, &c. The defendant pleaded not guilty, with leave to give title in evidence. The jury found a verdict for the plaintiff, and 75 dollars in damages. The facts in the case, as proved, were as follows: The plaintiff, to prove his title to the premises, read in evidence a patent from the U. S., dated in 1823, granting them to Slade, Herbert's heirs, and the plaintiff. The plaintiff claimed one-third, and John Smith two-thirds, by lease from Slade—that by agreement with plaintiff and Smith, they had some time before the trespass complained of, occupied the mills alternately; Smith for two weeks, and the plaintiff for one week, and so on regularly; that on plaintiff's week, his occupation of the mill was always exclusive, and that during Smith's two weeks, *his* occupation was exclusive—that it was their practice to commence their week or two weeks' occupation on Monday morning, about the usual time of going to work—that one of them always used and occupied the mill, if he choose, through Sunday, and up to Monday morning, until the other would come to commence his week; that the two weeks preceding the 26th of December, 1825, (which day was Monday,) were Smith's two weeks for occupying the mill. Plaintiff's son, on the preceding Sunday night, fastened the gate of the mill-race, with a chain and lock—that it had not been usual to lock the

Unnecessary allegations must be proved, if they are relevant to the grounds of the action. The distinction is between what is immaterial merely, and what is wholly irrelevant. The former can not be rejected as surplusage. *Commissioners* v. *Brevard*, 1 Brevard, 11.

See also the following cases: *Shirtliff* v. *The People*, 2 Scam., 7. *Manlove* v. *McHattan*, 4 Scam., 96. *Walker et al.* v. *Welch et al.*, 14 Ill., 278. *Burnap* v. *Wight*, id., 302.

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gate—that the gate was not on the land mentioned in the patent, though a part and parcel of the mill-tract, and that they occupied it, alternately, as they did the mill. The defendant proved that some time in the week preceding the 26th of December, 1825, he applied to Smith to get possession of the mill and premises, and that Smith, for a stipulated price, let defendant have all the possession that he, Smith, had in the same, and that he, defendant, entered upon and occupied and used the same from some time about the middle of the week next preceding said 26th of December, and continued to occupy it during that week—that defendant, a little before day on the morning of said 26th, (Monday,) and which would have been plaintiff's week, went to the mill, and forced off the chain from the gate then in the water, opened the gate, and continued to occupy the mill with Smith, alternately, from that day to the commencement of the suit. The defendant offered in evidence, to prove a right of entry, a certificate from the sheriff of Clinton county, of the purchase of the premises under a sheriff's sale, and also three several executions against the plaintiff, and proposed to prove by the sheriff's return on them, and other evidence, that the sheriff had levied the executions on the plaintiff's interest in the premises, and had sold them to defendant as mentioned in his certificate, to which evidence the plaintiff objected, and the court sustained the objection. It was further stated by a witness, that when plaintiff's son put the chain and lock on the race-gate, on Sunday night, he was with him, that they did not go into the mill, but went past it, and that he did not see any person in it. Another witness said that no person was in the mill on Sunday, as the water was scarce; and another witness said, he went past the mill on said Sunday, and believed that defendant or some of his family was in it, but was not certain—he knew defendant occupied it through Saturday, the 24th. This was all the evidence.

The defendant moved the court to instruct the jury, that if they believed, from the evidence, that plaintiff's possession was not continuous, he could not recover in this action but for the first entry, and first week's occupation of the premises by defendant—that if they believed, from the evidence, that defendant entered under Smith by contract, the week preceding the said 26th December, and occupied for that week as Smith had a right to do, that his entry was lawful, and that retaining possession by defendant on Monday, the 26th, and thenceforward, did not make him a trespasser, and that they should find for the defendant.

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The court refused to give the instructions asked for, but instructed the jury that the plaintiff had a right to the possession of the premises on Monday, the 26th, in pursuance of their agreement, and that if defendant held the possession against the plaintiff on that day, he was a trespasser. The defendant excepted to this opinion, and moved for a new trial, which the court overruled.

Opinion of the Court by Justice SMITH. This was an action of trespass, for breaking and entering the close of the plaintiff. This case presents for consideration this question, whether persons may make a subdivision of time for the exclusive occupancy of the whole of a tract of real estate?

Joint tenants may make subdivisions of premises, and of the occupancy thereof, and may maintain several actions. According to this decision, it is thought that the subdivision of time for the occupancy is analogous, and may be legally done. The premises in question were alternately occupied by Swearingen, and another person of the name of Smith, a joint owner of two-thirds of the premises with Swearingen.

Smith occupied for two weeks, and Swearingen for one, in succession. From the evidence, it appears that Swearingen came into his possession by the locking of the gate of the mill, on the last evening of Smith's two weeks, by his agent. The holding of possession, *therefore*, under color of the previous entry under Smith, whose right expired with the two weeks, was tortious, and the court below properly instructed the jury that Curtis was a trespasser.

The offer to give in evidence the three executions against Swearingen, was, we think, properly rejected; there was no offer to show a judgment, and the regularity of the sale, and it is not pretended that any deed was ever executed by the sheriff to Curtis, as the purchaser of the premises in question. I am of opinion the judgment should be affirmed. (*a*) (1)

Judgment affirmed.

Blackwell, for appellant.

Mills, for appellee.

(*a*) A sheriff's *deed* can not be given in evidence without producing the judgment and execution under which the sale was made; without them, the sheriff has no authority to sell. *Den* v. *Wright et al.*, 1 Peters' C. C. Rep., 64.

(1) The general doctrine in regard to the sale of land by a sheriff is, that his deed is inadmissible in evidence, unless the judgment and execution under which the sale was made, be produced, to show the sheriff's authority to sell. *Bybee* v. *Ashby*, 2 Gilm., 163. *Davis* v. *McVickers*, 11 Ill., 329.

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ELI B. CLEMSON, Plaintiff in Error, *v.* HENRY KRUPER, Defendant in Error.

ERROR TO ST. CLAIR.

A refusal to grant a new trial can not be assigned for error. (1)

A bill of exceptions can not be taken, unless the exception be made on the trial, and before the jury is discharged, and it lies for receiving improper, or rejecting proper testimony, or for misdirecting the jury on a point of law. (2)

Opinion of the Court by Justice LOCKWOOD. Kruper, the plaintiff below, brought an action of *assumpsit* in the St. Clair circuit court. The defendant below plead *non assump-*

The act of February, 1841, (Purple's Statutes, 646, sec. 21; Scates' Comp., 609,) provides that the sheriff's deed shall be evidence that the provisions of law in relation to sales of land on execution were complied with, until the contray be shown; but this does not dispense with the necessity for the production of the judgment and execution, which are still necessary before the deed can be read in evidence. *Bybee* v. *Ashby*, supra.

When land is sold on execution, and a sheriff's deed thereon is executed, but no judgment is shown to support such execution, no title passes to the purchaser. In this case the execution described the judgment as having been rendered in 1844. The judgment offered was rendered in 1843. The variance was held to be fatal. *Pickett* v. *Hartsock*, 15 Ill., 283.

A sheriff's deed must convey the land levied on and sold; and if the levy is so uncertain in its description of the premises levied upon, that it can not be understood what they are; the sale will be void. The deed can not remedy it. *Fitch et al.* v. *Pinckard et al.*, 4 Scam., 84.

There should be entire uniformity in the return to the execution, the certificate of sale, and the deed, where real estate is sold by the sheriff, or the deed will be invalid. *Dickerman et al.* v, *Burgess et al.*, 20 Ill., 266.

A certificate of sale by a sheriff to another person than the purchaser, as shown by his return to the execution, is a void act. Id.

(1) See note to *Sawyer* v. *Stevenson*, ante, p. 24.

(2) The object of a bill of exception is to place upon the record some fact, or ruling of the court, which would not appear without it. But where the question already appears on the record, a bill of exceptions is unnecessary. Thus, a bill of exceptions taken to the overruling of a demurrer is improper; the point saves itself; the judgment is part of the record. *Hough* v. *Baldwin*, 16 Ill., 293. *Hawk* v. *McCullough*, 21 Ill., 220. *Kitchell* v. *Burgwin et ux.*, id., 40. *Swift et al.* v. *Castle*, 23 Ill., 209. *Van Dusen* v. *Pomeroy*, 24 Ill., 289.

Where a motion is made for a new trial on the ground that the verdict is contrary to evidence, it will not be considered in the supreme court, unless the bill of exceptions contains all the evidence. *Wheeler* v. *Shields*, 2 Scam., 350. *Rogers* v. *Hall*, 3 Scam., 6. *McLaughlin* v. *Walsh*, id., 185. *Stickney et al.* v. *Cassell*, 1 Gilm., 420. *Rowan* v. *Dosh*, 4 Scam., 460. *Bruce* v. *Truett*, id., 455. *Culbertson* v. *Galena*, 2 Gilm., 131. *Granger* v. *Warrington*, 3 Gilm., 310. *Webster* v. *Enfield*, 5 Gilm., 302. *Buckmaster* v. *Cool*, 12 Ill., 76. *Armstrong* v. *Cooley*, 5 Gilm., 512. 2 Scam., 506. Id., 256. 3 Scam., 381. 4 id., 33, 60. 5 Gilm., 186. 16 Ill., 138. Id., 277. Id., 390. 15 Ill., 297. 17 Ill., 321. *Trustees, &c.* v. *Lefler*, 23 Ill., 90.

The supreme court will not examine any question that does not appear on the record, unless it is preserved in a bill of exceptions. *Burlingame* v. *Turner*, 1 Scam., 588. *Thomas* v. *Leonard*, 4 Scam., 557. *Lyon et al.* v *Boilvin*, 2 Gilm., 629. *Selby* v. *Hutchinson*, 4 Gilm., 326. *Petty* v. *Scott*, 5 Gilm., 209. *Eaton* v. *Graham*, 11 Ill., 620. *McBain* v. *Enloe*, 13 Ill., 78. *Moss* v. *Flint*, id., 572. *Reeve* v. *Mitchell*, 15 Ill., 297. 3 Scam, 381. Id., 411. 4 Scam.,

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sit, and issue was thereon joined. On the trial a verdict was found for Kruper.

A motion was then made for a new trial which was overruled, and a bill of exceptions, containing the evidence given on the trial, was taken to the opinion of the court overruling the motion for the new trial. Judgment having been rendered on the verdict, a writ of error has been brought to this court to reverse the judgment, and the error relied on is, that "the court below erred in overruling the said Clemson's motion for a new trial, on the ground stated in the bill of exceptions, and because the damages were excessive." It is objected on the part of the defendant in error, that refusing to grant a new trial can not be assigned for error.

This objection, the court think, well taken, both on the score of adjudged cases, and on principle. A bill of exceptions can not be taken, unless the exception be made on the trial, and before the jury is discharged, and it lies for receiving improper or rejecting proper testimony, or misdirecting a jury on a point of law. The bill of exceptions taken in this case was not for any decision that occurred during the progress of the trial, and was therefore improperly allowed.

If this case had come before the court in a correct form, they are rather inclined to the opinion that the defendant below ought to have had a new trial, but as it is unnecessary to decide this point, they have not made up a definitive opinion on the subject.

As the court are opinion that the bill of exceptions was

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419. 2 Gilm., 728. 3 id., 366. 5 id., 126. 11 Ill., 586. 12 Ill., 380. 15 Ill., 329. 24 Ill., 187, 262, 598.

Where a default is taken against a defendant, he may cross-examine the plaintiff's witnesses, but can not take a bill of exceptions. *Morton* v. *Bailey et al*, 1 Scam., 215. Should improper testimony be allowed, or wrong instructions given, the proper course is to apply to the court to set aside the inquisition, and grant a new inquest. Ibid.

When a party voluntarily takes a nonsuit, he waives his right to except. *Barnes* v. *Barber*, 1 Gilm., 405. *The People* v. *Brown*, 3 Gilm., 88. The exception must be taken *at the time* the decision is made which is complained of: thus, for giving improper instructions, it must be when the instructions are given; it is too late after verdict. *Leigh* v. *Hodges*, 3 Scam., 17. *Vanderbilt* v. *Johnson*, id., 49. *Gibbons* v. *Johnson*, id., 63. *Hill* v. *Ward*, 2 Gilm., 293. *Dickhut* v. *Durrell*, 11 Ill., 84. Id., 587. *Martin* v. *The People*, 13 Ill., 342. *Dufield* v. *Cross*, id., 700. *Charlesworth* v. *Williams*, 16 Ill., 338. *Armstrong* v. *Mock*, 17 Ill., 166. *Hance* v. *Miller*, 21 Ill., 636.

Although the exception must be made at the time of the error complained of, it is not indispensable that it should be committed to writing at that time. It may be done at a future time by the agreement of parties, or by an order of the court, entered on the record. *Evans* v. *Fisher*, 5 Gilm., 456. *Burst* v. *Wayne*, 13 Ill., 666. 23 Ill., 416. 24 id., 43.

If a judge refuses to sign a bill of exceptions when properly presented to him, the Supreme Court will, by *mandamus*, compel him to sign it. *Bristol* v. *Phillips*, 3 Scam., 287.

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not correctly taken, to relax the rule in a real or supposed hard case, would be establishing an innovation in the proceedings of courts that would in practice prove extremely inconvenient, if not dangerous. If, however, the decision of the court below has worked serious injustice to the defendant, it is possible a court of equity, upon a proper case, might grant relief. The court, therefore, barely suggest, without deciding the point, if the counsel for the defendant misapprehended the law or practice in relation to taking bills of exception, that it might afford ground for granting a new trial by a court of equity. The judgment must be affirmed with costs. (*a*)

Judgment affirmed.

Blackwell, for plaintiff in error.

Cowles, for defendant in error.

AUGUSTUS COLLINS, Appellant, *v.* ABRAHAM CLAYPOLE, Appellee.

APPEAL FROM MADISON.

A refusal to grant a new trial can not be assigned for error.

Opinion of the Court by Chief Justice WILSON.* The first question, and the only one necessary to be decided in this case, is, whether the refusal to grant the new trial asked for is ground of error. That point has been settled in the case of *Clemson* v. *Kruper*.

The court was unanimously of opinion in that case that it

(*a*) Cases of new trials. *Sawyer* v. *Stephenson*, p. 24. *Cornelius* v. *Boucher*, p. 32. *Collins* v. *Claypole*, post. *Street* v. *Blue*, post.

No bill of exceptions is valid which is not for matter excepted to at the time of the trial. It is not necessary that the bill of exceptions should be formally drawn and signed before the trial is at an end; it is sufficient if the exceptions be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, during the term, according to the rules of the court, be reduced to form and signed by the judge. In all such cases, however, the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to form and signed, pending the trial, and it would be a fatal error if it appeared otherwise. *Walton* v. *United States*, 9 Wheat., 651.

An exception to the opinion of the court is necessary only, when the alleged error can not otherwise appear on the record. *Macker's heirs* v. *Thomas*, 7 Wheat., 530.

* Justices LOCKWOOD and SMITH gave no opinion.

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was not a ground of error. This case depends upon the same principle, and must be decided in the same way.

Judgment to be affirmed as of the last term. (a)

Judgment affirmed

JOHN FLACK, Plaintiff in Error, v. WILEY, O. HARRINGTON, Defendant in Error.

ERROR TO JACKSON.

If a magistrate officiously and without a y complaint on oath or of his own knowledge, issues his warrant to apprehend a person, he will be liable in an action of trespass.

THIS was an action of trespass, assault and battery, and false imprisonment, brought by Harrington against Flack, a justice of the peace, and one Johnson, who was deputed by Flack to serve a warrant on plaintiff below.

The first count of the declaration states that Flack, as justice of the peace, irregularly and illegally issued a warrant against the plaintiff below and others, to answer the complaint of the people of the state of Illinois, for a breach of the peace said to have been committed on the body of one Edward Valentine, without any affidavit having been made before him, the said Flack, by any person against the said Harrington, and without any personal knowledge of the transaction above mentioned and complained of, or other legal information or accusation, whereon to have predicated his said warrant so issued as aforesaid, and whereby to justify his said proceedings. He the said Flack having no reasonable or lawful cause whatever to suspect that the said Harrington had been guilty of the said supposed breach of the peace, which warrant was delivered to Johnson, and the plaintiff below arrested on it by the advice and request of Flack. The second count is similar to the first.

To this declaration Flack and Johnson demurred, which was overruled by the court below, whereupon they severally plead not guilty; and Johnson plead in addition, a special plea of justification.

On the trial, Johnson was acquitted and Flack was found

(a) *Sawyer* v. *Stephenson.* page 24. *Cornelius* v. *Boucher,* page 32. *Clemson* v. *Kruper,* ante, p. 210.

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guilty, and judgment rendered against him for damages and costs.

Opinion of the Court by Justice LOCKWOOD. This case is clearly distinguishable from the case of *Flack and Johnson* v. *Ankeny*, decided this term. The allegation here is, that Flack officiously and without any complaint on oath, issued his warrant for the apprehension of Harrington. And these allegations are found true by the verdict of a jury upon a plea putting the facts directly in issue. Will the law tolerate such conduct in its officers? This is clearly not a case of error in judgment in a case legally before the justice.

In fact, there was nothing before the justice to authorize him to act at all, for he made the case and then adapted his process to the assumed facts. A justice in issuing a warrant for the apprehension of a person for a criminal offense, acts ministerially, and can not, of his mere motion, institute such a proceeding, unless in particular cases, where he is present at the commission of the offense.

If he voluntarily acts, he is liable to an action, and trespass will lie. The law appears to be well settled on this point, as will appear from the following authorities. In Swift's digest, page 800, the law on this subject is stated as follows:

If a justice of the peace, without complaint or information, should issue a warrant, and cause a person to be arrested, trespass would lie against him, for though he is excused when he issues a warrant on a false accusation, yet it is otherwise where he issues his warrant without accusation. Swift cites Cro. El., 130. In the case of *Wallsworth* v. *Mcullough*, 10 Johns., p. 93, this was an action of false imprisonment; on the trial the following facts appeared. That the plaintiff was arrested by virtue of a warrant issued by defendant as a justice of the peace, on the complaint of the overseers of the poor, setting forth the examination of the mother, &c. The overseers, however, testified that they never made complaint, nor did they request the justice to issue the warrant.

They also stated that one *Garley* was occasionally employed by them to do their business, but they had not employed him in this case, and on whose application the warrant had actually issued. The overseers appeared before the justice on the examination and agreed to the proceedings. The warrant issued without authority, because it was not issued upon the complaint of the overseers of the poor, or either of them. The justice, acting ministerially in this case, was responsible for issuing the warrant without the application required by the statute. The subsequent consent of one of the overseers, that the proceeding might go on, would not deprive the plain-

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tiff of the action for the previous arrest, upon a warrant irregularly issued. And the same court in the case of *Jones* v. *Percival*, 2 Johns. Cases 49, held, "trespass for a false imprisonment lies against a justice of peace who voluntarily and without the request or authority of the plaintiff in an action before him, issues an execution against the body of the defendant who is privileged from imprisonment, who claims his privilege, and is taken on the execution." The errors assigned are altogether technical and relate to form, and do not appear to require any examination. The judgment must be affirmed with costs. (*a*) (1)

Judgment affirmed.

Cowles, for plaintiff in error.

Eddy, for defendant in error.

(*a*) Vide *Flack* v. *Ankeny*, ante, page 187.
(1) See note to *Moore* v. *Watts*, ante, p. 42.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1827 AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice*,
THOMAS C. BROWNE,
SAMUEL D. LOCKWOOD, } *Associate Justices.*
THEOPHILUS W. SMITH,

RICHARDSON and HAGGATT, Ex'rs. of R. CROW, deceased, Appellants, *v.* SAMUEL PREVO, Appellee.

APPEAL FROM CLARK.

If a bill for an injunction contains on its face no equity, it will be dissolved on motion. A defense at law, if a legal one, must be made before judgment. It is error to decree against a principal and security in an injunction bond, the amount of the judgment at law.

Opinion of the Court by Justice LOCKWOOD This was a bill in equity, filed in the Clark circuit court, praying relief and for an injunction restraining the collection of a judgment at law. The injunction was dismissed on motion, before answer, and a judgment rendered against appellants and their securities in the injunction bond, for the original judgment and interest and damages. From which decision an appeal has been taken to this court. Two errors are assigned :

1. That the injunction was dissolved before answer, notwithstanding the bill on its face contains sufficient equity :
2. That the judgment was given against both principals and securities, for the whole amount of the judgment enjoined, together with damages and costs.

The first error was not much relied on in the argument, and from an inspection of the bill the court are satisfied that the injunction was properly dissolved on motion. If the intestate had any defense to the action on the bond, it was a legal one, and no sufficient reason is given why he did not

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defend the suit at law. His *laches* was therefore a bar to the interference of a court of equity.

The second error is well assigned. This court has frequently decided that such a judgment as was rendered in this case, can not be given. The judgment of the court below must be reversed altogether, as to the securities in the injunction bond. It is also reversed as to the judgment against the complainants, for the debt and interest of the judgment at law, and affirmed as to the dissolution of the injunction, and for twenty-eight dollars and eighty cents, the damages and costs of the court below, as against the appellants. The court also are of opinion that the appellants recover the costs of this appeal. (*a*) (1)

JAMES J. RYAN, Plaintiff in Error, *v.* ABNER EADS, Defendant in Error.

ERROR TO WASHINGTON.

A return to a writ by a person who signs himself "Deputy Sheriff," without stating for A. B., sheriff, is erroneous. A deputy sheriff can only act in the name of his principal.*

Opinion of the Court by Justice LOCKWOOD. This is a writ of error to the Washington circuit court.

Several errors have been assigned, but it is unnecessary to notice more than one of them.

The second writ of *scire facias* was returned by a person who signs himself deputy sheriff. This was clearly erroneous. A deputy sheriff can only act in the name of his principal. The judgment having been entered by default, this irregularity can be assigned for error. Judgment reversed for the

(*a*) Vide *Hubbard* v. *Hobson*, ante, p. 190.

(1) See note (2) to the case of *Reynolds* v. *Mitchell*, ante, p. 177.

* Rev. Laws of 1827, p. 373, sec. 11.

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irregularity of the proceedings below with costs, but the reversal not to operate to the prejudice of any future proceedings on the mortgage. (*a*) (1)

Judgment reversed.

T. Reynolds, for plaintiff in error.

McRoberts, for defendant in error.

(*a* It is essential when a deputy is appointed, that he have all the powers of his principal. 3 Dane's Dig., 89.

A deputy has no interest in the office, but is only the shadow of the officer, *in whose name* he does all things. Jac. Law Dict., *Title*, Deputy.

A return by the deputy sheriff in his own name as deputy sheriff, is not a return by the sheriff which the court can notice, *Simonds* v. *Catlin*, 2 N Y. Term Rep., 66.

In North Carolina, a return of the service of a writ made by the deputy sheriff was held good, it being the immemorial custom of the state to receive their returns. *McMurphy* v. *Campbell*, 1 Hayw., 181. Peake's Ev., 441.

(1) A return to a summons signed by a person as "deputy sheriff," without using the name of the sheriff, is erroneous and void. *Ditch* v. *Edwards*, 1 Scam., 127.

If judgment by default be rendered against a defendant who has not been served with process, the proceedings are *coram non judice*, and in such case the cause will not be remanded. Ibid.

A return of service of a summons is good, if signed by the sheriff, although the signature has not to it anything to indicate by what authority he served the process. *Thompson* v. *Haskell*, 21 Ill., 215.

A court is presumed to know its own officers, and especially the sheriff. Ibid.

The return of an officer to a writ is only *prima facie* evidence of the facts stated in it. *Owens* v, *Ranstead*, 22 Ill., 161.

See also on the subject of returns, the following cases: *Sims* v. *Klein*, post· *Wilson* v. *Greathouse*, 1 Scam., 174. *Clemson* v. *Hamm*, id., 176. *Ogle* v. *Coffey*, id., 239. *Mitcheltree* v. *Stewart et al.*, 2 Scam., 20. *Townsend et al.* v. *Griggs*, 2 Scam., 366. *Beaubien* v. *Sabine*, id., 457. *Belingall* v. *Gear*, 3 Scam., 575. *Montgomery et al.* v. *Brown et al.*, 2 Gilm., 584. *Farnsworth* v. *Strasler*, 12 Ill., 485. *Sconce* v. *Whitney* id., 150 *Morris* v. *Trustees of Schools*, 15 Ill., 269. *Turney* v. *Organ*. 16 Ill., 43. *Ball* v. *Shattuck*, id., 299. *Woods* v. *Gibson*, 17 Ill., 218. *Cost* v. *Rose*, id., 276. *Boyland* v. *Boyland*, 18 Ill., 551. *Nelson et al.* v. *Cook*, 19 Ill., 440. *Orendorff et al.* v. *Stanberry et al.*, 20 Ill., 89. *Beach et al.* v. *Schmultz*, id., 185.

The sheriff's return on a summons against Samuel B. Bancroft, was as follows: "Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858." This is insufficient. It does not show whether the date refers to the time of the service or the return. Nor does it show that service was made on Samuel B. Bancroft. S. B. may be the initials of a different person. *Bancroft* v. *Speer*, 24 Ill., 227.

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JOHN GILES, Plaintiff in Error, *v.* JOHN SHAW, Defendant in Error.

ERROR TO MADISON.

Oyer can not be demanded of a record. A variance between the record declared on, and the one produced as evidence, can be taken advantage of by the plea of *nul tiel record.*

Opinion of the Court by Justice LOCKWOOD. This was an action of debt, commenced on a judgment recovered in the [then] territory, now state of Missouri. The declaration is in the usual form. Subsequent to the filing the declaration, the plaintiff filed a transcript of the judgment in Missouri. To which declaration the defendant "having oyer given him of the record declared on," says, that he is not bound to answer farther than demand, (supposed to mean demurrer,) and plaintiff joins in demurrer. On this state of pleadings the circuit court of Madison gave judgment for defendant. To reverse which a writ of error has been taken to this court. The declaration was sufficient, *prima facie*, to sustain the action. Could the defendant then, crave oyer of the transcript on file, and demur? Such a course would completely exclude the plaintiff's testimony, and in most cases work the greatest injustice. Oyer at common law is only demandable of specialties. Our statute has probably extended the rule, but clearly limits the right to demand oyer of instruments signed by the party, and can not apply to actions founded on judgments. The proper course for defendants would have been to have pleaded, either *nil debet** or *nul tiel record. Nul tiel record* it has been decided, is the proper plea to put in issue *such* a judgment as has been declared on, where the judgment is either *domestic*, or from a *sister state.* If however, the defendant regarded the judgment as not coming within the purview of the constitution and law of congress, then the proper plea would have been *nil debet.* On the trial of either of these issues, the defendant could object to a material varience between the evidence offered and the declaration. The court do not decide which of these pleas would be proper, but are of opinion, that inasmuch as the declaration is sufficient on its face, that the court erred in sustaining the *demurrer.*

* *Quere:* Is *nil debet* a proper plea in any case to an action of debt upon a record? See *Chipps* v. *Yancey*, ante, p. 19.

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Judgment reversed with costs and the cause remanded to Madison for further proceedings.

The court having been referred to some authorities since the above opinion was written, remark, that the demurrer ought to have been regarded by the court below as a nullity. The demurrer only states, that "having oyer given him of the record declared on," but does not proceed to set it out, or in any manner make the transcript a part of the demurrer.

This was clearly erroneous. See 5 Bac. Abr. title, "pleas and pleadings," page 438, and the authorities there cited. It is by those authorities holden, "that if the defendant, after praying oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it; for that by craving oyer, the defendant undertakes to set out the whole *verbatim*, and if he do not do so the plea is bad." That oyer is not, in strictness, demandable of a record, see 5 Bac. Abr., page 437. (*a*) (1)

Judgment reversed.

Cowles, for plaintiff.

Blackwell and *Reynolds*, for defendant.

(*a*) The defendant shall not have *oyer of a record* when only conveyance to the action, as in escape; nor in debt on a recovery in an inferior co rt, for it remains there; nor of a record in another court, nor where he is party to it. 1 Saund., 9.

One has no right to have *oyer* of a record, as of an original writ. 1 T. R., 150. 5 Comp. Dig., 467.

The defendant is not entitled to *oyer* of the *original record*, and if he prays oyer of it, the plaintiff may proceed without taking notice of it. Douglass, 227, 477.

(1) A *scire facias* upon a recognizance issues after such recognizance is made a record, and oyer of it is not demandable; if the writ misdescribes the record, the proper plea is *nul tiel record*. *S aten* v. *The People*, 21 Ill., 28.

If a demurrer craves *oyer* of an instrument, it must be set out in *haec verba*, or the declaration will be judged as it stands. *Young* v. *Campbell et al.*, 5 Gilm., 83.

In order to take advantage on demurrer, of a variance, between the note set out in the declaration, and the copy of the note fi ed with the same, *oyer* shou'd be *craved*, and the note set out in *haec verba* in the demurrer. *Bogardus* v. *Trial*, 1 Scam., 63.

To make a copy of a note, filed with a declaration, a part of the record for any purpose, *oyer* must be craved *Sims* v. *Hugsby*, post. See *Harlow* v. *Boswell*, 15 Ill., 57. *Collins* v. *Ayres*, 13 Ill., 362.

Where a judgment is declared on without a profert, no *oyer* can be had. *Hall* v. *Williams*, 8 Greenl., 434.

In Connecticut, *oyer* must be given of the record of the superior court, when required. *Williams* v. *Perry*, 2 Root, 462.

The proper mode of obtaining *oyer* is by prayer entered on record, to which the opposite party may counterplead, and thereby have a decision of the court whether *oyer* is to be given or not. *Pendleton* v. *Bank of Kentucky*, 1 Monroe, 171.

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BELTHAZAR P. MELLICK, Plaintiff in Error, *v.* JUSTUS DE SEELHORST, Defendant in Error.

ERROR TO MADISON.

Any evidence that tends to prove a promise to take a case out of the statute of limitations, should be left to the jury with instructions from the court as to the law thereon.

An unqualified promise to pay a debt barred by the statute will take it out of it. Where the promise to pay is accompanied with a qualification, it rests with the plaintiff to do away the qualification. An acknowledgment that the debt is still due and subsisting, is sufficient. So also proof of an actual payment of part of the debt, will be sufficient evidence for the jury to infer a promise to pay the balance.

Opinion of the Court by Justice LOCKWOOD. This was an action of *assumpsit* brought in the Madison circuit court. The plaintiff below declared on a promissory note, to which the defendant plead the statute of limitations, and the plaintiff replied a promise within five years. On the trial of the cause, after the plaintiff had adduced his proof, the court directed the jury "to return a verdict for the defendant." To this opinion the plaintiff excepted, and the cause is brought into this court by writ of error. Several errors have been assigned, but the court only deem it necessary to notice one of them, and that is, whether the court ought not to have permitted the evidence to go to the jury without the direction.

On this point we are of opinion that the circuit court erred in not permitting the evidence to go to the jury, with instructions as to the law arising on the case, and then left the jury to decide whether the proof came within the rule.

The case of *Lloyd* v. *Maund*, 2 Durnford & East's Reports, 760, is an authority to show that the evidence ought to have been left to the jury.

As it will be necessary for this cause to go to another jury, the court feel themselves called upon to lay down what they consider the best construction of the statute of limitations in relation to the cases taken out of its operation.

In doing so, however, the court labor under much embarrassment from the great number of conflicting decisions that are to be found in the books of reports. These decisions are of so irreconcilable a character, that this court are at liberty to extract from all the cases such rules as will, in their opinion, most conduce towards effecting the intentions of the legislature in passing the law. An unqualified promise to pay the debt, has, by all the decisions, been held sufficient to take the case out of the statute. Where the promise to pay

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is accompanied with a qualification, or upon a contingency, the court are of opinion that the proof rests upon the plaintiff to do away the qualification, or show that the contingency has happened. Where the acknowledgment of the party is that the demand is still due and subsisting against him, this will be sufficient to infer a promise to pay. So, also, proof of an actual payment of part of the debt, by the party, or his authorized agent, will also be sufficient evidence for the jury to infer a promise to pay the balance. The court give no opinion whether the evidence contained in the bill of exceptions was sufficient for the plaintiff to recover. If a party wishes to refer the eviden·· to the court, it ought to be done by a demurrer to evidence.

The judgment is reversed with costs, and the cause remanded to the circuit court, and a *venire de novo* awarded in that court. (*a*) (1)

Judgment reversed.

Cowles, for plaintiff in error.

McRoberts, for defendant in error.

(*a*) An acknowledgment of the original justice of the claim is not sufficient to take the case out of the statute; the acknowledgment must go to the fact that it is still due. 8 Cranch, 72. *Clementson* v. *Willams.*

An acknowledgment which will revive the original cause of action, and remove the bar created by the statute, must be unqualified and unconditional; it must show positively that the debt is due in whole or in part. *Wetzel* v. *Bussard*, 11 Wheat., 309.

Vide *Kimmel* v. *Schwartz*, post, and the cases there referred to.

(1) Proof that the defendant had promised to pay a debt barred by the statute of limitations, is insufficient without evidence of the original consideration of the indebtedness. The new promise only removes the bar, and leaves the case to be proved, as though the statute had not been pleaded. *Kimmel* v. *Schwartz*, post.

The promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption, beyond the express words of the promise. Ibid.

A defendant stated to an agent of the plaintiff, that he thought the account shown to him by the agent was correct, and he would see the plaintiff and settle with him. This is not sufficient to take the case out of the statute. There was no promise to pay, express or implied. It is not enough that the party admitted the account to be correct, or that he got the things charged, or executed the note sued on; there must at least be an admission that the debt is still due and unpaid. *Ayers* v. *Richards*, 12 Ill., 148.

A promise to pay may be implied, from an unqualified admission that the debt is due and unpaid, nothing being said or done at the time, rebutting the presumption of a promise to pay. Ibid.

In Keener, ex'r., &c. v. *Crull & wife*, 19 Ill., 189, the evidence was, "that the defendant's testator, who was the father of the *feme covert* plaintiff, in a conversation with one Longwith, said, he had agreed to give his daughter (plaintiff below,) two hundred dollars a year for her work, and he had not paid her yet, and she had gone to Ohio." The evidence also showed she had worked for her father five years. On this evidence the court said: "The new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay

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MARY ANN MEARS, Ex'rx of WM. MEARS, Plaintiff in Errror, *v.* WM. MORRISON, Defendant in Error.

ERROR TO RANDOLPH.

The usual and appropriate mode of executing a deed or other writing, by an agent or attorney is for the agent or attorney to sign his principal's name, and then his own, as agent.

Opinion of the Court by Chief Justice WILSON. This is an action of covenant, brought by the plaintiff in error, against the defendant, upon the following obligation:

"I do hereby sell, deliver over, and transfer to William Mears, the time that a negro girl named Harriet, and her children, had to serve William Morrison, she being a daughter of a servant of said Morrison, indentured under the laws of this territory concerning the indenturing of slaves, for the sum of three hundred dollars, payable in twelve months, with interest from this date. Witness my hand and seal, 17th June, 1818.

GUY MORRISON, *Agent.*" [SEAL.]

Upon the trial, a verdict was found for the plaintiff in error and upon motion of the defendant below, the court arrested the judgment, upon the ground that the instrument declared on created no liability on William Morrison. The correctness of this opinion is the only point to be decided.

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it, at the time acted upon and acceded to by the creditor, the promise. Like any other promise, having legal force and sanction, it must be made to the party seeking its benefits, or to some one authorized to act for him. A promise to a stranger is insufficient. Tested by these rules, the plaintiff can not recover. The language of the defendant's testator was used to a stranger, having no concern in the matter, or right to act for the party in interest; the amount of the debt was not named, or in any manner indicated, nor was there any language unequivocally importing a present intention or undertaking to pay."

An indorsement of a partial payment on a note, made by the holder without the privity of the maker, is not, of itself, and uncorroborated, sufficient evidence of payment to repel the defense created by the statute of limitations. *Connelly* v. *Pearson*, 4 Gilm, 110.

Although the statute of limitations may not, in terms, apply to courts of equity, yet by analogy equity will act on the statute, and will refuse the relief when the bar is complete at law. *Manning* v. *Warren*, 17 Ill., 267.

Where a trust fund continues with the trustee, it is not subject to be barred by the statute of limitations, as between trustee and *cestui que trust*. *King* v. *Hamilton*, 16 Ill., 190.

When the statute once commences running, it continues to run unless saved by the statute. *The People* v. *White et al.*, 11 Ill., 350, and cases there cited. *Chenot* v. *Lefevre*, 3 Gilm., 637. *Vanlandingham* v. *Huston*, 4 Gilm., 128.

Cases within the reason, but not within the words of the statute, are not barred by it. *Bedell* v. *Jenney*, 4 Gilm., 207, and numerous authorities cited in the opinion of the court.

The statute of limitations should be specially pleaded to all actions of a personal nature. *Gebhart* v. *Adams*, 23 Ill., 397.

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Something has been said by counsel, as to the sufficiency of this instrument to impose a liability upon any one. Upon this point the court will give no opinion; it is unnecessary, and indeed, it would be improper to determine upon the rights or obligations of persons not parties in the case. Has Morrison, then, bound himself in person or by his agent? The covenant is in the first person. The signing, by Guy Morrison, is also in the first person. In no part of the instrument is William Morrison referred to as covenanting, not even by recital.

What is the grammatical construction of the language used in the covenant? It can not be that it is the defendant who covenants, when the covenant commences in the first person, and is signed, not by him, but by Guy Morrison, agent. By no construction of language, or principle of law, can the term *agent*, affixed to the name of Guy Morrison, be intended to import that he is the agent of William Morrison. The usual and appropriate mode of signing a deed by an agent or attorney, is for him to sign his principal's name, and then to sign his own, as agent. Here, the seal is clearly not the seal of William Morrison, but of another person. There are numerous cases to be found in illustration of this rule. It was so decided in the cases of *White* v. *Cuyler*, 6 Term Reports 176. *Wilks* v. *Back*, 2 East, 142. 4 Mass. Rep., 595. 5 Mass. Rep., 299; and 2 Wheat., 56. *Duvall* v. *Craig*. We are clearly of opinion that the circuit court decided correctly in arresting the judgment, and that its judgment ought to be affirmed. (*a*) (1)

Judgment affirmed.

J. & T. Reynolds, for plaintiff in error.

Breese, for defendant in error.

(*a*) A drawer of a bill may be liable personally, though known to all parties to be agent, as where he signs his name without any qualification. 11 Mass. Rep., 54.

One who covenants for himself, his heirs, &c, and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describes himself in the deed as covenanting for, and on the part and behalf of, such other person. *Appleton* v. *Binks*, 5 East., 148.

(1) Approved in *Graham* v. *Dixon et al.*, 3 Scam., 117. *Pensonneau et al.* v. *Bleakley et al.*, 14 Ill., 16. *Gray et al.* v. *Gillilan et al.*, 15 Ill., 454.

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MICHAEL JONES, Plaintiff in Error, *v.* LLOYD, SERRILL and OAKFORD, Defendants in Error.

ERROR TO GALLATIN.

A judgment in damages, where the action is in debt, is erroneous, and upon a verdict rendered for eight hundred dollars in damages where the action is debt, no judgment can be rendered.

In such case the judgment ought to have been for the amount of the debt found to be due, and the damages sustained, which damages would be the amount of interest on the sum found by the jury as the debt.

Opinion of the Court by Justice SMITH. This is an action of debt on a sealed negotiable note, assigned to the defendants in error. The declaration sets forth the amounts of the note as the debt due, and alleges that the plaintiffs sustained damage, by the non-payment thereof, to fifty dollars.

The defendant pleads several pleas, which it is not necessary to enumerate. Issues of facts were made up, the cause tried, and a verdict rendered for the plaintiffs, for eight hundred dollars and fifty cents, without specifying whether in debt, or damages. Upon this verdict, a judgment was entered up as follows: "It is therefore considered by the court, that the plaintiffs recover against the said defendant, eight hundred dollars and fifty cents damages, by the jurors aforesaid, in their verdict aforesaid, assessed, and also their costs," &c. Under the sixth assignment of errors, which is the only one it is considered necessary to notice, it is contended, the action being in debt, and the judgment in damages, that the judgment is improper, and wholly irregular. We think the judgment to be evidently erroneous. It ought to have been for the amount of the debt found to be due, and the damages sustained, which damages would have been the amount of interest on the sum found as the debt by the jury. (1)

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(1) Affirmed in *Guild* v. *Johnson*, 1 Scam., 405. *Jackson* v. *Haskell*, 2 Scam., 565. *Pattison* v. *Hood*, 3 Scam., 152. *Heyl* v. *Stapp et al.*, id., 95. *Frazier* v. *Laughlin*, 1 Gilm., 358. *Wilmans* v. *Bank of Illinois*, id., 671. *Mager* v. *Hutchinson*, 2 Gilm., 266. *Wilcoxon* v. *Roby*, 3 Gilm., 476. *O'Conner* v. *Mullen*, 11 Ill., 59. *Knox* v. *Breed*, 12 Ill., 61. *March* v. *Wright*, 14 Ill., 248. *Bowman* v. *Bartley*, 21 Ill., 30.

In a debt on a penal bond, the jury should find the amount of the bond as debt, and the damages separately. The court then renders the judgment for the amount of the debt, to be discharged on the payment of the damages. *Frazier* v. *Laughlin*, 1 Gilm., 358. *Toles* v. *Cole*, 11 Ill., 563.

In an action of debt, where the finding is only for a part of the debt due, upon which a judgment is rendered, it is not necessary to specify which part is debt and which is damages; it is all debt. *Lucas* v. *Farrington*, 21 Ill., 31.

Where it can be ascertained from the record what part is debt and what damages, the supreme court will enter the proper judgment. *Wilmans* v. *Bank of Illinois*, 1 Gilm., 671.

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The verdict of the jury is therefore an improper finding and a judgment is incapable of being rendered thereon.

The plaintiff should, at the trial, have required a correction of the verdict, and had the same put into form. Even then, the plaintiffs could not have recovered the whole amount found by the jury, that amount exceeding the amount of the note declared on, and the damages, as laid in the declaration. It is certain that the plaintiffs can not recover more than their declaration covers, for this would be to award him more than he asks himself. In cases of torts, where a jury have found more than the amount of damages laid, the courts have refused, on application, to permit the plaintiff to enlarge the amount of damages laid in his declaration, so as to avail himself of the verdict, and enter judgment thereon. Such has been the decision of the supreme court of New York. The practice is, where the amount found by the verdict exceeds the amount in the declaration, to enter a *remittitur* for the excess. This not having been done, and the judgment being in damages, is clearly erroneous. The remaining question is, whether this court has the power to afford the means of correcting it? It has been the practice, in the courts of Kentucky, in cases very analogous to the present, for the party desirous of having the error amended when the proceedings are in the appellate court, to suggest a diminution of the record, and ask for a *certiorari* to the circuit court, to certify the diminution, and apply to the circuit court for leave to amend the proceedings in the mean time, so that, when the *certiorari* is returned, the error will appear to have been corrected in the court below. In this case, however, such a course, if it had ever been pursued, would have been unavailing, as it is not perceived how the circuit court could have either amended the verdict, or determined what portions of it were the debt, and what the damages, or what sum should have been relinquished. The error being then incurable, the judgment must, for this cause, be reversed, and the cause remanded to the circuit court of Gallatin county, with directions to award a *venire de novo*. The plaintiffs recover their costs.

Judgment reversed.

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VINCENT and BERTRAND, Appellants, *v.* SAMUEL MORRISON, Appellee.

APPEAL FROM ST CLAIR.

A special verdict must find facts, not the evidence of facts.

In a sale of land, where there is no fraud, and the vendee has taken a deed with covenants, the same will be considered a sufficient consideration for notes executed for the purchase of money of said land.

In relation to covenants, the general rule is, that an administrator has no power to charge the effects of his intestate by any contract originating with himself. and his contracts, in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis.*

Opinion of the Court by Justice LOCKWOOD. This is an action of debt on a sealed note, brought by Morrison in the St. Clair circuit court, to recover the sum of $466. The defendants pleaded four several pleas, to which the plaintiff below demurred; and the court decided that all the pleas were insufficient, and thereupon the following order was entered, to wit: "On motion of defendant's attorney, leave is given to plead on the third Monday of July next, and the cause continued to the next term;" at said term, defendants filed four new pleas, which were severally traversed, and issues joined. On the trial, a special verdict was taken, comprising the facts relied on by defendants to bar the action. On the special verdict, the court below rendered judgment for Morrison, and the cause is brought into this court by appeal. A number of errors have been assigned, but the court do not deem it necessary to examine them all in detail. In relation to the first set of pleas, they are of opinion that by the motion to plead generally, they were abandoned, and can not be relied on as subsisting defenses to the action. The second set of pleas, being all traversed, the special verdict presents all the questions that the court are called on to decide.

In order to enable the defendants below to get at their defense, it was necessary for them to prove in what the consideration of the note consisted; all we find in the special verdict on that point, is as follows: "We further find, that on the 4th day of October, 1821, the said S. Morrison and Olive Morrison executed the deed of conveyance for the house and lot, to the said Michael Vincent, set forth in the third plea of the said defendants, and that the same was delivered to him, and he accepted it, and that the said note or writing obligatory was made to the said Samuel at the same time, and that they are in the handwriting of the said

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John Hay." In relation to special verdicts, it is a general rule that they must find facts, and not merely the evidence of facts. Jac. Law Dict., Title "*Verdict.*" (1) In this verdict, there is no evidence whatever that the note was executed as the consideration for the deed. It is true that facts are stated, that possibly might have authorized the jury to have presumed the note was given, as the consideration for the deed. But as the jury have not found the fact, it would probably be a stretch of power in the court, if they should conceive the deed and note executed in consideration of each other. As the special verdict is defective, it would perhaps be the duty of the court to send back the case to the circuit court, with directions either to amend the special verdict, if it could be done, or award a *venire de novo.* Yet as the court, upon an inspection of the whole verdict, are satisfied that plaintiff below is entitled to recover, admitting the fact to exist, that the note was executed in consideration of the execution of the deed mentioned in the pleadings, sending back the case would only be attended with costs, without any benefit to the parties.

The special verdict does not find that Morrison and wife were guilty of any fraud in the sale to Vincent, and the law will not impute fraud to them. In the case of *Abbot* v. *Allen executor of Allen*, 2 Johns. Chan. Cases, 159, it was decided by the court of chancery, that "a purchaser of land, who had paid part of the purchase money, and given a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect of title; there being no allegation of fraud in the sale, nor any eviction, but must seek his remedy at law, on the covenants in his deed." The same point is also decided in the case of *N. J. & S. Bumpas* v. *Platner, Bay and Underwood*, 1 Johns. Ch. Cases, 213. In the case under consideration, the verdict finds that one of the defendants received a deed from Morrison and wife, which contains a variety of covenants—that Vincent entered into possession of the house and lot, conveyed by said deed, and has continued to live in it

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(1) A special verdict, to enable the court to act on it, must find facts, not merely state the evidence. *Brown* v. *Ralston*, 4 Rand., 504. *Henderson* v. *Allen*, 1 H. and M., 235. *Seaward* v. *Jackson*, 8 Cowen, 405. *Laframboise* v. *Jackson*, id., 589. *Thompson* v. *Farr*, 1 Speers, 93.

The presiding judge may authorize the jury to find specially on any point arising at a trial. *Dyer* v. *Greene*, 10 Shep., 464.

A special verdict may be found by consent of parties, or by the direction of the judge, or at the discretion of the jury, but can not be claimed of right by one party. *Thompson* v. *Farr*, 1 Speers, 93.

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ever since, and still is in the possession of the same. Upon the principle decided in the above cited cases, even a court of equity would not relieve, although the title was defective. The party having thought proper to take covenants to secure his title, he must resort to them in the first instance. (2) It

(2) The principle is well settled, that where a suit is brought on a note, a plea that the consideration of the note was an agreement to convey certain lands—that the conveyance has not been made, and that the payee has no title to the land, is a good defense to the note. *Tyler* v. *Young et al.*, 2 Scam., 444. *Mason* v. *Wait et al.*, 4 Scam., 135. *Gregory et al.* v. *Scott*, id., 393. *Duncan et al.* v. *Charles*, id., 566. *Hall* v. *Perkins*, id., 549. *Davis* v. *McVickers*, 11 Ill., 329. But where the conveyance has actually been executed, it is not by any means clear that such is the rule. In New York, (and this appears to be the rule in most of the states,) if a purchaser who has a deed containing the usual covenants, has been evicted, he may, in an action by the grantor for the purchase money, show the eviction as a defense to the suit. *Lamerson* v. *Marvin*, 8 Barbour's S. C. Rep., 11, and cases there cited. *Hoy* v. *Talieferro*, 8 Smedes and Marshall, 727. *Clark* v. *Snelling*, 1 Carter, 382. *Wilson* v. *Jordon*, 3 Stewart and Porter 92. Rawle on Covenants for Title, 652. Where, however, there has been no eviction, though the evidence shows a want of title in the grantor at the time of making the conveyance, it is not so well settled, and the authorities are conflicting. *Frisbie* v. *Hoffnagle*, 11 Johns., 50, was one of the first prominent cases on this subject. In that case the defendant, in an action on two notes given for the purchase money of land sold with covenants of warranty, proved that the land had subsequently been sold under a judgment against the plaintiff, and a sheriff's deed made to the purchaser, but the defendant had not been actually evicted or disturbed in his possession. The court said: "The consideration for the note has entirely failed, for the defendant has no title, it having been extinguished by the sale under the judgment. Here is a total, not a partial failure of consideration; for although the defendant has not yet been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the mesne profits." This decision, it is said, has been repeatedly overruled; but the principal objection to it has been that there was no eviction. It was however approved in *James* v. *Lawrenceburg Ins. Co.*, 6 Blackford, 525, and *Cook* v. *Mix*, 11 Conn., 438. In *Scudder* v. *Andrews et al.*, 2 McLean C. C. Rep., 464, McLean, J., said: "If the plaintiff had no title or claim to the land, which is asserted by the plea and admitted by the demurrer, the defendant has a right to set up that fact as a defense to an action on the note. Why should he be driven to his action on the warranty, if a warranty deed were given, of which, however, there is no evidence?"

In *Tallmadge* v. *Wallis*, 25 Wendell, 113, Walworth, Chancellor said: "The question whether a total failure of title, upon a conveyance with warranty, is a good defense to a suit upon the notes given for the purchase money, is one upon which judges have entertained different opinions." Again, after speaking of an actual eviction so that the claim to damages would be equal to the full amount of the purchase money: "In such a case I can see no good reason why the defendant, to avoid circuity of action, should not be permitted to plead such total failure of consideration as an absolute bar to the suit, in the same manner as if the note or bond had been given upon the sale of a horse warranted sound, which turned out to be unsound and entirely valueless."

On the other hand, in *Lamerson* v. *Marvin*, 8 Barbour's S. C. R., 11, it was held, that as the defendant had received the possession from his grantor, and still retained it, until he had been evicted or compelled in some way to recognize the title of the person in whom it was alleged to be, he should not be permitted to draw in question the title of his grantor, Rawle says, in Covenants for Title, 652, after reviewing the New York decisions: "From the foregoing cases, it would seem to be settled in New York, that unless there has been an eviction, actual or constructive, of the whole subject of the contract, no defense to payment of the contract price can be set up in a plea in bar." The cases referred to in the opinion of Judge Lockwood, and in the note of Judge Breese, are to the same effect.

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was, however, urged on the argument, that the covenants contained in the deed, were not personal covenants, but covenants in the character of agents. In order to ascertain how far it was the intention of Morrison to bind himself by this deed, it will be necessary to examine the deed itself for the terms of the covenants. By the deed, Morrison and wife, in the capacity of administrators, covenant that the intestate died seized; that said Olive Morrison, administratrix, was duly licensed to make sale of the premises; that it was necessary to sell the same for the purpose of paying the debts of the intestate; that previous to the sale, she took the oath prescribed by law; that she gave public notice in the newspaper printed at Edwardsville, according to the directions of the law in such case made and provided, and of the court; and that one François Olivier Valois offered the most for said premises, which were struck off to him for the sum of four hundred and sixty-six dollars. They also further covenant in their said capacity, that the premises are free from incumbrance, and that they will warrant and defend the same forever, against the claim or demands of all persons in law and equity, and Morrison and wife sign and seal the deed, without the addition of their representative character. Under these covenants, it was urged, that Morrison was not person-

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See also *Dix* v. *School District*, 22 Vermont, 316. *Oldfield* v. *Stevenson*, 1 Carter, 153. *Clark* v. *Snelling*, id., 382. *Wheat* v. *Dobson*, 7 Arkansas, 699.

In our own courts the question was raised once incidentally and once directly, since the decision of the case of *Vincent* and *Bertrand* v. *Morrison*. In *Furness* v. *Williams et al.*, 11 Ill., 229, in an action brought to recover the purchase money, the defendant pleaded that a part of the land conveyed had been sold for taxes—that the time of redemption had expired—and that therefore the consideration to that extent had failed. TREAT, C. J., said: "On every principle of correct pleading, he (the defendant,) is bound to set forth the proceedings under which the lot was sold, so that the court can see that the covenant has been broken; or he must make the general averment that the sale was legally made, and the title thereby divested." Probably we might infer from this, if the matter had been properly pleaded, the court would have held it a good defense; but the question not being directly before them, no further opinion is expressed by the court.

The other case referred to is, *Slack* v. *McLagan*, 15 Ill., 242. There the court held it a "sufficient defense to an action upon a note to set up a breach of a covenant of warranty in a deed of land, for the price of which the note was given." The opinion of the court was delivered by SCATES, Justice, and in it no allusion is made to the case of *Vincent* and *Bertrand* v. *Morrison*, and the only authorities referred to are *Gregory et al.* v. *Scott*, 4 Scam., 392, and *Tyler* v. *Young et al.*, 2 Scam., 446. These two cases we respectfully submit, do not sustain the position of Judge SCATES. In each case no conveyance had been made; the defendants held only bonds for title, and the pleas alleged that the titles were defective, or that the plaintiffs had no title, and therefore the consideration of the notes sued on had failed. We have before attempted to show that in such cases our courts have invariably held it a good defense; but in none of those cases, except the case of *Slack* v. *McLagan*, has the question under consideration been decided by them. We therefore assert, from this review of the authorities, that it is not a settled principle, that such defense can be made where there has been a conveyance with covenants of warranty, and no eviction.

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ally liable, but that the assets of the intestate were the only fund which could be reached to pay any damages that might arise from the breach of the covenants in the deed. That the assets of the intestate can not be bound to answer a breach of the most of these covenants, is apparent from the nature of the covenants. Most of these covenants are, that the administratrix has done her duty as administratrix. If an administrator, in the course of his administration, is guilty of any improper conduct, the estate is not answerable for such malfeasance. In relation to covenants, the general rule is, that an administrator has no power to charge the effects of the intestate, by any contract originating with himself; and it seems from the current of decisions, that his contracts, in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis*. The whole doctrine relating to the liability of administrators, covenanting in their capacity of administrators in the sale of real estate, was very elaborately discussed by the supreme judicial court of Massachusetts, in the case of *Sumner*, *administrator* v. *Williams and Williams*, 8 Mass. Rep., 162. In that case, the administrators, in their capacity of administrators, covenanted that, as administrators, they were lawfully seized of the premises; that they were clear of all incumbrances, &c.; that they, in their said capacity, had good right to sell, &c., and that as administrators, they would warrant and defend the premises, and then signed and sealed the deed as administrators. The court held the administrators personally liable for a breach of these covenants. It is to be remarked, that a very material difference exists between the case in Massachusetts, and the one before this court, in this, that in the case in Massachusetts, there were no covenants that the administrators had proceeded in all respects according to the directions of the statute which, as the court has before observed, must from their very nature, be personal covenants. The court infer from the pleadings and verdict, that the *gist* of the defense to the action below, consists either in the fraud of the plaintiff, or a breach of the covenants—on the part of Morrison and wife, that she had proceeded according to law in making sale of the premises mentioned in the deed. In conclusion, therefore, the court are of opinion first, that there was a good consideration for the note, to wit: the deed with covenants; second, that there has been no failure of the consideration, because Vincent received the possession of the premises contracted for, and has remained in the quiet possession thereof, until the trial of the cause; third, that the verdict does not find that any fraud was prac-

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ticed on the defendants; and lastly, if there has been any breach of any of the covenants mentioned in the deed, it is no bar to this action, but the party must resort to his covenant for damages. The judgment of the court below is affirmed. (*a*)

Judgment affirmed.

Blackwell, for appellants.

Cowles, for appellee.

WM. C. GREENUP and CLEMENT C. CONWAY, Plaintiffs in Error, *v.* PHILANDER WOODWORTH, Defendant in Error.

ERROR TO RANDOLPH.

In an action on a judgment against administrators, suggesting a *devastavit*, a judgment by default admits the truth of the allegations in the declaration, and a jury of inquiry is not necessary to ascertain the damages.

Opinion of the Court by Chief Justice WILSON. This is an action of debt against the plaintiffs in error, upon a previous judgment against them as administrators. The declaration sets forth the previous judgment against them, and alleges that goods and chattels to the amount of said judgment came to their hands to be administered, and that they wasted them. Judgment was suffered to go by default, the court ascertained

(*a*) Where a special verdict is imperfect by reason of any ambiguity or uncertainty, so that the court can not say for which party judgment ought to be given, a *ven re de novo* should be awarded. 2 Mason, 31. 11 Wheat., 415.

Where a promissory note is given for the purchase of real property, the failure of consideration, through defect of title, must be total, to constitute a good defense to an action on the note. *Greenleaf* v. *Cook*, 2 Wheat., 13.

Any partial defect in the title is not inquirable into in an action on the note in a court of law, but the party must seek relief, if any where in chancery. *Ibid.*

The guardian of an insane person who had given promissory negotiable notes for the proper debt of his ward, and expressed in the notes that he did it *as his guardian*, was held bound in his private capacity. *Thatcher* v. *Dinsmore*, 5 Mass. Rep., 299.

If a deed contain the usual covenants, the vendee can not set up either a partial or total failure of title against the vendors' suit for the purchase money. *Phelps* v. *Decker*, 10 Mass. Rep., 279. So in Maine, 1 Greenleaf, 352.

In Pennsylvania and South Carolina a defect in the title or quality of the land may be given in evidence against a demand upon a bond or note for the consideration money of the deed. 1 Searg. and Rawle, 438. *Hart* v. *Porter*, 5 ibid., 204. *Thompson* v. *McCord*, 2 Bay 76. *Sumpter* v. *Welch*, ibid., 558.

A covenant by an executor on a conveyance of land of his testator, in his capacity of executor, "and not otherwise," is not binding on him in his individual capacity, although it may not be binding on the estate of the testator. *Thayer* v. *Wendell*, 1 Gallison, 37. Coxe's Dig., 219.

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the amount of interest, and rendered judgment for the principal, interest and costs. The rendition of this judgment is assigned for error. The plaintiff's counsel contends, that a jury ought to have been impanneled to ascertain the amount of assets that came to their hands, and also the fact of a *devastavit*. These are certainly material allegations in the defendant's declaration, and if the plaintiffs here, had, by their pleadings, traversed them, the intervention of a jury would have been necessary. This, however, they have not done. The judgment by default, then, admits the truth, and must conclude them. Upon a judgment by default, in an action of *assumpsit*, or covenant, it is usually necessary to have a jury to inquire of damages, but it is never necessary upon a default in an action of debt, unless required by the plaintiff. In this form of action, the plaintiff recovers the sum *in numero*, and it is the constant practice of the court to tax the damages occasioned by the detention, as well as the costs of suit. 6 Johns. Rep., 287. The court is therefore of opinion that there was no error in the court below, and that the judgment be affirmed with costs. (1)

Judgment affirmed.

Young, for plaintiffs in error.

Baker, for defendant in error.

JONATHAN COBB, Plaintiff in Error, *v.* D. INGALLS, Defendant in Error.

ERROR TO MORGAN.

Motions, demurrers, &c., should be determined by the court, in the order in which they are made, and a demurrer, while a motion to dismiss is undisposed of, is a waiver of the motion, and a plea of the general issue, the demurrer being undisposed of, is a waiver of the demurrer.

Opinion of the Court by Justice SMITH. Three grounds are relied on by the plaintiff in error, for reversal of the judgment of the circuit court:

1. That the motion to dismiss the cause ought to have been acted on by the circuit court;

2. That permitting the plaintiff to amend his declaration, before acting on such motion, was erroneous;

(1) See note to *Biggs e. al.* v. *Postlewait et al.*, ante, p. 198.

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3. That the court should have decided the demurrer before the issue in fact was tried.

The untechnical manner in which the record has been made up is calculated to lead to some confusion in the examination of the real merits of this case. As far, however, as we can give to it a fair interpretation, it would seem that the defendant, without assigning any grounds for cause of dismissal, upon the plaintiff's being permitted to amend his declaration, abandoned his motion, and filed a general demurrer, and without insisting on a decision of the demurrer, filed a plea of the general issue. We can not doubt that this demurrer to the declaration was a waiver of his motion to dismiss the cause, but whether it was or not, the grounds of that motion, not appearing on the record, can not, of course, be inquired into. By pleading in chief the general issue, the defendant equally waived his demurrer. If the causes of demurrer were thought by his counsel to have been sufficient, a decision on the demurrer should have been insisted on. Had the court refused, as was suggested on the argument, to decide the questions raised by the demurrer, the defendant should have rested his case, and not have plead to the merits. The court would then have been compelled to decide the question of law, and the defendant, if not satisfied therewith, would have had the opportunity of having that opinion reviewed in this court. He, however, thought proper to waive that right, and thereby conclude himself by a trial on the merits. The jury rendered a verdict against him, and as there is no irregularity therein, we are bound to say that the judgment of the circuit court must be affirmed with costs. (1)

Judgment affirmed.

(1) See note to *Beer et al.* v. *Philips*, ante, p. 44.

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WILLIAM CLARY, Appellant, *v.* THOMAS COX, JOHN DURLEY, and THOMAS M. NEALE, Appellees.

APPEAL FROM SANGAMO.

It is too late, after a judgment has been rendered on a bond, and *fieri facias* issued, to object that the party did not sign the bond. It is therefore erroneous to quash an execution issued on such judgment upon an affidavit affirming the non-execution of the bond.

Opinion of the Court by Justice SMITH. The only point made in this cause is, whether the circuit court erred in quashing the execution as to one of the defendants, upon his disclosure, by affidavit, of his belief that he did not execute the bond given, upon the granting of the writ of *certiorari*. This bond may be considered as analogous to the bond given, when an appeal is taken from the decision of a magistrate; and the circuit court seem so to have considered it, and entered up a judgment against the principal and the securities in the bond, upon which judgment the execution against the defendants was issued, as is provided in the case of appeals, by the provisions of the sixth section of the act defining the duties of justices of the peace and constables, approved 18th February, 1823. (*a*) It is not necessary to consider what the circuit court might have done, upon an application to have the judgment vacated, if they had been satisfied of the truth of the facts contained in the affidavit of Durley, one of the defendants, or what would have been the powers of the court in reference to such an application. The execution, it is not pretended, does not follow the judgment, nor is any regularity on its face complained of. The matters disclosed, relate to the non-execution of the bond only; it was therefore manifestly erroneous for the circuit court to have quashed the execution for the causes alleged. Until the judgment was set aside or vacated, the execution was entirely regular: the party has mistaken his remedy, if he has one. The judgment of the circuit court in quashing the execution must, therefore, be reversed, with leave to the plaintiff, in

(*a*) "Appeals from the judgment of justices of the peace shall be allowed, &c., *provided* the party shall first give a bond as is required by the second section of the act entitled "An act regulating appeals from justices of the peace, and further defining their duties," which bond so given shall have the force and effect of a judgment, and execution may be issued thereupon upon default of the condition of the said bond; a certificate of such bond having been given, shall be presented to the justice from the clerk of the circuit court; whereupon it shall be the duty of the justice to make out a transcript," &c. Laws of 1823, page 189, section 6.

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the court below, to sue out a new execution, if necessary: he is also entitled to costs.

Judgment reversed.

WILEY B. GREEN, appellant, *v.* MURRAY M'CONNELL, appellee.

APPEAL FROM MORGAN.

If the transcript of the record is not filed within the time required by law, and the rules of the court, the appeal will be dismissed.

W. Thomas, for the appellee, on the 6th of December, being the fourth day of the term, filed the transcript of the record in this cause, and moved the court to dismiss the appeal, on the ground that the appellant had failed to file the record within the time required by law, and cited Rev. Laws of 1827, page 319, and the 12th Rule of this court.

Per Curiam. The appellant having failed to file a transcript of the record, within the time required by the 12th rule of this court, it is considered that the appeal be dismissed, and that a copy of this order be certified to the clerk of the Morgan circuit court, and that the defendant recover his costs. (1)

Appeal dismissed.

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(1) See note to *Bebee* v. *Boyer*, post.

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THE COUNTY COMMISSIONERS OF RANDOLPH COUNTY, Plaintiff *v.* MICHAEL JONES, Defendant.

AN AGREED CASE FROM RANDOLPH CIRCUIT COURT.

An agreement to pay the county commissioners of Randolph county a certain sum of money, provided they will build a court-house on a particular lot, is not binding for want of mutuality, although they do build the court house on the lot designated, the obligation to pay and to build not being reciprocal. (1)

A promise to pay the county commissioners to do an act which they are required to do by law, is against public policy, and therefore void.

The county commissioners of a county have no power to contract only as a court. (2)

Opinion of the Court by Justice SMITH. This is an agreed case, and is submitted to the decision of this court by the following agreement:

"It is agreed by the parties in this suit, that a transcript of the record in this cause be taken to the supreme court for a decision of this question: Whether the instrument set forth in any count of the declaration, can be made the foundation of an action at law, taking all the statements and averments in the said counts to be true?

If decided in the affirmative, then judgment to be entered up in this court at the next term, for the amount of Jones' subscription, and costs accordingly. If decided in the negative, then the said suit to be discontinued, and that the respective parties enter their appearance at the next term of the supreme court."

The instrument declared on is in the following words:

"We, the subscribers, promise to pay to the county commissioners of the county of Randolph, or their successors in office, the sums annexed to our respective names, at such times, and in such proportions, as the said county commissioners shall require, for the purpose of defraying, in part, the expense of a court-house for the county of Randolph:

(1) Where a statute fixed the seat of government at Springfield, on condition that the inhabitants of Springfield should subscribe a certain sum of money towards erecting a state-house, and execute their bonds for the payment of the same: *Held*, that a bond given under such statute was founded on a sufficient consideration, and was valid. *Carpenter* v. *Mather*, 3 Scam., 374.

Where several persons sign a subscription paper, payable to a portion of their number, as trustees, whereby each one agrees to pay the sum set opposite his name, for the purpose of erecting a building, and the work is done by a mechanic, an action may be maintained by the trustees against any subscriber who refuses to pay his subscription. *Robertson* v. *March et al.* 3 Scam., 198.

In the last case referred to, the court make a distinction between that and the case of *Co. Com'rs, &c.*, v. *Jones*, but do not question that decision.

(2) The same principle held in *County of Vermilion* v. *Knight*, 1 Scam., 97.

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provided, the said court-house *shall be located* and erected on a lot proposed to be granted to the said county by the Hon. Nathaniel Pope."

The several counts in the declaration allege the consideration to have been the erection of the court-house on the proposed lot, and aver that the lot was granted to the commissioners—that the court-house was erected on the lot—and that the defendant was owner of lots and houses contiguous to such court-house; and assigns the breach a refusal to pay on demand.

The questions which present themselves for consideration, in determining the validity and effect of the writing, seem to divide themselves into three distinct propositions:

1. The authority of the commissioners to enter into the agreement, or to accept one of its character?

2. If they might legally do so, is the agreement mutual, or the obligation to pay, and to erect the building on the lot granted, reciprocal?

3. Is there a sufficient consideration to support a promise?

The authority of the commissioners to erect the court-house, is derived solely from the act of the 24th March, 1819. It is made their duty, by the second section of that act, to cause to be erected a suitable court-house in their county, and where the county funds are insufficient for that purpose, they are *required* to levy a tax, and collect it agreeably to the act creating a revenue for this state. They are also authorized by the same section, to enter into contracts for the *erection* thereof at any *regular* or *special* term of their court which they may appoint for that purpose. Have they pursued the powers thus granted to them?

Their authority would certainly seem to be confined to entering into contracts with individuals, for the performance of the workmanship of the building, not for the purpose of raising a fund to defray the expense thereof, because such expense is to be paid out of the fund they are authorized to raise by taxation.

The law granting the power to erect the court-house, and making it compulsory on them so to do, gave the *only* power to raise the means to defray the expense thereof; and by so designating the power, would seem to exclude all other modes. It can not be contended that the act has in any of its parts, recognized the authority to receive gratuities or donations, for the purpose of forming a fund, out of which the commissioners are to discharge the debts which they might incur for the erection of the building. It is true, they are nowhere forbidden, and although they might, with pro-

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priety, receive the donation of money for such an object, the inquiry whether a court of justice can legally enforce such an obligation, where the court are not authorized by law to enter into one of such character, is certainly a very different question.

To show more clearly that the second section of the act could not possibly authorize an agreement of the present character, the power to enter into the contract is to be exercised only at a *regular* or *special* term of the county commissioners' court. Here, it is evident, from the terms of the agreement, that the commissioners did not conceive themselves acting under that section, nor even as a court. If they had, they would most certainly have required the proposition to have been made at the sitting of the commissioners' court, and had it entered on their record; but instead of that, it is a mere agreement with the commissioners by that name, and really, one which they had no power to enter into out of court. The acceptance and assent of the commissioners to the agreement is their own act, which, in their character as commissioners, they had no power whatever to agree to, for it will not be denied, even admitting that they had no power in term time to agree, that out of term they have any authority to do any act whatsoever not expressly conferred on them by law. None having been conferred on them, it most clearly follows, that their act is altogether extra-judicial and void.

On the second point, the inquiry is presented, whether the agreement is mutual, or in other words, whether the obligation to pay and to erect the building, is reciprocal. For the reasons already stated, it will be perceived that no obligation was imposed on the county to erect the building on the lot proposed, and that neither the commissioners in their official or individual capacity, nor the county, could in any way be rendered liable for a refusal to do it. The obligation is neither mutual or reciprocal; it is a promise by one party only. No engagement of any character whatever is made to erect the building. The act is altogether on one side. Reverse the case, and suppose an action brought against the county for not erecting the building, could it be insisted that the county would have been at all liable for the assent of their commissioners under this agreement, if it were possible to suppose, from the writing, that such assent was given, and could it be liable even if agreed to, when the commissioners exceeded the powers and jurisdiction given to them by law? Clearly not. It is certain that to every valid contract there must be parties capable of contracting. Were the commis-

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sioners capable of contracting in the manner stated? If not then there is an end to the question. They could only contract in the manner authorized by law. This manner, most clearly, has not been pursued.

The law did not embrace the subject matter in the manner contracted for, if it be admitted that a contract was made, nor has the mode prescribed by law been observed. It therefore follows: First, that there is no evidence of a contract on the part of the county by their commissioners, and that therefore there is no mutuality of consideration, which is necessary to every contract. Second, that the commissioners had no power to bind the county in such a contract, and that *they* were bound by law to erect a court-house.

Third, That a promise to them to pay money for the performance of an act they were obliged to execute by law, in the faithful discharge of their official duties, is illegal and against public policy, and therefore void. To the third question, whether there is sufficient consideration to support a promise, it is not perhaps necessary to say more than this, that the act of erecting a court-house, which was a duty imposed by law, could not be a consideration to support a promise. The fact of its location near the lands of the defendant, is of course the only ground upon which it could be contended that a consideration could be raised, and even this vanishes, when it is perceived that such a consideration is altogether equivocal and imaginary. It might or might not be of value to the defendant. No data can be assumed by which it can be determined whether the erection of the building at the place proposed could benefit the defendant one cent or one hundred and twenty-five dollars, the amount of the subscription, nor whether it might not be an injury. It is not shown that any benefit has been experienced by the defendant from its location, nor injury sustained by the commissioners.

The consequences resulting from its location may have been an injury to other portions of the inhabitants, and upon the ground of public policy it is very questionable whether the court ought not to decide the contract void, for that reason alone.

I am of opinion that the present action can not be sustained on the writing set forth, and that the agreement of the parties to discontinue the suit, be carried into execution. (*a*)

(*a*) *Turn. Cor.* v. *Collins*, 8 Mass. Rep., 298. *Trustees of Phil. Lim. Academy* v. *Ezra Davis*, 11 Mass. Rep, 113. See *Religious Society in Whitestown* v. *Stone*, 7 Johns. Rep., 112.

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Separate opinion of Chief Justice WILSON.* I concur in the opinion that the agreement of the parties to discontinue this suit be carried into execution, but my opinion is founded upon the single objection, that it does not appear that the contract upon which suit is brought, was entered into by the county commissioners as a court; it is only in that character they are capable of contracting.

T. Reynolds, for plaintiff.

Baker, for defendant.

* Justice LOCKWOOD gave no opinion.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1828, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice.*
THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, } *Associate Justices.*

NANCE, a girl of color, Plaintiff in Error, *v.* JOHN HOWARD, Defendant in Error.

ERROR TO SANGAMO.

Registered servants are goods and chattels, and can be sold on execution. (1)
A poll tax is inhibited by the constitution of this state. (2)

Opinion of the Court by Justice LOCKWOOD. The point presented to the consideration of the court in this case, is whether a registered servant is liable to be taken and sold on execu-

(1) As the present constitution of this state does not permit slavery within the state, this decision is now of but little practical importance. The following points have, however, been decided by our courts, on the subject of slavery, some of which are of interest to the profession.

The constitution of Illinois prohibits slavery; therefore, negroes within its jurisdiction are presumed to be free. *Rodney* v. *Illinois Central Rail Road Co.*, 19 Ill., 42. *Bailey* v. *Cromwell et al.*, 3 *Scam.*, 71. *Kinney* v. *Cook*, id., 232.

A contract made in Illinois for the sale of a person as a slave, who is at the time in the state, and to a citizen of the state, is illegal and void. TRUMBULL, Justice, in *Howe* v. *Ammons*, 14 Ill., 29.

Slavery is the creation of municipal regulations in states where it exists, and such regulations have no extra-territorial operation or binding force in another sovereignty. *Rodney* v. *Ill. Cen. R. R. Co.*, *supra*.

The laws of other states recognizing slavery, being repugnant to the laws and policy of the institutions of Illinois, neither the law of nations, nor the comity of states, can affect the condition of a fugitive in Illinois, so as to give the owner any property in, or control over him, by force of any state authority. *Ibid.*

The remedy in matters connected with fugitive slaves, is to be found under acts of Congress, and in the courts of the United States. *Ibid.*

(2) The present constitution of Illinois has the following provision: "The

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tion? By the act concerning judgments and executions, approved January 17, 1825,* "all and singular, the goods and chattels, lands and tenements and real estate" of a judgment debtor, shall be liable to be sold on execution. The phrase, goods and chattels, means personal property in possession.

Before entering on this subject, it is necessary to lay down the true rule in relation to what kinds of property ought to be subjected to seizure and sale on execution. The dictates of honesty, as well as sound policy, require, as a general rule, that every description of tangible property of the debtor, should be liable to pay his debts, unless it be such articles of the first necessity, that the legislature, from motives of humanity to persons who have families, may reserve for their use. And such doubtless was the intention of the legislature, when they declared, "that all and singular the goods and chattels, lands and tenements and real estate," shall be sold on execution. The legislature, however, pursuing the dictates of an enlightened humanity, have, by the 19th section of the above recited act, reserved for the use of families, a variety of articles of personal property of the first necessity, from sale on execution. But registered servants are not among the reserved articles. Are then registered servants, goods or chattels, within the meaning of the statute? This is a question of mere dry law, and does not involve in its investigation and decision, any thing relative to the humanity, policy, or legality of the laws and constitution, authorizing and recognizing the registering and indenturing of negroes and mulattoes.

In order to ascertain the nature of the interest that the master possesses in his registered servants, it will be necessary to review the several statutes that have been passed by the legislature concerning them.

The first act, giving character to the interest of the master, is "An act concerning executions," passed 17th of September, 1807;† the 7th section thereof recites, "and whereas, doubts have arisen whether the time of service of negroes and mulattoes, bound in this territory, may be sold under execution," it was therefore enacted "that the time of service of such negroes and mulattoes may be sold on execution," &c. This section, taken in connection with its preamble,

general assembly may, whenever they shall deem it necessary, cause to be collected from all able-bodied free white male inhabitants of this state, over the age of twenty-one years and under the age of sixty years, who are entitled to the right of suffrage, a capitation tax of not less than fifty cents, nor more than one dollar each." Article 9, sec. 1, Constitution of 1848.

* Laws of 1825, p. 151.

† Rev. Code of 1807, page 188, vol. 1.

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must be considered as declaratory of what the law was, rather than introductory of a new rule. On the same day an act was passed subjecting "bound servants," with a variety of personal property, to taxation. By the third section of the "act concerning servants," passed also on the 17th of September, 1807, ‡ the benefit of the contract of service may be assigned by the master, with the consent of the servant, and shall pass to the executors, administrators and legatees of the master.

These three acts are all the statutes that have been found passed by the territorial legislature. These acts can bear no other construction than that the legislature considered this description of servants as property, for they rendered them liable to sale on execution, to be assigned by their masters with their consent, to pass to executors, administrators and legatees, and to taxation. By the 20th section of the 8th article of the constitution of this state,§ it is declared, "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." A poll tax would seem from this feature in the constitution to be inhibited. The legislature, however, it will be seen, by examining their several acts relative to revenue, have invariably taxed servants, not by poll, but "by valuation."

I refer to the acts passed 27th of March, 1819,‖ 18th of February, 1823,¶ and the 19th of February, 1827.** The 15th section of the last mentioned act, and which is the law now in force for "raising a revenue," is as follows: "Whenever, in their opinion, the revenue arising to the county from the tax on lands shall be insufficient to defray the county expenses, the county commissioners' court shall have power to levy a tax, not exceeding one-half per cent., upon the following descriptions of *property*, viz: On town lots, if such lots be not taxed by the trustees of such town, on slaves and indentured or registered negro or mulatto servants, on pleasure carriages, on distilleries, on stock in trade, on all horses, mares, mules, asses and neat cattle, above three years of age, and on watches with their appendages, and such other property as they shall order and direct." By this act, registered servants are expressly denominated property. Each of the execution laws, passed March 22d, 1819,†† and 17th of

‡ Rev. Code of 1807, vol. 2, page 647.
§ Rev. Laws of 1827, p. 39.
‖ Laws of 1819, p. 313, sect. 3.
¶ Laws of 1823, p. 203, sect. 3.
** Rev. Laws of 1827, p. 331.
†† Laws of 1819, p. 181, sect. 13.

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February, 1823,‡‡ contain the following provision, to wit: "That the time of service of negroes or mulattoes, may be sold on execution against the master, in the same manner as personal estate; immediately from which sale the said negroes or mulattoes shall serve the purchaser or purchasers for the residue of their time of service."

There is, however, no such provision in the act relative to executions passed 17th of January, 1825,§§ and which act repeals all former acts; and hence it is argued that the legislature intended in future that registered servants should not be subject to seizure and sale on execution. This inference would no doubt be correct, if these servants were only made liable to execution by express enactment of the legislature, but from the review of the legislation in relation to indentured and registered servants, I am inclined to the opinion that the legislature have always regarded them as property, and that the object of the legislature in expressly authorizing them to be sold on execution, was not to introduce a new rule, but to remove "doubts" that had arisen on the subject. If, then, the statutes concerning executions are only to be considered as declaratory of what the law was, then the omission of a similar provision in the act of 1825, can not be deemed decisive of the intention of the legislature. The intention must, therefore be sought in the "several acts *in pari materia* and relating to the same subject."

All these acts ought to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule applies, though some of the statutes may have expired, or are not referred to in the other acts. 1 Kent's Com., 433. By the 22d section of the act "concerning attachments," passed 24th of January, 1827,‖‖ authority is given to the sheriff, when he "shall serve an attachment on slaves, or indentured or registered colored servants, or horses, cattle or live stock," to provide sufficient sustenance for the support of such slaves, indentured or registered colored servants and live stock, until they shall be sold or otherwise legally disposed of, or discharged from such attachment."

There is no express provision in this statute to authorize a levy and sale of registered servants, but from this section no doubt can exist that the legislature acted upon the supposition that registered servants were regarded as property which might

‡‡ Laws of 1823, p. 173, sect. 9.

§§ Laws of 1825, p. 151.

‖‖ Rev. Code of 1827, p. 76.

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be seized and sold. And no good reason is perceived why these servants should be liable to attachments, and not be liable to sale on executions obtained by the ordinary prosecution of a suit. The proceeding by attachment, and by a common action, are intended to effect the same object, to wit: the sale of the debtor's property, in order to pay the creditor his debt. I have, therefore, come to the conclusion that indentured and registered servants must be regarded as goods and chattels, and liable to be taken and sold on execution. In support of this opinion, I refer to the case of *Sable* v. *Hitchcock*, 2 Johns. Cases, 79.

That case was this. In the state of New York they have an act by which, "in order to prevent the further importation of slaves into that state," it is enacted "that if any person shall sell as a slave within that state, any negro, or other person who has been *imported or brought* into that state after the first of June, 1785, he shall be deemed guilty of a public offense, and forfeit £100, and the person so imported or brought into that state shall be free." The plaintiff had been imported into New York after June, 1785, and after the death of the plaintiff's master, she was sold by her master's executors to defendant, against whom she brought her action to recover her freedom. The supreme court of that state decided, (and the decision was affirmed by the court of errors,) that a sale in the course of administration or by persons acting in *auter droit*, as executors, assignees of absent or insolvent debtors, sheriffs on execution, and trustees, would not be within the act, so as to subject the vendors to the penalty, or make the slave *free*. Judge Kent in delivering his opinion says, "while slaves are regarded and protected as property, they ought to be liable to an essential consequence attached to property, that of being liable to the payment of debts. If it is otherwise, the debtor is possessed of a false token, and the creditor is deceived." The analogy between the cases exists in several respects.

The masters, in each case, are, by law, secured in the services of the servants, in the New York case for life, and in this case for a period of years, but in each case the services are general and not restricted or limited to any particular trade or business. In neither case did the services arise out of any contract, or with reference to any special confidence reposed in the masters.

They were both slaves in the states from whence they were imported, and their services were held in the same manner that the services of absolute slaves are held, for the masters were entitled to all the fruits of their labor. The rights of

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the masters had no reference to the benefit of the servants; hence they are in every essential particular personal property, and subject to most of its attributes and liabilitles.

The only difference perceived between the two case, is, that *Sable*, upon being brought into New York, became a servant for life to her master, but not subject to transfer and sale by the act of her master, with or without her consent. But *Nance*, upon being brought into the territory of Illinois, and being registered, became a servant to her master until she should arrive "at the age of thirty-two years," and she is, by law, liable to be sold by her master upon her giving her consent in the "presence of a justice of the peace."

This difference can not operate to exempt *Nance* from the rule applied to the case of *Sable*, and particularly as this very difference regards *Nance* more in the light of property than it does *Sable*.

A sale by *Sable's* master, with or without her consent, would operater to emancipate her. Upon the whole, *the court* is of opinion that the judgment of the circuit court must be affirmed with costs.

Judgment affirmed.

McRoberts, for plaintiff in error.

Cavarly, for defendant in error.

FANNY, a woman of color, Appellant, *v.* MONTGOMERY AND OTHERS, Appellees.

APPEAL FROM FAYETTE.

Where the defendant in an action of trespass, assault and battery and false imprisonment, justifies under a certificate granted by a justice of the peace in pursuance of the act of congress respecting fugitives from labor, the plea must show that all the facts existed at the time of granting the certificate contemplated by that act.

The plea should also state affirmatively, to whom the certificate was given, whether the person claiming the fugitive, or his agent, and if the agent, his name.

Opinion of the Court by Justice LOCKWOOD. This is an action of trespass, assault and battery and false imprisonment, brought to try the plaintiff's right to freedom. The defendant plead in bar that plaintiff and others were taken before a justice of the peace in and for Bond county, as a person *held* to labor and owing service in the state of Kentucky, to John

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Housten, and that the justice of the peace, upon proof to his satisfaction that the said Fanny with others, *did* owe service or labor to said Housten, in Kentucky, according to the laws thereof, and that the said Fanny and others, *were* fugitives from the service of him, the said Housten, &c., did in pursuance of the constitution and laws of the United States, grant a certificate to said Housten, *or* his attorney, to have and take said Fanny, and that he take her where she belonged. Defendants further say that after the granting said certificate, and while it was in force, they assisted said Housten, *or* his attorney, to take said negroes, for the purpose of removing them as authorized by said certificate, they having no interest whatever in said negroes; that no more force was used than necessary, and that this is the same trespass mentioned in the declaration, and which said certificate the defendants have now in this court, ready to be produced, &c. To which plea the plaintiff demurred, and on joinder therein by defendants, the circuit court sustained the plea and gave judgment for defendants, and thereupon an appeal was taken to this court. A great number of errors have been assigned. I shall only, however, notice such of them as I deem important to the decision of the case as presented by the record. The first error assigned is, that it does not appear from the plea that the justice, in granting the certificate, had jurisdiction.

No principle in pleading is better settled than that where a party justifies under a power derived from an inferior court or magistrate, that he must show that such court or magistrate had jurisdiction of the subject matter. The authorities to this point are so numerous that it is unnecessary to cite them. Does it then appear from this plea that the justice had jurisdiction of the case? The third section of the act of congress referred to in the plea,* declares "That when a person held to labor in any of the United States, or either of the territories, on the northwest or south of the river Ohio under the laws thereof, shall *escape* into any other of the said states or territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her, before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof, to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken and certified by a magistrate of any such state or territory, that the

* Rev. Code of 1829, p. 242.

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person so seized or arrested, *doth*, under the laws of the state or territory from which he or she *fled*, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive from labor, to the state or territory from which he or she fled." In order to give a magistrate jurisdiction under this act, it ought to appear that the person apprehended as a fugitive slave had escaped from the state or territory where the labor or service is due, into the state or territory where he or she is apprehended, and that proof, either by oral testimony or affidavit, be exhibited, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her.

It does not appear from this plea that Fanny had escaped or fled from Kentucky; the allegations being that she was taken, &c., as a person held to labor and owing service in the state of Kentucky, to Housten. This is not sufficient, for the authority conferred to take and arrest fugitives from labor or service, is only granted where the fugitive has fled, or escaped from the service of his or her master.

But the plea is still more fatally defective in not stating that the proof was, that she *now* owes service and labor in Kentucky.

The words of the act *are*, *doth* owe service or labor. The proof exhibited may be true, that she did owe service, and yet show no right to her present service, for that service may long since have terminated; and, consequently, she would not be liable to be taken and carried back to Kentucky.

Under the attachment laws, an affidavit that a debtor hath absconded, being in the past tense, is insufficient; and such an error has been decided to render an attachment irregular, and all proceedings under it void. I consider the first assignment of error well taken and sufficient to reverse the judgment, but as this case will have to go to the circuit court again, I think it better to notice some of the other errors assigned. The seventh error assigned is, that the plea does not set forth to whom the certificate was given, but is in the alternative. The language of the plea is, that the certificate was granted to "Housten or his attorney," without naming who the attorney was. This, I think, altogether too uncertain; it ought to have shown affirmatively to whom it was granted, and if granted to an attorney, who that attorney was. The plea is therefore bad in this respect. The ninth error

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assigned is, that it is not stated that either of defendants assisted Housten or his attorney, or that they acted under any legal authority. The words of the plea are, "that defendants assisted Housten or his attorney, to take said negroes." Who did they assist? Housten, or his attorney? and if the attorney, who was that attorney? The plea does not answer this plain interrogatory with any kind of certainty; it is, therefore, too uncertain in this respect.

For these and other reasons, I am of opinion that the judgment must be reversed, with costs, and remanded to the Fayette circuit court, with liberty to defendants to amend their plea, upon payment of the costs occasioned by the plea.

I have not deemed it necessary in making up an opinion in this cause, to give an opinion on the question, how far a certificate which is good, *prima facie*, can be inquired into. Whether such a certificate would be final and conclusive, does not arise on this plea. We are not required, from the state of the pleadings, to go into any such inquiry; on this point, therefore, I forbear; for "sufficient unto the day is the evil thereof."

Judgment reversed.

Hall and *Cowles*, for plaintiff in error.

McRoberts, for defendants in error.

FINLEY and CREATH, Plaintiffs in Error, *v.* JOHN ANKENY, Defendant in Error.

ERROR TO JACKSON.

When the circuit court, sitting as a court of chancery, grants a re-hearing, the first decree is thereby vacated, and the case stands as if no decree had been rendered in the cause.

After the time of the replevy of a judgment has expired, the plaintiff may, if he chooses, proceed on his original judgment without issuing against the security in the replevy. (1)

Opinion of the Court by Justice LOCKWOOD. This case presents the following facts. Judgment was obtained in the Jackson circuit court in favor of Ankeny against Finley and Creath, at November term, 1822. Subsequently, Finley and Creath filed an injunction bill, and at the August term, 1823, a decree was entered, perpetually enjoining the judgment.

(1) This law is now repealed by statute.

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At the next term after said decree, a re-hearing was granted, and a different decree entered which dissolved the injunction, upon the complying with certain requisitions on Ankeny's part, first to be performed. From this last decree, Finley and Creath brought a writ of error to the supreme court. At the December term, 1825, of the supreme court, the said decree was reversed generally, at the costs of the defendant in error. On the 18th of October, 1826, Ankeny procured an execution on the judgment at law. At the April term, 1827, of the Jackson circuit court, a motion was made to quash said execution, upon the ground that the decision of the supreme court operated as a perpetual injunction of the judgment at law, which motion was overruled by the court, and the cause is brought into this court, by writ of error, to reverse the decision of the circuit court in refusing to quash the execution.

It may well be questioned, whether a writ of error will lie in a case situated as this is. If a party proceeds to take out an execution, in violation of an injunction, he can be attached for contempt. But without intending to decide whether a writ of error will lie or not, the court are of opinion that the circuit court decided right in refusing to quash the execution. When the circuit court, sitting in chancery, granted a re-hearing in the suit in equity, the first decree was thereby vacated, and the case stood as if no decree had been rendered in the cause. By the reversal in the supreme court, of the second decree, without remanding the cause for further proceedings, or pronouncing such decree as the circuit court ought to have given, the suit in chancery was ended, and left the judgment at law in full force. Consequently, the issuing the execution could not be erroneous. The judgment of the circuit court is affirmed with costs. It was assigned for error, that the execution does not follow the judgment. It appears, by an examination of the record, that previous to the filing the bill in chancery, an execution issued on the judgment, and the same was replevied by one Garner, who indorsed on the back of the execution, that he entered himself security for the debt; which indorsement, the statute declares, shall have the force and effect of a judgment, and after the expiration of said replevy, the like execution may issue in favor of the plaintiff, against the principal and security, as may issue on judgments at law. The variance relied on is, that the execution should have been on the replevin, and not on the original judgment. But it may be asked, who is injured by this course? certainly no one.

The statute does not declare what effect the replevy shall

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have on the original judgment. If it had enacted, that upon the execution of the replevin security, that the original judgment should be considered satisfied, it would clearly have been unconstitutional. The only effect that the replevin can, or ought to have, is, to delay the plaintiff, and after the time has expired, he may proceed on his original judgment if he prefers that course. This then, is not error.

Judgment affirmed.

Cowles, for plaintiffs in error.

Baker, for defendant in error.

WM. C. GREENUP and CLEMENT C. CONWAY, Plaintiffs in Error, *v.* A. B. BROWN, Defendant in Error.

ERROR TO RANDOLPH.

Where a full and ample defense might be made at law, a court of chancery will not relieve. (1)

The time of the *devastavit* of an adminis'rator is properly ascertained from the return of *nulla bona* to the execution issued against them in their representative character.

If an execution has issued irregularly and informally, the most speedy and easiest mode to obtain relief is to apply to a judge to stop all proceedings on it, until an application can be made to the circuit court to arrest or vacate the proceedings of the sheriff. (2)

Opinion of the Court by Justice SMITH. The plaintiffs in error ask the reversal of a decree, dismissing a bill seeking relief in equity, against a judgment entered in the circuit court of Randolph, against them in their personal capacity, upon a *devastavit* suggested and proven, which judgment has been affirmed in this court. We are at a loss to perceive on what possible ground the plaintiffs could expect such relief.

(1) See note to the case of *More et al.* v. *Bagley et al.*, ante, p. 94.

(2) "A party out of term, intending to move to set aside or quash any execution, replevin bond, or other proceedings, may apply to the judge at his chambers for a certificate, (and which the said judge may in his discretion grant,) certifying that there is probable cause for staying further proceedings until the order of the court on the motion; and a service of a copy of the certificate at the time of or after the service of the notice of the motion, shall thenceforth stay all further proceedings accordingly." Purple's Statutes, p. 827, sec. 46. Scates' Comp., 263.

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It is not pretended that the judgment has not been fairly and regularly obtained, and after a due course of legal investigation; no fraud or mistake is alleged, nor does it appear but what the party seeking the relief has actually availed himself of every possible ground of defense in the trial at law. The matters now asked to be re-examined in a bill in equity, have already been amply considered and determined in this court, upon reviewing the decision of the circuit court upon a writ of error. Nothing is disclosed in the bill but what would be matter of defense in law, and for aught that appears, has actually been used as grounds of defense. We can perceive no ground upon which the bill could have been entertained and the injunction granted in the circuit court, but upon the question whether the real estate of the defendants, which was taken in execution, was liable to be sold for less than two-thirds of its appraised value.

This must depend upon the fact when, in the language of the act of 1825,* authorizing the sale of real estate on execution, the contract was made, cause of action accrued, or liability was incurred."

To ascertain that, we are to determine the period of the commencement of such liability. This must depend on the evidence of a *devastavit*, and the proof to establish that is the return of *nulla bona* on the execution issued on the judgment against the administrators in their representative capacity. This return is alleged, in the bill, to be of a date long subsequent to the passage of the act of 1825, subjecting real estate to execution. The provisions of the act exempting real estate taken on execution from being sold for a less sum than two-thirds of its appraised value, referring entirely to contracts created, cause of action accrued, or liabilities incurred anterior to its passage, necessarily determines the point, that the present is not a case within the exemption created by the law. If the facts disclosed in the bill had shown a case within the provisions of the act, the sale might have been restrained, but the more regular course would have been to have applied to a judge for an order to stay all proceedings under the execution, until an application could be made to the circuit court, in term time, to arrest or vacate the proceedings of the sheriff. This would have been equally as effectual, and less oppressive, and would have been recommended for its simplicity and ease. We are satisfied that the order of the circuit court in dissolving the injunction and

* Laws of 1825, p. 154.

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dismissing the bill for want of equity, was correct, and that the same ought to be affirmed with costs. (*a*)

Decree affirmed.

McRoberts, for plaintiffs in error.

Baker, for defendant in error.

GREENUP and CONWAY, Plaintiffs in error, *v.* PHILANDER WOODWORTH, Defendant in Error.

ERROR TO RANDOLPH.

Where a full and ample defense might be made at law, equity will not relieve.

Opinion of the Court by Justice SMITH. This case is similar to the preceeding, excepting, that in the facts disclosed, it appears that the judgment against the defendants in the action at law, in their representative capacity, was by confession, and in the action against them in their personal character, by default for want of a plea. The recovery here, as in the other case, has been in the due course of legal proceedings; no fraud or mistake alleged, nor want of means of making a defense at law, and investigating the grounds now urged as cause of relief in equity.

We can perceive no color for even the interference of the equitable powers of a court, much less the annulling of a judgment duly obtained in the course of legal proceedings.

If the administrators had grounds of defense, they were of a legal character and should have been interposed during the progress of the actions against them. It however appears they have admitted their liability, by their own confession, and suffered judgment to be entered thereon.

This surely puts an end to their asking relief now. The same ground, as to the sale of real estate taken upon execution, is also presented. As the facts disclosed are of the same character in point of time, and the nature of the liability, upon the return of *nulla bona* in the action suggesting a *devastavit*. The opinion that there can be no exemption from

(*a*) Vide *Hubbard* v. *Hobson*, ante, p. 190. *Crow's executors* v. *Prevo*, ante, p. 216.

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sale for a sum not less than two-thirds of the appraised value of the land, is applicable to this case also, and must prevail.

The decree of the circuit court is therefore affirmed with costs. (*a*) (1)

Decree affirmed.

McRoberts, for plaintiffs in error.

Baker, for defendant in error.

BARRET and WIFE, Plaintiffs in Error, *v.* STEPHEN GASTON, Ex'r, Defendant in Error.

ERROR TO RANDOLPH.

This court will not entertain a writ of error on a judgment founded on a *tort*, after the death of the *tort feasor*.

Opinion of the Court by Justice SMITH. In this case it is manifest, the proceedings on the writ of error can not be sustained.

The cause of action is for a *tort*, and could not survive against the executor of James Gaston, who has been made defendant in error.

Suppose this court were to reverse the judgment of the circuit court, what object could be gained by such reversal? The executor has only to plead the fact of the death of his testator, and the circuit court, on the proof of the truth of such plea, would be bound to give judgment for the defendant. Is not then this court bound, when the plaintiffs in error themselves, by their own proceedings, disclose the same facts, to pronounce a decision similar in its effects? The record shows the cause of action, the writ of error suggests the death of James Gaston, and that Stephen is his executor, and that, consequently, as against James Gaston, in whose favor the judgment of the court below was, the cause of action is gone, and can not survive against his executor. If the executor retains the possesion of the plaintiff's wife, under a claim, in right of his testator, as an indentured servant or slave, that might present a question of legal investi-

(*a*) Vide *same plaintiffs* v. *Brown*, and cases there referred to, ante, p. 252

(1) See note to *More et al.* v. *Bagley et al.*, ante, p. 94.

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gation in a new action against him, but can form no ground of examination in this. We are therefore of opinion that the writ of error must abate, and that judgment be entered accordingly.

Writ of error abated.

Cowles, for plaintiffs in error.

Breese, for defendant in error.

HENRY CURTIS, Appellant, *v.* THE PEOPLE, Appellee.

APPEAL FROM CLINTON.

All objection to the form of an indictment, must be made before trial, and an omission to state in an indictment that it was found upon the "oaths" of the grand jury, is matter of form only, and can not be assigned for error. (1)

In an indictment for an assault and battery with intent to kill, it is indispensable that the intent should be alleged to be unlawful and felonious. (2)

Where there are two or more counts in an indictment, one of which is good and the rest bad, and a general verdict of guilty, the judgment shall stand. (3)

AT the April term, 1828, of the Clinton circuit court, the grand jury of Clinton county preferred the following bill of indictment against the appellant, viz. :

Of the April term of the Clinton circuit court in the year of our Lord one thousand eight hundred and twenty-eight.

State of Illinois, Clinton county, ss.

The grand jurors chosen, selected and sworn, within and for the county of Clinton, in the name and by the authority of the people of the state of Illinois upon their present, that at the county aforesaid, on the tenth day of December, in the year of our Lord one thousand eight hundred and twenty-seven, with force and arms, to wit: with a rifle gun then and

(1) Mere formal objections must be made before pleading. *Guykowski* v. *The People*, 1 Scam., 476. *Stone* v. *The People*, 2 Scam., 333. *Townsend* v. *The People*, 3 Scam., 329. *Conolly* v. *The People*, id., 477.

(2) An indictment for an assault with intent to murder, should not only charge the intent to have been malicious and unlawful, but the felonious intent, and the extent of the crime intended to be perpetrated should be distinctly set forth. *Curtis* v. *The People*, 1 Scam., 285.

In an indictment for an assault with intent to murder, it did not charge the offense to have been *unlawfully* done. The court held the indictment good. *Perry et al.* v. *The People*, 14 Ill., 496.

(3) The same is held in *Townsend* v. *The People*, 3 Scam., 329. *Holliday* v. *The People*, 4 Gilm., 113.

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there held in his hands, and loaded with powder and one leaden ball, Henry Curtis, on the day and year aforesaid, at the county aforesaid, with intent to kill one James Tilton, and him did with the said loaded gun assault and discharge against and upon, giving then and there to the said Tilton one dangerous wound in his said leg, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois.

And the jurors aforesaid do further present, that on the day and year aforesaid, at the county aforesaid, Henry Curtis did then and there with force and arms make an assault upon the body of James Tilton, the said Tilton then and there being in the peace of God and the said people, and him then and there, the said Curtis, did beat, bruise and ill treat, contrary to the statute in such case provided, and against the peace and dignity of the same people of the state of Illinois.

Upon this indictment, at the September term, Curtis was tried and found guilty. A motion was then made in arrest of judgment, which the court overruled, and sentenced him to pay a fine of 50 dollars and to imprisonment for the term of twenty days. From this judgment Curtis appealed, and assigned as causes for the reversal of the judgment: 1. That it does not appear by the indictment that it was presented upon the *oaths* of the grand jury.

2. The indictment does not pursue the language of the act of assembly, but is totally variant therefrom.

3. The indictment does not charge the defendant with shooting with intent to *commit murder*, the offense designated in the act, but with intent to *kill*.

4. The indictment contains two counts and for separate offenses, and the first one being bad, a general verdict of guilty can not be supported.

Opinion of the Court by Justice SMITH. The grounds of error assigned and relied on, for a reversal of the judgment in this case, which it becomes important to notice are,

1. That it does not appear that the presentment of the grand jury in the bill of indictment, was on the oaths of the grand jurors.

2. That in the indictment, the offense charged, is not in the language of the statute, although founded on the statute, but is wholly variant therefrom.

3. That in the first count, the offender is not charged with shooting with intent to commit murder, but with intent to kill.

4. That there are two counts in the indictment for separate

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offenses, and the first being bad, a general finding of guilty is bad, and that, therefore, judgment ought not to have been rendered on the verdict.

These objections will be considered in the order they are stated. The omission of the word "oaths" in the indictment, although evidently a slip of the pen, would, we have no doubt, been fatal, according to the decisions at common law.

But the forms of proceedings in criminal cases having been prescribed by our criminal code, and the time prescribed when objections to want of form are to be made, it becomes necessary to inquire, whether the prisoner has not waived this objection by his plea of not guilty, and whether it is not, therefore, too late now, to urge this objection as a sufficient cause for the reversal of the judgment. In the act constituting the code of criminal jurisprudence of this state, under the 15th division, relative to the construction of the act itself, and the duty of courts, it is provided by the 150th and 151st sections,* that the form of the commencement of an indictment shall be in substance the same as that used in the present case, including the word "oaths," which is omitted, and that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this code, or so plainly, that the nature of the offense charged may be easily understood by the jury; that all exceptions which go merely to the form of an indictment, shall be made before trial, and that no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in such indictment." The manner, then, in which the legislature intended the word "oaths" to be used, seems to be, necessarily, as a term of form, and not substance, and must be so considered; and it is equally clear, that under this view the prisoner is prohibited, by the latter clause above recited, from now urging it as ground of error. It can not, in the language of that clause, in any way affect the real merits of the offense charged in the indictment. As it regards the second objection, it is to be remarked, that there is, in no part of the criminal code, a defintion of an assault with an intent to kill or murder, but barely a specification of the punishment for the offense of an assault with an intent to murder. The statute then can not be said to have required any language whatever to be used in describing the offense, but has left it as it was at common law.

The conclusion in the first count is a common law, as well as a statute conclusion, and if the offense be well recited as at

* Rev. Laws of 1827, p. 157.

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common law, it will be sufficient to sustain the first count. In an examination of this count, however, there exists a striking and manifest departure from the common law precedents, in not averring that the intent was unlawful and felonious.

The most approved precedents aver, not only that the assault was committed willfully and maliciously, but with the intent feloniously to kill and murder.

Hence, it seems to be not only necessary and indispensable that the intent should be charged to be in itself malicious and unlawful, but that the felonious design and extent of the crime intended to be perpretrated, should be distinctly and clearly set forth, otherwise the inference would be that the assault might be excusable or justifiable in self defense. Nothing could be more certain and comprehensive than an allegation that the assault was made with an intent to murder. This would, from its technical sense, entirely cover the offense intended to be charged. As the offense charged in the indictment is simply an assault with an intent to kill, and as there is no allegation that it was done with a felonious, unlawful or malicious design, it is certainly fatally defective, whether the omission of the term "murder," be important or not. As the objections contained in the third assignment are substantially the same as those in the second, and are embraced in the reasoning in relation to those, it is unnecessary to examine them.

The remaining one to be considered is, whether a general verdict of guilty, rendered on an indictment where one of the counts is materially defective, be good.

It was urged on the argument, that the two counts were for different offenses, one being for a simple assault, and the other for an assault with an intent to kill, and that, therefore, a general verdict could not stand, and more particularly so, as the court could not know to which the jury applied the evidence.

The objection is not tenable. It is unimportant as to which the jury applied the evidence, because a general finding of guilty as to the whole, necessarily includes the guilt as to a part. In finding the prisoner guilty of the greater offense, the one of inferior grade is surely included. If the assult was committed with the intent alleged, though that intent may not have been sufficiently set forth to sustain the first count of the indictment, he is still guilty of an assault from the verdict, because the jury, having found the truth of the whole charge, the less is included in the greater. It would, however, be sufficient in meeting this objection to say, that

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the universal practice is, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher or more criminal part of the charge, or as it may be precisely laid, to insert two or more counts in the indictment. Thus, in an indictment for burglary, it is usual to insert one count for a burglarious entry with an intent to steal the goods of A, and stealing them, and another count to steal the goods of another person, or with an intent to kill and murder A, and no doubt has ever been entertained that it is both advantageous and legal; nor is it any objection upon demurrer, or in arrest of judgment, that separate offenses of the same nature are joined against the same defendant. It is also well settled, that the defectiveness of one or more of the counts, will not affect the validity of the remainder, because judgment may be rendered on those which are valid, and the court can regulate the severity of the sentence according to their discretion, on the counts of the indictment which are supported. 1 Chitty's Criminal Law, 204 and 205. It has been repeatedly determined in the supreme court of New York, that if one count in an indictment be good, although all the others are defective, it will be sufficient to support a general verdict of guilty. *The People* v. *Olcott*, 2 Johnson's Cases, 311. *The People* v. *Curling*, 1 Johnson's Reports, 320. In the present case, the finding of the jury, of the guilt of the prisoner in making the assault with intent to kill, establishes an assault, whether it be accompanied with such intent or not; and although it is true, that the finding as to the first count is inoperative, yet it can not affect the finding as to the second. We are therefore of opinion that the general verdict of guilty is supported, although the first count is defective; but as the imprisonment was doubtless made a part of the sentence of the court in reference to that count, and the evidence adduced under it, justice would seem to require that so much of the judgment of the circuit court as subjects the prisoner to imprisonment be reversed, and the residue, as to the imposition of the fine and costs, be afirmed. (*a*)

Judgment affirmed.

McRoberts, for appellant.

Cowles, state's attorney, for appellee.

(*a*) Vide *Archbold's Crim. Pl.*, 245-7.

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JOSEPH M. STREET, Plaintiff in Error, *v.* SOLOMON BLUE, Defendant in Error,

ERROR TO GALLATIN.

A refusal to grant a new trial can not be assigned as error.

Opinion of the Court by Justice SMITH. This case comes before the court by way of exception to the opinion of the circuit court of Gallatin county, in refusing to grant a new trial. In the progress of the cause it appears that two new trials have already been had, and that the cause has been fully litigated before three several juries. The granting, or refusing a new trial, is a question to be determined in the sound discretion of the court to whom the application is addressed, and a refusal is no ground of error, as has been settled by the unanimous opinion of this court in the case of *Clemson* v. *Kruper*, ante, page 210, and other cases subsequent thereto.

There is nothing in the present case to authorize a departure from that decision, nor is it perceived but that entire justice has been rendered in the case. The jury, whose province it was, have determined on the evidence, twice in favor of the plaintiff, and we can see no sufficient reason for unsettling their verdict, if it were even possible to exempt this case from the operation of the decisions of the court respecting new trials, the reasons for which have been heretofore given, and need not now be repeated.

The judgment of the circuit court is affirmed with costs. (*a*) (1)

Judgment affirmed.

Hall, for plaintiff in error.

Eddy, for defendant in error.

(*a*) Cases in relation to new trials. *Sawyer* v. *Stevenson*, p. 24. *Cornelius* v. *Boucher*, p. 32. *Collins* v. *Claypole*, p. 212. *Clemson* v. *Kruper*, p. 210.

The refusal of a court to grant a new trial is not a matter for which a writ of error lies. *Barr* v. *Gratz*, 4 Whea., 213. 5 Cranch, 11. Ibid., 187. 7 Wheat., 248.

(1) See note to *Sawyer* v. *Stevenson*, ante, p. 24.

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JOHN ANKENY, Plaintiff in Error, *v.* JAMES PIERCE, Defendant in Error.

ERROR TO JACKSON.

A tenant is estopped from denying the title of his landlord.

If a tenant enters upon and enjoys leased premises, though his landlord may have no title, the tenant has no right to complain of his landlord until after an eviction.

Opinion of the Court by Chief Justice WILSON. This is an action of covenant from the Jackson circuit court, founded upon an article of agreement for the leasing of the big Muddy Saline, by Pierce, the plaintiff below, to the defendant, Ankeny. To the plaintiff's declaration, the defendant filed five pleas, all of which were withdrawn except the third and fifth.

The third plea avers a want of consideration, to which plea the plaintiff replies, and the defendant files a demurrer to his replication. The court overruled the demurrer. This opinion is assigned for error, but I am clearly of opinion that the court decided correctly. The replication shows a good and valuable consideration; it sets forth a lease from the said Pierce to the said Ankeny, of the premises therein described, and the tenant, Ankeny, is estopped from denying the title of the landlord, Pierce, under whom he had enjoyed the premises, as is alleged in plaintiff's declaration. The demurrer to the fifth plea was well sustained; the plea does not allege that Pierce had not obtained a lease from the governor, and for aught that appears, he may have had good title and authority to lease the premises. Another objection to the plea is, that it does not appear but that defendant entered upon and enjoyed the demised premises; if so, he has no ground of complaint until after eviction, which is not alleged. The judgment of the court below is affirmed, with all costs here and below, and execution is directed to issue from this court. (1)

Judgment affirmed.

Baker, for plaintiff in error.

Cowles, for defendant in error.

(1) While a tenancy exists, the tenant can not dispute the title of his landlord, either by setting up a title in himself, or a third person. *Dunbar* v. *Bonesteel* 3 Scam., 34. *Wells* v. *Mason et al.*, 4 Scam., 90. *Furgeson* v. *Miles*, 3 Gilm., 358. *Rigg* v. *Cook*, 4 Gilm., 351. *Tilghman* v. *Little*, 3 Ill., 241.

The tenant must surrender up the possession before he can assail or question the title of his landlord. He must put the landlord in the same position he occupied, when he parted with the possession. *Tilghman* v. *Little*, *supra*, and cases there cited.

But the tenant may show that the title of his landlord has terminated,

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MORELAND AND WILLIS, Appellants, *v.* THE STATE BANK OF ILLINOIS, Appellee.

APPEAL FROM GALLATIN.

The 22d section of the act establishing the state bank, is merely directory to the board of directors, and an omission by them to comply with it does not release the securities to a note executed to the bank for an accommodation. (1)

Rules of decision are the same in a court of equity as in a court of law.

Opinion of the Court by Justice LOCKWOOD. This action was originally commenced before a justice of the peace, and judgment rendered in favor of plaintiff below, against defendants below, as securities to a note given to said plaintiff. The defendants appealed to the circuit court of Gallatin county, where the following facts were agreed to by the parties: "That the note was discounted upon the application of one Garner Moreland, and the accommodation was made to him upon his check, that neither the directors of the bank,

either by its original limitation or by a conveyance to himself or a third person, or by the judgment and operation of law. Id.

If the landlord transfers the estate, the allegiance of the tenant is due to the grantee. Id.

If the estate is vested in a third person by operation of law, the tenant holds the possession subject to the title of such third person. Id.

The tenant may purchase in the premises under a judgment against the landlord, and set up the title thus acquired, in bar of an action brought against him by the landlord. Id.

A tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord, although it may be a better title. *Bailey* v. *Moore et al.*, 21 Ill., 165.

An eviction in fact or in effect, which renders the premises useless, may prevent a recovery of rent. *Halligan* v. *Wade*, 21 Ill., 470.

A tenant, upon a proceeding by distress, may show that he was evicted from a part of the premises, or that he was disturbed in his possession. *Wade* v. *Halligan*, 16 Ill., 507.

(1) The present statute is nearly the same as that cited in the opinion of the court. Purple's statutes, 1083, sec. 1. Scates Comp., 835. And under this statute the court holds that "To sustain a plea under the statute, it must appear on the face of the note that the party signed it *as security*.' *McAllister* v. *Ely*, 18 Ill., 249. *Payne* v, *Webster*, 19 Ill., 103.

This statute applies only to such obligations as are transferable by indorsement, so as to vest the legal interest in the assignee. *Taylor* v. *Beck*, 13 Ill., 384.

The rule is well settled that mere passiveness or delay in proceeding against the principal, except when required by statute to sue, will not discharge a surety. *The People* v. *White et al.*, 11 Ill., 341. *Pearl et al.* v. *Wellmans*, id., 352. *Taylor* v. *Beck*, 13 Ill., 376.

If a creditor, by a valid and binding agreement, without the assent of the surety, give further time for payment to the principal, the surety is discharged both at law and in equity; and it makes no difference, whether the surety be actually damnified or not. *Davis et al.* v. *The People*, 1 Gilm., 410. *Waters* v. *Simpson*, 2 Gilm., 574. *Warner* v. *Crane*, 20 Ill., 148.

A promise to delay for an uncertain period, will not discharge a surety. The time of extension must be definitely fixed. *Gardner et al.* v. *Watson*, 13 Ill., 352. *Waters* v. *Simpson*, 2 Gilm., 574.

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nor any agent for them, ever gave the said Hazle Moreland and John Willis, any notice of the failure to renew said note, or of its non-payment, until the commencement of this suit, and that at the time the note fell due, and for twelve months after, the said Garner Moreland resided in this county, and was in solvent circumstances, and that he afterwards, before the commencement of this suit, left the state, and took with him all his property, and that these facts are all the evidence in the case." The circuit court affirmed the judgment of the justice of the peace, and the case is brought into this court by appeal. It is, among other things, urged, that the securities became released, because the president and directors did not cause the note to be protested; and secondly, because they did not use diligence against the principal in the note. By the 22d section of the bank law,* "it shall be the duty of the board of directors of the said principal bank or branch, to have the note (if a note) protested; if said loan be secured by mortgage, to have the mortgage foreclosed, and to proceed to the collection of said debt, without delay." Does the mere omission of the board of directors to have the note protested and sued, operate as a release to the securities?

It is a general rule of the common law, that mere delay to sue, does not release the security. And it is a controverted point, whether a refusal to comply with the request of the security to bring suit would release him.

But, by "an act providing for the relief of securities in a summary way in certain cases," passed 24th March, 1819,† it is provided, that a security may, by notice in writing to the creditor, require him to put the note, &c., in suit, and in default to comply with such request, the creditor shall thereby forfeit his right of action against such security. In this case no such request has been made.

It may, however, well be doubted, whether the legislature did not intend to take away from securities, the right to give this written notice to bring suit, for by the 12th section of the bank law,‡ the security is to "sign such note as principal," and consequently, liable to be considered as such. It is, however, unnecessary to decide what effect a notice to bring suit would have, as no such notice has been given.

In putting a construction upon the 22d section of the bank act, it is the duty of the court to ascertain the intention of the legislature, by carefully examining the context, and give such a construction to each of the provisions of the act as

* Laws of 1821, p. 39. † Laws of 1819, p. 243. ‡ Laws of 1821, p. 86.

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will harmonize with other parts of the act, if it can be done without violating any of the acknowledged rules of construing statutes. Acting upon this principle, the court are of opinion that the 22d section of the bank law is to be considered as merely directory to the board of directors, and their neglect forms no ground of defense to the debtor, or his securities. The directors were not acting in their own right, and any omission of duty on their part ought not to work an injury to the state, as it was in the power of the securities, by paying the note, to commence suit and thus secure themselves. The court are confirmed in this construction, by a recent decision of the supreme court of the United States.

By the post-office law,* "If any postmaster shall neglect or refuse to render his accounts and pay over to the postmaster-general the balance by him due, at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person or persons so neglecting or refusing; and if the postmaster-general shall not cause such suit to be commenced within six months from the end of every such three months, the balances due from every such delinquent shall be charged to, and be recoverable from, the postmaster-general." It is observable, that the requirement of the act of Congress to commence suit against postmasters, is as strong as in the case of the board of directors under the bank act, and in addition, the postmaster-general is to be charged with all sums due from postmasters, if he neglects performing his duty. Yet the supreme court of the United States have decided, in an action on the postmaster's bond, that his securities were not discharged by the neglect of the postmaster-general, and that the remedy given against the postmaster-general was intended for the benefit of the government, and consequently, was cumulative in its character.

We have not seen this decision, but such we understand to be its import. It was argued, on the part of the defendants below, that by commencing suit before a justice of the peace, the circuit court was authorized to decide this case, in the same manner that a court of equity would have done. The rule, however, is the same in courts of law and equity, and whatever would exonerate the security in one court, would also in the other. The facts being ascertained, the rule must be the same in this court as in a court of chancery. *People* v. *Jansen*, 7 Johns., 337. It is laid down in Jansen's case, "that mere delay in calling on the principal, will not dis-

* Gordon's Digest, p. 63,

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charge the surety, is a sound and salutary rule, both at law and in equity." This case of *The People* v. *Jansen*, is relied on by defendants below, as an authority in point, to show that the *laches* of the board of directors, operates as a good defense to this suit. If that case, since the decision in the supreme court of the United States, on postmasters' bonds, should be considered as correctly decided, still, we think that there is a wide difference between that case and this. The securities in that case were bound for the faithful performance of the duties of an officer. Here, the defendants bound themselves absolutely, to pay the note when it became due.

They are to pay unconditionally. The risk of the insolvency of the principal is assumed by sureties, and it was their business to see that the principal paid the note when it became due. Jansen's case is not, therefore, analogous; and it was also decided under its peculiar circumstances, which have no application in this case. The objection that was made in the argument, that the bank, by its cashier, can not take an appeal, is not well founded, for both appeals were taken by the defendants below, and if the appeal had been taken on behalf of the bank, by the cashier, or prosecuting attorney, the court do not perceive that it would be liable to objection. The judgment must be affirmed with costs. (*a*)

Judgment affirmed.

Gatewood, for appellants.

Eddy, for appellee.

(*a*) The omission of the proper officer to recall a delinquent paymaster in pursuance of the fourth section of the act of congress, of April 24th, 1816, does not discharge the surety. *United States* v. *Van Zandt*, 11 Wheat., 184.

The neglect of the postmaster to sue for balances due by postmasters, within the time prescribed by law, although he is thereby personally chargeable with such balance, is not a discharge of such postmasters or their sureties, from liability on their official bonds. *Locke* v. *P. M. General*, 3 Mason, 446.

The provisions of the law are merely *directory* to the P. M. Gen. and form no condition in the contract with the postmaster, or their sureties. Id.

Mere *laches*, unaccompanied with fraud, forms no discharge of the contract of securityship between individuals. 9 Wheat., 720.

In general, *laches* is not imputable to the government. Id.

A surety in a bond is not discharged by a mere delay to demand payment after it becomes due, unaccompanied by fraud, or an express agreement with the principal to a low the delay. 1 Gallison, 32.

He is exonerated by any agreement, without his consent, between the creditor and principal, which varies essentially the terms of the contract. 1 Paine, 305. See 3 Stark, Ev., 1390 and cases there referred to in note.

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JOHN C. GORE, Plaintiff in Error, *v.* CHAUNCEY SMITH, Defendant in Error.

ERROR TO FRANKLIN.

It is erroneous to take a judgment by default, where the declaration has not been filed ten days before court, unless by consent.

Opinion of the Court by Justice LOCKWOOD. This is an action of debt on a penal bond. The declaration was filed the first of October, 1827, and a default for not appearing was entered the fourth of the same month. This was clearly irregular. By the eleventh section of the practice act,* "the court, for want of appearance, may give judgment by default on calling the cause, except where the process has not been served, or declaration filed ten days before the term of the court." The record states, that "on the fourth day of October, 1827, came the parties by their attorneys, and the said defendant being three times solemnly called, made default, and came not." This entry contradicts itself, and is probably a mistake of the clerk. It does not appear from the record, that the defendant waived his right to have the declaration filed ten days before the term, and without doing so the court had no power to enter his default, and thereby preclude him from making his defense. For this error, the judgment must be reversed with costs, and remanded to the Franklin circuit court for further proceedings. (1)

Judgment reversed.

Eddy, for plaintiff in error.

McRoberts, for defendant in error.

* Rev. Code of 1827, p. 3[illegible]3.

(1) A party is entitled to a continuance if a plaintiff does not file an account ten days before the term commences, if he has common counts in his declaration. *Hawthorn* v. *Cooper et al.*, 22 Ill., 225. *Collins* v. *Tuttle*, 24 Ill., 623.

If the plaintiff desires to avoid a continuance, he can stipulate against using the common counts, (except as to the claim declared on specially when applicable,) or enter a *nolle prosequi* as to them. Ibid. *The People* v. *Pearson*, 1 Scam., 458.

Phœbe, a woman of color, Plaintiff in Error, *v.* William Jay, Defendant in Error.

ERROR TO RANDOLPH.

The act of 1807, respecting the introduction of negroes and mulattoes into the territory, is void, as being repugnant to the sixth article of the ordinance of 1787, but indentures executed under that law are made valid by the third section of the sixth article of the constitution of this state.

A constitution can do what a legislative act can not, as it is the supreme, fixed, and permanent will of the people, in their original, sovereign, and unlimited capacity, and in it are determined the condition, rights, and duties of every individual of the community; from its decrees there can be no appeal, for it emanates from the highest source of power, the sovereign people.

An act of the legislature is different, and if it contravenes the constitution, no repetition of it can render it valid.

The ordinance of 1787 is still binding upon the people of this state, unless it has been abrogated by "common consent." *Quere?*

The act of accepting the constitution of this state, and admitting it into the Union by congress, abrogated so much of the ordinance of 1787, as is repugnant to that constitution.

In a plea to an action of assault and battery, &c., brought to try the plaintiff's right to freedom, justifying under an indenture entered into with plaintiff, it is not necessary that it should state, or that the master should prove, that every requisition of the statute was complied with, before the execution of the indenture. In such case, the *onus probandi* rests upon the plaintiff, and he may show, in a replication to the plea, facts inconsistent with the validity of the indenture.

A contract of service entered into in pursuance of the act of 17th September, 1807, is not terminated by the death of the master, but passes to his legatees, executors, or administrators, but not to an heir at law.

The administrator has no power to compel the servant "to attend to the ordinary business" of the administrator; he has only the custody of the servant, for safe keeping, until his time of service can be sold.

A demurrer by either party has the effect of laying open to the court, not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of the law, and if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault.

Opinion of the Court by Justice Lockwood. This is an action of trespass, assault, battery, wounding, and false imprisonment, to which the defendant plead that the plaintiff, on the 26th day of November, 1814, before Wm. C. Greenup, clerk of the court of common pleas of Randolph county, Illinois territory, agreed to and with one Joseph Jay, the father of this defendant, and who is now deceased, to serve him as an indentured servant, for and during the term of forty years from and after the day and year aforesaid, and then and there entered into and acknowledged an indenture, whereby she bound herself to serve the said Joseph Jay forty years next ensuing said date aforesaid, conformably to the laws of the Illinois territory, respecting the introduction of negroes and mulattoes into the same; and defendant avers, that the said Joseph has since departed this life, leaving this defendant,

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his only son and heir at law, and who is also his administrator. That plaintiff came to his possession lawfully, after the death of said Joseph. That in order to compel plaintiff to attend to and perform the duties of an indentured servant, in doing the ordinary business of him, the said defendant, and remain in his said service, he had necessarily to use a little force and beating, which is the same trespass, &c. To this plea the plaintiff demurred, and the defendant joined in demurrer. The circuit court sustained the plea, and thereupon the plaintiff obtained leave to withdraw her demurrer and reply.

Several replications were filed, to which defendant demurred, and the demurrers were sustained, and judgment given on the demurrers for the defendant. To reverse which judgment, a writ of error has been brought to this court. From the conclusion I have arrived at, I deem it unnecessary to state the matter, or legality of the replications. The first question presented by this case is, whether the "act concerning the introduction of negroes and mulattoes into this territory, passed 17th September, 1807,"* by the territory of Indiana, and continued by the territory of Illinois, was not a violation of the sixth article of the ordinance of congress, passed 13th July, 1787,† for the government of the territory of the United States, north-west of the Ohio river. That portion of the ordinance applicable to this case, reads as follows: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." The first, second and third sections of the act of 1807 are as follows: "It shall and may be lawful for any person, being the owner or possessor of any negroes or mulattoes of and above the age of fifteen years, and owing service or labor as slaves in any of the states or territories of the United States, or for any citizen of the said states or territories purchasing the same, to bring the said negroes and mulattoes into this territory. Sec. 2. The owner or possessor of any negroes or mulattoes, as aforesaid, and bringing the same into this territory, shall, within thirty days after such removal, go with the same before the clerk of the court of common pleas of the proper county, and in the presence of said clerk, the said owner or possessor shall determine and agree, to and with his or her negro or mulatto, upon the term of years which the said negro or mulatto will and shall serve his or her said owner or possessor, and the said clerk is hereby au-

* Rev. Code of 1807, vol. 2, p. 467.

† *Vide* Laws of 1823, p. 38.

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thorized and required to make a record thereof, in a book which he shall keep forthat purpose." Section 3d. "If any negro or mulatto, removed into this territory as aforesaid, shall refuse to serve his or her owner as aforesaid, it shall and may be lawful for such person, within sixty days thereafter, to remove the said negro or mulatto to any place which, by the laws of the United States or territory, from whence such owner or possessor may, or shall be authorized to remove the same."

If the only question to be decided was, whether this law of the territory of Illinois conflicted with the ordinance, I should have no hesitation in saying that it did.

Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master. The law authorizes the master to bring his slave here, and take him before the clerk, and if the negro will not agree to the terms proposed by the master, he is authorized to remove him to his original place of servitude. I conceive that it would be an insult to common sense to contend that the negro, under the circumstances in which he was placed, had any free agency. The only choice given him was a choice of evils. On either hand, servitude was to be his lot. The terms proposed were, slavery for a period of years, generally extending beyond the probable duration of his life, or a return to perpetual slavery in the place from whence he was brought. The indenturing was in effect an involuntary servitude for a period of years, and was void, being in violation of the ordinance, and had the plaintiff asserted her right to freedom previous to the adoption of the constitution of this state, she would, in my opinion, have been entitled to it. But by the third section of the sixth article of the constitution of this state,* "Each and every person who has been bound to service by contract or indenture, in virtue of the laws of the Illinois territory heretofore existing, and in conformity to the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures, and such negroes and mulattoes as have been registered, in conformity with the aforesaid laws, shall serve out the time appointed by such laws."

And here, certainly, a very grave question arises, and that is, if these indentures were originally void, can any subsequent act, and that without the consent of the persons most interested, make them good? I readily concede, that no

* *Vide* Rev. Laws of 1827, p. 36.

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subsequent legislative act could have made the indenture valid. Can then this constitutional provision make a void indenture valid? In order more fully to understand this question, it will be necessary clearly to ascertain the difference between an act of the legislature and a constitutional provision. What is ment by the term "constitution" as applied to government? It is the form of government instituted by the people in their sovereign capacity, in which first principles and fundamental law are established. The constitution is the supreme, permanent and fixed will of the people in their original, unlimited and sovereign capacity, and in it are determined the condition, rights and duties of every individual of the community.

From the decrees of the constitution there can be no appeal, for it emanates from the highest source of power, the sovereign people. Whatever condition is assigned to any portion of the people by the constitution, is irrevocably fixed, however unjust in principle it may be. The constitution can establish no tribunal with power to abolish that which gave and continues such tribunal in existence. But a legislative act is the will of the legislature, in a derivative and subordinate capacity. The constitution is their commission, and they must act within the pale of their authority, and all their acts, contrary or in violation of the constitutional charter, are void.

If they have no power to pass an act, any number of repititions of unconstitutional acts, or acts beyond the pale of their authority, can never make the original act valid. As it respects the territorial legislature, the ordinance had the same controlling influence over their acts as a constitution has over the legislature of a state. By this course of reasoning I conclude, that although the act of the territory in relation to indenturing negroes and mulattoes, was originally void, yet it enumerated a description of persons that the constitution of this state has undertaken to fix their condition in life, and the rights they shall possess in this community. It has determined that they shall serve their masters according to the provisions of the law before recited. It was, however, urged on the argument of this cause, that the people of this state, when they assembled in convention, were not absolutely free and independent, and at liberty to adopt what frame of government they choose, for they were controlled by the constition of the United States, and by the ordinance of 1787. The provision of the third section of the sixth article of the constitution of this state does not, as I conceive, in any way conflict with the constitution of the United States. Several of the states, in the formation of their constitutions, have ingrafted

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into them provisions relative to the right to hold persons in slavery, without objection. The ordinance, however, is no doubt still binding upon the people of this state, unless it has been abrogated by "common consent." By "common consent," I understand the United States, and the people of this state, and whenever they shall agree that the whole, or any part of the ordinance of 1787 shall be repealed, it will, so far as it affects this state, become a dead letter. The people of this state, by recognizing the validity of the indenturing and registering of servants, in pursuance of the act of 1807, before referred to, gave their consent, to alter so much of the ordinance as was repugnant to the constitution of this state. When the constitution of this state was presented to congress, in order to our admission into the Union, the attention of that body was called to that clause of our constitution which requires that registered and indentured servants shall be held to serve pursuant to said act, and which was contended, and if I mistake not, was conceded to be a violation, of the ordinance. Congress, however, admitted this state into the Union with this constitutional provision, and thereby, I think, gave their consent to the abrogation of so much of the ordinance as was in opposition to our constitution. Having thus shown that registered and indentured servants are bound to serve, the next question that arises in this case is, whether the defendant has set forth sufficient matter in his plea to support his claim to the services of the plaintiff? Several objections have been made to the plea. Those which are deemed important, I shall notice.

1. That the plea does not state the existence of those facts which would authorize the indenturing, to wit: that she owed service to Joseph Jay, was above fifteen years of age, and that the indenturing took place within thirty days after she was brought into the territory.

2. That by the death of Joseph Jay, the indenture ceased to have any operation.

3. The plea is uncertain whether defendant claims the service in virtue of his administration, or his heirship; and

4. That the plea does not answer the wounding.

As it regards the first objection, it evidently appears from the constitution that it does not intend to confirm every indenture. It only saves those that were made "in conformity to the provisions of the law, without fraud or collusion." If the court could not inquire beyond the fact of indenturing, then this provision of the constitution would be useles and absurd. But upon the ground assumed, to sustain the validity of these indentures, no doubt can exist that, unless the indenturing

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was in conformity to the law, it is void. On whom then must the *onus probandi* rest? I should think, in ordinary cases, on the party who sets up a claim, founded on statute, and in derogation of common right? It was, however, on the argument urged with great force, that if it was incumbent on the master after a lapse of several years, to prove that every prerequisite of the statute had been complied with, it would subject the master in most cases to great inconvenience and expense, and in many cases to the loss of services that the constitution had secured to him. Witnesses might forget, remove or die, and thus, by the lapse of time and accident, be deprived of their proof. It was also urged, that something ought to be presumed in favor of records, that the officers had done their duty. These arguments possess considerable weight, and I feel it the duty of the court in deciding on the point, to allow them to have some influence.

If the injury complained of had consisted in constraint, imposed on the plaintiff soon after the time of the indenturing before the clerk, and no subsequent imprisonment of the plaintiff had taken place, the statute of limitations would have barred the action in five years, and the defendant would not then have been bound to have plead a right to restrain the plaintiff's liberty under the indenture. The statute of limitations was made for the purpose of quieting parties after so much time has elapsed, as affords a presumption that the evidence might be lost by death or forgetfulness. That this statute is a wise law, all who are conversant with trials in courts and the frailty and forgetfulness of mankind will readily concede. The law, therefore, discourages law suits, after so much time has intervened as to create the presumption that witnesses have died or forgotten the transactions; or, in other words, the law favors the diligent and not the slothful. Had the plaintiff brought an action within five years after the commencement of what she complains as an unlawful restraint on her liberty, I should have been clearly of opinion that it was incumbent on the defendant to have shown, not an indenturing only, but that the indenture had been made "in conformity to the provisions of the law." But after a period of more than ten years has intervened, and an acquiescence in the mean time of the plaintiff, I think it would impose what would in some cases be impossible, and in all an unreasonable hardship, to require the defendant to plead and prove all the facts necessary to show the validity of the indenture. I am, therefore, of opinion, under the circumstances of this case, that it was unnecessary in the plea to aver the existence of the facts to warrant the making of the indenture in question. As,

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however, this opinion is based on legal presumptions, it would certainly be competent for the plaintiff, by way of replication, to state facts inconsistent with these presumptions, and thereby take upon herself the burthen of proving that they had no existence. The second objection to the plea is, "that by the death of Joseph Jay, the indenture ceased to have any operation." The act "concerning the introduction of negroes and mulattoes into this territory," passed September the 17th, 1807, contains no provision as to the consequences of the death of the master, upon the indentured servants. But by the third section of the sixth article of the constitution of this state, before referred to, it is declared that "each and every person, who has been bound to service, by contract or indenture, in virtue of the *laws* of Illinois territory, shall be held," &c. From this phraseology it would seem that the convention recognized the existence of more than one law that had reference to the indenturing and registering of negroes and mulattoes.

It hence becomes necessary to inquire into all the laws of the territory in relation to this description of persons. By the seventh section of the act entitled "an act concerning executions," passed the 17th of September, 1807,* being the same day on which the indenturing law was passed, it is enacted, "That the time of service of such negroes or mulattoes, may be sold on execution against the master, in the same manner as personal estate, immediately from which sale, the said negroes and mulattoes shall serve the purchaser or purchasers for the residue of their time of service." By the act entitled "an act to regulate county levies,"† passed the same day, "bound servants," are declared to be taxable as property. And by the third section of the act entitled "an act concerning servants,"‡ passed on the said 17th day of September, 1807, it is declared that "the benefit of the said contract of service shall be assignable by the master, to any person being a citizen of this territory, to whom he shall, in the presence of a justice of the peace, freely consent that it shall be assigned, the said justice attesting such free consent in writing, and shall also pass to the executors, administrators, and legatees of the master." But by a strict and literal construction of the language employed in the first section of this statute, to which the word "contract," in the third section refers, it might be considered doubtful whether the words "negroes and mulattoes," under contract to serve another, embrace the negroes and mulattoes registered and

* Rev. code of 1807, vol. 1, p. 188. † Ibid., vol. 2, p. 608. ‡ Ibid., p. 647.

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indentured under the act "concerning the introduction of negroes and mulattoes into this territory," or only negroes and mulattoes who shall come into this territory under "contract to serve another." But when it is recollected that the convention supposed that there were several laws on the subject of indentured and registered servants, I have no hesitation in concluding that the act concerning servants embraced indentured servants. It is also a rule in the construction of statutes, that the sense which "the contemporaneous members of the profession had put upon them, is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege.*" 1 Kent's Com., 434. I have been informed that the members of the bar always understood the act concerning servants, had application to indentured and registered servants, and upon that opinion the community at large have supposed that these persons might be sold, with the consent of the servants, and that they went to the administrator in the course of administration. It is a further rule in construing statutes, that "several acts *in pari materia*, and relative to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule applies, though some of the statutes may have expired, or are not referred to in the other acts. 1 Kent's Com., 433. The first legislature, after the adoption of the constitution of this state, in the act entitled "an act respecting free negroes and mulattoes, servants and slaves," passed 30th of March, 1819,* have adopted the third section of the "act concerning servants" *verbatim*, though from the context it does not appear that any contract of service is before spoken of. This section of the act of 1819, can not have any object or meaning, unless it have reference to the indentured and registered servants mentioned in the constitution. I thence conclude that the third section of the act "concerning servants," and the 11th section of the act of 1819, embrace indentured and registered servants, and consequently, upon the death of Joseph Jay, the plaintiff went to the administrator as assets. The third objection to the plea is, that it is uncertain whether the defendant claims the service in virtue of his being administrator or heir? This objection is, I think, fatal. The plea, in this respect, is wholly indefinite. If the defendant claims the plaintiff in his character as heir, there is no law to sanction the claim. If the services of the plaintiff are to be considered as prop-

* Laws of 1819, p. 358.

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erty, by the common law, they would go as assets to the administrator, and the statutes that I have referred to, give the same direction. Should the party claim the defendant as administrator, still the plea would be bad, as an administrator would only have the custody of the plaintiff for safe keeping, until her time of service could be sold; as administrator, he had no power to compel the plaintiff "to attend to the ordinary business of him, the said defendant." On the ground that the plea is too uncertain as to the character in which the defendant claims the services of the plaintiff, and upon the further ground that in neither capacity can the defendant claim her services, the judgment must be reversed. The plea is also defective, in point of form, for not answering the wounding. It was urged on the argument, that plaintiff, having demurred to defendant's plea, and having subsequently withdrawn it, and replied, upon the demurrer's being overruled in the court below, it is now too late to object to the plea. The withdrawing the demurrer, is as if it had never been put in; consequently, when a good declaration is filed, the defendant must interpose a good bar, or else the plaintiff is entitled to recover. It is a rule of pleading, that "a demurrer by either party, has the effect of laying open to the court, not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of the law." 1 Saund., 285, (*n.* 5). And "if two or more of the pleadings be bad in substance, the court will give judgment against the party who committed the first fault." *Archbold's civil pleadings*, 351. Therefore, notwithstanding the plaintiff's replication may be bad, of which I give no opinion, if the plea also be bad, judgment must be for plaintiff. I am of opinion that judgment must be reversed with costs, and that the proceedings be remanded to the Randolph circuit court, with liberty to defendant to amend his plea, on payment of the costs occasioned thereby. (*a*) (1)

Judgment reversed.

Baker, *Breese*, and *Cowles*, for plaintiff in error.

McRoberts, *Young*, and *T. Reynolds*, for defendant in error.

(*a*) The effect of the ordinance of 1787, having undergone discussion in the supreme court of Missouri, a reference is here made to the cases there decided.

Merry v. *Tiffin and Menard*, Dec. sup. court, Mo.. 725. This case is now before the supreme court of the U. S. *Winney* v. *Whitesides*, ibid., 472.

Vide the case of *Nance, a girl of color* v. *Howard*, ante, p. 242.

(1) See note to the case of *Nance, &c.* v. *Howard*, ante p. 242.

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JOSEPH DUNCAN, Appellant *v.* INGLES AND BURR, Appellees.

APPEAL FROM JACKSON.

If a defendant in a suit at law can not prove his defense, he shou'd file a bill for a discovery, and if he has a legal defense and neglects to make it, equity will not relieve.

Opinion of the Court by Justice LOCKWOOD. This was a bill in chancery, filed by the complainant, to perpetually enjoin a judgment obtained in the Jackson circuit court, in favor of the defendants, against the complainant. The bill states that the recovery was had on a judgment obtained in the state of Kentucky. The court, after a careful perusal of the bill, are clearly of opinion that the bill discloses no ground for the interference of a court of equity. If the complainant could not prove his defense, it was his duty to have filed a bill of discovery when the suit in Kentucky was pending against him. The law is well settled, if a party has a legal defense to a suit at law, and neglects to make it at the proper time, he is precluded from seeking relief in equity. Judgment affirmed with costs. (*a*) (1)

Judgment affirmed.

Blackwell, for appellant.

Cowles, for appellee.

(*a*) Vide *Hubbard* v. *Hobson*, ante, 190. *Crow's executors* v. *Prevo* ante, 216

(1) See note to *Moore et al.* v. *Bagley et al.*, ante, p. 94.

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PETER KIMMEL, Plaintiff in Error, *v.* JACOB SCHWARTZ, Defendant in Error.

ERROR TO JACKSON.

To take a case out of the statute of limitations, proof that the defendant promised to pay the debt is insufficient, without evidence of the original consideration of the indebtedness. (1)

The promise to pay a debt barred by the statute only removes the bar, and leaves the case to be proved, as if no statute had been pleaded.

The rule, as to what proof is required to take a case out of the statute is this: The promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise.

It is correct to substitute another person as security for costs, and then permit the discharged security to testify.

This was an action of *assumpsit*, for goods, wares, and merchandise, sold and delivered, money lent and advanced and on an account stated, brought in the Jackson circuit court, by Schwartz against Kimmel. Kimmel pleaded *non assumpsit*, upon which issue was joined, and *non assumpsit* within five years. This plea was traversed and an issue to the country; jury and verdict for the plaintiff for two thousand one hundred and thirty-one dollars and thirty-one cents. The defendant moved for a new trial for the following reasons:

1. The suit was brought without the authority of the plaintiff.
2. The plaintiff is, and has been insane since and before the pretended existence of the alleged cause of action.
3. No promise to pay within five years was proved.
4. The plaintiff never knew of the action or cause of action.
5. The verdict is against law and evidence.

The motion for a new trial was overruled, During the progress of the trial, and after the plaintiff had gone through with the testimony on his part, the defendant moved the court to exclude the evidence from the jury, and direct as in case of a nonsuit. Which motion the court overruled, to which opinion of the court the defendant excepted. From the bill of exceptions, the following is the testimony given on the trial, by plaintiff: Eli Penrod, a witness for plaintiff, testified that about two years before the trial, he was living at the defendant's house, when Mrs. Schwartz, the wife of the plaintiff, was there, and asked the defendant for money, and said that the defendant owed her for a long time; the sum asked for by Mrs. Schwartz was about two thousand five hundred dollars. The witness understood from the conversation be-

(1) See note to *Mellick* v. *De Seelhorst*, ante, p. 221.

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tween them that she had let defendant have notes which he had collected, and had also lent him money—that during the same conversation, defendant said he had not the money then, but that he was going to New Orleans and would get money, and when he returned, if she would send one of her boys with him to Shawneetown to prove a paper or some hand writing, witness did not recollect which, he would pay her, to which Mrs. Schwartz replied, that the boys did not know any thing about the hand writing. The witness further stated, that at the time of this conversation, there were no persons present, but defendant, Mrs. Schwartz, and witness, and he does not know whether she had any papers in her hands or not; that she was there about half an hour.

Susannah Will testified, that she went in company with Mrs. Schwartz to see defendant, and that Mrs. Schwartz told defendant, in the presence of witness, that he owed her the sum of two thousand five hundred dollars, and that she wanted it. To which the defendant replied, yes, but said he had not the money to pay her. The time of this conversation was about four years before the commencement of the suit. This witness also stated, that about two years thereafter, defendant was at her, witness' husband's house, and in a conversation with witness, defendant said that he had rented a house in Arkansas, for a tavern, and wanted Mr. Will to move there and keep a tavern, and said he would try to make up for Mrs. Schwartz five or six hundred dollars. Witness further stated, that Mrs. Schwartz was the sister of defendant, and that her husband, the plaintiff, had never been in this state; that Mrs. Schwartz, with the family, had lived in it about seven years, apart from the plaintiff, and that she understood that this claim on defendant was for money that Mrs. Schwartz had lent him.

Conrad Will testified, that in the year 1817, he had a settlement with defendant, at Kaskaskia, in which he fell in defendant's debt, and Mrs. Schwartz said she would take witness for her debtor, and credit defendant with the amount on the ten hundred and fifty-five dollars which she had let defendant have at Pittsburgh, which arrangement the defendant agreed to. He also understood from Mrs. Schwartz, that this ten hundred and fifty-five dollars had been settled.

George Schwartz, the son of the plaintiff, testified that in the month of August, 1824, shortly before the commencement of this suit, he went to the defendant and asked him for the sum of 2,132 dollars thirty-seven and a half cents, which the defendant was owing them. To which defendant replied, that that was the sum, but said also that he had settled it with

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George Kimmel; that the demand against defendant for said sum of money was created twelve or thirteen years ago; that his mother when in Pennsylvania, had frequently let defendant have money; that the amount now claimed was loaned to defendant by his mother, the plaintiff's wife. On his cross-examination he stated that the plaintiff lived in the state of Pennsylvania, and had not been in his right mind or capable of doing business since the year 1810; that this suit was commenced by direction of his mother who has lived in this state for about seven years, and has been in the habit of transacting business for plaintiff's family both before and since she came to this state. This witness was objected to, on the ground that he was the security for the costs of the suit, but the court permitted him to be released, and another security substituted. Judgment being rendered on the verdict against the defendant, he sued out a writ of error, and assigned for error, 1. The refusal of the court to exclude the testimony and direct a nonsuit.

2. In permitting the security for costs to be released and become a witness.

Opinion of the Court by Justice LOCKWOOD. This was an action of *assumpsit.* The defendant below plead *non assumpsit*, and the statute of limitations. On the trial of this cause, after the plaintiff, Schwartz, had gone through with his testimony, the defendant moved the court to charge the jury that the testimony was insufficient, which instruction the court refused to give, and a bill of exceptions was tendered and signed, containing all the testimony given in the cause.

The testimony is very loose, confused and contradictory. After a careful perusal of it, the mind is left without any satisfactory conclusion as to the real merits of the case. The duty of the court, in a case thus situated is very difficult. We are, however, satisfied that injustice has been done, and that the cause ought to be presented to another jury.

In a recent case, decided in the supreme court of the United States, they were of opinion, that proof that defendant had promised to pay a debt barred by the statute of limitations, is insufficient, without evidence of the original consideration of the indebtedness. The promise to pay a debt barred by the statute, only removes the bar and leaves the case to be proved as if no statute of limitations had been pleaded. The evidence on this point is very defective. It is impossible to gather from the proof the precise nature of the original debt. Without some clear and distinct evidence of the existence of the original demand, it was the duty of the court to have sus-

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tained the defendant's motion for nonsuit, or given the instructions.

As this case will have to go to another jury, the court lay down the following, as the rule heretofore adopted by this court as to what proof is required to take a case out of the statute.

The promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise.

Several other objections have been raised to the proceedings in this cause, but the court do not deem any of them of sufficient importance to be commented upon, except the objection that the court suffered the security for costs to be discharged and new security taken, and then permitted the discharged security to testify. This was correct. Security for costs is in the nature of special bail, except the liability is not so great, yet bail are often discharged in order to obtain their testimony.

The judgment must be reversed with costs, and the cause remanded to the Jackson circuit court, where a *venire de novo* must be awarded. (*a*)

Judgment reversed.

Eddy and *Breese*, for plaintiff in error.

Baker, for defendant in error.

(*a*) The statute of limitations, instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended emphatically to be, a statute of repose. It is a wise beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. *Bell* v. *Morrison and others*, 1 Peter's Rep., 360.

If the bar of a statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. Id., 362.

If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague or indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the cause of action. Id., 362.

To take a case out of the statute there must be an unqualified acknowledgment not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed. *Bangs* v. *Hall*, 2 Picker. Mass. Rep., 368.

If at the time of the acknowledgment of the existence of the debt such

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THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, Plaintiffs in Error, *v.* HAZLE MORELAND, Defendant in Error.

ERROR TO GALLATIN.

It is regular, under the act of 1825, concerning judgments and executions, to proceed to foreclose a mortgage for money borrowed of the state bank, by *scire facias*.

Opinion of the Court by Justice LOCKWOOD. This action was commenced by *scire facias* in the Gallatin circuit court, on a mortgage executed to plaintiff, and recorded according to law.

The defendant demurred to the *scire facias* and judgment was rendered for defendant. The cause was brought into this court by writ of error. The error relied on is, that the circuit court decided erroneously in sustaining the demurrer to the *scire facias*.

It is understood by the court, that the circuit court, in sustaining the demurrer, went upon the ground that the bank mortgages do not contain an absolute promise to pay the money, but in order to charge the mortgagor, it is necessary to refer to a promissory note, *dehors* the mortgage, in order to assign a breach of the condition of the mortgage. If this constitutes a valid objection to proceeding by *scire facias* on the mortgage, then the demurrer was properly sustained. By the 18th section of the act concerning judgments and executions, passed 17th of January, 1825,* it is enacted, "that if default be made in the payment of any sum of money, secured by mortgage on lands and tenements, duly executed and recorded, and if the payment be by installments, and the last shall have become due, it shall be lawful for the mortgagee, his executors, or administrators, to sue out a writ of *scire facias*, from the clerk's office of the circuit court in which the said mortgaged premises may be situated, or any part thereof, directed," &c. If language is comprehensive enough to authorize this proceeding by *scire facias*, the legislature have certainly employed it in this statute.

acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt and take it out of the statute. *Sands* v. *Gelston*, 15 Johns. Rep., 511.

Vide *Clementson* v. *Williams*, 8 Cranch, 72. *Wetzell* v. *Bussard*, 11 Wheat., 309. *Harrison* v. *Handley*, 1 Bibb, 443. *Gray* v. *Lawridge*, 2 Bibb, 284. *Ormsby* v. *Letcher*, 3 Bibb, 269. *Bell* v. *Rowland's adm'rs*, Hardin's Rep., 301. *Mellick* v. *De Seelhorst*, ante, p. 221.

* Laws of 1825, p. 157.

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Whenever default is made in the payment of any sum of money secured by mortgage, and the last installment is due, the mortgagee is allowed to proceed by *scire facias.* The payment of the money borrowed of the bank was certainly secured by mortgage, and consequently the plaintiffs were authorized to proceed by *scire facias.* The court are at a loss to perceive any solid objection to this mode of recovering the money due the bank.

The judgment must therefore be reversed, with costs, and the cause remanded to the Gallatin circuit court for further proceedings. (1)

Judgment reversed.

Eddy, for plaintiff in error.

JOHN ADAMS, SEN'R., PETER PHILIPS and JACOB PHILIPS, Plaintiffs in Error, *v.* CHAUNCEY SMITH, Defendant in Error.

ERROR TO FRANKLIN.

A constable can not enter upon land and take in execution fruit trees standing and growing—they are part and parcel of the freehold.

It is not error to refuse a new trial.

Opinion of the Court by Justice LOCKWOOD. This was an action of trespass *quare clausum fregit.* The defendants plead not guilty, and Adams justified under an execution from a justice of the peace against the plaintiff, by virtue of which he seized and took the apple trees, &c., in the plaintiff's declaration mentioned.

To this plea plaintiff below demurred, and the court sustained the demurrer, and on trial of the issue of not guilty, the jury found a verdict for plaintiff below for 130 dollars, and judgment was given thereon. To reverse which, a writ of error has been brought to this court. The first error assigned is, that the circuit court erred in sustaining the demurrer. The only question presented by the demurrer is, whether on an execution from a justice of the peace, a constable can enter on land and sell fruit trees there standing and growing? This question is easy of solution. Fruit trees are part and parcel of the freehold, and can in no sense be considered as

(1) See note to *Cox* v. *McFerron*, ante, p. 28.

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goods and chattels. How far trees growing in a nursery might be considered goods and chattels, is not involved in the question decided by the demurrer, for the plea does not allege them to be nursery trees intended for sale. The demurrer was, therefore, correctly decided.

Another error assigned is, that the court erred in overruling the motion for a new trial. It has been frequently decided by this court, that overruling a motion for a new trial, cannot be assigned for error. The judgment below must be affirmed with costs. (*a*) (1)

Judgment affirmed.

McRoberts and *Hubbard* for plaintiffs in error.

Cowles, for defendant in error.

(*a*) Lord Kenyon, in the case of *Penton* v. *Robarts*, 2 East, 88, holds, that a nurseryman who is a tenant of land, may remove from the land his hot-houses and green-houses, with the trees growing, which he has erected.

As to what is personal, and what real property affixed to the soil, vide *Elwes* v. *Maw*, 3 East, 28.

A stone for grinding bark, affixed to a mill, called a bark mill, is not part of the freehold, but a personal chattel. 6 Johns. Rep., 5.

Wheat or corn growing is a chattel, and may be levied upon by execution. *Whipple* v. *Foot*, 2 Johns. Rep., 418.

(1) The question of what is realty and what is personalty, is, as will be seen by a brief review of some of the authorities, one about which there is much conflict of opinion. Browne on Statute of Frauds, page 239, says: "In certain cases, also, though they (crops, &c.,) are actually growing in land, they may never have any character of realty themselves; as for instance, if the title to them and the title to the land were originally and have remained distinct. A familiar case of this is found in nursery trees; the nurseryman merely *using* the land for the purpose of nourishing his trees, the interest in the trees may be considered as separate from the realty, and they may well be denominated personal chattels, for the wrongful taking and conversion of which the owner may maintain an action *de bonis asportatis*." In *Smith* v. *Surnam*, 9 Barn. & Cres., 561, the defendant had agreed to purchase of the plaintiff a quantity of timber, (most of which was then standing,) at a certain price per foot. The court held this not to be an interest in land within the meaning of the statute of frauds.

Sainsbury v. *Matthews*, 4 Mees. & Wels., 343, was a contract to sell the potatoes then growing on a certain tract of land at two shillings *per sack*, the plaintiff to have them at digging time and to dig them. Held not to be within the statute of frauds.

In *Smith* v. *Bryan*, 5 Maryland Rep., 141, the court says: "The principle to be gathered from a majority of the cases seems to be this, that where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee under a special license to enter for that purpose, it is still, in contemplation of the parties, evidently and substantially a sale of goods only."

In *Bishop* v. *Bishop*, 1 Kernan's (N. Y.) Rep., 123, it was held that poles, used necessarily in cultivating hops, which had been taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, were a part of the real estate.

Gibbs, C. J., in *Lee* v. *Risdon*, 7 Taunton, 191, said, that trees in a nursery ground are a part of the freehold until severed.

In a late case in New York the question was very fully discussed. The

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JONATHAN CLARK, Plaintiff in Error, v. LEVI ROBERTS, Defendant in Error.

ERROR TO MONTGOMERY.

If the affidavit upon which an attachment is issued, does not comply with the requisitions of the statute, all the proceedings under it are void, and the attachment ought to be quashed.

THIS suit was originally brought by attachment, before a justice of the peace in Madison county, sued out by Roberts against Clark upon the following affidavit viz.:

State of Illinois, Madison county:

Levi Roberts being duly sworn, saith, that Jonathan Clark

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facts of that case were as follows: A sculptor placed in the grounds in front of his house, on a base three feet high, a statute of Washington, weighing, with its pedestal which was cut from the same block of stone, about three tons. The base rested on a permanent artificial mound, raised for that purpose. The statute was not fastened to the base, nor was the latter affixed to to the foundation upon which it rested: *Held*, that the statute was a part of the realty. This decision was placed principally on the intention of the person erecting the statute. Parker, J., who delivered the opinion of the majority of the court, said: "If the statute had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was, that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands." *Snedeker* v. *Warring*, 2 Kernan's Rep., 170.

In *Palmer* v. *Forbes et al.*, 23 Ill., 301, which was a contest between execution creditors and mortgagees of the railroad, and in which the question arose as to what was realty, Caton, C. J., said, "We are of opinion that the rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such; but fuel, oil, and the like, which are designed for consumption in the use, and which may be sold and carried away, and used as well for other purposes as in the operation of the road, and when taken away have no distinguishing marks to show that they were designed for railroad uses, can not, we think, with any propriety, be treated or considered as anything but personal property, and subject to, and governed by the law applicable to such property."

Brick, as soon as they are placed in a wall, become attached to the freehold, and if they are removed from the wall, unless for the purpose of being replaced by better material by the person who put them there, the proprietor of the soil is the owner of the brick. *Moore* v. *Cunningham*, 23 Ill., 328.

Hewn timbers intended for a granary, fence posts, &c., unattached to the soil, though on the land, are not appurtenances and do not pass by deed. *Cook* v. *Whiting*, 16 Ill., 480.

See also *Claflin* v. *Carpenter*, 4 Metcalf Rep., 580. *Safford* v. *Annis*, 7 Maine Rep., 168. *Cutler* v. *Pope*, 13 id., 377. *Bostwick* v. *Leach*, 3 Day, 476. *Green* v. *Armstrong*, 1 Denio, 550. *Westbrook* v. *Eager*, 1 Harr., (N. J.) 81

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is justly indebted to him in the sum of one hundred dollars, and that the said Clark is privately moving his property out of the county, and therefore prays an attachment.

LEVI ROBERTS.

Sworn and subscribed before me this 3d day of June, 1826.

E. MARSH, J. P.

Judgment was rendered in favor of Roberts, from which Clark appealed to the circuit court of Madison county. A motion was there made to quash the attachment, and at the same time a motion by plaintiff to amend his affidavit. The first motion was overruled, and the last sustained, to which an exception was taken. The amended affidavit is in the following form, viz.:

State of Illinois, Madison county:

Levi Roberts being duly sworn, saith, that Jonathan Clark is justly indebted to him in the sum of one hundred dollars, and that the said Jonathan Clark was, at the time of making the original affidavit in this cause, and suing out the attachment, privately moving out of the county of Madison, so that the ordinary process of law could not be served upon him, and therefore prays an attachment.

Sworn to in open court, Aug. 1, 1827.

E. J. WEST, *Clerk.*

The jury could not agree upon their verdict, and a change of venue upon motion, notice and affidavit, was ordered, at the instance of Clark, to Montgomery county.

Upon a trial there, the jury found a verdict for Roberts for one hundred dollars in damages, and another bill of exceptions taken to the opinion of the court, in refusing to admit as evidence a certain agreement between one Piggot and Clark, which, as it is not noticed in the opinion of the court, is omitted. The principal errors assigned, are:

1. That the court erred in overruling Clark's motion to quash the attachment.

2. The court erred in permitting the plaintiff, Roberts, to amend his affidavit; and

3. The amended affidavit is also void, it not being sworn to according to law.

Opinion of the Court by Justice LOCKWOOD. This action was originally commenced before a justice of the peace, by attachment. The affidavit states that Clark, the defendant below, "is justly indebted to Roberts, in the sum of one hundred dollars, and that said Clark is privately moving his property out of the county," &c. Judgment was rendered

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before the justice, in favor of Roberts, for one hundred dollars, and the cause removed to the circuit court of Madison county, by appeal, and subsequently the venue was changed to Montgomery, where judgment was again rendered for Roberts for one hundred dollars, besides costs. The cause is brought into this court by writ of error. A variety of errors have been assigned; it is, however, unnecessary to notice but one, which is, that the attachment was erroneously issued, and ought to have been quashed by the court. This objection is fatal.

The affidavit was necessary to give jurisdiction to the justice. It does not comply with the requisition of the statute; hence, all the subsequent proceedings are void. *Mantz* v. *Hendly*, 2 Hen. and Munf., 308. The courts in Kentucky sanction the same doctrine. The amendment of the affidavit, will not help the previous illegal proceedings. An affidavit being the foundation of the proceedings by attachment, must be framed agreeable to the provisions of the statute, otherwise the justice has no jurisdiction. The circuit court ought to have quashed the attachment. The judgment below must be reversed with costs. (1)

Judgment reversed.

McRoberts, for plaintiff in error.

Cavarly, for defendant in error.

JOSIAH T. BETTS and SAMUEL SMITH, Administrators of MICHAEL JONES, deceased, Appellants, *v.* SHADRACH BOND, Appellee.

APPEAL FROM RANDOLPH.

The act of 1823, regulating administrations and the descent of intestates' estates, &c., does not apply to the estates of those who died before the passage of the act. Under that law, the judgments obtained against the deceased in his life-time are to be first paid.

Opinion of the Court by Justice LOCKWOOD. This was an action of *scire facias*, brought by Bond, against defendants below, on a judgment obtained against them as administrators, for *assets in futuro*. The *scire facias* alleges that assets

(1) By the present statute any affidavit or writ of attachment may be amended, or a new affidavit filed. Purple's statutes, p. 92, sec. 6. Id., p. 98, sec. 8. Scates' Comp., 229. See *Phelps* v. *Young*, post.

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had come to the hands of defendants, sufficient to satisfy the judgment. The defendants set out in their third plea, several judgments rendered against Jones in his life time, that he died on the 28th of November, 1822, and that administration was granted thereon the 3d day of February, 1823, and that goods and chattels to a small amount have come to their hands to be administered, which are insufficient to satisfy those judgments. To this plea Bond demurred, which demurrer was sustained. A great variety of other proceedings were had in the cause, but from the view the court take of the case, it is unnecessary to recite them. The court, on a special verdict which was rendered in the cause, gave judgment that Bond was entitled to a *pro rata* portion of the assets that had come to the hands of the administrators, with the judgment creditors mentioned in the third plea, and gave judgment accordingly. To reverse which judgment, an appeal was taken to this court.

The legislature of this state, on the 12th of February, 1823, passed an act entitled "an act regulating administrations and the descent of intestates' estates, and for other purposes,"* which act directs the executors or administrators "of any person dying testate or intestate within this state, who shall not have estate sufficient to pay his or her just debts," after paying funeral expenses and probate fees, to pay the balance, on the legal demands that then and there be presented, in equal proportion, according to the amount of the several demands, without regard to the nature of said demand, not giving any preference to any debt on account of the instrument of writing on which the same may be found." The question presented in this case is, whether this act applies to estates, so as to alter the common law disposition of the assets, where the intestate died before its passage? By the common law, judgments obtained against the intestate before his death are entitled to a preference in payment over other debts. Has this statute altered the law, so as to divest creditors of their right to be paid according to the priority secured to them by the common law? The language of the statute is only prospective; it applies only to cases of persons dying "testate or intestate," and not to persons who have theretofore died. It does not appear to have been the intention of the legislature to interfere with rights already vested, but to give a different rule in future. It is also a general rule, that all statutes shall operate prospectively only, and courts never give them a retrospective operation, unless the legislature

* Laws of 1823, p. 127.

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use such language as to leave no doubt that such was their intention, and enlightened courts have ever disputed the power of the legislature to pass retrospective laws which take away vested rights. *Dash* v. *Van Kleck*, 7 Johns. Rep., 477. But, as we are clearly of opinion that the legislature did not intend to apply this act to cases where the intestate died before its passage, we think the circuit court erred in sustaining the demurrer to the defendants' third plea. As this plea goes to the whole merits of the action, and it appearing from the special verdict that the plea was proved on the trial, it is unnecessary to send this cause back to the circuit court. The judgment is reversed, with costs.

Judgment reversed.

Breese, *Cowles*, *Baker*, and *T. Reynolds*, for appellants.

McRoberts, *Young*, and *J. Reynolds*, for appellee.

JOHN ANKENY, Appellant, *v.* JAMES PIERCE, Appellee.

APPEAL FROM JACKSON.

The execution of a note is not evidence of a settlement of all demands due from one party to the other, anterior to the date of the note.

Opinion of the Court by Justice LOCKWOOD. Pierce sued Ankeny in the Jackson circuit court, on a promissory note. The defendant below pleaded payment, and on the trial of the cause, proved an account for goods sold and delivered previous to the execution of the note.

Whereupon, the plaintiff below moved the court to instruct the jury, "that the execution of the note sued on was evidence of a settlement of all demands due from plaintiff below to defendant below, up to the date of the note, unless the defendant had shown, by evidence, that the demands were not settled at the execution of the note;" which instructions the court gave, and the defendant below excepted, and brought the cause into this court by appeal. The only question presented to this court for its decision is, whether the instruction prayed for ought to have been given? In a case where the only proof consists in the production of a note on the one side, and evidence of an account anterior to the date of the note, on the other side, it is very difficult for the court

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to lay down with precision any general rule applicable to such cases. The court have not been referred to any adjudged cases, or any principle of law, analogous to such a state of facts, nor have they been able to find any authority on the subject. The court, therefore, in the absence of authority, must decide this question agreeably to the dictates of justice and common sense. A knowledge of the manner in which men generally transact their business, is necessary in arriving at a correct conclusion to the question presented in this case. Experience informs us, that notes are frequently given as the consideration for a particular trade, without any reference to the situation of the account between the parties—leaving them to be settled at some future time, or in some particular manner. And notes, also, are given on the settlement of accounts, and for the balance due on such settlement. Are there, then, in the dealings among mankind, sufficient uniformity in relation to the execution of notes, to authorize the court to decide that a legal presumption is thereby raised that all previous demands are released or settled? The court believe, from their experience and observation, that injustice would too often be done if they should sanction such a general rule.

It is safer to require a party who resists a demand upon the ground that it has been settled or paid, to prove in what manner it was paid. Slight evidence would, doubtless, be sufficient in this case, to warrant a jury in raising a presumption that the account was settled when the note was executed, but without any proof of a settlement of accounts and a balance struck, it is presuming too much to justify the court in deciding "that the execution of the note was evidence of a settlement of all demands due from plaintiff to defendant." The judgment must therefore be reversed with costs in this court, and the cause remanded, with directions to the court below, to award a *venire de novo* (a)

Judgment reversed.

Cowles, for appellant.

Baker, for appellee.

(a) A receipt for rent due at one time, affords a presumption that the rent due at an earlier date has been paid. 3 Starke's Ev., 1090.

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WILEY B. GREEN, Appellant, v. EUNICE ATCHISON, Appellee.

APPEAL FROM PIKE.

Appeal dismissed if copy of record not filed within three days

Reynolds, for appellee, on the 13th day of January, 1829, moved the court to dismiss this appeal, for the reason that the appellant has not filed a copy of the record within the time required by law, and the rules of this court, and cited the 12th Rule of Court, and Rev. Laws of 1827, page 319.

Per Curiam. This appeal is dismissed, and the appellee must recover her costs. (1)

Appeal dismissed.

(1) The present statute in relation to filing records in cases of appeal to the supreme court is as follows: "The appellant shall lodge in the office of the clerk of the supreme court, an authenticated copy of the record of the judgment or decree appealed from, by or before the third day of the next succeeding term of said supreme court, provided, that if there be not thirty days between the time of making the appeal and the sitting of the supreme court, then the record shall be lodged as aforesaid, at or before the third day of the next succeeding term of said supreme court, otherwise the said appeal shall be dismissed, unless further time to fill the same shall have been granted by the supreme court upon good cause shown." Purple's Statutes, 828, sec. 48 Scate's Comp., 264. And this is a transcript of the act of 1827.

In *Hagar* v. *Phillips*, the appellant filed the record, and moved that the appellee join in error. The appeal was prayed within thirty days of the commencement of the term. The motion was refused. The appellant was not bound to file the record before the next term, and the appellee ought not to be compelled to appear before that time. 13 Ill., 292.

Under the foregoing act it is held that "Where thirty days intervene between the date of the order of the court granting the appeal, and the first day of the next term of the supreme court, the record must be filed within the first three days of that term, although the time between the filing of the bond and the next term of the supreme court may be less than thirty days." *Vance* v. *Schuyler et al.*, 4 Scam., 286.

Where an appeal is taken to the supreme court, unless the record is filed within the first three days of the next term, which happens thirty days after the appeal is taken, or an extension of the time for filing the same is obtained within the three days, the appeal will be dismissed. It is not sufficient to file a motion for this purpose within the three days. *Frink* v. *Phelps*, 4 Scam., 480.

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ADAM SMITH, Appellant, *v.* JAMES A. JAMES, Appellee.

APPEAL FROM MONROE.

Further time to file record on an affidavit that it was through the negligence of counsel that the record was not filed in time, refused.

McRoberts, for appellee, on the 16th of January, 1829 entered his motion to dismiss this appeal because the appellant had failed to file a copy of the record within the time prescribed by law and the rules of court, and relied upon the 12th Rule and the 33d section of the Practice Act, Rev. Laws of 1827, page 319.

Ford, contra, read an affidavit stating that it was not owing to the negligence of the appellant that the record was not filed, but to that of his counsel, and asked further time to file the record.

Per Curiam. Let the motion for further time to file the record be overruled, and the motion to dismiss the appeal be sustained, and the cause remanded, so that the appellee may have his execution upon his judgment in the Monroe circuit court, and also that he recover his costs against the appellant. (1)

Appeal dismissed.

(1) See note to last case.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1829, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice.*
THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, } *Associate Justices.*

JOHN TYLER, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO JEFFERSON.

Larceny can not be committed of goods and chattels found in the highway, where there are no marks by which the owner can be ascertained; one ingredient of larceny is wanted in such case, to wit: a felonious taking.

Opinion of the Court by Justice BROWNE. This was an indictment against John Tyler, for a supposed larceny. He was tried and a verdict of guilty found against him in the court below, upon which judgment was rendered; to reverse which, he has brought this writ of error.

The whole of the evidence establishes clearly that the article of property for which he was charged with stealing, was found in the highway, and was a pair of saddle-bags. It was further proven, that there were no marks by which the owner could be ascertained.

The question then is, can an individual commit larceny at all, where the property is found on the highway, and no marks or brands by which the owner could be distinguished.

Larceny is defined by the books to be "the felonious taking, and carrying away of the personal goods of another." The original taking then, in this case, can not by any possible construction that can be given to it, be construed to be with a felonious intent.

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The court is therefore of opinion that the judgment of the court below be reversed, and the prisoner set at liberty. (*a*) (1)

Judgment reversed.

Gatewood, for plaintiff in error.

Eddy, state's attorney for defendant in error.

VERNON, BLAKE & CO., Plaintiffs in Error, *v.* W. L. MAY, Defendant in Error.

ERROR TO MADISON.

A writ of error will not lie upon a refusal to grant a new trial.

Opinion of the Court by Justice SMITH.* This case comes before the court on a bill of exceptions to the opinion of the court, in refusing to grant a new trial. It will be altogether unnecessary to consider the grounds upon which a new trial was refused in the court below, because this court has decided, in the case of *Clemson* v. *Kruper*, ante, page 210, that a refu-

(*a*) A *bona fide* finder of an article *lost*, as a trunk containing goods, lost from a stage coach, and found on the highway, is not guilty of *larceny* by any subsequent act in secreting, or appropriating to his own use the article found. *The People* v. *Anderson*, 14 Johns., 294.

To constitute larceny, the possession of the goods must have been acquired *animo furandi* in the first instance; an intention afterwards formed, of converting them to the party's own use, is not felonious. Ib.

If a man lose goods, and another find them, and *not knowing the owner*, convert them to his own use, this is no larceny, even although he deny the finding of them or secrete them. Archbold's Crim. Pl., 119.

Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings, but the next morning she concealed them and denied having them in her possession, the jury finding that she took them originally from a desire of saving them from the fire, and that she had no evil intention until afterwards, the judges held, it was a mere breach of trust, and not felony. *Rex* v. *Leigh*, 2 East. P. C., 694.

(1) If a person find an article of personal property in the highway, and converts the same to his own use, not knowing the owner, he is not guilty of larceny. It is otherwise if he knows the owner when he acquires the possession, or has the means of identifying him *instanter*, by marks he understands. *Lane* v. *The People*, 5 Gilm., 305.

If the owner of goods, alleged to have been stolen, voluntarily parts with the possession and title, then neither the taking or conversion is felonious. But if he parts with the possession, expecting that the identical thing will be returned, or that it shall be disposed of on his account, or in a particular way, then the thing may be feloniously converted, and the bailee be guilty of a larceny. *Welch* v. *The People*, 17 Ill., 339.

Where a bill is put into the hands of a person to procure change, and he appropriates it, it is larceny. *Farrell* v. *The People*, 16 Ill., 506.

* LOCKWOOD, J., having been counsel in this cause, gave no opinion.

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sal to grant a new trial is no ground of error, it being entirely a matter of sound discretion in the court below, to grant or refuse a new trial. The court, in several other cases, decided since the case of *Clemson* v. *Kruper*, have adhered to this principle, and no reason can be perceived why the present case should be exempted from the operation of the rule laid down. The judgment of the circuit court must, therefore, be affirmed with costs. (*a*) (1)

Judgment affirmed.

Starr, for plaintiffs in error.

Turney, for defendant in error.

NATHAN CROMWELL, Plaintiff in Error, *v.* ENOCH C. MARCH, Defendant in Error.

ERROR TO MORGAN.

Where parties agree to submit their differences to arbitration, and agree that "the award is to be entered of record and made a rule of court at the next term, and which award, when entered, is to have the force and effect of a judgment," it is irregular and erroneous for the circuit court to enter up a judgment on the award.

Opinion of the Court by Justice LOCKWOOD. The facts of this case are, that March and Cromwell, having several matters of difference, agreed to arbitrate the same, and in their agreement is the following clause, to wit: "Which award is to be entered of record and made a rule of court at the next term of the Morgan county circuit court, and which award, when entered, is to have the force and effect of a judgment." Subsequent to the making of the award, March served notice of his intention to apply for a judgment on the award, and the circuit court of Morgan county gave judgment by default, at the April term, 1829, on the award. A writ of error has been brought to reverse this judgment. Several errors have been assigned, but the court only deem it necessary to decide, whether the circuit court had jurisdiction over the case, so as to give any judgment on the award. By the "act regulating

(*a*) See cases in relation to new trials in note to the case of *Clemson* v. *Kruper*, ante, p. 210.

(1) See note to *Sawyer* v. *Stephenson*, ante, p. 24.

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arbitrations and awards," passed January 6th, 1827,* it is enacted that "where persons are desirous to determinate disputes by arbitration, agree that their submission to arbitrate shall be made a rule of the circuit court," and "insert such, their agreement, in the submission, or in the condition of the bond or promise;" which agreement, on producing an affidavit of the due execution thereof, and filing it in court, may be entered of record, and a rule of court shall thereupon be made that the parties shall submit to and be finally concluded by such arbitration. It is further enacted, "that where the award shall be for the payment of money only, the same being returned into and accepted by the court, judgment shall be rendered thereon for the party in whose favor the award is made, to recover the sum awarded to be paid to him, together with the costs of arbitration and the costs of court;" &c. It is contended that the agreement that the "award" shall be made a rule of court, does not bring the case within the statute. The English statute on this subject contains the same phraseology, "that the consent expressed in the bond or agreement, must make the *submission* a rule of court," and under their statute it was decided, if the agreement be to make the award a rule of court, it is not within the act. 2 Sellon's practice, 244, cites Strange, 1178. Upon the authority of this case, the court are of opinion that the circuit court of Morgan county erred in taking cognizance of the case. The judgment must therefore be reversed with costs. In giving this judgment the court do not express any opinion as to the validity of the award. The arbitration and award will therefore stand, and the rights of the parties under them, in the same manner as if no judgment had been rendered on the award. (1)

Judgment reversed.

Breese and *McConnell*, for plaintiff in error.

W. Thomas, for defendant in error.

* Rev. Code of 1827, p. 64.

(1) See note to *Chandler* v. *Gay*, ante, p. 88.

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EDWARD HUMPHREYS, Appellant, v. COLLIER AND POWELL, Appellees.

APPEAL FROM RANDOLPH.

On a note made in Missouri and assigned there the *lex loci* of Missouri as to the liability of the assignor, is to govern.

The deposition of a witness, stating the contents of a record or written instrument, will be rejected upon the general principle that such things can not be proved by parol, if they are in the power of the party to be produced.

It is irregular for the court to instruct the jury as to the weight of evidence.

Opinion of the Court by Justice SMITH. It does not become important to examine critically more than one of the grounds relied on as error, to arrive at a correct determination of the present cause. The action is on an assigned note made in Missouri on the third of April, 1822, and payable five months after date. The declaration contains the usual counts on a promissory note, and avers the assignment to have been made on the first day of June, 1825. It also contains a count for goods, wares and merchandize, and the money counts. The defendant plead the general issue. It is conceded that the *lex loci* of Missouri is to determine the liability of the assignor. (1)

By the laws of the state of Missouri, to show due diligence, it is rendered unnecessary to prosecute the maker of a promissory note to insolvency, "if it shall appear to the court or jury that the institution of such a suit would be unavailing;" see Laws of Missouri, vol. 1, p. 143. Under the provisions of this law, the plaintiff in the court below attempted to show that such suit would have been unavailing, because of the insolvency of the maker of the note, after the assignment thereof, and before the institution of the present action. From the bill of exceptions it appears, that for such purpose the deposition of a witness taken in Missouri was offered in evidence, and to a part of the interrogatories and answers of the witness, on his direct examination, the defendant, on the trial, objected to their being read in evidence to the jury. The answers of the witness speak of the maker of the note having, in the year 1823, been discharged under the insolvent laws of the state of Missouri, of the schedule of his property, and the incumbrances on the same as stated by the insolvent, according to the witness' recollection, in the schedule.

The court refused to suppress the interrogatories and

(1) See note to *Bradshaw* v. *Newman*, ante, p. 133.

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answers objected to, and permitted them to be read in evidence. The exception on the trial to the admission of this testimony, I think well taken. No part of the rules of evidence is better settled than the one that parol evidence can not be given, of the contents of a written instrument or record in the power of the party to produce, because it is neither the highest nor best of which the case is susceptible. The evidence of insolvency, or of the uselessness of a prosecution against the maker of the note, might no doubt have been proved by facts tending to show such insolvency connected with general reputation as to that point; or it might have been proved by the introduction of the record of his discharge under the insolvent laws of Missouri, and his subsequent poverty and inability to discharge the note in question, but the witness ought not to have been permitted to speak of the contents of a record which must necessarily have involved the correctness of his own recollection.

The application to suppress such portions of the deposition was correctly made, and ought, I think, to have been granted, Under the count for goods, wares and merchandize, the evidence offered, so far from sustaining that count, directly negatives the indebtedness of Humphreys in the character of purchaser. The testimony is clear, that the note was received, at least, in payment for the goods, with the usual recourse against the indorser or assignor, and if any inference is to be drawn from the statement of the witness, that it was given and received at a discount, as he understood from both the parties, of ten per cent., it would seem to authorize not only that presumption, but that it was intended to have been in full, without recourse to the assignor afterwards. The instructions of the judge to the jury as to the weight of evidence, was perhaps unnecessary and irregular, but as he subsequently instructed them that they were the sole judges of the testimony and its character, it does not become necessary to decide on that point. (2) The judgment of the circuit court must

(2) The act of February, 1847, provides that "hereafter, no judge of the circuit court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing." Purple's Statutes, p. 829, sec. 60. Scates' Comp., 261.

Under this statute it is held that the court is not prohibited from giving instructions of its own accord, such as are applicable to the case, provided they are given in writing. *Brown* v. *The People*, 4 Gilm., 441. *Bloomer* v. *Sherill*, 11 Ill., 484. *Galena and Chicago Union Railroad* v. *Jacobs*, 20 Ill., 478.

A judge has no authority on the trial of a cause, to affect or change the law as stated in the written instructions, by any expression not in writing. *Ray* v. *Wooters*, 19 Ill., 82.

An instruction asked for, which has no application to the case proved, is abstract and should not be given. *Riley* v. *Dickens*, 19 Ill., 29.

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be reversed, the case remanded to the court below with instructions to cause a *venire de novo* to be issued. (*a*)

Judgment reversed.

Hall, for appellant.

Breese, for appellee.

Instructions not based on evidence should not be given. *Chicago, Burlington & Quincy R. R.* v. *George*, 19 Ill., 510. *Hosley* v. *Brooks, et ux.*, 20 Ill., 115. *Coughlin* v. *The People*, 18 Ill., 266.

Where substantial justice has been done, even if improper instructions have been given, a judgment will not be disturbed. *Newkirk* v. *Cone*, 18 Ill., 449. *Dishon et al*, v. *Schorr*, 19 Ill., 59. *Elam* v. *Badger*, 23 Ill., 498. *Howard Ins. Co.* v. *Cornick*, 24 Ill., 45[illegible].

The right of a party to ask instructions must have some limit, and the supreme court will not sanction the abuse of it. *Fisher* v. *Stevens*, 16 Ill., 397.

A judge may, of his own motion, instruct the jury, and it may often be his duty to do so. *Stumps* v. *Kelly*, 22 Ill., 140.

The practice of instructing a jury to find for the defendant, as in case of a nonsuit, is not adopted in this state. Ibid.

It is objectionable that instructions be drawn at great length, and have "injected" into them an argument of the case. They should be concise, and briefly present the points of law on which the party relies. *Merritt* v. *Merritt*, 20 Ill., 65.

Instructions should be as few and simple as possible, otherwise they are more likely to mislead the jury. *Springdale Cemetery Association*, v. *Smith*, 24 Ill., 480,

We have cited above the case of *Ray* v. *Wooters*, 19 Ill., 82, but with all due respect to the opinions of the court, we can come to no other conclusion than that the case was improperly decided. It was admitted that the qualifications made by the judge were immaterial. The cases of *Newkirk* v. *Cone*, 18 Ill., 449, and *Dishon et al.* v. *Schorr*, 19 Ill., 59, expressly assert, that although errors may have been committed in the evidence or instructions, yet if substantial justice has been done, a case will not be reversed. It is said the statute provides that a judge shall give no instructions except in writing. So the statute also provides a judge shall do many other things, the non doing of which will not, unless a party has been prejudiced thereby, be grounds of error. A negro or Indian is called by a plaintiff as a witness. Instead of testifying for the plaintiff, his testimony is entirely for the defendant. The statute says he shall not be a witness; but the defendant can not assign as error that he was allowed to be called as a witness, because he is not injured by it. Suppose in this case the qualifications of the judge, if material, were wholly in favor of Ray, and still the jury found against him. He could not complain, and why? Because it was an error in his own favor, and it has always been held that a party can not except to an error in his own favor. *Smith* v. *Williams*, 22 Ills., 357. We can not but think that the point on which this case ought to have turned was overlooked by the court.

(*a*) The court may give an opinion to the jury upon the weight of evidence, or may decline so to do; and if the evidence is doubtful, it is most proper to leave it to the jury. *Consequa* v. *Willings et al.*, 1 Peter's C. C. R., 225.

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DAVID INGALLS, Appellant, *v.* GEORGE T. ALLEN, Appellee

APPEAL FROM MORGAN.

To say of the plaintiff in an action of slander, "that he, or somebody, had altered the credit, *or* indorsement on a note, from a larger to a less sum, and that the note would speak for itself," is not actionable, as the charge is not positive, but in the disjunctive, and for aught that appears, he may have altered the credit or indorsement on his own note and violated no law in doing it.

Opinion of the Court by Justice BROWNE. This was an action of slander, in which there are several counts laid in the declaration, one of which charges these words: "He, (meaning the plaintiff,) forged the indorsement of a credit on a promissory note made by said defendant to said plaintiff, by which the same was changed from a greater to a less amount." The other counts are in substance the same. The defendant below, pleaded not guilty. The jury brought in a verdict in favor of the plaintiff below, for fifty dollars, upon which judgment was entered, and to reverse which an appeal is brought to this court. The following bill of exceptions shows all the evidence given in the trial below: "That upon the trial Rice Dunbor, the first witness introduced on the part of the plaintiff, stated that he was present when the plaintiff told the defendant that he, the defendant, had charged him, the plaintiff, with forgery, by having altered the signature of a note or the indorsement, but did not recollect which. The defendant replied, that he did not know that he had said so, but that the note would show for itself, and that he would not take back his words. Abram Vance, a witness introduced by plaintiff, stated, that he met with defendant in the street, and that the defendant told the witness that the plaintiff had altered the signature, or the indorsement on the note, but could not recollect which. Murry McConnell, also introduced as a witness on the part of the plaintiff, stated, he heard defendant say that he, plaintiff, or somebody, had altered the credit or indorsement on a note, from a larger to a less sum; that the note speaks for itself. Charles F. Morgan, who was likewise introduced as a witness on behalf of the plaintiff, stated, that he was present at the conversation between plaintiff and defendant, as stated by the first witness, Mr. Dunbor, and stated that Mr. Ingalls said the note had been altered, and that it would show for itself." This was all the evidence. From the whole of the evidence, the party might have altered the indorsement or credit, and still, no criminality attach to his conduct. The

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charge is not positive, but is in the disjunctive; he is charged with being guilty of one thing or another. For aught that appears, he may have altered the indorsement, or credit, on his own note, and violated no law in doing it. The judgment of the court below must therefore be reversed. (1)

Judgment reversed.

McRoberts, for appellant.

McConnell and *Thomas*, for appellee.

(1) In *McKee* v. *Ingalls*, 4 Scam., 30, the words were, "You are a damned thief." "If you have got money you stole it." "I believe you are a damned thief. I believe you will steal." The court instructed the jury, "That the words 'If you have any property you stole it; I believe you will steal;' and other similar conditional expressions, are not such words as will sustain this action; and the jury can not find a verdict against the defendant for using such words." The supreme court held the instruction to be correct.

It is not actionable to charge a man with an intent to commit a crime. Id.

The words, "I have every reason to believe he burnt the barn," and "I believe he burnt the barn," are actionable. *Logan* v. *Steele*, 1 Bibb. 593.

To say, "My watch has been stolen in widow Miller's bar room, and I have reason to believe that Tiny Miller took it, and that her mother concealed it," is actionable. *Miller* v *Miller*, 8 Johns., 74.

To say of a person, "It is the general opinion of the people in J's neighborhood, that he burnt C's gin house," is actionable. *Waters* v. *Jones*, 3 Port., 442.

Charging a person with being a mulatto, and "akin to negroes," is not actionable. *Barret* v. *Jarvis*, 1 Hammond Rep., 83. *Otherwise* in South Carolina. *Eden* v. *Legare*, 1 Bay, 171. *Atkinson* v. *Hartley*, 1 M'Cord, 203. *King* v. *Wood*, 1 N. & M., 184.

Words calculated to induce the hearers to suspect that the plaintiff was guilty of the crime alleged, are actionable. *Drummond* v. *Leslie*, 5 Blackf., 453.

Ambiguous words are slanderous, if the hearers understood them to impute a crime. *Dorland* v. *Patterson*, 23 Wend., 422.

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IGNATIUS R. SIMS, Appellant, v. JOSEPH KLEIN, Appellee.

APPEAL FROM MORGAN.

Fraud vitiates every contract, but every false affirmation does not amount to a fraud. (1)

A plea to an action on a note for the payment of money, alleging that "it was obtained by fraud and circumvention, in this, that the plaintiff represented himself to be the owner of 100 head of hogs, and 54 head of cattle running in the neighborhood of his farm, and that they were worth $300, being the property for which the note was given, when in truth, plaintiff had not that number, nor were they good and valuable as represented," is bad, inasmuch as it does not allege the plaintiff used any means to deceive or circumvent defendant, and it was in his power by ordinary precaution to have ascertained the value and number. (2)

A plea of failure of consideration should allege specially in what the failure consisted, and the extent of it. The statute authorizing pleas to the consideration of a note, enumerates four grounds of defense: 1. Where the bond is entered into without any good or valuable consideration: 2. Where the consideration has wholly failed: 3. Where fraud and circumvention have been used in obtaining it, setting forth the facts which constitute fraud, &c., and 4. Where there has been a partial failure of consideration, setting forth in what it consisted. Precision as to the extent of the failure of the consideration is necessary to enable the court to give judgment for the residue. (3)

Opinion of the Court by Chief Justice WILSON. This is an appeal from a judgment of the Morgan circuit court. The action was commenced in the court below, by Klein against Sims, upon a note under seal. The defendant filed two pleas, both of which were demurred to, and the demurrers sustained by the court, and judgment was rendered for the plaintiff upon the note, from which judgment Sims appealed to this court, and now assigns for error the decision of the court, in sustaining the demurrers to the pleas. The first plea alleges that the note upon which the action is brought, was obtained by fraud and circumvention, and charges the fraud and circumvention to consist in the plaintiff's representing himself to be the owner of a hundred head of hogs and fifty-four head of cattle running in the neighborhood of his farm, and that they were worth 300 dollars, being the property for which the note was given, when in truth the plaintiff had not that number of hogs and cattle, nor were they good and valuable as represented.

(1) See note (1) to the case of *Bryan et al.* v. *Primm*, ante, p. 59.

(2) Fraud which will vitiate a negotiable instrument in the hands of a *bona fide* assignee, must be in obtaining the making or execution of the note. A fraud in the consideration will not be sufficient. *Woods* v. *Hines*. 1 Scam., 103. *Mulford* v. *Shepherd*. ib.. 583. *Adams* v. *Woldridge*, 3 Scam., 256. See note 3, to *Mason* v. *Buckmaster*, ante, 27.

(3) See note to *Taylor* v. *Sprinkle*, p. 17. *Wood et al.* v. *Goss et al.*, 21 Ill., 604.

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The court recognize the principle, that fraud vitiates and renders void every contract by which it is obtained, but every false affirmation does not amount to a fraud. A knowledge of the falsehood of the representation must rest with the party making it, and he must use some means to deceive or circumvent. This plea contains no charge of this kind, it only alleges the number and value of the cattle and hogs to be less than was represented by the plaintiff, Klein. As regards their value, that was clearly a matter of opinion, and by an ordinary degree of precaution the defendant might have ascertained the number. To this plea then, the demurrer was properly sustained. The second plea is of a two-fold character; it commences as a plea of part failure of consideration, which goes to only a portion of the action, and concludes as a plea of fraud, which is a defense to the whole action. It contains two distinct grounds of defense, which, if properly pleaded, though in the same plea, could not for its duplicity be taken advantage of, upon general demurrer. But is it not defective in substance?

The statute under which this plea is filed,* enumerates four grounds of defense to an action upon bonds or other writings, for the payment of money, &c.

1. Where the bond is entered into without any good or valuable consideration.
2. Where the consideration has wholly failed.
3. Where fraud and circumvention have been used in obtaining it; and
4. Where there has been a part failure of the consideration.

These are all separate and distinct grounds of defense, and should be so pleaded. If a bond is given without any good or valuable consideration, that fact may be pleaded generally. If fraud is relied upon, the plea must set forth facts which constitute fraud. If a total failure of consideration is relied on, the manner must be shown, and where a partial failure of consideration is relied on, as is the fact in this case, it is necessary to set forth in what the failure consisted. The plea should be as broad as the evidence, and upon the same principle, the extent of the failure of consideration should be specially alleged.

The plea in this case alleges fraud, but does not specify in what; it also alleges a part failure of consideration, and does partially show in what it consisted, but the extent is not specified; in this respect the plea is substantially defective. Precision as to the extent of the failure of the consideration, is

* Rev. Laws of 1827, p. 322, sects. 5, 6.

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essential, in order to enable the court to render judgment for the residue. The judgment of the court below is affirmed with costs. (*a*) *Judgment affirmed.*

Cowles, for appellant.

W. Thomas, for appellee.

JOHN DOE, *ex dem.* MOORE AND OTHERS, Plaintiffs, *v.* SAMUEL HILL, defendant.

AGREED CASE FROM MONROE.

A confirmation made by the governor of the North-west Territory, on the 12th of February, 1799, to a person claiming a tract of land in said territory, is, under the resolutions and instructions of congress, of June and August, 1788, valid, and operates as a release, on the part of the United States, of all their right.

Under this power to confirm, the governor was not limited to any definite number of acres, but could confirm to the extent claimed by the settler.

A confirmation so made by the governor, can not be nullified by any act of congress.

It is not necessary that it should be proved that the premises claimed lie within the limits prescribed by the resolutions of congress, passed in 1788, because by the resolutions of 28th of August, 1788, the improvements of the settlers were reserved for them, whether they were within or without the reserved limits.

In order to show the deed of confirmation, it is not necessary that any evidence should be given of their title to the land, because the power of the governor was plenary, and his decision on the claims presented to him is binding on the United States.

By the deed of cession of 1784, from Virginia to the United States, congress were obliged to confirm the settlers in their possessions and titles.

Opinion of the Court by Justice LOCKWOOD. This is an action of ejectment, commenced in the Monroe circuit court, for the recovery of a tract of land situate in Monroe county. On the trial, a special verdict was found, which contains in substance the following facts: That on the 12th day of February, 1799, Arthur St. Clair, then governor of the territory north-west of the river Ohio, granted his deed of confirmation or patent to Nicholas Jarrot, to the premises set out in the plaintiff's declaration, which deed of confirmation is as follows, to wit:

(*a*) Cases of failure of consideration, &c. *Taylor* v. *Sprinkle*, ante, p. 17. *Cornelius* v. *Vanorsdall*, ante, p. 23. *Poole* v. *Vanlandingham*, ante p. 47. *Bradshaw* v. *Newman*, ante, p. 133.

Where the vendee purchases a chattel on sight which the vendor affirms to be worth much more than its real value, no action lies, there being neither fraud nor warranty. *Davis* v. *Meeker*, 5 Johns. Rep., 354.

A mistaken opinion of the value of property if honestly entertained, and stated as opinion merely, unaccompanied by any assertion or statement untrue in fact, can not be considered as a fraudulent misrepresentation. *Hepburn et al.* v. *Dunlop et al.*, 1 Wheat., 179, 189.

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"Territory of the United States, north-west of the Ohio. *Arthur St. Clair*, governor of the territory of the United States north-west of the Ohio, to all persons who shall see these presents, greeting:

KNOW YE, that in pursuance of the acts of congress of the 20th of June, and 28th of August, 1788, and the instructions to the governor of the said territory, of the 20th of August of the same year, the titles and possessions of the French and Canadian inhabitants, and other settlers in the Illinois country, and at St. Vincennes, on the Wabash, the claims to which have been by them presented, have been duly examined into, and Nicholas Jarrot lays claim to a certain tract or parcel of land, lying and being in the county of St. Clair, and bounded in manner following, to wit: (here the governor's confirmation sets out the boundaries:) to which, for anything appearing to the contrary, he is rightfully entitled, as assignee of Philip Engel. Now, to the end that the said Nicholas Jarrot, his heirs and assigns, may be forever quieted in the same, I do, by virtue of the acts and instructions of congress, before mentioned, confirm unto Nicholas Jarrot, his heirs and assigns, the above described tract or parcel of land, lying and being in the county of St. Clair, and containing 778 acres and 131 perches, together with all and singular, the appurtenances whatsoever, to the said described tract or parcel of land with the appurtenances, to him, the said Nicholas Jarrot, to have and to hold, to the only proper use of the said Nicholas Jarrot, his heirs and assigns, forever: saving, however, to all and every person, their rights to the same or any part thereof, in law or equity, prior to those on which the claim of the said Nicholas is founded.

In testimony whereof, I have hereunto set my hand, and caused the seal of the territory to be affixed, at Cincinnati, in the county of Hamilton, on the 12th day of February, A. D. 1799, and of the independence of the United States, the 23d.

ARTHUR ST. CLAIR.

Registered: *Wm. H. Harrison*, secretary of the territory. Recorded 19th of October, 1804.

The verdict further finds, that on the 2d day of January, 1801, Jarrot conveyed the above mentioned premises, by deed of bargain and sale, to one George Lunceford. That the lessors of the plaintiff are the only heirs at law of said George Lunceford; that the premises mentioned in the governor's confirmation were surveyed by Daniel McCann, who was lawfully authorized to survey such claims, and was after-

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wards surveyed by Wm. Rector, deputy surveyor of the United States, for the said George Lunceford, prior to the year 1812. The jury also find, that after the above recited confirmation and surveys were made, that the board of commissioners at Kaskaskia, who were empowered by the act of congress, bearing date the 20th day of February, 1812, to revise and re-examine the confirmation to land made by the governor of the north-west territory, did, in pursuance of the said act, after an examination of the said claim, make a report thereon to the government of the United States, whereupon the government of the United States, by its proper officers, did reject the same.

The jury also find, that the said premises were afterwards exposed to public sale by the government of the United States, and that the defendant, Samuel Hill, became the purchaser of about 320 acres thereof, and has paid therefor, and obtained a patent from the United States.

Now, if the court should be of opinion that the law of the case is with the defendant, then the jury find him not guilty; but if the court should be of opinion, from the whole statement of facts here found, that the law is in favor of the plaintiff, then the jury find the defendant guilty of the trespass in the declaration mentioned, and assess the plaintiff's damages at one cent. On this verdict, the circuit court rendered judgment for the defendant, and the cause is brought into this court by consent. On the part of the plaintiff, it was contended:

1. That the governor had *full power* to make the confirmation, and thereby a title in fee simple in the premises was vested in Nicholas Jarrot, which no subsequent act of the government of the United States could divest.

2. That congress had, by their legislation, recognized the confirmations, and thereby had, if there was any defect of power in the governor, made his acts valid.

On the part of the defendant it was urged:

1. That the governor had no power to make the confirmation.

2. That he had exceeded his authority.

3. That congress have the power, admitting the governor acted in pursuance of law, to nullify his acts.

4. That the verdict is defective, because it does not appear that the premises lie within the limits prescribed by the resolution of congress, passed in 1788; and

5. Because the verdict does not find that plaintiff had a previous estate, for the confirmation to act on.

I propose to examine the correctness of the several positions

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advanced by the counsel for each of the parties. It was conceded on the argument that the United States were the original proprietors, and the source from whence the title of both parties were derived to the premises.

It is a principle in the action of ejectment, that let the defendant's title be ever so defective, still it is incumbent on the lessors of the plaintiff to furnish evidence of a good title in themselves. Has such evidence been produced? In order fully to understand the nature of the title exhibited on the part of the lessors, it will be necessary to take a concise view of the history of this country, and the legislation growing out of it.

The whole territory north of the river Ohio, and west of Pennsylvania, extending northwardly to the northern boundary of the United States, and westwardly to the Mississippi river, was claimed by Virginia to be within her chartered limits, and during the revolutionary war her troops conquered the country, and Virginia came into the possession of the French settlements situated on the Mississippi river. New York, Connecticut and Massachusetts, also claimed portions of the same territory. Other states, whose limits contained but small portions of waste and uncultivated lands, contended that a portion of the uncultivated lands claimed by Virginia, New York, &c., ought to be appropriated as a common fund to pay the expenses of the war. Congress, to compose these conflicting claims and opinions, recommended to the states having large tracts of waste unappropriated lands in the western country, to make a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union. Virginia, in pursuance of this recommendation, on the 1st of March, 1784, yielded to the United States all her right, title and claim to the territory north-west of the river Ohio, upon certain conditions.

One of the conditions contained in the deed of transfer from Virginia to the United States, and acceded to by the United States, is as follows: "That the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virgina, shall have their *possessions and titles confirmed* to them, and be protected in the enjoyment of their rights and liberties." The acceptance on the part of the United States of the deed transferring this country, imposed on them the duty to have the *possessions and titles* of the inhabitants of the country *confirmed* to them; but no steps were taken by congress relative to this subject until the year 1788, when George Morgan and his associates presented a

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memorial to congress, proposing to purchase a large tract of land in Illinois, on the Mississippi river, including all the French settlements on that river, and the premises in question.

On this memorial, a committee of congress made a detailed report to that body, on the 20th June, 1788, which was agreed to by congress, and thereby the recommendations of the report became a law, such being the manner in which congress, under the confederation enacted laws. See 1st Vol. Laws of United States, 580.

The committee in their report say that "they are of opinion that from any general sale which may be made of the lands on the Mississippi, there should at least be a reserve of so much land as may satisfy all the just claims of the ancient settlers on that river, and that they should be confirmed in the possession of such lands as they may have had at the beginning of the late revolution, which have been allotted to them according to the laws and usages of the governments under which they have respectively settled." The committee then recommend that separate tracts be reserved, embracing within their limits all the claims of the inhabitants, as was supposed, for satisfying the "claims of the ancient settlers," and for donations "for each of the families *now living* at either of the villages of the Kaskaskias, La Prarie du Rocher, Kahokia, Fort Chartres, and St. Phillips."

They further recommended "that measures be immediately taken for confirming in their possessions and titles the French and Canadian inhabitants, and other settlers on those lands, who on or before the year 1783 had professed themselves citizens of the United States, or any of them, and for laying off the several tracts which they might rightfully claim within the described limits." The report concludes as follows: "that whenever the French and Canadian inhabitants, and other settlers aforesaid, shall have been *confirmed* in their possessions and titles, and the amount of the same ascertained, and the three additional parallelograms for future donations, and a tract of land one mile square on the Mississippi, extending as far above, as below Fort Chartres, and including the said Fort, the building and improvements adjoining the same, shall be laid off; the whole remainder of the soil, within the reserved limits above described, shall be considered as pertaining to the general purchase, and shall be conveyed accordingly." "That the governor of the western territory be instructed to repair to the French settlements on the Mississippi, at and above the Kaskaskias; that he examined the titles and possessions of the settlers, as above described, in order to determine what quantity of land they may severally claim,

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which shall be laid off for them *at their own expense;* and that he take an account of the several heads of families living within the reserved limits, in order that he may determine the quantity of land that is to be laid off in the several parallelograms, which shall be laid off accordingly by the geographer of the United States, or his assistant, at the expense of the United States."

This report was subsequently re-committed to a committee, who, on the 28th of August, 1788, reported to congress some alteration in the terms of the contract between Morgan and his associates and the United States, but no essential variations were made in relation to the French and other settlers on the land, except as follows: "That in case there are any improvements belonging to the ancient French settlers without the general reserved limits, the same shall also be considered as reserved for them in the sale now proposed to be made." This report was adopted by congress. It may be here remarked that the contemplated sale to Morgan and others was never effected. On the report of another committee, instructions were given by congress to the governor of the western territory, dated 29th of August, 1788, from which I make the following extracts:

"SIR: You are to proceed without delay, except while you are necessarily detained by the treaty now on hands, to the French settlements on the river Mississippi, in order to give despatch to the *several me sures* which are to be taken, according to the *acts* of the 20th June last, and the 28th inst., of which a copy is inclosed for your information." "When you have examined the titles and possessions of the settlers on the Mississippi, *in which they are to be confirmed*, and given directions for laying out the several squares, which the settlers may decide as they shall think best among themselves, by lot, you are to report the whole of your proceedings to congress."

Whether the governor took any immediate steps to perform the duties enjoined on him by this letter of instructions, and the acts of Congress of the 20th June and 28th of August, 1788, does not appear from the verdict, and I am not acquainted with any public document to ascertain the fact. But, that congress did not consider that the power of the governor should cease upon his failure to "proceed without delay" to attend to his business, is evident from the act of congress entitled "An act for granting lands to the inhabitants and settlers at Vincennes, and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possessions," passed 3d March, 1791.

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From a hasty perusal of this act, it might be inferred that it was intended as a substitute for the acts of the 20th June, and 28th August, 1788, and consequently a virtual repeal of them. I am, however, satisfied from a careful perusal of the act, that such was not the intention of congress, but that this act was intended to embrace cases not included in the former acts, and repeals a part of the act of 28th August, 1788. That this is the object of this act, will appear from the following abstract of the different sections: Section one gives 400 acres to each of those persons "who, in 1783, were heads of families at Vincennes, or in the Illinois country on the Mississippi, and who, since that time, have removed from one of the said places to the other." This section gives the donation, notwithstanding a removal from one place to another. By the second section, heads of families at Vincennes, and the Illinois country in 1783, who afterwards removed without the limits of the territory, are, notwithstanding, entitled to the donation of 400 acres, made by a resolve of congress on the 29th of August, 1788, and the governor is directed to "cause the same to be laid out for such heads of families, or their heirs, and to cause to be laid off and confirmed to such persons, the several tracts of land which they may have possessed, and which, before the year 1783, may have been allotted to them according to the laws and usages of the government under which they may have respectively settled. *Provided*, that if such persons, or their heirs, do not return and occupy the said land within five years, such land shall be considered as forfeited to the United States."

One branch of this section gives the donation of 400 acres, notwithstanding the settler had moved out of the territory; and the other branch authorizes a confirmation of lands that may have been possessed, according to the laws and usages by allotment, but without a legal title to the fee. But in both cases the grant to be forfeited, in case the settler or his heirs do not return and occupy said lands in five years.

This section can not be considered a compliance with the obligation resting on congress to *confirm* the French settlers in their *possessions and titles* in pursuance of the deed of cession from Virginia. The confirmation contemplated by the cession, was an absolute assurance of the land to these persons, whether they occupied them or not. The third section of the act relates to other matters.

The fourth section is as follows: "That where lands have been *actually improved and cultivated*, at Vincennes, or in the Illinois country, under a *supposed* grant of the same, by any commandant or court, claiming authority to make such

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grant, the governor of said territory be, and he is hereby empowered, to confirm to the persons who made such improvements, their heirs or assigns, the lands *supposed* to have been granted as aforesaid, or such parts thereof as he, in his discretion, may judge reasonable, not exceeding, to any one person, 400 acres." This section evidently embraces only such cases as from defect of power in the granting authority left the settler without any valid title to support his possession, and hence it only operates on cases where the settler had actually improved and cultivated the land, and limits the extent of the confirmation to 400 acres. This, clearly, is not the confirmation contemplated by the deed of cession. The deed of cession intended to secure the inhabitants in their titles, whether they cultivated the land or not, and whatever might be the extent of their claim. This section then, does not embrace the possessions and titles contemplated by the deed of cession. The 5th, 6th and 7th sections relate to other matters.

The eight and last section repeals "so much of the act of congress of 28th August, 1788, as refers to the location of certain tracts of land directed to be run out and reserved for donations to the ancient settlers in the Illinois country;" and "the governor of the said territory is directed to lay out the same agreeably to the act of congress of the 20th of June, 1788." This section clearly recognizes the act of 20th June, 1788, as in full force. From this review of the act of 1791, it will be perceived that all its provisions are in addition, and not repugnant to, nor in lieu of, the provisions of the act of the 20th of June, 1788.

That portion of the act of 1788 that relates to the confirmation of the titles of the settlers, was in compliance with the obligation of duty; the act of 1791 was prompted by a spirit of liberality towards persons who had recently, by the fate of war, become subjects and citizens of a government to which they were strangers, and was, no doubt, intended to conciliate and secure their attachment to the United States. If then the act of June 20th, 1788, is to be regarded as in force, notwithstanding the act of 1791, what power did it confer on the governor of the northwestern territory? Doubtless upon the change that was effected in the government, when the French settlements were conquered by the troops of Virginia, many fears would be excited in the minds of the inhabitants, that the grants that had been made to them by the French and British governments, would not be recognized by their conquerors. To allay any such fears, was probably the reason that induced Virginia to require the con-

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firmations of the titles and possessions of the French settlers; and to effect so desirable an object, some act was required to be performed *in pais*, which would completely quiet all apprehensions. Could this be done by any thing short of an acknowledgment, on the part of the United States, that they never would disturb such titles and possessions as their agents should determine to be valid? A deed of confirmation, or patent, would release all the interest of the United States in the titles and possessions of the settlers, and effectually answer the wise and benevolent object that Virginia doubtless had in view in requiring that the United States should confirm these titles and possessions.

That congress intended to clothe the governor with power to make confirmations of the possessions and titles of the French inhabitants of the Illinois country, is sufficiently apparent from the language of the acts and instructions of 1788. Should any doubt, however, exist on the subject, the act of 1791, being a subsequent exposition of their intention and meaning, would remove it. By the fourth section of the act of 1791, "where any lands have been actually improved and cultivated, at Vincennes, or in the Illinois country, under a *supposed grant* of the same, by any commandant or court claiming authority to make such grant, the governor of the said [north-west] territory, hereby is empowered to confirm to the persons who made such improvements, their heirs or assigns, the lands supposed to be granted as aforesaid, or such parts," &c.

That the governor should be empowered to confirm claims which rested on the liberality of congress only, and not those founded on previous right, and which the United States were bound to confirm by a solemn compact, is so inconsistent with reason that congress ought not to be supposed to have intended any such distinction. A reference to this statute, being *in pari materia*, is proper to ascertain the probable intention of congress, if the acts and instructions of 1788 are not sufficiently clear in themselves.

That other statutes on the same subject may be consulted in construing what is doubtful, see 4. Bac. Abr., 647, 1 Kent's Comm., p. 433.

The intention of the legislature should also be regarded, though seeming to vary from the letter. 4. Bac. Abr., 643. From the letter and spirit then of the acts of 1788, and the instructions of the same year, it appears sufficiently clear that the governor had power to make deeds of confirmation to the French, and other inhabitants of the Illinois country.

These deeds of confirmation must also be considered at

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least as *prima facie* evidence that they were rightfully made. The governor was authorized to confirm to the settlers their possessions and titles, and if his acts are not to be regarded *prima facie*, as honestly and fairly done, what benefit would result to the settlers?

If in order to show their deeds of confirmation they must first give evidence of the title to their land, then the confirmations of the governor would be a farce, and the settlers would have been at the expense of surveying their lands for no useful purpose. But in truth, these confirmations were to be a benefit to the United States, as well as to the settlers. For by the settlers surveying their lands, and exhibiting their claims to the governor, the United States became apprized of the extent of those claims, and were thus enabled to ascertain what lands remained to them subject to be sold. It was a convenient mode of dividing the lands of individuals from the lands of the nation, and as an inducement for the settlers to survey their claims and adduce their titles to the governor, he was authorized, should he, upon examination find them honest and fair, to relinquish all claim on the part of the United States to those lands. "A confirmation at common law, is of a nature nearly allied to a release, and is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased." 2 Bl. Com., 325. Upon this definition of a confirmation, the *confirmor*, or those claiming under him, would not be permitted to deny the pre-existing estate in the *confirmee*. The *confirmor*, and those claiming under him, would be estopped by his deed. But from an examination of the several acts of congress relative to the governors' confirmations, a higher character has been given them than that of mere confirmations.

By the fourth section of the act entitled "An act supplementary to an act entitled an act making provision for the disposal of the public lands in the Indiana terrtory, and for other purposes," passed 3d March, 1805, it is enacted "that the lands lying within the districts of Vincennes, Kaskaskias, and Detroit, which are claimed by authority of French or British grants legally executed, or by virtue of grants issued under the authority of any former act of congress, by either of the north-west or Indiana territories, and which have already been surveyed by a person authorized to execute such surveys, shall, whenever it shall be necessary to resurvey the same for the purpose of ascertaining the adjacent vacant lands, be surveyed at the expense of the United States, any act to the contrary notwithstanding." Third Vol. Laws U. S., 671. As I

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have been unable to find any act of congress which gave to the governors of the north-west territory any power to make "grants," except the acts of 1788, and the act of 1791, I thence infer that the "confirmations" contemplated by those acts were regarded by congress in the nature of grants, so far as the United States were concerned; and if grants, a subsequent sale of the granted lands by the United States, although followed by a patent, is void. In the act entitled "An act respecting the claims to land in the Indiana territory and state of Ohio," passed 21st of April, 1806, the confirmations authorized by the acts of 1788 and 1791, are called "patents," and this probably is the more correct name by which to designate the instruments granted by the governor under the acts of 1788 and 1791.

The second proposition of the plaintiff is, that congress had recognized by their legislation the confirmations, and thereby had, if there was any defect of power in the governor, made his proceedings valid. The authority of the governor to confirm the titles and possessions of the settlers under the acts of 1788 and the act of 1791, continued until the 26th of March, 1804, a period of nearly sixteen years, when a board of commissioners were appointed to sit at Kaskaskia, to hear proof relative to British and French grants, and report to the secretary of the treasury.

This board virtually superseded the powers of the governor. But nothing appears from the acts of congress in disapprobation of the proceedings of the governor, until the passage of an act on the 20th of February, 1812, which authorized the register and receiver of the land office at Kaskaskia and another person to be appointed by the president of the United States, to examine and inquire into the validity of claims to land in the district of Kaskaskia, which are derived from confirmations made, or pretended to be made, by the governor of the north-west and Indiana territories respectively, "and they shall report to the secretary of the treasury, to be laid by him before congress at their next session, their opinion on each of the claims aforesaid." It will be recollected that the governor was directed by the instructions of the 29th of August, 1788, to report his proceedings to congress, and it is fair to presume that he kept congress, from time to time, advised by his doings, for congress had the subject repeatedly before them, and passed several acts which, if they do not expressly sanction the proceedings of the governor, do so impliedly; at all events, as the governor continued to act for so long a period, with at least the tacit approbation of congress, and his acts remaining unimpeached for a period of

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more than twenty years from the time his authority commenced, and the lessor's ancestor being an innocent purchaser, the soundest principles of policy, as well as of good faith, require that the governor's "confirmations" should be considered at least *prima facie*, valid. Upon both grounds then, the plaintiffs are entitled to recover, unless the defendant has shown an older title derived under a French or British grant, or some fact that will invalidate the deed of confirmation offered in evidence on the part of the plaintiffs. The first objection urged against the plaintiff's right to recover is, that the governor had no power to make the confirmation. But if the views above taken are correct, the governor was authorized by the resolutions and instructions of June and August, 1788. The second objection is, that the governor exceeded his authority. It was urged in support of this objection, that if the governor had power to confirm, he was limited to 400 acres.

From the review however, of the act of 1791, it appears that the limitation of 400 acres applies only to donations and defective claims, and not to confirmations of valid pre-existing rights. The third objection is, that congress have the power to nullify the acts of the governor, admitting he had power to make confirmations.

This position is too outrageous in a government of laws, to merit any consideration. Congress have not, however, exercised any such power. The act of 1812 only authorized the register and receiver to inquire into the validity of the governor's confirmations, and were to report their opinion to the secretary of the treasury, who was to lay the same before congress, and it does not appear that congress ever passed any law on the subject of those confirmations on which the commissioners reported an unfavorable opinion. The secretary of the treasury however, considered these confirmations void, and directed the sale of the land. But the secretary had no power to order the sale of any lands except those belonging to the United States. If the governor's deeds of confirmation or patents were obtained by fraud or misrepresentation, the deed of confirmation or patent is good until set aside by due course of law. The remedy of the second patentee in such cases is by *scire facias*, or a bill of information in a court of chancery. See the case of *Jackson* v. *Lawton*, 10 Johns. Rep., 23, where it was decided that "if a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appears on the face of the patent itself, it is not void, but voidable only by suit for that purpose." The fourth objection is, that the verdict is defective, because it does not

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appear that the premises lie within the limits prescribed by the resolutions of congress passed in 1788. The answer to this objection is, that such proof was unnecessary, for by the resolution of 28th of August, 1788, the improvements of the settlers "were reserved for them," whether "the improvements were within or without the reserved limits."

The last objection is, that the verdict does not find that the confirmee had a previous estate in the premises for the deed of confirmation to act on.

I am clearly of opinion, for the reasons heretofore given, that the confirmation was a release of the interest of the United States, and that the presumption was, that the deed of confirmation was made in a case authorized by the resolutions of June and August, 1788. If the governor's patent is to be considered as a technical deed of confirmation, then the confirmor, and all claiming under him, are estopped. Upon the whole, the law arising on the special verdict being in favor of the lessors of the plaintiffs, the judgment of the circuit court must be reversed with costs, and the cause remanded to the circuit court of Monroe county, with directions to enter judgment for the plaintiffs agreeably to this opinion, and the circuit court of Monroe county will make such order in relation to improvements on the premises, if any there are, as the statute and the facts of the case will warrant.

Judgment reversed.

J. Reynolds, for plaintiffs.

Ford, for defendant.

THE Administrators of FERDINAND ERNST, deceased, Appellants, *v.* MARY ANN ERNST, Appellee.

APPEAL FROM FAYETTE.

A debt due to the state bank is a debt due to the state, which the state can release.

Opinion of the Court by Justice SMITH. The bill in this case alleges that the intestate, in the year 1822, died indebted to the state of Illinois, and to the state bank, in the sum of twenty-two hundred and thirty-two dollars, as by reference to the records of the said county, and to the records of the circuit court of Fayette county, will appear. That the intes-

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tate died seized of certain real estate enumerated in the bill, and other interests in certain town lots in Vandalia, and public lands purchased by him of the United States.

That the legislature of this state at their session of 1823, passed an act releasing the said intestate's estate from the payment of such debts, and did direct the administrators to sell the same lands, and to pay the avails thereof to the complainant. That the administrators, disregarding such law, have applied to the circuit court aforesaid, to grant an order to sell such lands for the benefit of the common creditors of the said intestate, and refuse, when the same are sold, to apply the avails thereof to her, as she alleges she is entitled to them, under the provisions of the aforesaid law.

The bill designates what part of the lands were mortgaged to the bank, and the two lots, 4 and 8, are the ones on which the indebtedness of Ernst accrued, and were the consideration of the note on which the judgment was founded, The answer recites an account of the disposition of the personal estate of Ernst, and alleges that there are debts due and unsatisfied to an amount of nearly twenty-eight hundred dollars.

It also alleges, that by an order of the circuit court of Fayette, the lands described in the complainant's bill were, at the preceding term of the said court, ordered to be sold for the payment of the debts of the said Ernst; that they have been sold on a credit.

That the title of the said Ernst was not complete to a portion of the property sold by them, but which part is not designated, and they, therefore, sold only his interest therein; they allege that the law is unjust, and not binding, and pray that whatever decree is made, may be made with reference to such portion as the title was incomplete to.

The circuit court decreed, that out of the proceeds of the sale of such property, the appellants should pay to the complainant, when collected, the sum of seven hundred and forty-two dollars and eighty-eight cents, being the proceeds of the sales of said property after deducting the expenses thereof. To reverse this decree, the present appeal is prosecuted.

To a correct determination of this question, it will be necessary to premise, that by a decision of the court, in an action prosecuted against the administrators of Ernst, by the state bank, and for the very debt due by mortgage, it was determined that a debt due to the bank, was a debt due to the state, and that under the provisions of the recited act, the debt thus due by Ernst, was released. By the provisions of

that act* the state released the estate of Ernst from the payment of any debts due the state, and transmitted all their interest therein to the complainant. How far it was competent for them to authorize a sale of all the real estate and equitable interest of the intestate in lands, to be appropriated to the contemplated beneficent objects of the statute, is worthy of consideration.

The phraseology of the act is general, and includes all the lands and equitable interests of the intestate therein, except parts of sundry lots contracted to be conveyed before the death of the intestate. It must readily be perceived the state could not, rightfully, authorize the sale of the estate of the intestate, for the purposes expressed in the law, only so far as the state had a legal interest in them. This interest no where appears in the act itself, but the allegations of the bill show, that to a portion of it the bank held a mortgage, and to another portion the state had the title in itself. So far, then, as the bank had a lien by mortgage, and to as much as the fee in the lands was in the state, no doubt can remain of the power of the state to order the sale, and direct the appropriation of the proceeds of the sale to the benevolent purposes intended by the passage of the law. It does not appear from the proceedings, that any of the lots enumerated in the bill, are the parts of sundry lots contemplated in, and excepted from sale by the second section of the act. If such were the fact, the appellants should have shown it in their answer, to have exempted them from the operation of the decree.

They, however, only aver, that to a portion of the property sold, the intestate had no legal title, and that they only sold the interest of the intestate, and ask, therefore, that the proceeds of such parts, without specifying what parts in particular they are, be exempted from the operations of the decree. It is not perceived that the decree, from an inspection of the proceedings themselves, which are in many particulars too general and indefinite to a critical understanding of the rights of the parties, is not warranted by the state of facts presented by the bill and answer, except in appropriating the proceeds of the sale of the three quarter sections of land purchased of the United States, on which the first installment has only been paid. These appear to have been sold for the sum of one hundred and five dollars, and ought not to have been included, and for so much, the decree is, necessarily, erroneous.

* Laws of 1823, p. 178.

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But to the remainder, it seems that any other decision would involve a construction of the act of 1823, at war with its whole spirit and manifest intent.

The proceeds of the property can not be supposed, upon any principle of justice or right, to have been intended to revert to the creditors of Ernst in common. The state has furnished the fund, and had a clear right to direct its appropriation; and from the moment of the passage of the act, the administrators must be considered as vested with the interest of the state, in the lands mortgaged to the bank, and that, to which the state had not parted with its title, as trustees for the complainant. The vesting of the lands in the administrators for the purposes of sale, and the release of the debt, are contemporaneous acts, and although, as to the intestate, the debt was released, the lien on the mortgaged lands was not thereby released.

The law never contemplated, even if the lots, to which the intestate had no more than an equitable interest, are the parts of sundry lots authorized to be conveyed by the administrators, and which have not been conveyed, because the individuals to whom they were sold by the intestate have not complied with their agreement, should be sold by the administrators, and the proceeds thereof appropriated to the payment of the claims of the common creditors, because the state never could have contemplated such an act of extraordinary generosity as to appropriate its own property to the payment of the debts of any individual. Neither the letter nor spirit of the law warrants such an inference.

The court are, so far as they can consistently with the language of the statute, bound to give it such an exposition as will best carry its intentions into effect. This can only be done by giving to the complainant the benefit of the proceeds of the sales of the property, as made by virtue of the order of the circuit court, with the exception of the three quarter-sections named.

The judgment or decree of the circuit court, for the sum of eight hundred and seventy-three dollars, sixty-six cents, to be recovered of the defendants in the court below, is affirmed, to be paid out of the proceeds of the sale of the property named in the bill, excepting the N. E. qr. 24, 6 N. 1 W., S. E. 12, 6 N. 1 W., N. E. 36, 7 N. 1 W., which sold for 105 dollars; and so much of the decree as directs the proceeds of these lands to be paid to the complainant, is reversed. The costs of the appeal to be divided between

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the parties, and judgment entered in conformity to this opinion.*

Brown, for appellants.

Cowles, for appellees.

JOHN MCLEAN, Appellant, *v.* JOSEPH B. EMERSON, Appellee.

APPEAL FROM GALLATIN.

The act of the 22d March, 1819, respecting replevin bonds, declaring that such bonds shall be *executed* to the sheriff, does not mean that the sheriff shall be the obligee in such bonds, the word "executing" meaning nothing more than a making and delivery to the officer named, and such bonds, made payable to the plaintiff in the original action, are legally executed.

In a replevy bond, the fees of the officer are correctly inserted, and it is regular, though it should be for more than double the amount of the judgment.

Opinion of the Court by Justice SMITH. This is an appeal from the decision of the Gallatin circuit court, on a motion to quash a replevin bond entered into by appellant in 1819, as security, which motion the circuit court overruled.

The grounds of error relied on for the reversal of the judgment of the court below, may be embraced in two points:

1. Whether the bond is void because taken in the name of the plaintiff in the original action.

2. Whether, in other respects, the provisions of the statute of 1819, respecting replevin bonds, have been complied with.

By the first section of the act for the relief of debtors, approved March 22d, 1819,† it is declared "that all executions which now are or hereafter may be issued on any judgment or judgments, which heretofore have been, or hereafter may be recorded or given, the defendant or defendants shall be permitted to replevy the same for twelve months, upon *executing* bond, in double the amount of the execution, with sufficient security or securities, to the sheriff of the county, conditioned for the payment of the amount of such execution, with legal interest, and all costs that may accrue

* WILSON, Ch. J., dissented from this opinion, and LOCKWOOD, J., gave no opinion.

† Laws of 1819, p. 159.

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thereon," unless the plaintiff has previously authorized the sheriff to take certain bank notes, enumerated in the statute, which bond is to be deposited by the sheriff in the office of the clerk of the circuit court. It is further provided, that such bond shall have, in all respects, the force and effect of judgments of record, and be subjected to be proceeded on in like manner. Under the first section, it is contended that the bond should have been taken in the name of the sheriff, and that being in the name of the plaintiff, it is, for that reason, void.

The act declares that the bond shall be *executed* to the sheriff, but does it, because the statute requires it to be executed to the sheriff, necessarily imply that the sheriff is to be the obligee in the bond? Does the term "executed" imply any thing more than a making and delivery of the bond to the officer named, and is it not used in a synonymous sense? Can the term "executed" imply that the sheriff, who is no party in the original action, and who has no interest in the judgment, shall thus become the plaintiff in a judgment to be subsequently entered up upon the bond, and become entitled to control that judgment, receive the avails thereof, and no provision be made for his accounting to the creditor, for the proceeds of the judgment to be thus received?

The statute, it will be perceived, has not required the sheriff to make an assignment of the bond, as is always provided where bonds are taken by a sheriff for the benefit of third persons in his name, and in the absence of such a provision, and when no possible reason can be given, why the legislature should have intended that the sheriff should be the obligee in the bond, it is seriously contended that the bond is void, because the name of the plaintiff in the original cause, is inserted in the bond as the obligee.

If such a construction were sanctioned, it would involve the incongruity of subjecting the defendant, in the first action, to two judgments for the same cause, in right of different parties, and place the legal rights of the creditor under the disposal and entire control of one, having no possible right or interest in the original judgment.

The legislature could never have contemplated such an absurdity, and it ought not, from any ambiguity in the statute, to be inferred.

The objects and reasons of the statute clearly imply that the sheriff is only to receive the bond, and by executing the bond to the sheriff, no more than a making and delivery to

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that officer of a bond could have been intended, supposing that it would be in the name of the plaintiff in the original execution, of course. This inference is also to be drawn from the provision requiring him to deposit the bond in the clerk's office. The taking of the bond in the name of the plaintiff in the original cause, is conformable to the relation and right of the respective parties, and is in accordance with the spirit and intention of the statute. Such has been the constant, and I believe, uniform practice under the statute, and the correctness of it has never before been questioned. Such is the course pursued in the state of Kentucky; and one provision of their statutes relating to replevins is, in this very point, equally ambiguous; indeed, it says that the party may replevy by "*giving bond with approved security to the officer, to pay the amount of debt, interest, and costs of such execution to the plaintiff.*" According to the construction contended for by the appellant, it might with the same propriety be urged that the bond, under this clause of their statute, ought to be taken to the officer. Yet neither under this clause of the Kentucky statute, nor any other relating to replevin bonds, is it the practice.

Under the second point, it is also urged that the bond is taken for more than double the amount, and that the sheriff's fees are included. The fees of the officer are correctly inserted. The statute authorizes all costs arising on the execution to be included, and the insertion of a sum greater than required, has been assented to by the obligors in the bond, and can not now be urged by them as error. Independently of these considerations, the appellant has clearly concluded himself by his own act and gross neglect. The replevin bond was executed in September, 1819, and in November, 1820, execution was sued out; between this time and up to the 7th of March, 1826, a period of more than five years, various other executions were sued out and levied on the property of all the defendants, and in one instance the appellant caused the property of the principal debtor to be released from execution, and tendered real estate of his own for such purpose, and in lieu thereof, which was received. It *also* appears, that under some of these executions the sum of 330 dollars has been collected. Under every view of the facts in this case, and the statute under which the bond has been taken, we are constrained to say that the bond has been rightly taken, that nothing appears to vitiate it, and that, more especially, from the great delay and acquiescence of the appellant himself in the proceedings, he has himself waived all

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possible benefit of the exceptions taken, even if they were tenable.

The judgment below is, therefore, affirmed with costs.

Judgment affirmed.

Eddy, for appellant.

Gatewood, for appellee.

JAMES M. DUNCAN, Plaintiff in Error, v. CLEMENT B. FLETCHER, Defendant in Error.

ERROR TO FAYETTE.

Parties who agree to submit their case to arbitration, will be governed by their agreement, and if one party stands by and suffers judgment to be entered on the award, to which technical objections could be made, this court will not interfere to reverse the judgment

Where no fraud is charged or injustice alleged, the court will presume that the referee was sworn, if the fact does not appear on the award.

Opinion of the Court by Justice SMITH. This is a case of reference of a suit in the circuit court of Fayette, by consent of parties, under the fourth section of the "Act regulating arbitrations, and references," approved 6th of January, 1827 and brought into this court by writ of error. Two grounds are assumed as cause of error and relied on, for the reversal of the judgment of the circuit court:

1. That it does not appear on the face of the award that the arbitrator was sworn.

2. It does not appear on what day the award was made.

To determine the questions presented for the decision of the court, it will be necessary to refer to the terms of agreement under which the reference was made. The agreement is in the words following, viz.:

It is agreed between the parties in this case, that the same be referred to James Black, and that the books of C. B. Fletcher shall be evidence of the correctness of said account on the part of the plaintiff, and so far as they may make for the defendant, and that the award of the said James Black, shall be entered up as the judgment of the court. It is further agreed that said accounts shall be adjudicated, upon Saturday, the 29th of September, instant, whether the said parties are or are not present. And it is further agreed that all evidence which might be received in this court, shall be exam-

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ined by the said arbitrator who may call in a proper officer to swear witnesses.

Signed, J. M. DUNCAN.
W. H. BROWN, for plaintiff.

By this agreement it does not appear that the parties required the referee to be sworn, before acting on the matters submitted to him; nor by his report does it appear, affirmatively, that he was not sworn. If the reference be considered as a mere matter of consent and not under the statute, then, so far as it regards the necessity of the referee being sworn before acting on the matters submitted to his decision, the parties have themselves, manifestly, waived that necessity by their agreement. But I am disposed to consider the reference as made under the fourth section of the act above quoted.

By the sixth section* of that act, it is declared that each arbitrator and referee shall, before proceeding to the duties of his appointment, take an oath or affirmation, faithfully and fairly to hear, examine and truly to award or report, on the matters submitted to him. It was necessary, no doubt, that he should have taken the oath required, but whether such oath has, or has not been taken, can not be ascertained from the face of the report of the referee; it may, or may not, have been done.

If the defendant in the court below wished to have ascertained that fact, and considered it material to the decision of the cause, the objection ought to have been there made, because it did not so appear; or he might by affidavit, have shown the fact himself and thus impeached the report; or he should at the time of filing the report, have objected to the rendition of a judgment upon it, because of the absence in the report of an averment that the referee had been sworn. This was not done; neither course was pursued.

This court is in justice bound to presume that the requisition of the law has been complied with, after the party has stood by and neglected to make his exceptions, which are in a great measure merely technical.

It ought to presume in a case like the present, where no injustice is charged to have been done, where no fraud, partiality or mistake is alleged in the conduct of the referee, or his determinations, and for aught that appears, the report is both accurate and just as to the amount awarded, that the oath required has been taken.

It was in the power of the party in the court below to have raised the objections, and indeed to have contradicted the report, or impeached the conduct of the referee, if just cause

* Rev. Code of 1827, p. 65.

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had existed. He, however, lies by and suffers judgment to be entered without opposition. Had the objections been raised in the court below it would have given the plaintiff an opportunity to have made the report in respect to the objections urged, conformable to the fact, and to have inserted in the report, the avertment of the oath having been taken.

The same view is taken of the second objection. The award is not required to be made on any day, but the adjudication, as it is termed in the agreement, is to be on a particular day, whether the parties are present or not, and the evidence to be examined is the books of the plaintiff only, and by which the precise amount due is to be determined by the referee. The report does not aver that the referee did adjudicate the matter in dispute on that day, it is true, but was it really necessary that it should be done? The necessity for it is not perceived, and even if it were, the objection ought to have been made in the court below, so as to have afforded the plaintiff an opportunity to have shown the fact. The defendant might have shown, as has been before suggested, that it was done on a different day, and thus impeached the report; it has not been done, and the absence of the avertment ought not now, when such opportunity could not be afforded, to operate to the prejudice of the plaintiff. The court is bound to presume that the condition prescribed for the observance of the referee has been complied with. In support of this rule I refer to a case decided in New York, reported in 17 Johnson, 461, where it is determined, "that in a cause referred by the agreement of the parties to three referees, who, or any two of them were to report, and two only of the referees signed the report, which stated that the subscribers having heard the proofs and allegations of the parties, find," &c., on a writ of error brought on a judgment entered on the report; it will be presumed that all the referees met and heard the parties, though two only signed the report, nothing appearing to the contrary on the record; but if the fact were otherwise, the objection ought to be raised in the court below on the coming in of the report, and not in the court of error, which can only look to the record. The present case, manifestly falls within the reasons of this decision, and is indeed a case analogous in principle. The judgment of the circuit court must *therefore*, be affirmed with costs. (*a*) (1) *Judgment affirmed.*

Hall, for plaintiff in error.

Brown, for defendant in error.

(*a*) *Chandler* v. *Gay*, p. 88. *Cromwell* v. *March*, p. 295.

(1) See note to *Chandler* v. *Gay*, ante, p. 88.

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NATHAN CROMWELL, Plaintiff in Error, *v.* ENOCH C. MARCH Defendant in Error.

ERROR, WITH *SUPERSEDEAS*, TO MORGAN.

The bond upon which a *supersedeas* had been obtained, was executed by "M., attorney for the plaintiff," on a motion to dismiss the wri of err r for that cause, the court overruled it, but quashed the *supersedeas*, and awarded a *procedendo*.

W. Thomas, for the defendant in error, moved the court to dismiss this writ of error, on the ground that the plaintiff in error did not execute a bond as the statute required, and showed that the bond which had been executed, was executed by "*Murray M'Connel*, attorney for the plaintiff."

Per Curiam. The motion to dismiss the writ of error is overruled. Let the *supersedeas* be quashed, for the reason that it does not appear that McConnel was authorized to sign the bond as attorney, and let a *procedendo* issue to the clerk of the Morgan circuit court. (1)

Motion overruled.

(1) Where a bond was executed in order to make a writ of error a *supersedeas*, it appeared to be signed by the party, by his attorney in fact; the authority of the attorney was presumed, and the supreme court refused to inquire in o the fact, unless it was shown by affidavit, that no such authority existed. *Campbell* v. *State Bank*, 1 Scam, 42. But now, rule 2d of the supreme court, adopted at the November term, 1858, see 19 Ill Rep.,) provides: "Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question; in which case, the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original."

The supreme court will presume that a bond, executed by an attorney in the name of his principals, and filed in the court below, was executed by a person duly authorized, and that the court below was satisfied of that fact, unless the contrary appears. *Sheldon* v. *Reihle et al.*, 1 Scam., 519

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1830, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice.*
THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, *Associate Justices.*

ALEXIS PHELPS, Appellant, *v.* ROBERT R. YOUNG, Appellee.

APPEAL FROM ADAMS.

Under the attachment law of 1827, which requires that the *amount* and *nature* of the indebtedness shou d be specified in the affidavit, it is sufficient to state that the non-resident "is justly indebted to the plaintiff in the sum of $——, by his certain instrument in writing signed by him.

Upon an order for a change of venue and granted, but before the record is removed, an affidavit of the materiality of witnesses for the purpose of taking their depositions, is properly made in the circuit court of the county where the suit is brought, and the computation of time and distance must be m de from that county.

It is not necessary that the magistrate should state the *time* and *place* of taking the depositions.

Opinion of the Court by Justice SMITH. This is an appeal from the Adams circuit court. The grounds relied upon for a reversal of the judgment of the circuit court, are,

1. The insufficiency of the affidavit required by the provisions of the act authorizing the suing out of attachments.

2. The alleged irregularity in the mode of taking the depositions which were read on the trial.

The proceeding must be considered as one against a non-resident debtor, and all the forms of the statute appear to have been complied with, unless the affidavit upon which the attachment was sued out, should be defective in not sufficiently specifying the nature of the indebtedness. The

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statute requires* that the plaintiff in the attachment shall specify in his complaint, on oath or affirmation, the *amount* and *nature* of the indebtedness of the defendant. The deposition sets out that Phelps is justly indebted unto the plaintiff "in the sum of fourteen hundred dollars by his certain instrument of writing signed by him;" and the question is thus presented for determination whether this is the description of specification intended by the statute. It would seem at a first examination of the object of the act, that there was not that compliance with its spirit in the specification given, as its framers intended, but when it is recollected that the plaintiff has filed his declaration, in which the entire cause of action is fully set forth, the objection loses its force; and the more completely so, as the defendant did, at no time in the court below, except to the sufficiency of the affidavit for the cause now alleged, or for any other.

The objection, as to the irregularity in taking the deposition, is equally untenable. Upon the death of the magistrate before whom the depositions were to have been taken, the magistrate to whom the docket of the deceased magistrate was transferred, might have proceeded to take them, but the plaintiff took the precaution to give a further notice of the death of the magistrate, and that the examination of the witnesses would take place before another magistrate at the same place and hour, and to whom the docket and papers of the deceased magistrate had been transferred. The affidavit of the materiality of the witnesses, was properly filed in the circuit court of Jo Daviess county, before the removal of the record, although the change of venue had been awarded to Adams county. The witnesses were there to have been examined, and the computation of time and distance must be computed from that county, and not from Adams county. The further objection that the magistrate did not state the time and place of taking the depositions, is wholly immaterial.†

As the proceedings are manifestly against a non-resident debtor, the objection, that it is not stated in the affidavit of the plaintiff, that "the defendant had departed from this state with the intention of having his effects and personal estate removed without the limits of this state," is wholly inapplicable and untenable.

I am of opinion that the cause has been rightly decided,

* Rev. Code of 1827, page 66.

† Rev. laws of 1827, p. 175, sec. 3.

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and that the judgment of the circuit court ought to be affirmed with costs. (1)

Judgment affirmed.

Wm. Thomas, for appellant.

Strode and *Cavarly*, for appellee.

THE PEOPLE, &c., Plaintiffs in Error, *v.* FERNANDO D. SLAYTON, Defendant in Error.

ERROR TO ADAMS.

Upon an indictment found, a recognizance entered into by a person as surety for the appearance of the party indicted, who has not been served with process and who does not appear, is not obligatory upon such person. Where the person indicted has once entered into a recognizance, a separate one afterwards from a surety might be binding.

Opinion of the Court by Justice SMITH. The question presented to the court in this cause is one of some novelty. From the record, it appears that the defendant in error in the court below became bound in a recognizance, for the appearance of one McCrany, before the circuit court of Adams county at a future day, at his own request, the defendant not appearing. Whether the principal in the indictment had ever been arrested or appeared in court, is not to be collected from the record, and the court can not presume that he was ever in custody. If it were so, the record should have shown it, but the presumption is, that as the recognizance follows the caption in the record, it is not so, and for the further reason that the recognizance is given by the defendant only.

To the *scires facias* sued out on this recognizance, the defendant filed a general demurrer, and a joinder was filed on behalf of the plaintiff. The circuit court sustained the demurrer because the principal was not joined with the security in the recognizance.

As it can not be ascertained whether the defendant was ever in custody, we are constrained to say that there was no obligation on the part of the principal to enter into a recognizance with a surety, and as the principal was not bound, the

(1) See note to *Clark* v. *Roberts*, ante, p. 285.

mere voluntary act of a third person in doing so is not obligatory. If it were otherwise, it might place the individual indicted under a condition to which he had never assented. The surety is the keeper of the person of his principal, and might control his person without his assent, if the principle be recognized, that one, without the assent of the principal, may thus enter into a recognizance for his appearance. It might be carried further. The principal being under no obligation to appear at the time required by the condition of the recognizance thus entered into, he is rightfully absent, and yet a forfeiture of the recognizance happening, and a recovery for the breach being had against the voluntary surety, he may recover back of the principal the amount of the forfeiture, if the recognizance be obligatory on the part of the surety. Such consequences, it would seem, must inevitably flow from a decision which should establish the validity of a recognizance entered into under such circumstances.

It is not, however, to be understood that where the principal has ever entered into a former recognizance, the taking a separate one afterwards from a surety would not be binding, because cases might arise in which it might be impossible to procure the attendance of the principal, and where it might be attended with great hardship, and be productive of oppression. In such cases, if from sickness or other unavoidable casualties, the principal can not appear, and a surety is willing to enter into a recognizance of his appearance to save the forfeiture of a former one, there can be no doubt that it would be obligatory. The present case, however, being clearly distinguishable from such an one, the judgment of the circuit court must be affirmed. (1)

From this opinion Justice LOCKWOOD dissents.

Judgment affirmed.

Attorney General, for plaintiff in error.

Cavarly, for defendant in error.

(1) A sheriff may take a recognizance after indictment found, of a prisoner in his custody, although a writ has not issued from the circuit court commanding an arrest. *Sloan et al.* v. *People*, 23 Ill., 77.

Where money is deposited with a sheriff as security for the appearance of a prisoner, who makes default, it is proper to treat the money as if it had been recovered on recognizance. *County of Rock Island* v. *County of Mercer*, 24 Ill., 35.

See also *Shattuck et al.* v. *The People*, 4 Scam., 481. *Besimer et al.* v. *The People*, 15 Ill., 439.

A recognizance taken before an officer not having judicial power, as the president of a town, is without binding force. *Solomon* v. *The People*, 15 Ill., 291.

A recognizance is not vitiated because it is taken for a less sum than is indorsed on the writ. *Chumasero* v. *The People*, 18 Ill., 405.

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Bradley Rust, Plaintiff in Error, v. Frothingham and Fort, Defendants in Error.

ERROR TO MONROE.

A variance between the writ and declaration, can not be reached by demurrer.

This court can not look at a record which was introduced as evidence in the court below, unless the same is made a part of the record by bill of exceptions.

A record from another state is conclusive evidence of the debt claimed—it imports absolute verity, and nothing can be alleged against it.

A plea to an action of debt upon a record, stating "that the defendant had not been served with process, had never appeared, or authorized an attorney to appear for him," would be good, yet if the record shows that he did appear, &c., the record can not be contradicted by evidence.

The appearance of the attorney without authority is good.

A writ of inquiry is not necessary in any case, where the damages can be ascertained by computation.

Opinion of the Court by Justice Lockwood. This was an action of debt, commenced in the Monroe circuit court by Frothingham and Fort against Rust, on a record of a judgment obtained in the state of New York. The declaration is in the usual form. The defendant below demurred to the declaration, to which there was a joinder. The demurrer was overruled, and the declaration held to be good. Subsequently, the defendant pleaded *nul tiel record*, payment and a special plea, alleging that no service of process had been made on defendant below in New York, and that the appearance stated in the record to have been for defendant by attorneys in the New York court, was without the authority of defendant. To this last plea the plaintiffs below demurred, and the demurrer was sustained. Subsequently the defendant withdrew the plea of payment, and the court tried the issue of *nul tiel record*, which was found for the plaintiffs, and judgment rendered for the debt mentioned in the declaration, amounting to 254 dollars, 60 cents, and also gave damages amounting to 100 dollars, being less than six per cent. interest on the debt, from the rendition of the judgment in New York, to the rendition of the judgment below. To reverse this judgment, a writ of error has been brought to this court.

A variety of errors have been assigned, which will be noticed in the order they were argued.

1. It is assigned for error, that the court below overruled the defendant's demurrer to the plaintiff's declaration. The reason urged for sustaining the demurrer, was that there was a few cents difference between the statement of the debt in the writ and in the declaration. Can this variance be

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reached by demurrer? The practice of courts for a long time has been to give relief against irregular process by motion, and no good reason is perceived why this long established practice should be varied from. It is also a rule of practice, that if a party appears and pleads, a vicious process is aided. The objection, however, to the process was such, that the court below would have permitted it to be amended. A demurrer only goes to the sufficiency of the declaration; and that being good on its face, the demurrer was properly overruled. (1)

2. It is also assigned for error, that the plea of *nul tiel record* was found for plaintiff below. Whether this issue was correctly decided, can not be ascertained by this court. If the defendant wished to have excepted to the record introduced as evidence in the court below, he should have taken a bill of exceptions. (2)

3. That the defendant's special plea was decided to be bad. This plea admits that the record states that attorneys did appear for defendant and defend the suit. Can a party aver any thing which contradicts the record? A record imports absolute verity, and nothing can be averred against it. This court has repeatedly decided, that the records of sister states are to be considered as conclusive evidence, unless, perhaps, in cases where from the record and proceedings it should appear that the party had no notice. If the plea in this case had only averred that he had not been served with process, and that he had never appeared, or authorized an attorney to appear for him, the plea would probably have been good. Yet, on the trial of the cause, if the record showed either a service of process, or an appearance by attorney, the defendant would not have been permitted to contradict the record by evidence. But this plea admits that the record shows an appearance by attorney, and then denies the truth of the averment in the record. This can not be done. The presumption in favor of the records is, that the court where the cause is tried will not permit an attorney to appear unless they are satisfied that he has authority from the party. This rule is necessary for the safety and validity of judicial proceedings. Should an attorney appear for a party without authority, he would be liable in damages to the party injured, and would also subject himself to be punished for a contempt.

(1) No advantage can be taken of a variance between the writ and declaration, on a writ of error. It must be taken advantage of by a plea in abatement, or by a motion. *Prince* v. *Lamb* post. *Cruikshank* v. *Brown*, 5 Gilm., 75. *Wild* v. *Hubbard*, 11 Ill., 574. *Rowley* v. *Berrian*, 12 Ill., 202.

(2) See note to *Browder* v. *Johnson*, ante, p. 96.

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This is considered sufficient to protect parties from the officious interference of attorneys. Should an attorney, however, appear without authority, and the party sustain an injury beyond the abilty of the attorney to compensate, it is probable that a court of equity might set aside a judgment obtained in consequence of such wrongful appearance; but at law, the appearance is good, and can not be contradicted. (3)

4. It is also assigned for error, that the court entered judgment for damages without calling a jury, or issuing a writ of inquiry. A writ of inquiry at common law only issues where the judgment is interlocutory, but the judgment in debt is final.

A writ of inquiry is, however, unnecessary in any case, where the damages can be ascertained by computation. Our statute does not apply to this case. Had the plaintiff averred in his declaration, that he was, by the laws of New York, entitled to a higher rate of interest than he was entitled to by the laws of this state, there then would have been a propriety in calling a jury to ascertain what interest was allowed in New York; but even in such case, the court would have a right to ascertain the fact, and give the damages without the intervention of a jury. This objection, then, forms no ground of error.

The other errors assigned are not deemed of sufficient importance to require any notice. The errors assigned, being, in the opinion of the court, insufficient, the judgment is affirmed with costs. (*a*.)

Judgment affirmed.

Semple and *Breese*, for plaintiff in error.

Cowles, for defendants in error.

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(3) See note 3, to the case of *Kimmel* v. *Schultz et al.*, ante, p. 169.

(*a*) *Greenup and Conway* v. *Woodworth*, ante, p. 232.

In an action upon a judgment in another state, the defendant can not plead any fact in bar, which contradicts the record on which the suit is brought. 1 Peters' Cir. Court Rep., 155.

In an action of debt on a judgment. the interest on the judgment may be computed and made part of the judgment in Louisiana, without a writ of inquiry or the intervention of a jury. *Mayhew* v. *Thatcher et al.*, 6 Wheat., 129.

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THOMAS P. CLARK, Plaintiff in Error, *v.* HENRY J. ROSS, Defendant in Error.

ERROR TO ADAMS.

A writ of error will not lie where the judgment, exclusive of costs, is less than twenty dollars. The word "appea s," used in the 32d section of the practice act of 1827, applies equally to writs of error.

Opinion of the Court by Justice SMITH. This is a writ of error, brought to reverse the judgment of the circuit court of Adams county, on an appeal from a decision of a justice of the peace affirming such judgment, which amounted to nineteen dollars, and no more.

A preliminary question has been raised, denying the jurisdiction of this court in a case where the judgment below does not amount to twenty dollars, exclusive of costs.

The 32d section of the act concerning practice in courts of law, passed in January, 1827,* declares that "appeals from the circuit courts to the supreme court, shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars, or relate to a franchise or freehold."

This provision has clearly precluded the bringing of an appeal in a case like the present, but it is contended that it could not extend to writs of error.

We are then led to consider whether in the use of the term "appeals" the legislature intended to confine the exception to the case of appeals, using the word in its strict technical sense, or whether it was not used to embrace all cases brought into the supreme court, where the judgment was less than twenty dollars, without regard to the name of the process or manner by which it was brought into this court. A proceeding in error is, in truth, an appeal from the decision of an inferior to a superior tribunal. The term appeal implies the removal of a cause for a rehearing upon the facts as well as the law, yet in this court the reviewing of appeals has never received that interpretation. From this uniform exposition, in cases of appeals, and the terms of the law defining the cases in which appeals should be granted, it may be fairly inferred that the object of the legislature was to prevent the supervision of all cases in the supreme court, where the judgment was less than the sum of twenty dollars, except it should relate to a franchise or freehold.

* Rev. Code of 1827, p. 318.

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This construction has an additional support in the fourth article of the constitution creating the supreme court and defining its jurisdiction. By the second section of that article it is declared that "the supreme court shall have an *appellate* jurisdiction *only*, except in cases relating to the revenue, in cases of *mandamus*, and in such cases of impeachment as may be required to be tried before it." The framers of the constitution have here used the word appellate, in its extended and general signification, intending to embrace all cases without regard to the manner in which the cause might be removed. If it did not receive this construction it might be pretended that the powers of review of this conrt were limited to such cases as were strictly appeals, and we might then cavil on the question whether a writ of error was an appeal. No one could subscribe to such an absurdity, and thus circumscribe the jurisdiction of this court.

If this reasoning be correct, as it must necessarily seem to be, it follows as a corollary, that the word "appeals," used in the thirty-second section of the practice act must equally apply to cases of writs of error.

The judgment of the circuit court being for less than twenty dollars, exclusive of costs, this court is bound to declare that it has no jurisdiction of the cause, and that it must be for that reason dismissed and the defendant in error recover his costs. (*a*) (1)

Writ of error dismissed.

McConnel, for plaintiff in error.

Cavarly, for defendant in error.

(*a*) A writ of error is a writ of right, and can not be refused except in capital cases. 6 Johns. Rep., 337.

(1) This decision has been expressly overruled by the case of *Bowers* v. *Green*, 1 Scam., 42.

Where the subject matter of a suit does not relate to a franchise or a freehold, and where the judgment does not amount to twenty dollars exclusive of costs, the remedy is by writ of error, and not by appeal. *Washington County* v. *Parlier el al.*, 4 Gilm., 35 ι. Purple's Statutes, 827, Sec. 47. Scates' Comp., 264.

To justify an appeal on the ground that the judgment relates to a freehold, the right to the freehold must have been the subject directly of the action, not incidentally or collaterally, and the judgment must be conclusive of the right until reversed. *Rose et al.* v. *Choteau*, 11 Ill., 167.

An appeal is not allowed to a party from a judgment in his own favor. He must prosecute a writ of error. *Addix et al.* v. *Fahnestock et al.*, 15 Ill., 448.

In all criminal cases, not capital, the writ of error is a writ of right, and issues of course. *Stuart* v. *The People*, 3 Scam., 395.

A criminal case can not be brought to this court except by writ of error. *Mohler* v. *The People*, 24 Ill., 26.

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JONATHAN ELLIS, Appellant, *v.* JACOB SNIDER, Appellee.

APPEAL FROM UNION.

Where it appears from the account of the plaintiff that he claims less than one hundred dollars before a justice of the peace, the justice is not ousted of his jurisdiction, though a witness should prove that the plaintiff was entitled to more than one hundred dollars. The plaintiff's own claim must govern as to jurisdiction.

Opinion of the Court by Justice LOCKWOOD. This was an action originally commenced before a justice of the peace, in which the plaintiff recovered ninety dollars, and an appeal was taken by the defendant to the circuit court of Union county. Previous to the commencement of the trial in the Union circuit court, the plaintiff, on motion of the defendant, was ordered to file a written account, and thereupon the plaintiff filed a written account consisting of several items, amounting in the aggregate, to ninety-five dollars. It appearing to the court below, from the evidence of witnesses, that the defendant below was indebted to the plaintiff in a larger sum than one hundred dollars, (although the plaintiff had charged and claimed a less sum than one hundred dollars,) the court decided that the justice of the peace had no jurisdiction of the cause, and reversed the judgment of the justice on that ground. To review the judgment of the circuit court, an appeal has been taken to this court.

The only question presented for our consideration is, whether the circuit court erred in reversing the judgment of the justice of the peace for want of jurisdiction.

By a reference to the statute giving justices of the peace jurisdiction, it appears that they have jurisdiction, "for any debt *claimed* to be due upon open and unsettled accounts between individuals, where the whole amount of the accounts of either party shall not exceed one hundred dollars."* The party who presents an account is the best judge of the extent of his claim, where the amount of his claim has not been reduced to certainty by a note or express agreement. He is to determine how much he will demand for any particular service or article of property, and it is for the court or jury to decide whether the charge is reasonable or otherwise, and it is their province to allow either the amount claimed, or less, as in their judgment they shall believe the testimony will warrant. But neither the court or jury have a legal

* **Rev. Laws of 1827, p. 259.**

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right to allow *more* than the plaintiff claims. Should they do so, it would be error, unless the plaintiff remits the excess. The circuit court, consequently, erred in deciding that the justice had no jurisdiction. The judgment below is reversed, with costs, and the cause remanded for further proceedings. (*a*) (1)

Judgment reversed.

Breese, for appellant.

LANSING W. WELLS, Plaintiff in Error, *v.* PATRICK HOGAN, Defendant in Error.

ERROR TO JO DAVIESS.

The proceedings under the statute for forcible entry and detainer, being summary, and contrary to the course of the common law, must strictly conform to the requisitions of the statute.

A complaint made in writing before two justices of the peace, that the complainant "is entitled to the possession of a house and lot in the town of——, wherein one Wells lives, and that said Wells refuses to give possession of said house and lot, though he has been notified to do so in writing," is insufficient.

In order to give the justices jurisdiction, the plaintiff ought to have stated in his complaint that the defendant willfully, and without force, held over the premises after the time had expired for which they were leased to him; or in other words, the relation of landlord and tenant should be shown to exist, and a holding over, after a demand made in writing by the landlord.

No particular form is required in the proceedings of a court, to render them an order, or judgment; it is sufficient if it is final, and the party may be injured.

Opinion of the Court by Justice LOCKWOOD.* This was an action for forcible detainer, originally commenced by Hogan before two justices of the peace of Jo Daviess county. Hogan states in his complaint that "he is entitled to the possession of a house and lot in the town of Galena, wherein one Wells lives, and that said Wells refuses to give possession of said house and lot, though he has been notified so to do in writing," which complaint was sworn to, and on the trial before the justices, a verdict was found against the defendant below. To reverse this decision, an appeal was taken to the circuit court of Jo Daviess county, and upon the trial in that court, a verdict was found against Wells, that he was "guilty

(*a*) Cases in relation to jurisdiction of justices of the peace. *Clark* v. *Cornelius*, ante, p. 46. *Maurer* v. *Derrick*, ante, p. 197.

(1) See note to *Clark* v. *Cornelius*, ante, p. 46.

* Chief justice WILSON did not sit in this cause.

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of a forcible detainer." Upon giving this verdict, the defendant prayed time to file a bill of exceptions, which was granted. The record then states, "It is ordered and adjudged, that unless the defendant enter into bond as the law directs, within fifteen days, in the penal sum of seven hundred dollars, with James Jones as his security, that then a writ of restitution be awarded, and that the plaintiff have execution for his costs herein paid out and expended." To reverse this order or judgment, Wells has brought this case into this court by writ of error, and has assigned a number of errors. It will, however, be unnecessary to consider any but the following, to wit: The complaint made before the justices of the peace was insufficient. The proceedings under the statute for forcible entry and detainer being summary, and contrary to the course of the common law, must strictly conform to the requisitions of the statute. The complaint is, the foundation of the action, and must contain sufficient matter to give the justices jurisdiction, or the whole of the proceedings will be *coram non judice*, and consequently, void. In order to justify the justices of the peace in taking jurisdiction of this case, the plaintiff below ought to have stated in his complaint, that the defendant below willfully, and without force, held over the premises after the determination of the time for which such premises were let to him, or the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession; or in other words, the relation of landlord and tenant should be shown to exist, and a holding over after demand made in writing for a redelivery of the premises to the landlord.

The complaint exhibited to the magistrate, states that the plaintiff below "is entitled to the possession of a house and lot where defendant lives," without showing that the defendant was a tenant, either to himself, or to any person under whom he claims. This was not sufficient to give the justices jurisdiction of the case. It is, however, objected on the part of the defendant in error, "that no judgment has been given in the circuit court, and consequently, that a writ of error will not lie." No particular form is required in the proceedings of a court, to render their order a judgment. It is sufficient if it is final, and the party may, be injured. In this case the order of the court is absolute, that a writ of restitution should issue, unless the defendant below executed a bond in a large penalty, with security, within fifteen days. If the party failed to execute the bond, the writ of restitution was to issue, to obtain which writ was the design of commencing the suit. It does not appear that the bond was executed, and consequently,

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the defendant was exposed to have the writ of restitution issued against him, and thereby be expelled from the premises in a case where the justices had no jurisdiction. A writ of error was, under the circumstances, the only means left, after the fifteen days had expired, to prevent the defendant's being illegally turned out of possession of premises, which for any thing that appears, actually belonged to him.

The judgment below must be reversed with costs. (*a*) (1)

Judgment reversed.

Cavarly, for plaintiff in error.

Ford and *Strode*, for defendant in error.

(*a*) Vide *Clark* v. *Roberts*, ante, p. 285.

(1) There are four cases in which a forcible entry and detainer may be maintained in this state: 1. Where there has been a wrongful or illegal entry upon the possession of another; 2. Where there has been a forcible entry upon such possession; 3. Where any person may be settled upon the public lands within this state, when the same have not been sold by the general government; and 4, Where there has been a wrongful holding over by a tenant after the expiration of the time for which the premises may have been let to him. In the first three classes, before the action can be maintained, there must be an illegal and forcible entry upon the actual, or as in the case of a settlement upon the public lands, *constructive* possession of another. In either of these cases, it is not sufficient to charge in the complaint that the complainant's *right* to the possession only, had been invaded by the forcible or illegal entry. *Whitaker et al.* v. *Gautier*, 3 Gilm., 443.

A complaint for a forcible entry and detainer should clearly show the foundation of the right, which is sought to be enforced; and that the wrongful or illegal entry was made upon the actual or constructive possession of the plaintiff; or the relation of landlord and tenant, and a wrongful holding over must be shown. Id.

When the relation of parties is that of vendor and vendee, a proceeding for forcible detainer will not be sustained. *Dixon* v. *Haley*, 16 Ill., 145.

To constitute forcible entry and detainer, violence is not essential. If the entry is made against the will of another, the entry is *forcible* in legal contemplation. *Croff* v. *Ballinger*, 18 Ill., 200.

Title is immaterial in a proceeding for forcible entry and detainer, except to show the extent of the possession. Deeds may be read in evidence to prove boundaries, or extent of possession. *Brooks* v. *Bryan*, 18 Ill., 539.

See note to *Bloom* v. *Goodner*, ante, p. 63.

Since preparing the foregoing notes the following law has been passed by our Legislature. "Chapter 43 of the Revised Statutes of 1845, (Forcible Entry and Detainer,) shall be extended to all cases between vendor and vendee, where the latter has obtained the possession of lands under a contract, by parol or in writing, and before obtaining a deed of conveyance of the same, fails or refuses to comply with such contract to purchase, and to all cases where lands have been sold, under a judgment or decree of court in this State, and the party to such judgment or decree, after the expiration of the time of redemption refuses, after demand in writing by the purchaser under the same, to surrender possession thereof: *Provided*, that in cases of vendor and vendee, the latter shall be entitled to cultivate and gather the crop growing on the premises at the commencement of the suit, and the right of ingress and egress for that purpose, and for the purpose of removing said crop after its maturity." Acts of 1851, p. 176.

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THOMAS P. CLARK, Plaintiff in Error, *v.* THE PEOPLE, &c., Defendant in Error.

ERROR TO ADAMS.

The power to punish for contempts is incident to all courts of justice, independent of statute, and the exercise of this power, resting in the sound discretion of the court, can not be reviewed by the supreme court.

If the magistrate acts maliciously or oppressively, our laws can punish him by indictment or impeachment.

Opinion of the Court by Justice SMITH. This case is brought up to reverse the decision of the circuit court of Adams county, in dismissing the appeal from the justice of the peace for want of jurisdiction in the circuit court.

The single point presented by the case is, whether an appeal will lie to the circuit court to re-examine the decision of a justice of the peace in imposing a fine on a party for a contempt offered him while sitting as a justice of the peace, and acting in his official capacity? It is contended in support of the grounds of error assigned by the plaintiff in error, that the appeal from the justice's decision to the circuit court, is warranted by the statute authorizing the taking of appeals from their decision to the circuit court.* The 31st section of that statute is alone applicable to proceedings in civil cases, and can not, therefore, embrace a case of the present character, which must be considered as partaking of a criminal nature; nor is it given by the 7th section of the act extending the criminal jurisdiction of justices of the peace, passed in December, 1826,† which is confined exclusively to the cases enumerated in that act. It is manifest that neither of the sections referred to give the right to an appeal in a case like the present.

There are other considerations which it may be proper to examine to show that the circuit court does not possess the power to review the decision of the magistrate, either by appeal or in any other form. By the 24th section of the "act concerning justices of the peace and constables,"‡ it is provided "that every person who shall appear before a justice of the peace, when acting as such, or who shall be present at any legal proceedings before a justice, shall demean himself in a decent, orderly and respectful manner, and for failing to do so, such person shall be fined by the justice for contempt in a

* Rev. Code of 1827, p. 268.
† Rev. Code of 1827, p. 275.
‡ Rev. Code of 1837, p. 266.

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sum not more than five dollars.'" The fine imposed in this case was fixed at three dollars, but in what the contempt consisted does not appear, nor is it deemed material to inquire. It is not pretended that the magistrate has exceeded his powers in any way, nor that the contempt was not committed in his presence. The power, however, to punish for contempts, is an incident to all courts of justice independent of statutory provisions, and the power to enforce the observance of order, punish for contumacy by fine or imprisonment, are powers which may not be dispensed with, because they are necessary to the exercise of all others. The distinction that courts of inferior jurisdiction, not having a general power to fine and imprison for contempt, are restricted to such as are committed in their presence, will not alter the rule in the present case. The exercise of this power must necessarily rest in the sound discretion of the magistrate, and as such, is not the subject of review in the circuit court. To this point a train of numerous decisions may be found, but in a case where it is not pretended that the magistrate has exceeded the powers conferred on him by statute, it is not perceived why this principle should not be strictly applied. The reasoning, as to the possible abuse which might grow out of the exercise of the power to punish for contempts, if superior jurisdictions refuse to examine into the correctness of the decision of the magistrate, is readily met by the answer that if he acts maliciously or oppressively, our laws affords an adequate remedy by indictment. We are not, however, without authority on the very point in question, from a tribunal of the highest character in the country. In the case of *Kearney ex parte*, 7 Wheaton, p. 88, the supreme court of the United States have said that "they will not grant a *habeas corpus* where a party has been committed for a contempt by a court having competent jurisdiction; and if granted they will not inquire into the sufficiency of the cause of commitment." The magistrate having had competent jurisdiction to impose the fine, the circuit court properly refused to inquire into the nature of the contempt, and very properly dismissed the appeal. The judgment of the circuit court is therefore affirmed with costs. (*a*) (1)

Judgment affirmed.

McConnel, for plaintiff in error.

Ford, state's attorney, for defendant in error.

(*a*) The power of punishing contempts is an incident to courts of justice. Trial of *Smith* and *Ogden*, 73.

(1) A writ of error may be sued out of the supreme court to reverse the

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decision of a circuit court, fining a person for contempt of court. *Stuart* v. *The People*, 3 Scam., 395. In this case, BREESE, J., speaking of the case of *Clark* v. *The People*, said: "I do not think that case decisive of this, for the reason that there the contempt was committed in the presence of the justice of the peace, whilst trying a cause, and the statute gave him power to fine for contempt, in a sum not exceeding five dollars, in such a case, and he had not exceeded his jurisdiction, as the record shows. Besides, no law of the state allowed an appeal in such a case, partaking of a criminal nature, and it was properly dismissed." And in *Ex parte, Thatcher*, 2 Gilm., 170, SCATES, J., said: "It is indeed denied that any appeal or writ of error lies from its judgment for contempt by any court. I will not undertake to decide the general question, but the power has its limits. The court may not treat any and every act as a contempt, and I have no doubt that the appellate court may revise and reverse its judgment when it exceeds its jurisdiction, by treating that as a contempt, which in law is no contempt, and can not be. The supervision will be to ascertain that fact." In *Crook et al.* v. *The People*, 16 Ill., 536, the court said: "In the examination of the merits of the remaining question raised in the assignment of errors, and argument, we would be understood as distinctly waiving any determination, whether a defendant, in a criminal information for contempt, can appeal or maintain a writ of error." They also held that in such case a party was not entitled to a change of venue.

In Indiana it was held that courts of record have exclusive control over charges for contempt committed in such courts; and their conviction or acquittal is conclusive. *State* v. *Tipton*, 1 Blackf., 166. So in North Carolina. "There can be no revision, either by appeal or *certiorari*, of the judgment of a court of record for imposing a punishment for a contempt of the court, declared by the record to have been convicted in open court." *State* v. *Woodfin* 5 Iredell, 199, ib., 149. But if the court states the facts upon which it proceeds, a revising tribunal may, on a *habeas corpus* discharge the party, if it appears that the facts do not amount to a contempt. Ib., 149.

The county commissioners' court had power to punish for contempt. *Ex parte, Thatcher*, 2 Gilm., 169.

A justice of the peace who has imposed a fine upon a person for contempt of his court can imprison him until the fine and costs are paid. *Brown* v. *The People*, 19 Ill., 613.

Contempts of court are either direct, such as are offered to the court, while sitting as such, and in its presence, or constructive, being offered, not in its presence, but tending by their operation to obstruct and embarrass, or prevent the due administration of justice. A newspaper publication that has not such effect will not be a contempt. *Stuart* v. *The People*, 3 Scam., 395.

The provision of the constitution of the United States, that the trial of all crimes shall be by jury, does not take away the right of courts to punish contempt in a summary manner. The provision is to be construed to relate only to those crimes which, by our former laws and customs had been tried by jury. *Hollingsworth* v. *Duane*, Wallace, 77, 106. 5 Iredell, 199.

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ADAM W. SNYDER, Appellant, *v.* BAPTISTE LAFRAMBOISE, Appellee.

APPEAL FROM ST. CLAIR.

In a sale of land where there is no fraud and no warranty, the vendee can not recover back the purchase money. (1)

This court will not protect a party who stands by and permits improper testimony to go to the jury.

The rule of law is, that where there is a community of interest and design, the declarations of one of the parties is evidence against the rest, and this rule is not confined to cases of civil contract.

The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. (2)

A party who takes a quit claim deed on the sale of land, runs the risk of the goodness of the title.

Where there is a total failure of title on a sale of land, and no circumstances are proved to induce a jury to believe that the vendor has acted dishonestly, it is not *prima facie* evidence of fraud.

Opinion of the Court by Justice LOCKWOOD. This was an action of *assumpsit* commenced in the St. Clair circuit court by Laframboise against Snyder. The declaration contains the common money counts to which the defendant below pleaded *non assumpsit.* On the trial of the cause, the defendant took a bill of exceptions containing the evidence and the charge of the judge. From the bill of exceptions it appears that the plaintiff below purchased a tract of land of the defendant and one Louis Pinçonneau, for which he paid one hundred and fifty dollars, and received from them a quit-claim deed, in which it is stipulated that they do not warrant the land against the claims of any person but themselves. It was also proved that defendant below had no title to the premises. The plaintiff further proved by a witness "that after the sale and purchase, said Pinçonneau told witness that he, said Pinçonneau, had understood plaintiff did not wish to trade with Snyder for the land, as he was afraid he, Snyder, would cheat him, being a lawyer; that plaintiff preferred trading with said Pinçonneau; that plaintiff would find that he, Pinçonneau, could cheat as well as defendant; and that Pinçonneau admitted to witness that the legal title to the said land was in the heirs of one Augustin Pinçonneau; that

(1) The doctrine is well settled, both in law and in equity, that on a sale of land, where there is neither fraud nor warranty on the part of the vendor, the vendee can not recover back the purchase money, although there may be a total failure of title. *Doyle et al.* v. *Knapp*, 3 Scam., 334. *Owings* v. *Thompson et al.*, id., 509. A quit claim deed is a sufficient consideration. *Bonney* v. *Smith*, 17 Ill., 531.

(2) See note 2, to the case of *Humphrey* v. *Collier et al.*, ante, p. 297.

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if plaintiff would give fifty dollars more, he, Pinçonneau, would make plaintiff a warranty deed, as he could let Augustin Pinçonneau's heirs have other lands for it." The defendant was not present when these statements were made by Pinçonneau. Some testimony was adduced on the part of the defendant which it is unnecessary to notice. After the testimony was produced, the defendant moved the court to instruct the jury, that if there was no fraud practised by defendant, nor any false affirmation as to his title, the plaintiff could not recover; and further, where there is no false affirmation or fraud in a sale of lands, the purchaser can not recover back the purchase money, and that in the sale of land where there is no fraud, the maxim of *caveat emptor* applies. The court, however, instructed the jury, that if they were satisfied from the evidence that Snyder and Pinçonneau sold a title to the land, either legal or equitable, when in truth they had no title of either kind, or that they, or either of them, deceived the plaintiff as to the title, they should find for the plaintiff; but if they were satisfied from the evidence that Snyder and Pinçonneau did not deceive the plaintiff as to the nature of the title, they ought to find a verdict for the defendant. To all of which instructions the defendant, by his counsel, excepted. A verdict was found for plaintiff, and judgment rendered thereon. Several errors have been assigned, and under them it was urged that a part of the testimony ought not to have been permitted to go to the jury, and that the instructions were not such as the defendant was entitled to, and was prayed for. The court in examining the bill of exceptions, do not find that the testimony was excepted to on the trial. If a party permits improper testimony to go to the jury without objection, the reasonable presumption is, that it was received by consent. In the event that a verdict should be found on such testimony, the proper remedy is by a motion for a new trial, and the case must be a strong one where this court will interfere to protect a party who stands by and permits improper testimony to be given to the jury. The court feel themselves called on to condemn the practice that seems to prevail extensively, to suffer illegal testimony to be given to the jury, and then rely upon the skill of counsel to extricate his client from the effect of such testimony. This course leads to much embarrassment, and frequently presents much difficulty in distinguishing between the province of the court and jury. In this case the court feel no hesitation in declaring that the evidence of the declarations of Pinçonneau under the circumstances were not evidence against the defendant, and no doubt exists that, had the court below been called on

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to take this evidence from the jury, that it would have been withdrawn, and in that event no verdict could have been given for the plaintiff. The rule of law on this point is, that where there is a community of interest and design, the declarations of one of the parties is evidence against the rest, and this rule is not confined to cases of civil contract. It is indeed true, that in general, the declarations or admissions of one trespasser or other wrong-doer is not evidence to affect any other person, for it is merely *res inter alios*, but where it has once been established that several persons have entered into the same criminal design with a view to its accomplishment, the acts and declarations of any one of them, in furtherance of the general object, are no longer to be considered as *res inter alios* with respect to the rest. They are identified with each other in the prosecution of the scheme; they are partners for a bad purpose, and as much mutually responsible as to such purpose, as partners in trade are for more honest pursuits, and may be considered as mutual agents for each other. Where an unity of design and purpose has once been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all; and this seems to be the general rule in the case of trials for conspiracies, and other crimes of a like nature. 2 Starkie on Ev., 47. It was urged on the argument that Snyder and Pinçonneau ought to be considered as partners, and consequently the admissions of either be evidence against the other. The court are, however, of opinion that this action can not be sustained on this principle. The plaintiff's right to recover in this case depends upon the question whether the defendant and Pinçonneau were guilty of fraud in selling the land mentioned in the deed. Even in equity a vendee has no remedy on the ground of failure of title, if he has no covenants and there is no fraud. *Chesterman* v. *Gardner*, 5 Johns. Ch. Rep., 29. *Gouveneur* v. *Elmendorf*, ibid, 79. And the fraud must exist at the time of the execution of the deed or lease, and not fraud in a subsequent and distinct transaction.

Testing this case by the above principles, there is an absence of evidence of any concerted design between Snyder and Pinçonneau to defraud the plaintiff below. The declarations of Pinçonneau being made subsequent to the execution of the deed, and in the absence of Snyder, and there being no evidence of concerted design, must be considered as admissions *res inter alios*, and consequently, hearsay, and inadmissible as evidence.

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But ought the court to reverse the judgment because of the inadmissibility of this evidence? Were there no other objections to the judgment, the court might well doubt whether they ought to interfere; but on examining the charge of the judge, they are of opinion that it is not as specific and certain as it ought to have been. The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. From what the judge said in the first part of the charge, the jury may have inferred that if they believed that Snyder and Pinçonneau had no title to the land sold, that the plaintiff had a right to recover; yet from the latter part of the charge, the jury might have an equal right to infer that the plaintiff had no right to recover, unless Snyder and Pinçonneau had deceived the plaintiff as to the nature of their title. The charge then, as preserved in the bill of exceptions, does not convey to the jury distinctly the precise rule that is to govern them in their deliberations. The court are of opinion that the judge should have instructed the jury that the defendant was not liable to refund the money paid in this case, unless the defendant, previous to the sale, affirmed what he knew to be false in relation to the title to the land, or concealed some material fact in relation to the title, or used some fraudulent means to induce the plaintiff to accept a deed without covenants of warranty; that a party who takes a quit claim deed on the sale of land, runs the risk of the goodness of the title, unless some fraud has been practiced upon him. Inasmuch then as the charge may have had an improper influence on the jury, the judgment must be reversed with costs, and the cause remanded to the St. Clair circuit court, for further proceedings.

See the cases of *Livingston et al.* v. *Maryland Insurance Company*, 7 Cranch, 506. 11 Wheaton, 59, as to the manner of charging a jury.

Separate opinion of Justice SMITH. I concur in the reversal of the judgment in this cause, on the ground that it is possible the jury may have decided against the defendant on the simple ground of a failure of title in Snyder and Pinçonneau, without considering it essential that there should have been evidence of fraud against him.

I hold the doctrine correct, that where there is a total failure of title in a case like the present, and no circumstances are adduced to induce the jury to believe that the vendor has acted dishonestly in the sale, but are left to infer that he may have sold under a mistaken impression of his title, that such sale is not *prima facie* evidence of fraud, and

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that it is necessary, to entitle a party to recover, to show facts sufficient to warrant inferences of fraud. From the general character of the charge, and the fact of the qualification in it, (being in the disjunctive) it may have led the jury to the simple inquiry, whether Snyder had title or not, and as none was shown on the trial, they may not have inquired into the question of fraud. That an individual may execute a release for a valuable consideration, for a supposed interest in lands, when in truth he may have no title, either legal or equitable, and not be liable to refund, will depend upon the honesty with which he acts. Should he conceal facts, or misrepresent others necessary to a correct understanding of his title, it can not be doubted that he would be liable.

In the present case it does not appear that Snyder was guilty of either a surpression or a misrepresentation of the manner in which he deduced his title to the lands in question. I had great doubts on the motion for a new trial, whether it ought not to have been granted, but as the evidence of Pinçonneau's declarations were not objected to on the trial, and the whole evidence had been weighed by the jury, whose peculiar province it alone was to determine its character and force, I did not feel disposed to disturb the verdict. Upon reflection, I am now satisfied that the confessions of Pinçonneau were not evidence, that they must have had great weight with the jury in determining, their verdict, that there was no evidence connecting Snyder's acts with those confessions, and when Snyder was not present, and that a possible indistinctness in the charge given may have had its effect upon the jury to lead them away from the question of fraud in selling the lands in controversy. I believe, for the purposes of justice, that the reversal of the judgment will be but right, all circumstances considered, and therefore concur in the reversal. (*a*)

Judgment reversed.

Breese and *Semple*, for appellant.

Blackwell, for appellee.

(*a*) The civil law bound every man to warrant what he sold, albeit there be no express warranty; but the common law does *not*, without a warranty in deed or in law, for the rule is, *caveat emptor*. Co. Lit., 102. 4th Dane's Dig., p. 3-7.

In a sale of lands, the maxim of *caveat emptor* applies. *Boyd* v. *Bopst*, 2 Dallas, 91.

A purchaser of real estate can not recover back the purchase money in an action for money had and received, in case the title prove defective, unless there be fraud or warranty. *Dorsey* v. *Jackman*, 1 Serg. and Rawle, 42.

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THOMAS ALLISON AND OTHERS, Appellants, v. THOMAS P CLARK, Appellee.

APPEAL FROM MORGAN.

Upon principles of natur l justice, a person ought not to be compelled to part with his title to land, until he has received the amount which he had contracted to take for it, nor should a person receive a title until he has paid what he agreed to pay for it. (1)

CLARK exhibited his bill in chancery in the Morgan circuit court, at the April term of 1829, against the appellants, to compel the specific performance of a contract to convey a tract of land in the county aforesaid. The bill charges that the Allisons, on the 16th of February, 1826, executed their bond to the complainant, to convey to him a tract of land, upon the condition that the complainant paid them 207 dollars on or before the last day of February, 1827, the conveyance to be made on the day the money was stipulated to be paid. The complainant, in his bill, stated that on the last day of February, 1827, he was ready and willing to pay the purchase money, and that on the 27th of May, of that year, he did pay the money to Adam Allison for the defendants, but that the defendants refused to make the conveyance, and sold and conveyed the land to another person, (who was made defendant,) who had notice of the claim. The bill prays for a decree against the defendants for a conveyance to complainant.

The Allisons severally answered the bill, denying the payment of the purchase money, and set up a new and different contract in avoidance thereof, which was evidenced by the note of said Clark to the Allisons, executed since the 27th of May, 1827, and which, the Allisons contended, was part of the purchase money originally contracted to be paid, but which remained unpaid. The depositions taken by com-

Between the sale of goods and of land, there is a marked distinction. In the former, the law implies a warranty of title, but not in the latter. Ibid.

An action will not lie to recover back a sum of money paid in consideration of the assignment of a mortgage, although it turned out to be a forgery. *Bree* v. *Holbeck*, Doug., 655.

(1) The true rule, in cases of dependent covenants, such as agreements to pay at a certain time, and thereupon the lands to be conveyed, is undoubtedly this: that the vendor can not sue for the consideration money until he has tendered a deed, nor can the vendee claim a deed until he shows himself ready to pay. The vendor can not be compelled to part with the deed but he must have it ready to be delivered as soon as the money is paid; both are concurrent acts. *Murphy* v. *Lockwood*, 21 Ill., 617, and cases there cited.

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plainant, together with the receipts of the Allisons, proved the payment of the notes first executed by Clark to the Allisons. The Allisons contended that the note subsequently executed by Clark to them, which they produced and proved, was evidence of a new contract yet unperformed on the part of Clark, the complainant. The circuit court, on a final hearing of the cause, rendered a decree in favor of the complainant for a conveyance of the land, as prayed for in the bill, from which decree the Allisons appealed to this court.

Opinion of the Court by Justice SMITH. From a consideration of the facts disclosed by the bill, answers and testimony, in this cause, it is in some degree questionable, whether the decree ought to be disturbed. Taking the whole facts, however, in favor of the appellants, as disclosed, they can not amount to more than substantiating the belief that the note remaining unpaid, and which, it was contended, was substituted for the orignal, is still due, and that before the land was to be conveyed, the note, amounting to 179 dollars, was to have been paid on the first of January, 1828. The question of the justice of the decree in the circuit court will turn then on the single point, whether that court should have required the payment of that note before it decreed a conveyance of the land in question. The court below must have considered this point of the appellants' answers, as matters in avoidance of the allegations of the bill, and as such, requiring proof, before it could adopt the conclusion that this note was substituted for so much of the original consideration. It is really questionable, whether it ought not to be so considered. If it be right so to understand it, the decree ought to stand untouched; but the better construction would seem to be, that this note was given for a part of the original consideration for the lands; and that upon its payment, the lands were to be conveyed to Clark. The principles of natural justice would seem to require that the appellants ought not to part with their title to the land until they had received the amount for which they had contracted, and that equally so, the appellee ought not to receive a title until he had paid for the same the amount agreed on. The transaction between the parties is by no means free from obscurity and doubt. Upon the whole, it is the opinion of the court, that equal justice to the parties requires a modification of the decree, so that each shall obtain his rights. The decree is to be modified in this court, so as to require the complainant in the bill to pay the note of 179 dollars, with the interest due thereon to this time, and upon which, the defendants in

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equity are to convey the lands in the manner stated in the decree of the circuit court, and the costs in this court, and in the court below, are to be divided between the parties, each paying in those courts, his own costs.

Thomas, for appellants.

McConnel, for appellee.

HYPOLITE ROLETTE, Appellant, *v.* LEMON PARKER, Appellee.

APPEAL FROM JO DAVIESS.

A tenant in common of a chattel who sues for a conversion of the same, is entitled to recover damages for his share or interest only.

Opinion of the Court by Justice BROWNE. This was an action of *trover* and conversion brought by Lemon Parker against H. Rolette. The plaintiff below derived his title from the following bill of sale, viz.:

KNOW all men by these presents, that I, William Kelly, in consideration of four hundred dollars to me paid by Parker and Tilton, do hereby sell, alien and convey to Lemon Parker, four yoke of oxen, with the yokes and chains belonging thereto. The condition of the above sale is such that I, the said William Kelly, stand indebted to the above named Parker and Tilton in the above named sum ; now, if the above debt is canceled within one year, then the above sale to be null and void, otherwise to remain in full force and virtue ; and it is further agreed between the parties, that the said Parker and Tilton are to loan me the said team without charge, and to furnish hauling for the said team to the amount of said debt.

Signed, WM. KELLY. [SEAL.]

July 11, 1829.

The defendant, by his counsel, moved the court to instruct the jury, that if they believed that William P. Tilton was interested in the contract between Kelly and Parker for the oxen, &c., they should find a verdict for the plaintiff for his share or interest only. Other instructions were prayed for which will not now be noticed. I am of opinion, that the

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court below erred in refusing the instruction as asked for, for which reason the judgment must be reversed with costs, and the cause remanded to the circuit court.

From this opinion, Justice SMITH dissents. (1)

Judgment reversed.

Ford, for appellant.

J. B. Thomas, Jr., for appellee.

JOSEPH JOHNSON, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO MADISON.

A fine against a retailer of spirituous liquors for selling without a license by a less quantity than one quart, can not, under the act of 1827, exceed ten dollars.

Opinion of the Court by Justice BROWNE.* This is a writ of error sued out to reverse a judgment of the circuit court of Madison county. At the October term, 1829, an indictment was preferred against the plaintiff in error, for retailing spirits by a less quantity than one quart, in violation of the statute. At the same term following, he was tried, and found guilty, and the court thereupon imposed a fine of *twelve* dollars against him. A motion was made by his counsel to arrest the judgment, which the court overruled. The statute of 1827, page 150, section 127, is in the following words; "Every person not having a legal license to keep a tavern, who shall barter, exchange or sell, any wine, rum, brandy, gin, whiskey, or other vinous, spirituous, or mixed liquors, to any person or persons, by a less quantity than one quart, shall, on conviction, be fined *ten* dollars." I know of no statute in force imposing a greater fine for the offense of re-

(1) In actions for torts, the non-joinder of persons interested with the plaintiff, must be pleaded in abatement, and can not be taken advantage of on the trial, otherwise than in mitigation of damages; and in such case, if the defendant omit to plead the non-joinder in abatement, the plaintiff may have judgment for his aliquot share of the damage sustained. *Edwards* v. *Hill*, 11 Ill., 22. But in an action to recover a specific penalty, given by statute, which does not rest in compensation, such as an action to recover the penalty for cutting timber, the owners of the land must all join in the action. Ibid.

* Chief Justice WILSON did not sit in this cause.

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tailing spirits without a license than the one referred to. The court, therefore, erred in rendering the judgment and imposing a fine of twelve dollars, for which error it must be reversed.

From this opinion Justice SMITH dissents.

Judgment reversed.

Semple, for plaintiff in error.

Cowles, state's attorney, for defendant in error.

WILLIAM BENNET, and JACOB JUDY, Appellants, *v.* PHILIP SCHERMER & Co., Appellees.

APPEAL FROM JO DAVIESS.

When the whole record on its face is so imperfect as not to warrant the entering of the judgment, it will be reversed.

THE appellees brought an action of *assumpsit* in the court below against the appellants, on a promissory note. The declaration contained but one count. The appellants pleaded a failure of consideration, to which there was a demurrer, which was sustained as to the declaration, and leave given to amend it. The amendment was not made. A plea of *non assumpsit* was afterwards filed and issue taken thereon. There was then filed a special plea of failure of consideration, to which there was a demurrer and joinder. A plea of payment, and of set-off, to which there was also a demurrer and joinder. These demurrers not having been disposed of, the appellees replied, traversing the pleas of failure of consideration and payment, upon which an issue was made up, and demurred to the plea of set-off, which was sustained, and no further answer to it. In this state of the case, a jury came, who found a verdict for the appellees. A motion was made for a new trial which the court overruled, and judgment entered on the verdict for the appellees, to reverse which judgment an appeal was taken to this court, and the appellants assigned for error, among others, the following, viz: That after the plaintiff's demurrer to the defendant's first plea was sustained as to the declaration, and leave was granted to amend it, the court permitted the cause to go on to

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trial without any amended declaration, and that the court gave judgment for the appellees on the issue found by the jury, when there were several issues of law undisposed of, and the plea entirely unanswered.

Opinion of the Court by Justice SMITH. The extremely imperfect condition of the record in this cause shows that it is impossible to determine the real merits of the points presented to the court. The whole presents a confused mass of pleadings, with leave to amend some, which amendments were never made; demurrers to others appear to be undecided, and issues appear to have been made up, and again abandoned on several points. The whole record can not warrant the entering of a judgment on its face; and this court are bound, for these reasons alone, to reverse the judgment. The court take this occasion to remark on the generally imperfect state of records brought up from the Jo Daviess circuit court, and to intimate the absolute necessity of the proceedings from that court being, hereafter, presented in a more perfect state. It is hoped that the parties hereafter interested in causes brought here for a review, will profit from the intimation here given. Let the judgment be reversed, with the directions to the court below, to proceed *de novo* in the cause, and the appellants here, recover their costs. (1)

Judgment reversed.

Cavarly and *Semple*, for appellants.

Ford, for appellees.

(1) See *Mason* v. *State Bank*, ante, 183.

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JOHN DOE, *ex dem.* NOBLET HERBERT, THOMAS JANNEY AND JOHN D. BROWN, Plaintiffs, *v.* JOHN C. HERBERT, (CHAS. LOUVIERE, Tenant,) Defendants.

AGREED CASE FROM RANDOLPH.

Prior possession is evidence of a fee, and although the lowest, unless rebutted by higher, it must prevail. (1)

A prior possession, short of twenty years under a claim of right will prevail over a subsequent possession of the same time where no other evidence of title appears on either side.

A prior possession of less than twenty years without any other evidence is *prima facie* evidence sufficient to put the tenant on his defense.

Where the title to land is divested by operation of law, as in sales under execution, the possession of the defendant can not be considered such an adverse possession as to defeat the deed and render it inoperative.

A grantor in a deed who has no interest in the suit, and who has made no covenants, upon general principles, is a competent witness.

To render a deed for land valid and effectual, there must be both a delivery and acceptance of the deed. A deed not delivered and accepted, though recorded passes no estate. (2)

THE record presented the following state of facts. Ninian Edwards had peaceable possession of the premises in question

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(1) In actions of ejectment, and for injuries to the inheritance, the possession of a tract of land by a party, claiming to be the owner in fee, is *prima facie* evidence of his ownership and seizin of the inheritance, and throws upon his adversary the burden of rebutting the presumption thus raised *Mason* v. *Park*, 3 Scam., 532. *Davis* v. *Easley et al.*, 13 Ill., 198.

Whoever is in the actual possession of land, claiming the fee, is presumed to own it, until the contrary appears; and may maintain an action for an invasion of his possession against any one but him who holds the legal title, or right of possession. *Brooks* v. *Bruyn*, 18 Ill., 539.

Possession of land is sufficient to entitle a party to maintain an action on the case against one who has so constructed his mill-dam as to overflow the plaintiff's land. *Stout* v. *McAdams*, 2 Scam., 68.

Possession of a ferry franchise, for a term less than twenty years, is not evidence of a grant, or of a right to the same. *Mills et al.* v. *County Com'rs St. Clair Co.*, 3 Scam., 56.

Possession and occupancy, when applied to land, are nearly synonymous terms, and may exist through a tenancy. *Walters* v. *The People*, 21 Ill., 178

Where possession of land alone is relied on for any legal purpose, in the absence of paper title, it should be an actual occupancy of the premises in question. *Webb* v. *Sturtevant*, 1 Scam., 181. *Ill. Mutual Fire Insurance Co.* v. *Marseilles Man. Co.*, 1 Gilm., 266.

Where two lots were claimed by a party, and improvements were made on one, but the lots adjoined; the court held the occupancy extended to both. *Prettyman et al.* v. *Wilkey et al.* 19 Ill., 235.

(2) It is everywhere conceded that delivery is necessary to the validity of a deed. *Hulick* v. *Scovil*, 4 Gilm., 159, and cases there cited. But delivery may be made in various ways, and in some cases will be presumed, indeed in most cases, until the contrary is shown by evidence In case of delivery to a stranger, without authority from the grantee to accept it, the acceptance by the grantee at the time of delivery will be presumed under the following circumstances: 1. That the deed be, upon its face, beneficial to the grantee; 2. That the grantor part entirely with all control over the deed; 3 That the grantor, (except in cases of an escrow,) accompany the delivery by a declara-

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in 1810, and continued it until the sale to Thomas F. Herbert by deed duly executed and recorded, bearing date the 7th day of September, 1818, which was produced and read in evidence. T. F. Herbert immediately upon the purchase, went into peaceable possession under his deed from Edwards, and remained in possession until his death which happened in 1821. The plaintiffs also produced in evidence a deed regularly executed and recorded from Charles Slade, administrator of said T. F. Herbert, bearing date the 23d day of July, 1823, conveying to the lessors of the plaintiff the premises in question, to whom he had sold the same under the authority of, and in compliance with an act of the general assembly of the state of Illinois, entitled "An act authorizing the administrator of Thomas F. Herbert, deceased, to sell certain lands," approved Dec 19, 1822. The plaintiff also proved that Charles Louviere was in possession of the premises at the time of the service of the declaration and notice, and here the plaintiffs rested their case. The defendant then moved the court for a nonsuit on the ground that the plaintiffs had not produced sufficient evidence of title to put the defendant on his defense, which motion the court overruled. The defendant then pro-

tion, intention, or intimation, that the deed is delivered for and on behalf and to the use of the grantee; 4. That the grantee has eventually accepted the deed and claimed under it. *Hulick* v. *Scovil*, *supra.*

These further propositions are well established by the courts:

1. That although a deed may, under certain circumstances, be presumed to have been delivered by the grantor to the grantee and accepted by him, yet this presumption may be overcome by evidence which shows that there was no delivery or acceptance. *Hulick* v. *Scovil*, 4 Gilm., 159. *Bryan* v. *Wash* 2 Gilm., 564. *Ferguson* v. *Miles*, 3 Gilm., 363. *Wiggins* v. *Lusk*, 12 Ill., 132. *Hines* v. *Keighblinger*, 14 Ill., 471.

2. That where a grantee claims under a deed, and has it in his possession, this raises a presumption of a delivery and acceptance. Id.

3. A deed can not become operative by a delivery after the death of the grantor. *Wiggins* v. *Lusk*, *supra.* *Barnes* v. *Hatch*, 3 N. Hamp., 304. *Hale* v. *Hills*, 8 Conn., 39. *Stilwell* v. *Hubbard*, 20 Wend., 44. *Baldwin* v. *Maultsby*, 5 Iredell, 505.

4. If a deed is made by A. to B. and deposited with C., to be delivered to B. on the death of A., the deed will take effect from the delivery to C. *Belden* v. *Carter*, 4 Day, 66. *Ruggles* v. *Lawson*. 13 Johns., 285. *Foster* v. *Mansfield*, 3 Metcalf, 412. *Goodell* v. *Pierce*, 2 Hill, 659. *Tooley* v. *Dibble*, id., 641.

In Freeman's Digest, p. 1173, the case of *Hines* v. *Keighblinger*, 14 Ill., 471, is cited as conflicting with the case of *Herbert* v. *Herbert;* but on examination, I apprehend it will be found not to be the case. That the possession by the grantee of a recorded deed is *prima facie* evidence of a delivery, is undisputed, and is the point decided in the case of *Hines* v. *Keighblinger.* But when the possession of the deed is retained by the grantor, without proof of delivery, it is quite as well settled that the deed is inoperative, and the fact that it has been recorded is not presumptive evidence of delivery. In *Wiggins* v. *Lusk*, 12 Ill., 132, the deed had been recorded, but was found, at the death of the grantor, among his papers. It was held by the court that it was insufficient to convey the title; and the case of *Herbert* v. *Herbert*, was cited and approved.

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duced in evidence the record of a deed from T. F. Herbert, to John C. Herbert, bearing date the 29th of September, 1818, for the premises in question, which deed was not attested by any subscribing witness, but was acknowledged before a justice of the peace for Randolph county, within which county the premises are situate, and recorded in the recorder's office for said county, on the 15th day of January, 1819. This deed was objected to by the plaintiffs, on the ground that it was not executed in conformity with law, having no subscribing witness, and on the further ground that it had not been delivered by the grantor, and accepted by the grantee; and to sustain this latter objection, the plaintiffs proved by Charles Slade, the administrator aforesaid, (whose testimony was objected to by the defendant on the ground that he was the grantor, as administrator, in the deed under which the plaintiff claimed, but who deposed that he had no interest in the event of the suit, and his deed to plaintiffs contained no covenants,) that he had *found* the deed from Thomas F. Herbert to John C. Herbert, among the papers of the said Thomas, after his death. The original deed from T. F. Herbert, to J. C. Herbert was not produced, nor was it proved that it was ever in the possession of J. C. Herbert, nor was it proved where the same was. The defendant then proved that T. F. Herbert was indebted to the said J. C. Herbert in the sum of $1,200, and that at the time of the execution of said deed, he had incurred further responsibilities for the said T. F. Herbert as his security amounting to more than $3,000, that they were brothers, and that C. Slade, the administrator of T. F. Herbert, permitted the said J. C. Herbert, by his agent, to take possession of the premises and receive the rents, who had continued the possession ever since.

Upon this state of facts, the circuit court gave judgment for the lessors of the plaintiff, which, by consent, was subject to the opinion of the supreme court.

Opinion of the Court by Justice SMITH. Under the agreed case, upon which this cause has been presented to this court, four questions are to be considered:

1. Was the motion in the court below for a nonsuit, properly overruled?

2. Was the executions of the deed of Slade, as administrator of Herbert, valid; and did the title to the lands in question pass thereby?

3. Was the grantor, Slade, a competent witness on trial?

4. Was there a due execution and delivery of the deed by Thomas F. Herbert to John C. Herbert?

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The action of ejectment is considered in reality as an action of trespass, adding thereto an execution by which the prevailing party obtains the possession of the thing itself. The plaintiff must prove property in himself, or a right of possession—he may try the title or not, and if he does not desire to adduce his title, he may try nothing but the right of possession. Prior possession is evidence of a fee, and, although the lowest, unless rebutted by higher, it must clearly prevail. It is equally well settled, that the lessor of the plaintiff must recover on the strength of his own title. Let these principles be applied to the case before us, and inquire upon what evidence the court below overruled the motion for a nonsuit. It appears from the case, that it was proven that N. Edwards, through whom the title in question is asserted, had peaceable possession of the premises as early as 1810, and continued it, without any chasm, until the sale to Thomas F. Herbert, on the 7th of September, 1818; that Herbert, immediately upon the purchase, went into peaceable possession, and died in possession in 1821. A deed regularly executed by Charles Slade, the administrator of Thomas F. Herbert, of the date of the 23d May, 1823, conveying to the lessors of the plaintiff the land in question, which had been duly recorded, was produced, and to whom he had sold the same under the authority of and in compliance with a law of this state, approved 19th December, 1822. The plaintiff also proved that Charles Louviere, the tenant, was in possession at the time of the service of the declaration, and here rested his case.

The supreme court of the state of New York have said, that *title may be inferred from ten years' possession*, sufficient to put the defendant on his defense. *Smith* ex dem. *Teller* v. *Burtis and Woodward*, 9 Johns. Rep., 197; and that a prior possession, short of twenty years, under a claim of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. There are several decisions of that court which sustain this doctrine. *Smith* v. *Lorillard*, 10 Johns. Rep., 355. *Jackson* v. *Myers*, 3 do., 388. *Jackson* v. *Harder*, 4 do., 202.

The proof here adduced was *prima facie* evidence both of title and right of possession, and was sufficient to put the defendant on his defense. It was not necessary that the plaintiff should have shown a possession of twenty years, or a paper title. His possession as proved, was presumptive evidence of a fee, and was conclusive on the defendant, until he showed a better title. Upon this state of the case, the mere naked possession of the defendant could not prevail against it. There can, then, be no doubt, that the

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motion for a nonsuit was properly overruled. The next point to be considered is, the validity of the deed of the administrator, executed by virtue of a law of this state, and the effect thereof.

T. F. Herbert having died in 1821, between that time and the making of the deed by the administrator in 1823, by consent of the administrator, John C. Herbert, by his agent, took possession of the premises in question, and continued up to the present time. It is then contended, that the administrator being out of the possession of the lands, at the time of making the conveyance, that it is therefore void. Upon the death of Herbert, the estate in the premises passed to his heirs, and the legislature having by a law authorized the sale of the premises by the administrator, we think it not important to inquire whether the administrator was in or out of the actual possession of the land, at the time of making the conveyance by him. It may be doubted whether the possession of Herbert was such an adverse possession as would have rendered a conveyance by the heirs void; but the law of the legislature must be considered as a paramount authority, and it being admitted that the conveyance has been made agreeably to the provisions of that law, the estate, of which Herbert died seized, passed by that deed, and it was well executed, and not void because of the possession of the agent of John C. Herbert. Where the title is divested by the operation of law, as in sales under execution, the possession can not be considered such an adverse possession as to defeat the deed and render it inoperative. *Jackson* v. *Bush*, 10 Johns. Rep., 223. The inquiry as to the competency of Slade, the administrator and grantor of the deed to the lessor of the plaintiff, will be now considered.

It is apparent that Slade had no interest in the decision of the cause; he had entered into no covenants upon which he could be liable; upon general principles, then, he was a competent witness, and the rule that all persons not affected by crime or interest are competent witnesses, must prevail. This is not a question of the admissibility of the maker of an instrument to impeach it, or destroy it for want of a consideration, or for fraud. Though even in such a case, the grantors in a deed have been admitted in an action of ejectment, in the supreme court of Massachusetts—that court deciding that the exception made, applies alone to negotiable instruments, which, upon principles of public policy and morality, ought not to be suffered to be impeached. *Loper* v. *Haynes*, 11 Mass. Rep., 498.*

Vide *Duncan* v. *Morrison and Duncan*, ante, p. 151, and the cases there referred to in note.

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In the present instance, Slade was not offered to prove any fact in connection with the execution of his deed as administrator, but collateral facts affecting the deed from Thomas F. Herbert to John C. Herbert. His admissibility, then, depended entirely upon his interest in the event of the suit, and standing indifferent in that respect, he was properly admitted to testify.

The last and remaining question, and most important one in the case, is, whether there was a *delivery* of the deed from T. F. Herbert to John C. Herbert. The objection to it is, that it was never delivered by the grantor to the grantee, nor to any other person for his use, nor was there any acceptance by the grantee. The facts disclosed in relation to this deed are, that it was found among the papers of Thomas F. Herbert, after his death, by Slade, his administrator; that the deed had never been in possession of the grantee, the administrator having, after its discovery, delivered it to a third person, and that the administrator did not know where it was. The original deed was not produced in evidence, nor its absence accounted for; but the records of the county, which showed that the deed had no subscribing witness, was acknowledged before a justice of the peace, bore date on the 29th of September, 1818, and was recorded on the 15th of January, 1819. The defendant proved that Thomas F. Herbert was, in 1812, indebted unto the grantee, John C. Herbert, in the sum of $1,200, and that he had been compelled to pay as security for Thomas F. Herbert, more than $3,000 since that time.

From this state of facts it is to be determined whether there was a delivery and acceptance of the deed to John C. Herbert.

It is most manifest that there could have been no delivery of the deed to the grantee, so as to pass the estate. The act of recording a deed can not amount to a delivery, when there does not appear an assent or knowledge by the grantee of the act. In this case, there is not a scintilla of evidence calculated to lead the mind to the belief that the grantee ever knew of the existence of the deed until after the death of the grantor. There could then have been no acceptance by the grantee, because the possession of the deed, if such had been the fact, derived after the death of the grantor, could not amount to one, there having been no delivery during the life of the grantor. That it is essential to the validity of a well executed deed, that there should be a delivery, will not be controverted. This delivery is said to be "either actual, by doing something and saying nothing, or

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else verbal, by saying something and doing nothing, or it may be both; but by one or both of these, it must be made, for otherwise, though it be never so well sealed and written, yet is the deed of no force.

"It may be delivered to the party himself to whom it is made, or to any other person by sufficient authority from him, or it may be delivered to a stranger for, and in behalf, and to the use of him for whom it is made without authority, but if it be delivered to a stranger without any such declaration, unless it be delivered as an *escrow*, it seems that it is not a sufficient delivery." *Jackson* v. *Phipps*, 12 Johns. Rep., 419. 1 Shep. Touch., 57, 58. 2 Black. Com., 307. Viner's Abr., 27, § 52.

It is also held to be essential to the legal operation of the deed that the grantee assents to receive, and that there can be no delivery without an acceptance. Indeed, a delivery of a deed, which is essential to its existence and operation, necessarily imports that there should be a recipient. Now, in this case, it would be idle to contend that there was a delivery and reception, when the grantor died before the grantee knew of the existence of the deed? he could not then receive that of the existence of which he had no knowledge, nor could there have been a delivery to him without such an acceptance. There had been no act on the part of the grantor before his death, tantamount to a delivery, much less an actual one. The act of recording does not amount to it, because there appears a total absence of knowledge, on the part of the grantee, of such recording, or even of the existence of the deed until after the death of the grantor, and it does not appear that he had ever received the deed. The case of *Jackson* v. *Phipps*, 12 Johns. Rep., 419, before referred to, and *Maynard* v. *Maynard and others*, 10th Mass. Rep., 457, are directly in point, and sustain the principles here laid down. Without then inquiring whether the deed was fraudulent, it is sufficient to ascertain that the deed was never well executed by delivery, and that no estate passed thereby. The judgment is therefore affirmed with costs. (*a*)

Judgment affirmed.

Breese, for plaintiffs.

Kane and *Baker* for defendants.

(*a*) Delivery is essential to the validity of a deed. 2 Stark. on Ev., 476, 477. Co. Litt., 36. (*a*) 2 Bl. Com., 306, 307.

The delivery of every deed must be proved, as well as the execution of it, being an essential requisite to its validity. *Jackson* v. *Dunlap*, 1 Johns. Cases, 114. 2 Day's Rep., 280. 3 Dane's Dig., 356, § 21.

A formal delivery is not essential if there be acts evincing an intention to

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ELI S. LATTIN, Plaintiff in Error, *v.* WILLIAM A. SMITH, Defendant in Error.

ERROR TO JO DAVIESS.

A *ca. sa.* issued upon a judgment is not void on its face, though it does not recite that the oath required by law to be made was made before it issued, nor is it necessary that a declaration for an escape on such *ca. sa.* should aver that the oath was made.

An officer acts at his peril; he is bound to obey the mandate of the writ, and if he proceeds to execute it he is bound to complete the execution of it.

I is sufficient to justify the officer executing the process, that the magistrate had jurisdiction; he is not bound to examine into the validity of the proceedings or regularity of the process.

THIS was an action on the case against Lattin, commenced in the Jo Daviess circuit court by the defendant in error for an escape, to which Lattin pleaded not guilty, with notice of special matter to be given in evidence. The plaintiff below, to maintain his action, produced in evidence a *ca. sa.* issued by a justice of the peace of Jo Daviess county, at the suit of the plaintiff below against one E. Q. Vance. The counsel for defendant below objected to the introduction of this *ca. sa.* for the reason that it did not appear on its face that the oath to authorize the issuing a *ca. sa.* had been made, but the court permitted the same to go in evidence to the jury, to which the defendant below, by his counsel, excepted, and judgment on the verdict being rendered against him after several continuances, he has brought this writ of error, and assigned for error,

1. That the court erred in permitting the *ca. sa.* to be read

deliver. *Goodrich* v. *Walker*, 1 John's Cases, 250. *Verplanck* v. *Story et uxor*, 12 Johns. Rep., 536.

A delivery is essential to the validity of a deed, and there can be no delivery without an acceptance by the grantee. Where A., residing in this state, agreed with B., in Massachusetts, to give him a deed of his farm as security for a debt, and A., on his return home, in 1808, executed and acknowledged a deed to B., and left it in the clerk's office on the same day to be recorded; neither the grantor nor any person in his behalf being present to receive the deed, and the grantee died in 1809, and in 1810 A. sent the deed to the son and heir of the grantee: it was held there was no delivery of the deed. *Jackson* v. *Phipps*, 12 Johns. Rep., 418.

A. signs and seals a deed conveying land to his son, and leaves it with the scrivener with directions to get it recorded, which was done, and the deed at the grantor's request, still retained in the scrivener's hands until the death of the son, when the father reclaimed and canceled it, the son having known nothing of the transaction. It was holden that the father was still entitled to the land, as against the heirs of his son, the conveyance having never been perfected by a delivery of the deed. *Maynard* v. *Maynard and others*, 10 Mass. Rep., 456.

If one convey lands to pay his debts, yet keeps the conveyance, this is fraudulent. 1 Dane's Dig., Ch. 32, Art. 13 § 6.

The grantor in a deed not interested in the event of the suit, is a competent witness to show that the deed was fraudulent. *Loper* v. *Haynes*, 11 Mass. Rep., 498. 3 Dane's Dig., Ch. 86, Art. 3, § 17 to 22.

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to the jury, because it did not appear on its face that the requisite oath had been made.

2. That the court erred in entering judgment in November term, 1829, because between that time and the rendering the verdict in the cause, three terms of the court had elapsed which ought to operate as a discontinuance. To these errors there was a joinder.

Opinion of the Court by Justice SMITH. The grounds of error insisted on in the present cause, are not sustainable.

The *ca. sa.* upon which the defendant was arrested, was properly admitted in evidence. It was not void on its face, because of the want of a *recital* of the necessary oath having been taken to authorize the magistrate to issue it. This court are bound to presume that the magistrate acted in conformity to the laws until the contrary appears, having jurisdiction over the subject matter before him. The court will therefore intend that what ought to have been done, was done, until it be shown to be otherwise. The evidence was therefore properly admitted, and it devolved on the defendant to show that the law had not been complied with if it could have availed him in such an event. The same reasons are equally applicable to the want of an averment in the declaration of the taking of the oaths. Such an averment was altogether unnecessary, being substantially embraced in the averment that the *ca. sa.* was sued out in conformity to law.

As to the main point which involves the liability of the officer, the rule of law is well settled, that where process is delivered to an officer he acts at his peril; that he is bound to act in conformity with the commands of the writ, and if he proceeds to execute it, he is bound to complete the execution. 1 Gallis., 519, *Meecher et al.* v. *Wilson.* It is doubtless true that an action can not be maintained against an officer for not executing void process, or process founded on a void judgment, or suffering a prisoner to escape from such process. But if the proceedings on the judgment on which process is founded, are merely erroneous aud not void, he will be liable. *Abbe* v. *Ward*, 8 Mass., 9. The magistrate, it is not denied, had jurisdiction of the subject matter; the judgment was regularly entered, and for aught that appears, the oath necessary to have been administered before the *ca. sa.* could issue, must be presumed to have been taken.

It was sufficient then to justify the officer executing the process, to know that the court had jurisdiction of the subject matter, he was not bound to examine into the validity of the proceedings, or the regularity of the process, and even if it

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had been erroneous, he would not have been liable as a trespasser for executing it. For this doctrine, the cases of *Hill* v. *Bateman*, Stra., 710, case of the Marshalsea, 10 Co., 76, (*a*) and *Warner* v. *Shad*, 10 Johns. Rep., 138.

The officer having proceeded to take the party into custody, has, it would seem, tacitly admitted the regularity of the process, and his subsequently permitting him to escape and go at large, could not be justified, unless, indeed, the process was not merely voidable, but absolutely void. This not being the fact, we can see no reason why, according to the principles endeavored to be laid down, he should not be held liable for the damages sustained by that act.

The objection, that a discontinuance in the cause has happened, is not sustainable, because the judgment has been entered *nunc pro tunc*, and any supposed error on that gound has been thereby cured. The judgment is affirmed with costs. (*a*) (1)

Judgment affirmed.

Ford, for plaintiff in error.

Cowles, for defendant in error.

(*a*) *Vide* Salkeld, 273. *Shirley* v. *Wright*, where the sheriff had the defendant in custody upon a *ca. sa.* issued after the year and a day without a *sci. fa.*. and permitted him to escape. It was held the sheriff was liable, and could not take advantage of the error. *Vide* also, 2 Searg. and Rawle, 152, *Lewis, Esq.* v. *Smith.*

(1) See note to *Moore* v. *Watts et al.*, 42. *Brother* v. *Cannon*, 1 Scam., 201.

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JOHN CONNOLLY, Appellant, *v.* ALMOND COTTLE, Appellee.

APPEAL FROM JO DAVIESS.

In an action upon a note evidently given to pay the debt of a third person, if there is no consideration for the promise expressed in the note, one should be averred in the declaration, and the want of such averment is fatal.

A variance between the description of a note and the one produced in evidence is fatal.

THIS was an action of *assumpsit*, commenced in the Jo Daviess circuit court of the term of October, 1828, by Cottle against Connolly on the following instrument of writing:

"ST. LOUIS, 27th April, 1821.

We hereby obligate ourselves to pay or cause to be paid unto the creditors of Samuel B. Smith, the following sums, viz.:

To Almond Cottle, - - $350 or thereabouts,
" Alexander Nash, - - 31
" Abijah Hull, - - 12

Signed, JAMES TIERNAN, by power of att'y
J. CONNOLLY."

To the declaration the defendant pleaded *non assumpsit* generally, and *non assumpsit* within five years. An issue was made up to the first plea, and to the second there was a demurrer and joinder. The demurrer being sustained to the second plea, it was by leave of court, withdrawn, and the cause submitted to the jury upon the plea of *non assumpsit.* A verdict was found for the plaintiff, the appellee, and judgment rendered thereon for three hundred and fifty dollars and costs. The only evidence on the part of the plaintiff was the writing above set out, on which the suit was instituted. The defendant, by his counsel, moved the court to exclude it from going as evidence to the jury, for the reason, as appears from the bill of exceptions, that it was variant from the declaration, which motion the court overruled, to which opinion of the court in overruling said motion, the defendant, by his counsel, excepted, and has appealed to this court, and assigned for error, among others,

1. The refusal of the court below to exclude the writing declared on, on the ground of variance between it and the declaration; and

2. The want of an averment of a consideration for the defendant's promise, in the declaration.

Opinion of the Court by Justice SMITH. Various grounds

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of error have been assumed in this cause, and on which it is contended the judgment below ought to be reversed.

It will be unnecessary to notice more than two, which are deemed sufficient to require a reversal of the judgment.

The note declared on is evidently one given to pay the debt of a third person. As there is neither a consideration for the promise expressed on the face of the note, nor one averred in the declaration, the omission in the last instance is certainly fatal, whether the first be so or not.

It is deemed unnecessary to discuss the difference between our statute of frauds, which is said to be the same as that of Virginia, under which, it has been adjudged, that the difference between the use of the words "promise" and "agreement," which is required to be in writing, renders it unnecessary that the consideration for the promise shall be in writing, and the British statute; or whether the use of the word "promise" in the one statute, and that of "agreement" in the other, be a mere legal subtilty, because the omission to aver in the declaration that there was a sufficient consideration for the promise, and the ground of the legal liability of the defendant, is such a substantial defect as can not be cured after verdict.

There also existed a fatal variance between the instrument declared on, and the one produced in evidence. This objection, it appears by the bill of exceptions, was taken on the trial and overruled. The note declared on, is described as a promise by the defendant to pay to the plaintiff the amount, by the name of Almond Cottle; the note produced in evidence promises to pay to the creditors of Samuel B. Smith, jointly, the sums enumerated and set opposite each of the names of said creditors, of whom the said Cottle is alleged to be one. The promise in the note produced in evidence is a joint, and not a several promise, and does not therefore support the declaration. It is made to all the creditors of Samuel B. Smith, and not to each separately. The variance, however, in the description of the note, and the one produced, is obviously fatal. *Sheehy* v. *Mandeville*, 7 Cranch, 208. *Ferguson* v. *Harwood*, 7 ibid, 40.

The judgment of the circuit court is, for these reasons, reversed with costs. (*a*)

Judgment reversed.

Semple, for appellant.

Strode and *Ford*, for appellee.

(*a*) As to variance, vide *Taylor and Parker* v. *Kennedy*, ante, p. 91. *Rust* v. *Frothingham and Fort*, ante, p. 331. *Prince* v. *Lamb*, post.

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TIMOTHY AND WM. BRINKLEY, Appellants, *v.* REUBEN GOING, Appellee.

APPEAL FROM GALLATIN.

A payee of a note, although he may have written an assignment on the back of it, can maintain an action thereon in his own name, and his describing himself "assignee" of the person to whom he made the assignment, may be rejected as surplusage. The indorsement is in the control of the payee, and he may strike it out or not as he thinks proper.

The possession of the note by the payee, is, unless the contrary appears, evidence that he is the *bona fide* holder of it.

GOING, as assignee of Hulett, brought an action of debt before a justice of the peace in Gallatin county, against the appellants, upon a note under seal made payable to him, by the appellants, on the back of which was an assignment of the same to one Thomas Hulett, but crossed thus, ⋈. Judgment was rendered by the justice of the peace in favor of Going, and an appeal taken by the defendants to the circuit court. On the trial of the appeal there, it appears from the bill of exceptions, that the counsel for the appellants moved the court to reverse the justice's judgment for want of proof that Going had either paid the money to Hulett, or that said Hulett had retransferred the note to him, which motion the court overruled, and affirmed the judgment of the justice of the peace. The bill of exceptions states further, that there was proof that the defendant acknowledged the note to be just after judgment was rendered by the justice of the peace, and that he would pay the money by court, or let judgment go against him. The appellants assigned for error,

1. That the plaintiff below sued as assignee of Hulett, when it appeared that the note had not been assigned to him, and that the court below erred in not reversing the judgment of the justice of the peace for this variance; and

2. That the court erred in not reversing the judgment of the justice on the ground that the note had not been retransferred to the plaintiff, and on the ground that the right of action was vested in Hulett, and not in Going.

Opinion of the Court by Chief Justice WILSON. This is an appeal from the judgment of the circuit court of Gallatin county, affirming a judgment of a justice of the peace, rendered against T. Brinkley in favor of R. Going, upon a joint and several note made by T. and W. Brinkley to Going. On the back of the note is an assignment by Going to Thomas Hulett;

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the signature of Going to the assignment is *crossed*, and from the bill of exceptions containing the evidence, it appears that the defendant below acknowledged, after the judgment of the justice was rendered, that the note was just, though it does not appear that he knew of the assignment.

For the appellants it is contended, that Going can not maintain this action in his own name without accounting for the assignment or a retransfer of the note. This position is untenable. The indorsement on the back of the note is in the control of the payee, which he may strike out or not, as he thinks proper, and in this case he has stricken it out. But even if the assignment had remained perfect, the possession of the note by the payee, is, unless the contrary appears, evidence that he is the *bona fide* holder and owner of the note, and will enable him to maintain an action in his own name without a reassignment, or receipt from the assignee, and the allegation that he is assignee, may be regarded and rejected as surplusage. The presumption of law in favor of the appellee's claim, is supported by the acknowledgment of the appellants, that the note was just, and his promise to pay the money, or suffer judgment to go by default. See *Dugan el al.* v. *United States*, 3 Wheat., 172. *Lansdale* v. *Brown*, 3 Wash., 404. The judgment is affirmed with costs. (1)

Judgment affirmed.

Eddy, for appellants.

Gatewood, for appellee.

TIMOTHY BRINKLEY, Appellant, *v.* REUBEN GOING, Appellee.

APPEAL FROM GALLATIN.

The payee and holder of any negotiable note, with an assignment thereon to a third person, can, without a reassignment, maintain an action in his own name. (*a*)

THE facts in this case are the same in all respects as those in the case of *T. and W. Brinkley* v. *Going*, *supra*.

Opinion of the Court by Chief Justice WILSON. The single point presented in this case, is, whether the payee and

(1) The principles of this decision have been reaffirmed in the following cases. *Kyle* v. *Thompson et al.*, 2 Scam., 432. *Campbell* v. *Humphries*, 2 Scam., 478. *Parks* v. *Brown*, 16 Ill., 454.

A payee may, at the trial, erase any assignments which are on the note. Id.

(*a*) Ante, p. 366.

holder of a negotiable note, with an assignment thereon to a third person, can, without a reassignment, maintain an action in his own name. The case of *Brinkley* v. *Going*, decided at the present term, is in every respect analogous to this one. There it was decided that the payee could maintain the action in his own name. In conformity to that decision, the judgment of the court below must be affirmed.

Judgment affirmed.

Eddy, for appellant.

Gatewood, for appellee.

JARRET GARNER, Plaintiff in Error, *v.* M. C. WILLIS, Defendant in error.

ERROR TO GALLATIN.

The oldest execution first delivered to the officer, binds the personal property, though issued upon a junior judgment. An execution returned "not levied." is *functus officio.*

If a purchaser, at a sheriff's or constable's sale, takes possession of the property purchased, without the consent and against the command of the officer, though the purchaser be the plaintiff, in the *fiere facias* under which the sale is made, he is a trespasser.

Opinion of the Court by Chief Justice WILSON. This is an action of trespass, brought by Willis against Garner, and the following facts are submitted by the parties, for the opinion of the court as to the law thereon, viz.:

There were two judgments on a justice's docket against John Huston, one in favor of Wight, the other in favor of Garner. Wight, the plaintiff in the oldest judgment, sued out an execution which was returned "not levied;" Garner then took out an execution on his judgment, which was levied by the defendant in error, Willis, who was a constable, on the horse of Huston, after which, Wight took out a second execution upon his judgment, which Willis also levied on the same horse, and sold him under both. Garner became the purchaser, and took possession of the horse without the consent and against the command of Willis. Now, it is agreed, that if Garner's execution should, in law, be first satisfied, and also that Garner was guilty of a trespass in taking the horse, then judgment is to be given against him for nominal damages; but if the court should be of opinion that Wight's

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execution bound the property, then judgment is to be given for its value and costs. The judgment of the court below was against Garner, and for the amount of Wight's execution. To reverse this judgment, this writ of error is prosecuted.

In deciding this case, the court below seems to have gone upon the ground that the oldest execution created a lien upon the defendant's personal estate, and that the lien was kept alive, and extended to a second execution issued upon the same judgment after the return of the first, and in exclusion to Garner's execution issued after the return of Wight's.

This position is not maintainable, either upon the principles of the common law, or the provisions of the statute. At common law, writs of execution had relation to their *teste*, and subjected the estate of the defendant from that time to be levied on and sold, wherever it might be found, between different plaintiffs against the same defendant, however, the law created no lien in favor of one to the prejudice of the other, on account of the age of their executions, but it imposed an obligation on the officer to act impartially, and of two executions in hand at the same time, to satisfy that first which was first received. If he departs from this rule, and levies the last execution first, he does it at his peril, and though a sale under that would be legal as respects purchasers, the officer would be responsible to the plaintiff in the first execution.

The statute of 1825, regulating judgments and executions, and which is the only one applicable to this case, provides,* "that no writ of execution shall bind the goods, &c., of any person against whom such writ shall be issued, but from the time such writ shall be delivered to the sheriff or other officer."

This statute changes the common law only so far as to limit the commencement of the binding efficacy of the executions to the time of their delivery to the officer; it was certainly not intended to give them a more extensive operation than they had before its passage. Such is the construction given by the courts of England and Kentucky to a similar statute. They have repeatedly decided that an execution, after the expiration of the time when by law it should be returned, is officially dead, and that its delivery to an officer in the first instance, does not create a lien which can be preserved and continued to a subsequent execution issued after the return of the first. 4 Bibb, 29. Salkeld, 320.

* Rev. Laws of 1829, page 86, sect. 6.

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Upon this point the court below erred. The next inquiry is, as to the liability of Garner to an action of trespass, for taking the property out of the possession of the constable against his will. The general principle, that a sheriff or constable who seizes goods on an execution, has a special property in them, and may maintain trover or trespass against a wrong-doer, is well settled, and there are no circumstances in this case to take it out of the operation of this rule. Garner, being the plaintiff in one of the executions under which the horse was sold, gave him no interest in the property; his only title to the possession was the sheriff's sale, and his right under that was not complete until the terms of sale were complied with by the payment of the purchase money, or the delivery of the property to him by the officer. The sale being under both Wight's and Garner's executions, the constable might have applied the proceeds to the discharge of either, and his liability for a wrong application of it, affords no justification to Garner. It may also be observed that officers are entitled to retain their fees; but the benefit of this principle would be defeated if a plaintiff in an execution, who becomes a purchaser, was entitled to more favor than a stranger. Under this view of the case, I am of opinion that Garner's execution should have been first satisfied, and also, that he was guilty of a trespass in taking the property against the consent of the constable. The judgment of the circuit court is therefore reversed, and judgment rendered against the appellant for one cent damages and costs below, and that the appellant recover the costs in this court. (1)

Judgment reversed.

Gatewood, for appellant.

Eddy, for appellee.

(1) Where two or more writs of *fi. fa.* are delivered at different times either to the same or different officers, and no sale is actually made of the defendant's goods, the execution first delivered must have the priority, though the first seizure may have been made on a subsequent execution. But where the goods are actually sold by virtue of a levy made under a junior execution, the sale will be good, and the property can not afterwards be taken from the purchaser by the senior execution. The only remedy of the party injured is against the officer. *Rogers* v. *Dickey*, 1 Gilm., 636.

An execution becomes a lien on the personal property of the defendant from the time it is indorsed by the constable, and no subsequent sale by the defendant can affect the rights of the plaintiff. *Marshall* v. *Cunningham*, 13 Ill., 20.

If a defendant dies between the *teste* of an execution and its delivery to the sheriff, the sheriff can not proceed to make a levy under it. *People* v. *Bradley*, 17 Ill., 485.

An execution issued after the death of the judgment debtor, is void, and if a sheriff sells land under it, his deed is a nullity. *Laflin* v. *Herrington*, 16 Ill., 301.

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IGNATIUS R. SIMMS, Appellant, *v.* JOSEPH KLEIN, Appellee.

APPEAL FROM MORGAN.

A sheriff's return in this form: "I. R. Simms summoned by reading" and and signed by the sheriff, and dated, is sufficient.

Neither the law, nor the practice of the courts requires that the judgment shou.d contain the amount of costs *in numero.*

Ten per cent. damages allowed, where the appeal was evidently taken for delay.

KLIEN brought an action of *assumpsit* in the court below against Simms, on a promissory note, and recovered a judgment by default, and the clerk assessed the damages. The declaration was in the usual form. The sheriff's return to the original summons against Simms, was in this form, viz.: "*I. R. Simms* summoned by reading, this 17th day of August, 1830. *S. T. Matthews*, sheriff."

Several errors have been assigned, which are particularly noticed in the opinion of the court.

Opinion of the Court by Justice SMITH. The appellant relies on four errors assigned as cause for the reversal of the judgment:

1. The insufficiency of the return of the sheriff of the service of the summons.

2. The insufficiency of an allegation of a promise in the declaration to pay the sum demanded.

3. That the judgment by default is erroneous, because no evidence appears to show how the clerk assessed the damages.

4. That as the judgment does not include the costs *in numero*, it is error.

The whole of the objections are considered untenable. The return shows that the defendant was regularly summoned, although his name was written "*I. R. Simms*," in the return, and the court will infer that it is the defendant, although his christian name is not written out at length. The

The death of a defendant in execution, after its delivery to the sheriff, but before a levy under it by him, wi l not prevent that officer from proceeding to levy and sell. *Dodge* v. *Mack*, 22 Ill., 93.

A title, acquired under an execution issued after the death of the defendant, is not *prima facie* void; it becomes so upon proof of the fact of the death. *Finch et al.* v. *Martin et al.*, 19 Ill., 105.

A return of an officer to an execution is not simply his indorsement upon the process, but is the actual placing it in the office from which it issued. Until then he may change the indorsement, and afterwards, only by permission of the court. *Nelson et al.* v. *Cook*, 19 Ill., 440.

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objection is considered frivolous. Equally so are the second and third objections. The declaration is sufficient, and even technically correct, and the mode of entering up the default of the defendant and assessing damages is the only one recognized by courts.

As to the last objection, that the judgment does not contain the amount of the costs in a particular enumeration or their amount, it is a sufficient answer, that neither the law, nor the practice of our court requires it to be done; and it is also manifest that, from our mode of proceeding in the circuit court, it would be impracticable to comply with such a form.

In every aspect in which this case can be viewed, it must be considered as having been brought here for delay, and as such, the court is of opinion that the judgment should be affirmed with ten per cent. damages and costs. (1)

Judgment affirmed

McConnel, for appellant.

Thomas, for appellee.

SOLOMON BLUE, Plaintiff in Error, *v.* WEIR and VANLANDINGHAM, Defendants in Error.

ERROR TO GALLATIN.

A justice of the peace has no jurisdiction if the whole claim of the plaintiff exceeds one hundred dollars, though it may be reduced by credits before suit brought to a sum less than one hundred dollars.

THE defendants in error brought suit before a justice of the peace, against the plaintiff in error, on an account which amounted to two hundred and eighty-four dollars and eleven cents, but which was reduced, by credits, to eighty-four dollars and eleven cents, and recovered a judgment against him for that sum, from which judgment the plaintiff in error appealed to the circuit court of Gallatin county. On the trial of the cause there, a motion was made by the plaintiff in error to dismiss the suit, and reverse the judgment, on the ground that the account sued on exceeded the jurisdiction of a justice of the peace; the court overruled the motion, and

(1) See note to *Ryan* v. *Eads*, ante, 217.

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affirmed the judgment of the justice; to reverse which judgment this writ of error is prosecuted, and the refusal of the court to dismiss the suit and reverse the judgment is, among other things, assigned for error.

Opinion of the Court by Chief Justice WILSON. One of the errors assigned for the reversal of this judgment is, that the cause of action exceeded the jurisdiction of a justice of the peace.

The statute of 1827* giving jurisdiction to justices of the peace in civil cases, enumerates, among other causes of action, any debt claimed to be due upon open and unsettled accounts between individuals, where the whole amount of the accounts of either party shall not exceed one hundred dollars. The account offered in evidence before the justice in this case by the plaintiff below, was an open and unsettled account amounting to two hundred and eighty-four dollars and eleven cents. Credits, it is true, are given at the foot of the account to the defendant, which reduce the amount purporting, by the account, to be due the plaintiff, below one hundred dollars. These credits are given by the plaintiff himself; the balance was not ascertained by a settlement between the parties as contemplated by the statute. To ascertain the balance due the plaintiff, it was necessary for the justice to investigate an account greatly exceeding one hundred dollars. This power is not conferred by the statute, and the justice exceeded his jurisdiction in assuming it. The judgment of the court below must be reversed for want of jurisdiction in the magistrate. (*a*)

Judgment reversed.

Webb, for plaintiff in error.

Eddy, for defendant in error.

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* Revised code of 1827, p. 259.

(*a*) Vide *Clark* v. *Cornelius*, ante, 46. *Maurer* v. *Derrick*, ante, 197. *Ellis* v. *Snider*, ante, p. 336.

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PHILANDER WOODWORTH, Plaintiff in Error, *v.* ENOCH PAINE'S Administrators, Defendant's in Error.

ERROR TO RANDOLPH.

Notwithstanding the act of 1823, regulating the distribution of an intestate's estate, a judgment obtained before that time against the intestate in his life time, is entitled to preference in the payment of his debts out of his personal *assets*, even if the estate is insolvent.

A statute enumerating things or persons of an inferior dignity, shall not be construed to extend to those of a superior dignity.

THE plaintiff in error obtained a judgment in the Randolph circuit court, against Paine in his life time, in 1822; and after his death, sued out a *scire facias* to revive it against his administrators. The plea to the *sci. fa.* was in the following words: "The said defendants come and defend the wrong and injury, when, where, &c.; and for plea say that the plaintiff (*actio non*) because they say that the whole amount of assets which have come to their hands to be administered is one thousand fifty-six dollars ninety-nine cents; that the burial expenses and the expenses of the last illness of the said Paine, deceased, the allowance made by the judge of probate to the widow, and the expenses of administration amount together to the sum of three hundred eighty-two dollars forty-four three-fourth .cents, leaving for distribution among the several creditors, the sum of six hundred seventy-four dollars fifty-five cents. These defendants aver that the amount of claims and demands against the estate of said Paine, deceased, entitled to a distributive share of the said assets, is three thousand six hundred fifty-three dollars thirty-seven and a half cents, and that the actual amount paid upon the said claims and demands by these defendants, exclusive of the sum of three hundred eighty-two dollars forty-four and three-fourth cents aforesaid, is eight hundred eighty-three dollars sixty-two and a half cents. That the amount of the claim and demand of the plaintiff aforesaid, is about nine hundred eighty-eight dollars in state paper, and three hundred twenty-nine dollars in specie, or thereabouts, and these defendants aver that they have paid to the said plaintiff, on account thereof, the sum of one hundred fifty-five dollars sixty-eight cents, and that the said plaintiff hath obtained a judgment against these defendants in their individual character, for the sum of two hundred and fifty dollars, a part of which has been made of the sale of the property of these defendants by execution, and a part whereof is not paid, to wit, the sum of ——dollars, for which

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last mentioned sum of —— dollars, the plaintiff now has execution levied; wherefore, these defendants say that the said plaintiff has received his distributive share of the assets aforesaid, and this they are ready to verify, wherefore, they pray judgment, &c. This plea was demurred to, and the demurrer was overruled by the circuit court, and a writ of error prosecuted to reverse that judgment.

Opinion of the Court by Chief Justice WILSON. Woodworth, the plaintiff in this case, sued out a *scire facias* against Greenup and Conway, administrators of Enoch Paine, deceased, to revive a judgment obtained against Paine in 1822, for the sum of one thousand fifty-six dollars sixty-one cents. To this *sci. fa.* the defendants pleaded, among other things, outstanding claims against the estate of their intestate, exclusive of the judgment of the plaintiff, greatly exceeding the amount of assets that remained in their hands, but neither the nature of those claims, whether judgments, specialties or parol, nor the time of the death of Paine, are set forth. To this plea there was a demurrer, which was overruled by the court. For the defendants it is contended that the statute of 1823,* relative to deceased persons' estates, placed all demands against the estates of such persons (except funeral expenses) upon the same footing, as well judgments as debts by specialty and parol, and that each claim was entitled to a distributive share of the assets according to its amount, without regard to the nature of the claim.

The statute of 1823 referred to, is clearly prospective in its operation, and was so decided in the case of Betts and Smith, administrators of *Jones* v. *Bond.*† If the position of the defendants was true as regards judgments against persons dying since the passage of this act, it was incumbent upon them to have shown the death of their intestate subsequent to that time. According to the construction of the statute for which they contend, this is a material fact which should have been affirmatively stated. The plea in this respect is bad; it leaves the time of the decease of Paine uncertain, and the rule is that a plea which has two intendments, shall be taken most strongly against the party pleading it. Chitty Pl., 521.

The imperfections of the defendant's plea are sufficient to reverse the judgment of the court below, but as this case has to be remanded for further proceedings, it becomes necessary to inquire whether the act of 1823, was intended to apply to judgments rendered previous to its passage. After enumera-

* Laws of 1823, p. 127

† *Ante*, p. 287.

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ting several descriptions of claims that shall be entitled to a preference in the distribution of an intestate's estate where the same is insufficient to pay all the debts, it provides "that executors, &c., shall then pay the balance on the legal demands, in equal proportions, according to their amount, without regard to the nature of said demand, not giving preference to any debts on account of the instrument of writing on which the same may be found." Judgments, it will be perceived, are not mentioned in the statute, and it is a rule of law that an enumeration of things or persons of an inferior dignity, shall not extend to a superior. A judgment is a demand, but it is not a demand evidenced by an instrument of writing as contemplated by the statute. It is a debt of record created by operation of law, in which the original demand, whether evidenced by oral testimony or specialty, is merged. At common law, debts were to be paid by executors, &c., according to their dignity. Our statute was intended to establish a more equitable rule, and, without taking from the judgment creditor the fruits of his diligence, required other debts to be paid *pro rata*, regardless of the kind of testimony by which they were to be established. 1 Bl. Com., 88. 3 Burr. Rep., 1548. 3 Bl. Com., 389. 2 Bl. Com., 465.

According to the law in force, at the time the judgment upon which this *sci. fa.* issued was obtained, a judgment bound the real estate of a defendant from its rendition, and the personal from the delivery of an execution into the hands of an officer. No sale or transfer made by a defendant of his property, after that time, could divest the plaintiff of the lien which the law gave him on the property, for the purpose of satisfying his debt. Without inquiring into the power of the legislature to divest a party of a right thus acquired, it is sufficient for the present case, that they have not attempted it by naming judgments, or using any other terms that will necessarily include them; and a previous right or remedy can not be taken away without a positive enactment; it is never done by implication. 19 Vin., 514. Dane's Abr., Chap. 196.

The same legislature that enacted the statute relative to the distribution of intestates' estates, a few days after its passage, re-enacted the law of 1821, which made judgments bind the property of a defendant. If then the defendant's construction of the first law be right, the second one, as regards judgments against persons subsequently dying, is a nullity, even though an execution had been issued and levied, previous to his death. This certainly can not be true. If, however, either statute conflicts with, and repeals part of the other, it is the defendant's position which is taken away by the re-enact-

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ment of the law of 1821. If the view I have taken of this subject be correct, then both statutes may have an operation without violating legal principles, or doing injustice to any, and two laws of the same session, and in part on the same subject, each evidently intended by the legislature to have full operation, will be reconciled and preserved. For these reasons, the judgment of the court below must be reversed with costs, and the cause remanded, with leave given the defendants to plead over. (1)

Judgment reversed.

Breese and *Baker*, for plaintiff in error.

Hall, for defendants in error.

BRYAN TEAGUE, Plaintiff in Error, *v.* LANSING S. WELLS, Defendant in Error.

ERROR TO MADISON.

On an appeal taken by the defendant from the judgment of a justice of the peace, the circuit court can not rule the plaintiff to give security for costs.

Opinion of the Court by Justice LOCKWOOD. This was an action commenced by the plaintiff before a justice of the peace, in which court he recovered a judgment for nine dollars and twenty-eight cents. The defendant took an appeal to the circuit court, and there, on filing an affidavit that the plaintiff was unable to pay the costs, obtained a rule that the plaintiff should give additional security for costs, or that the suit would be dismissed, and the judgment of the court below reversed. The plaintiff having failed to file the required security, the suit was dismissed at the plaintiff's costs, and the judgment of the justice of the peace reversed. To obtain a reversal of the judgment of the circuit court, a writ of error has been brought to this court.

(1) Statutes which treat of things or persons of an inferior rank, can not, by any general words, be extended to those of a superior. *Hall et al.* v. *Byrne et al.*, 1 Scam., 140.

Now we have the following statute on this subject: "The word 'person' or 'persons,' as well as all words referring to, or importing persons, shall be deemed to extend to and include bodies politic and corporate, as well as individuals." Stares' Comp, 7[illegible]2, sec [illegible]9.

Corporations are included in the word "person" in the attachment law. *Mineral Point R. R.* v. *Keep*, 22 Ill., 9.

The only question presented for the decision of this court is whether the first section of the act concerning costs, passed 10th January, 1827,* applies to appeals taken from a justice of the peace to the circuit court. We are of opinion that the legislature only contemplated requiring voluntary plaintiffs to give security for costs by this section. In this case the plaintiff was satisfied with the decision of the magistrate, and it seems unreasonable to compel him to give security to prosecute a suit against his inclination and interest. Such a principle does not comport either with the act or with justice.

The judgment, therefore, of the circuit court, must be reversed with costs, and the cause remanded for further proceedings. (1)

Judgment reversed.

Semple, for plaintiff in error.

Blackwell, for defendant in error.

Francis Prince, Plaintiff in Error, *v.* Levi Lamb, Defendant in Error.

ERROR TO GALLATIN.

Variances between the writ and declaration, can only be taken advantage of by plea in abatement—they are not reached by a general demurrer, nor can they be assigned for error.

It is not essential to entitle a party to recover interest on a judgment rendered in another state and sued on here, that the declaration should allege that by the laws of the state where the judgment was rendered, interest is recoverable.

A judgment rendered for "interest on the amount," without stating what the amount is, by way of damages, is uncertain, and therefore erroneous.

Where this court have the power to render such a judgment as the court below ought to have rendered, it will do so, without sending the parties back for that purpose.

This was an action of debt in the Gallatin circuit court, brought on a record of a judgment obtained in the state of Kentucky, against Prince. The first declaration and writ demanded a debt of 206 dollars and 50 cents, and 150 dollars damages. The alias writ is for the same demand, but the amended declaration demands a debt of 206 dollars and 50 cents, and interest from the 25th of December, 1820. The

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* Rev. Code of 1827, p. 103, sec. 1, title "Costs."

(1) Affirmed in *Campbell* v. *Giblin*, 19 Ill., 5[illegible].

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defendant below, the plaintiff in error here, pleaded *nul tiel record* and payment. The court, by consent, tried both issues, and gave judgment for the plaintiff below, for 206 dollars and 50 cents, with interest on 200 dollars, from the 25th day of December, 1820, until paid. The points relied on by the plaintiff in error, are fully stated in the opinion of the court.

Opinion of the Court by Justice SMITH. The points relied on for a reversal of the judgment of the circuit court, are :

1. That the judgment was for a greater amount than the sum named in the writ, or demanded in the declaration.

2. That in the absence of an averment that by the laws of Kentucky, judgments bear interest, the court below could not give judgment for the interest specified in the Kentucky judgment.

3. That the judgment is uncertain, being for a constantly accruing interest on a part, and silent as to another part.

4. That the court did not inquire into the value of Kentucky bank paper.

5. That the Kentucky judgment is not correctly stated, in the declaration, in respect to the amount of costs, and should have been rejected on the plea of *nul tiel record*.

I shall consider the points raised as they are stated. Under the first, it is contended that the judgment was for a greater amount than was specified in the writ and declaration, and that therefore the judgment is erroneous. The variance, if there be one, between the writ and the declaration, should have been taken advantage of before plea pleaded. It is now too late to urge that, as error, here. Variances between the writ and declaration are matters pleadable in abatement only, and can not be taken advantage of, even upon a general demurrer. *Duval et al.* v. *Craig*, 2 Wheat., 45. *Garland* v. *Chattel*, 12 Johns. Rep., 430. *Chirac et al.* v. *Rencher*. 11 Wheat., 280. (1)

On the second point it is deemed only necessary to remark, that it is not essential to entitle a party to recover interest on a judgment, that it should be shown, in the declaration, that by the laws of the state where the judgment is recovered, interest is allowed thereon by statute.

The judgment is a debt, and may be assimilated to a contract to pay a sum certain with interest. Such interest is recoverable as a part of the contract, in the present case, by way of damages for the detention of the debt, the interest

(1) See note 1 to *Rush* v. *Frothingham*, ante, 331.

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being a part of the judgment. Interest is recoverable on an ordinary judgment which contains in itself no award thereof, by way of damages.

The fourth objection, that the court did not inquire into the value of Kentucky paper, is readily disposed of. There was no obligation on the plaintiff to receive the Kentucky bank paper, in conformity with the indorsement made on the execution, except under it. The defendant having neglected to avail himself of that offer at the proper time, can not now avail himself of it. The judgment is for dollars, and the court could only recognize by that judgment the standard value of the legal currency of the United States, without discount or abatement of value.

The variance between the declaration and the record, produced as evidence to rebut the plea of *nul tiel record*, will be considered. The declaration alleges that the defendant is indebted unto the plaintiff in the sum of 206 dollars and 50 cents, and also interest thereon, to be computed after the rate of six per centum per annum, from the 25th day of December, 1820. The judgment adduced as evidence, is for 200 dollars debt, with interest thereon, to be computed after the rate of six per cent. per annum, from the 25th day of December, 1820, until paid, and also six dollars and fifty cents for costs. The question of variance is, then, whether the six dollars and fifty cents are to be considered as a part of the debt or not. This case is distinguishable from the case of *Giles* v. *Shaw** in this, that here the record of the proceedings show that the six dollars and fifty cents which are the costs, are a part of the record itself, duly certified under the hand of the clerk to be so, the award of the execution and the execution itself being inserted in, and made a part of the record, in which the costs are recited to have been the actual costs awarded to the plaintiff. In the case of *Giles* v. *Shaw*, there were not so shown, nor was there any evidence that they formed any portion of the record, and were, for that reason, considered as entirely *dehors* the record. It is then manifest, that the record produced in evidence negatives the plea of *nul tiel record*, and the judgment for the plaintiff on the plea was therefore correctly given.

The objection that the judgment is uncertain, being for interest on the amount, without rendering that amount into a precise sum in damages, is well taken. In this particular, the judgment is manifestly erroneous for want of certainty.

* *Ante*, p. 123.

The judgment must, therefore, be reversed in that portion of it which gives the interest on the amount of the original judgment in Kentucky. But still, as the court here have the power to render such judgment as the court below ought to have rendered, and as the amount of interest is readily computable, the error is to be remedied without sending the parties back for such purpose. The amount of damages can be ascertained by the clerk of this court, which should be allowed for the interest, and the judgment is to be entered in conformity with this view of that part of the case, at the costs of the defendant in error. (*a*) (2)

Eddy, for plaintiff in error.

W. Thomas and *Rowan*, for defendant in error.

N. Buckmaster, Plaintiff in Error, *v.* Henry Eddy, Defendant in Error.

ERROR TO GALLATIN.

A bond for the conveyance of land executed on the 9th day of January, 1819, is not assignable. The statute of 1807 governs in such case.

Opinion of the Court by Chief Justice Wilson. This is an action brought in the circuit court of Gallatin county by H. Eddy, as assignee of William Grundy, upon a bond executed by Buckmaster to Grundy on the 9th day of January, 1819, and which is alleged in the declaration to have been assigned to Eddy on the same day. The penalty of the bond is eight hundred dollars, conditioned to be void upon Buckmaster's making a deed to Grundy to a certain tract of land. The defendant below, after having taken several exceptions to the proceedings, suffered judgment to go by default, and then moved in arrest of judgment, on the ground that the instrument upon which suit was brought was not assignable, which motion was overruled by the court. This is assigned

(*a*) A narr. in debt for 860*l*. 12*s*. 1*d*., founded on a decree in chancery for that sum, with interest from a certain day, to the day of rendering the decree, is fatally defective. 1 Cranch, 259.

(2) Affirmed in *Wilmans* v. *Bank of Illinois*, 1 Gilm., 667.

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here, for error, and is principally relied on to reverse the judgment.

It is not pretended that at common law, this bond is assignable. Has the statute then of 1807,* which was the only one in force relative to the assignment of writings at the time this was executed, embraced it? The first section of that statute makes all notes in writing for the payment of money, assignable; the fifth section provides that "the assignments of bills, bonds or other writings obligatory for the payment of money, or any specific article shall be good," and the assignee may maintain an action in his own name. The writing upon which this action is brought, is for the conveyance of land, and does not come within the description of assignable instruments specified in the statute. The word "property" has been decided to be a general term, including every visible subject of ownership, but this comprehensive meaning of the term may be circumscribed, by coupling with it other terms which from their common acceptation, as well as their grammatical construction, are applicable to one class of property, in contradistinction to another. In the statute under consideration, however, the word property is not used; the language is, "money, or any specific article." These are not technical terms, including as well real, as personal property. On the contrary they are terms applicable to objects of a personal nature, and can not, by a fair construction, be made to embrace real estate. The judgment of the court below must be reversed. (1)

Judgment reversed.

Gatewood and *Semple*, for plaintiff in error.

Eddy, for defendant in error.

* Rev. Code of 1807, p. 48.

(1) A deed containing mutual covenants, on the one part to lease a house and machine, and keep the machine in order; and on the other, to pay the rent and return the machine, is not assignable so as to transfer the legal interest. *Beezley* v. *Jones*, 1 Scam.. 34.

The lessor can not assign a lease by indorsement, so as to give the assignee such a legal interest as can be enforced in his name, although the assignee may, in that way, acquire an equitable title to the rents. *Chapman* v. *McGrew*, 20 Ill., 101. *Dixon* v. *Buell*, 21 Ill., 203.

Equity treats the assignee of a contract not assignable at law, as the party in interest, and will afford him relief in a proceeding instituted in his own name. Id.

A judgment is not assignable so as to authorize an execution to issue in the name of the assignee; it should still issue in the name of the assignor. *Elliot* v. *Sneed*, 1 Scam., 517. *McJilton* v. *Love*, 13 Ill., 495.

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HAMPTON PANKEY, Plaintiff in Error, *v.* STEPHEN MITCHELL, Defendant in Error.

ERROR TO GALLATIN.

An alteration made in a note without the knowledge or assent of the payor, renders the note void. The proper plea in such case is *non est factum.*

MITCHELL sued Pankey before a justice of the peace of Gallatin county for a debt of thirty-seven dollars, and recovered a judgment against him for that amount, and costs. Pankey appealed to the circuit court where the judgment of the justice was affirmed. On the trial there, a bill of exceptions was taken to the opinion of the court, from which the following facts appear, viz.: The plaintiff was sworn and stated that he had a note on the defendant, signed, also by one Stephen Roach, for thirty-seven dollars, due about the first day of June, 1830, which was lost. The plaintiff then swore three witnesses, and examined one as to the description and contents of said note, and rested his case. The defendant then examined one of these witnesses, and proved that the defendant, with Roach, at his own house, executed a note to plaintiff for the sum of thirty-seven dollars, and that the consideration thereof was, that the plaintiff should lend to Roach thirty-seven dollars in money. Another of these witnesses testified that he was present at the plaintiff's shop, when Roach came with the note in question to plaintiff to get the money, and saw plaintiff pay the money. The defendant was not present. The witness further stated that when the note was first brought, the plaintiff objected to receiving it; alleging that the sum was not large enough. The plaintiff and Roach went together to plaintiff's house and got the money. The defendant then introduced testimony to prove that the plaintiff acknowledged that he had altered the note executed by the defendant to Roach, from thirty-seven dollars to forty-four dollars and fifty cents. It was also proved that a note was afterwards seen in the possession of the plaintiff for forty-four dollars and fifty cents, signed by Roach and the defendant, which appeared to have had the amount that was first inserted, erased, so that it could not be read, and "forty-four dollars and fifty cents," inserted in lieu, and plaintiff remarked, that was the note in controversy between him and defendant. This was all the testimony. The defendant thereupon then offered to plead *non est factum*, and deny on oath that he had executed a note to plaintiff with Roach, for forty-

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four dollar and fifty cents, or that he had given any authority for the alteration of the note for thirty-seven dollars. To this, the plaintiff, by his attorney, objected, because the merits had been gone into, and no such plea had been filed, or notified to the plaintiff, and the court sustained the objection, refused to receive the plea, and affirmed the judgment of the justice. The exception was to this opinion, and the case brought up by writ of error.

Opinion of the Court by Justice SMITH. In this case it is clear from the evidence that the plaintiff in the court below made an alteration in the amount of the joint note signed by Pankey and Roach, increasing the sum from thirty-seven dollars to forty-four dollars and fifty cents, without the consent of Pankey. This rendered the note itself void ; and on it no recovery could be had. The note is sued on as a lost note, and until it was produced, or evidence offered to prove the alteration, the defendant in the court below could not be supposed to be in a condition to plead *non est factum*. The offer to do so so soon as the evidence disclosed the fraud, was sufficiently in time, as the proceedings were not in writing, being an appeal from the justice's decision to the circuit court, and *therefore* the court erred in not permitting the plea to be received.

But upon the whole evidence, as disclosed by the bill of exceptions, without even the tender of the plea, we are of the opinion that the judgment ought, on the ground of the alteration and fraud, to have been for the defendant. The judgment of the circuit court is reversed with costs. (1)

Judgment reversed.

Gatewood, for plaintiff in error.

Eddy, for defendant in error.

(1) In *Gilleett* v. *Sweat*, 1 Gilm., 489, the court say: "We need not cite authorities to prove that any material alteration of a note by which any of the parties to it would be prejudiced, or where its terms are changed, so as to alter the relative liabilities of the parties, will destroy the legal effect of the entire instrument."

The rule is well established in England, and in many of the courts of this country, that it is incumbent upon the party offering in evidence an instrument which appears to have been altered (as by interlineation,) to explain such alteration; and in the absence of all evidence, either from the appearance of the instrument itself, or otherwise, to show when the alteration was made, it must be presumed to have been subsequent to the execution of the instrument. "And such," says the court, "we believe to be the true rule." Though the alteration may be explained by the appearance of the instrument upon inspection, and does not necessarily require proof *dehors* the instrument. *Walters* v. *Short*, 5 Gilm., 258. *Montag* v, *Linn*, 23 Ill., 551.

The party receiving a paper interlined in a material part, should see that

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WILLIAM A. BEAIRD, Appellant, *v.* MARY FOREMAN AND OTHERS, Appellees.

APPEAL FROM ST. CLAIR.

If an officer acts illegally or oppressively in executing process, the remedy against him is at law, and a court of equity can not interfere.

The defendant in an execution, who desires a levy upon any particular tract of land, should exhibit to the officer all the evidences of his title to it. The officer is not bound to take any loose memorandum of title which the defendant may show him.

Where the plaintiff in an execution, and the officer serving it, are made parties to a bill for an injunction by the defendant, if they do not participate in the acts of the officer in making the levy, &c.. they need not answer the bill; the answer of the officer is sufficient to authorize the court to proceed and make a decree.

As a general rule, a court of chancery will not adjudge executions regular on their face, void, at least until an attempt is made in the tribunal from which they issued, to obtain relief against them.

THE defendant, together with Johnathan Lynch, Mary Ann Chartrand, John Norton and Thomas Baldwin, who were judgment creditors of the appellant, issued executions upon their several judgments against the appellant who was then sheriff of St. Clair county, and placed them in the hands of Pulliam, the coroner of that county, to be executed. Pulliam, by direction of the defendants, levied said executions upon the personal property of Beaird, but before the sale, Beaird, obtained an injunction from the judge of the fifth judicial circuit, to stay all proceedings on said executions, setting forth in his bill, that he had real estate unincumbered, in Madison, St. Clair and Randolph counties, which ought to be first taken in execution and sold, before resort could be had to his personal property, and relied on the proviso in the 9th section of the "act concerning judgments and executions," approved Jan. 17, 1825, which declares, "that the plaintiff in any execution, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution." Pulliam, the coroner, alone answered the bill, denying that Beaird had any title to the lands specified by him as lying in

the interlineation is noted in the attestation. Such interlineations must be explained by those who claim the benefit of them. *Hodge* v. *Gilman et al.*, 20 Ill., 437.

An obligee may make immaterial alterations in a bond, if they are consistent with the true contract of the parties. *Reed* v. *Kemp*, 16 Ill., 445.

Adding the words "ten dollars and fifty interest" immediately after the words "value received," in a promissory note, is not a material alteration; such words would be construed to mean that a portion of the value received by the makers, consisted of ten dollars and fifty cents of interest. *Gardiner* v. *Harback*, 21 Ill., 129.

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St. Clair county, except his homestead, and that they were mortgaged, prior to the judgments on which these executions issued, to the State Bank, and alleging that Beaird never surrendered to him the lands in Madison and Randolph, or the title papers to the same, to satisfy said execution, and that all his lands lying in St. Clair county, except his homestead, had been previously sold on executions against him. On filing this answer, the defendants moved to dissolve the injunction and dismiss the bill. The court dissolved the injunction, but refused to dismiss the bill, and thereupon, by consent, the bill was dismissed and an appeal taken by Beaird to the supreme court. The circuit court awarded damages in favor of the appellees, though some of them were not served with process, had not appeared or answered. Some exceptions were also taken to the validity of the executions in virtue of which the levy complained of was made.

Opinion of the Court by Justice SMITH. The points presented for the consideration of this court in the present case are, that the circuit court erred in dissolving the injunction:

1. Because a part of the defendants were never served with process, and another portion never answered; and
2. Because the executions were not shown to the defendant in the court below, and that the same are void, and conferred no authority to the coroner to proceed under them.

To understand these objections fully, it may be necessary to recapitulate the objects of the bill.

The complainant sought to enjoin perpetually, all the defendants to the bill, who were several judgment creditors, except the coroner, in their separate and individual capacities, from proceeding to collect their several judgments by execution, because he alleges that, under the laws of this state, the property so taken in execution by the coroner was not liable to be sold, being personal property. The authority of the coroner is not disputed as such coroner, but that the appellant having real estate sufficient to satisfy the executions in his hands, it was the duty of the coroner to have levied on that, and sold it first, before he could resort to the personal estate. This ground was assumed in the argument, though it will be perceived it is not assigned as one of the causes of error, nor could it have been sustainable, when it is remembered that, if there had been any oppressive or illegal act of the coroner in the levy on the property, the circuit court possessed sufficient power to stay the proceedings under the execution and remedy the evil if one had existed. That this power is a necessary incident to all courts to prevent

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abuses of process, will not be denied, and that it is the proper mode to which to resort, rather than a court of equity, seems equally certain. The complainant having then a full and perfect remedy at law, the bill could not properly be sustainable for that reason.

But, on examining the answer of the coroner, it is clearly shown, that all the real estate in St. Clair county of the complainant, except the tract on which he resided, had been sold previously by the coroner upon other executions, or was subject to incumbrance by mortgage, and that the complainant neither offered the lands on which he resided, nor did he exhibit his title deeds, or manifest any desire to deliver any estate whatever, either real or personal, to be sold in satisfaction of the executions, previous to the levy made by the coroner on his personal estate. Without then deciding whether the defendant in a judgment, or the plaintiff, has the right of selecting the *personal property*, or the *lands* upon which the defendant resides under an execution issued under such judgment, it will be apparent that the complainant has not shown that at any time before the levy upon his personal estate, or even at that time, did he offer his real estate to be sold upon the executions of the defendants.

It will surely not be contended that an officer is bound to take any loose memorandum which a defendant may offer as evidence of his title to lands, and thereupon expose the same for sale. Every reasonable evidence of title should be exhibited, and the officer satisfied that he was not proceeding to expose to sale the property of another person before the exemption could be claimed for the personal estate if that exemption be allowed by law; but which is not now decided, because the complainant has not shown himself entitled thereto, even if the statute be so construed. There is, then, no ground of equity disclosed, by which the complainant should be entitled to relief on this part of the case.

The error relied on in the first point, is readily met, when it is seen that the coroner could alone answer to the allegations of the bill as to the manner of the levy, and the property taken, which is the sole ground relied on for the equitable interposition of the court. The judgment creditors were entire strangers to the acts of the coroner, could not in any way be supposed to have participated therein, and if called on to answer as to that part of the bill, could only have avowed that the coroner had done what he distinctly states he has done.* Their answer or appearance would then have

* Ante, *Reynolds* v. *Mitchell and others*, 177.

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been wholly unimportant for the decision of the question before the court on the motion to dissolve the injunction, and for that reason, the objection fails entirely as a ground of error. The coroner's answer to the main allegations, of the bill relied on for relief, fully meets those allegations, negativing some of the most important ones, and particularly as to the time when the levy was made. The second ground, that of not showing the executions, and the mode of levying them are already anticipated by the remarks on the power of the court below on motion, to have remedied all irregularity, if any existed; and indeed, if the process of execution was void, or used oppressively for malicious purposes, the officer would no doubt be liable for whatever injury might be sustained.

If, however, the executions were void, and conferred no authority to the coroner to proceed under them, it is certain that all the parties concerned would be answerable as trespassers. But it is not by any means certain that this court would proceed to adjudge executions apparently regular upon their face, void, at least until an effort had been made in the tribunal from which they issued, for relief, in conformity to the views herein already expressed on that point. No attempt has been made to the law side of the circuit court to set aside or quash those executions as having been irregularly issued, or as being void on their face, and it will not be denied if either exist, that relief at law by making such application also exists.

The bill having been dismissed by the consent of parties, after the dissolution of the injunction, no question is now made, whether the dissolving an injunction is a mere interlocutory order from which no appeal or writ of error lies.

Upon a full view of all the grounds presented in this case, it is the opinion of the court that there are no sufficient equitable grounds of relief disclosed by the complainant to entitle him to the interposition of a court of equity, and that the circuit court did not err in dissolving the injunction and dismissing the bill. The judgment of the circuit court is, therefore, affirmed, with costs. (1)

Judgment affirmed.

McRoberts, for appellant.

Blackwell, for appellees.

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(1) See note to ***Greenup*** v. ***Brown***, ante, 252, and ***More et al.*** v. ***Bagley et al.***, ante, 94. *Dun ap* v. *Berry*, 4 Scam., 327.
The statute now in force, prescribing what property shall be first taken in execution, is nearly identical with that of 1815. Purple's statutes, 643, sec. 9.

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SUPREME COURT

OF THE

STATE OF ILLINOIS.

DECEMBER TERM, 1831, AT VANDALIA.

Present, WILLIAM WILSON, *Chief Justice.*
THOMAS C. BROWNE, SAMUEL D. LOCKWOOD, THEOPHILUS W. SMITH, } *Associate Justices.*

JAMES SEMPLE, Appellant, *v.* THOMAS S. LOCKE, Appellee.

APPEAL FROM ST. CLAIR.

It is erroneous to take a judgment by default, when there are pleas filed by defendant, in compliance with a rule against him to plead; in such case, the plaintiff has no right to have the defendant called. (1)

LOCKWOOD, J., *delivered the opinion of the Court.* This was an action of debt on a record from a foreign state, brought in the St. Clair circuit court, by Locke against Semple and another. Semple was alone served with process. On the first day of the term to which the process was returnable, the plaintiff obtained a rule that defendant should plead on the next day; and thereupon the defendant filed his pleas of *nul tiel record*, and payment. The record then states, that the defendant being called, came not, but made default, and upon which the court gave judgment for the debt. From this judgment, the defendant has appealed to this court, and has assigned for error the entry of a judgment by default, without noticing the pleas put in.

This was clearly erroneous, according to the case of *White* v. *Thompson*, decided by this court in Nov. term, 1823, ante, p. 72. When the defendant filed his pleas, he had complied with the rule obtained against him, and the plaintiff had no right to have the defendant called. There was no act in

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(1) See note to *White* v. *Thompson*, ante, p. 72.

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court for the defendant to perform, until the plaintiff had demurred or replied. It was, therefore, error to enter a judgment by default in a case so situated.

The judgment must be reversed with costs, and the cause remanded to the St. Clair circuit court for further proceedings not inconsistent with this opinion.

Judgment reversed.

Prickett and *Semple*, for appellant.

Cowles, for appellees.

KERR and BELL, Plaintiffs in Error, *v.* WILLIAM B. WHITESIDE, Defendant in Error.

ERROR TO MADISON.

A judgment by default set aside, after the term at which the judgment was rendered. (1)

A sheriff's return contradicted by his own affidavit and that of the defendant. (2)

Upon a division of the court, the judgment below is affirmed.

THE plaintiffs in error brought their action on the case in the Madison circuit court against the defendant in error, for-

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(1) See note, *Morgan* v. *Hays*, ante, 126.

In *Garner* v. *Crenshaw*, 1 Scam., 143, the court held that an application to set aside a default is addressed to the sound discretion of the court, and no writ of error will lie to correct its exercise.

It is too late to make an application to set aside a default after one term of the court has intervened between the term at which the default was taken, and that at which the motion was made. Ibid.

(2) There is great contrariety in the decisions of the different states, on the question whether the return of an officer is conclusive, or whether it may be shown by a party interested to be false. In the following cases, it has been held to be conclusive; *Hawks* v. *Baldwin*, Brayt., 85. *Purrington* v. *Loring*, 7 Mass., 388. *Wilson* v. *Loring*, id., 392. *Bots* v. *Burnell*, 11 id., 163. *Boston* v. *Tileston*, id., 468. *Wellington* v. *Gale*, 13 id., 483. *Lawrence* v. *Pond*, 17 id., 433. *Whitaker* v. *Sumner*, 7 Pickering, 551, 555. *Diller* v. *Roberts*, 13 S. and R., 60. *Stinson* v. *Snow*, 1 Fairf., 263. *Lewis* v. *Blair*, 1 N. Hamp., 68. *Henry* v. *Stone*, 2 Rand., 455. *Zion's Church* v. *St. Peter's Church*, 5 Watts and Serg., 215. *Gardner* v. *Small*, 2 Harr., 162. *Rose* v. *Ford*, 2 Pike, 26. While in the following cases it has been held not to be conclusive: *Butts* v. *Francis*, 4 Conn., 424. *Watson* v. *Watson*, 6 id., 334. *Cunningham* v. *Mitchell*, 4 Rand., 189. *Chapman* v. *Cumming*, 2 Harr., 11. And in our own state they have lately held it was only *prima facie* evidence, and may be questioned by plea in abatement. *Mineral Point Railroad Co.* v. *Keep*, 22 Ill., 9. *Owens* v. *Ranstead*, id., 161.

But this is understood as applying only to the parties to the suit. It would not be applicable in a proceeding against the officer for a false return, nor between persons not parties to the suit; then it would never be held more than *prima facie* evidence.

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mer sheriff of said county, for a false return upon an execution in favor of the plaintiffs against one Joseph Meacham. At the March term, 1824, the defendant's default was entered, the process against him being returned served, and a jury of inquiry impanneled, who assessed the plaintiff's damages to $517 81-100, for which the court rendered judgment. At the March term, 1825, the defendant moved the court to set aside the judgment by default, on an affidavit of merits. The affidavit also stated that he had not been summoned to appear, and had no knowledge that a suit was pending. The defendant also produced the affidavit of the sheriff of the county, as to the service of the summons, from which it appeared, together with his own affidavit, that the defendant did not know that he had been served with process. This motion was continued until the August term, 1826, when the court set aside the judgment by default, and the cause was continued from term to term, until the July term, 1827, when the defendant pleaded not guilty; and upon the plaintiffs being called, they made default, a nonsuit entered against them, and a judgment rendered for the defendant for the costs.

The plaintiffs sued out a writ of error, and assigned for error, 1st, that the court below erred in setting aside the judgment by default; 2d, because they received the affidavit of the sheriff, contradicting his return of service on the defendant; 3d, because the court erred in receiving the defendant's affidavit, contradicting the sheriff's return of service on the defendant; 4th, because the court set aside a regular judgment, and regularly obtained, at a term subsequent to the term at which it was obtained.

Cowles, for plaintiffs in error, in support of the errors assigned, cited the following authorities: 6 Mass. Rep., 325. 4 ib., 478. 10 ib., 313. 1 Peter's Rep., 155. Serg. Cons. Law, 382-3. 1 Tidd's Practice, 508. 2 Dunlap's Prac., 764-6. 1 Dunl., 321-2. Ib., 378-80.

Semple, contra, made the following points:

Where any error has been committed by the officers of the court, or gentlemen of the bar, it may be corrected on motion, at a succeeding term of the court. 1 Hen. and Munf., 20s. 1 Salk., 50, in note.

In civil cases, a special verdict may be corrected by notes of counsel, after a writ of error brought. 1 Salk., 47, and cases there cited. A judgment may be amended after the term at which it is signed, and even after error brought, and *in nullo est erratum* pleaded. 2 Arch. Prac., 276, and cases there cited.

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A judgment by default can be set aside after a *fieri facias* has issued. 3 Salk., 224.

This motion is in the nature of a writ of error *coram vobis;* or an *audita quere'a.* 1 Bac. Ab., 194. 2 ib., 215 1 Strange, 606-690, and cases there cited. 2 Wash., 135. 4 Munf., 377.

LOCKWOOD, *J., delivered the opinion of the Court.* In this case, the court are equally divided in opinion, and therefore the judgment of the court below is affirmed. (*a*)

Judgment affirmed.

THE AUDITOR OF PUBLIC ACCOUNTS, Plaintiff, *v.* JAMES HALL, LATE TREASURER, Defendant.

Notice of a motion by the auditor against a delinquent treasurer must be certain and specific, and must ask for a judgment.

THIS was an original suit brought in the supreme court by the auditor against James Hall, late treasurer of the state, in pursuance of the act defining the duties of auditor and treasurer, approved March 24, 1819.* The notice for the motion was in the following words:

To James Hall, late treasurer of the state of Illinois. Take notice, that before the next supreme court, to be held in Vandalia on the first Monday of December, 1831, I shall move against you for default, in not paying over the sum of fourteen thousand eight hundred ninety-nine dollars, ninety-six cents, which was in your hands as treasurer, in January, 1831, as appears by your report to the last legislature.

October 22, 1831.

ALFRED COWLES, *Circuit Attorney*
For the Auditor of Public Accounts.

On this notice the sheriff of Fayette county made the following return: "Delivered a copy of the within notice to James Hall, Oct. 24, 1831."

The defendant moved the court to dismiss the motion on the following grounds: *First.* The notice filed in this case

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(*a*) Whenever the supreme court shall be equally divided in opinion on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed. Rev. Laws of 1827, p. 319, sec. 36.

* Laws of 1819, p. 242.

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does not apprise the defendant that the plaintiff will move for any judgment.

Second. The motion does not specify for what the plaintiff will proceed by motion against him.

Third. There is no account or other instrument or copy thereof as the foundation of the motion filed in the cause.

Fourth. The motion does not lie in this case at the suit of the auditor, and the auditor has not given any notice.

Cowles, state's attorney, for plaintiff.

Blackwell and *McRoberts*, contra.

SMITH, J., *delivered the opinion of the court.* A majority of the court is of opinion that this motion be dismissed for insufficiency of the notice. The notice is defective in not setting forth the cause of action with sufficient certainty—no particular judgment is asked for, nor does the notice show how, or at what time defendant was indebted, nor is the reference to the report certain, to remove these objections.

Motion dismissed.

J. and M. LITTLETON, Appellants, v. MOSES, a man of color, Appellee.

APPEAL FROM UNION.

A judgment will not be reversed if the court give instructions to the jury substantially as asked for. (1)
It is not error in the court below to refuse a new trial.

THIS was an action brought in the Union circuit court by Moses, a man of color, for a trespass, assault and battery, and false imprisonment; to which the defendants pleaded not guilty. The jury found a verdict for the plaintiff for forty dollars in damages. On the trial, the defendants moved the court to instruct the jury, that there must be proof of actual restraint at the time of action brought, or a claim to restrain plaintiff, before the plaintiff can recover in this form of action.

(1) See note 2, to the case of *Humphries* v. *Collier et al.*, ante, p. 297.

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Second. That there is nothing in the pleadings in this case different from a common action of assault and battery and false imprisonment, and the question of freedom or slavery is not involved in the pleadings.

Third. That by virtue of our constitution, the plaintiff was a free man, and had a right, by virtue of the laws, to hire himself to whom he pleased.

Fourth. That for the services rendered by the plaintiff, he can recover in an action of assumpsit, but not in this action.

Fifth. That the fact of seeing plaintiff working for defendants is not sufficient in law to establish an illegal restraint.

The court instructed the jury that the mere fact of the plaintiff's working for the defendants, and under their control, was not of itself sufficient (unconnected with other circumstances) evidence of his being restrained of his liberty; and further, the court instructed the jury that in this form of action, the plaintiff could not recover for services rendered, unless the jury should be satisfied from the evidence that there was restraint or force used to compel him to work, or to abridge him of his liberty. The court further instructed the jury, that if they should be satisfied from the evidence, that the defendants had exercised restraint or force over the person of the plaintiff, that they should find for the plaintiff a verdict. The court also instructed the jury, that from the state of the pleadings it was not different from the common action of assault and battery and false imprisonment. The defendants moved for a new trial, which the court overruled, and excepted to the opinion of the court in refusing to give the instructions asked for, and in refusing a new trial, and brought the case, by appeal, to the supreme court.

Breese, for appellants, assigned for error, that the court did not give the instructions as asked for by the defendants below; 7 Cranch, 506. That the court erred in giving the instructions they did give; and also erred in giving judgment in this action, if brought to try the plaintiff's right to freedom, for more than nominal damages. 2 Call, 343.

Baker, contra.

BROWNE, J., *delivered the opinion of the court.* This was an action of trespass and false imprisonment, in the circuit court of Union county, and brought here by appeal. The defendants, by their counsel in the court below, pleaded not guilty. The counsel for the defendants moved the court to instruct the jury on certain points of law, which was substan-

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tially given by the court as asked, so far as they had any relation to the points before the court. The jury returned a verdict for the plaintiff below for thirty dollars in damages. The counsel for the defendants then moved the court for a new trial, which was overruled, to reverse which opinion this appeal was brought.

It is a principle well settled, that the refusing to grant a new trial is no cause of appeal, and it has been so decided, frequently, in this court. *Clemson* v. *Kruper*, ante, 210, and the cases there referred to. This court is, therefore, of the opinion that the judgment of the court below be affirmed. (1)

Judgment affirmed.

JOSIAH T. BETTS, Appellant, *v.* PIERRE MENARD, Appellee.

APPEAL FROM RANDOLPH.

The ferry law of Feb. 12, 1827, does not authorize a county commissioners' court to grant a license to ferry to a corporation.

The county commissioners' court is a mere creature of the statute, and though created by the constitution, its powers and duties are defined by the law, and in some instances are ministerial, and in others judicial.

In a legislative act where "persons" are spoken of, none other than *natural* persons are meant.

The act of incorporation, creating the trustees of Kaskaskia a body corporate, no where confers the power to take a grant of a ferry license.

A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence.

THIS suit was originally brought by Menard, before a justice of the peace of Randolph county, by motion and notice, under the eleventh section of the act of February 12, 1827, to recover certain penalties, alleged to have accrued to him as proprietor of a ferry across the Kaskaskia river, from Betts, who at the time of the notice and motion was engaged in running a ferry boat within one mile of the ferry of Menard, across the same river, under a license granted to the trustees of the town of Kaskaskia, under whom said Betts acted, by the county commissioners' court of Randolph county, at the August term, 1830, of said court. The justice of the peace, on a hearing of the cause, gave judgment against Menard, which was taken by appeal to the circuit court of Randolph county, and there reversed, and a judg-

(1) See note to the case of *Sawyer* v. *Stevenson*, ante, p. 24.

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ment entered in favor of Menard, for ninety dollars, the amount of the several penalties accrued and the costs. From this judgment Betts appealed, and assigned for error, among others, the decision of the circuit court, declaring that the ferry license granted by the county commissioners' court to the board of trustees of Kaskaskia, was void, and that the circuit court erred in deciding that a party who had a license to ferry, was as much amenable to the penalties of the law, as one who had no such license, and that the court erred in deciding that the legislature of the state could grant an exclusive right to the use of any of the public highways of the state.

Breese, in support of the errors assigned, insisted upon the following points: *First*, the license granted by the county commissioners' court to the trustees of the town of Kaskaskia, was valid, and conferred a right to ferry on the board of trustees. The act of 1827, gives the county commissioners' court exclusive jurisdiction and control over ferries. Rev. Laws of 1827, p. 220, *et seq.* That court is a court of record, though of limited jurisdiction, and when such court has decided upon any matter within their jurisdiction, that decision can not be reversed in any collateral way, or in any action indirectly bringing into review their acts. Laws of 1819, p. 175; 3d Cranch, 300; Coxe's Dig., 407; 3d Wheat., 246, 315. Having such jurisdiction, that court had a right to decide upon all the facts, without the existence of which no license could be granted by them. Their decision as to the right of the trustees to have a ferry license, is final and conclusive as to that right, so far as the present motion is concerned, and not void. 6 Wheat., 109; Coxe's Dig., 408, 409, 411.

Second. Though the county commissioners' court may have decided erroneously in granting a license to the trustees to keep a ferry, yet, having jurisdiction of the subject matter, their decision is not void. Coxe's Dig., 409, 410; 1 Dane's Abr., 579; 3 ib., ch. 75, Art. 4.

Third. The act of 1827 authorizes the county commissioners' court to grant a ferry license, and as many of them, without regard to distance, as the public exigencies may require. Rev. Laws of 1827, p. 220.

Fourth. The 11th section of the act of 1827 was only intended to punish those who, without any color of right, should establish a ferry within one mile of a licensed ferry. The act *excepts* those ferries which may *hereafter* be licensed. Ib., 224.

Fifth. The ferry law, or the 11th section of it, is penal in

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its character, and must be construed strictly. Black. Com. and other elementary writers, *passim*.

Sixth. The act of 1827, (the ferry act,) so far as it designs to grant an exclusive privilege to use or navigate the public navigable waters of the state, is null and void. Ord. of 1787, art. 4.

Seventh. The act of 1829, supplemental to the act of 1827, does not embrace cases where a person has a regular license to ferry. Rev. Laws of 1829, p. 73.

Eighth. The acts of the legislature clearly refer to two kinds of ferries—the one licensed, and the other unlicensed. Rev. Laws of 1827, p. 220, &c.; Rev. Code of 1829, p. 73.

Hall, contra, contended that the county commissioners' court is authorized by the act of Feb. 12, 1827, to grant ferries to individuals, not to corporate bodies. They transcended their powers in granting a ferry license to the trustees of Kaskaskia. The trustees are not shown to have any power to accept a ferry license. They have no such power by the act of incorporation.

The county courts are forbidden by the statute of 1829, from establishing any ferries within one mile of those established before the passage of that act. Rev. Laws of 1829, p. 73; 2 Kent's Com., 226, 239: 1 Cond. Rep., 374, 376; 2 ib., 501, were cited in support of the positions assumed.

Baker, in reply.

SMITH J., *delivered the opinion of the court.**

Several points have been presented by the counsel for the appellant, upon which it is contended that the judgment of the circuit court ought to be reversed.

It will however be unnecessary to examine but one question presented by the record and bill of exceptions, and upon which this case must entirely depend.

The appellant justified the keeping up and maintaining his ferry in the action in the circuit court, under the license granted by the county court to the trustees of the town of Kaskaskia as a body corporate, as their agent constituted in writing. The date of the license granted to the trustees, is the 15th of August, 1830, and that of the agency, the 30th of the same month. It appears that the appellant actually conducted the ferry, and transported the passengers on the times, and in the manner and number as alleged by the plain-

* Chief Justice WILSON did not sit in this cause.

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tiff, and it is conceded that the amount of the judgment is not the point in controversy, but the right to maintain and exercise the ferry privileges as granted to the corporation.

The accuracy then of this decision, necessarily involves the question, whether the county court possessed the power to grant a license to a corporate body to exercise ferry privileges? and if so, whether the corporation could legally accept a right thus offered to be conferred ?

The county commissioners' court is the mere creature of the statute, which gave to it all the powers which it exercises; and although it is directed to be created by the constitution of the state, as a court, still its whole powers and duties are also directed by that instrument to be, and in fact are, defined by law. The fourth section of the act defining its duties, and declaratory of its powers, restricts their exercise within the county, enumerating, among other special powers, the right to grant licenses for the erection of ferries, leaving it, doubtless, to the exercise of its legal discretion, to determine in what cases it should be done, as restricted by various legislative acts.

It will not then be doubted, that although it is a court of record, still its jurisdiction is special and limited in its character; and from the various anomalous duties it is by law required to perform, it will be seen that those duties and powers are in some instances ministerial, and in others judicial. The several acts relative to the powers and duties of the county commissioner's courts, which have been passed at various times by the legislature of the state, have invariably defined the manner of making the application for such license, and also prescribed the mode of *granting*, and *to whom*, and upon what conditions.

Those acts, and particularly the act of the 17th February, 1837, *Rev. Laws*, 1827, page 220, being the one under which the license to the trustees was granted, speaks of "persons" only, and this act in the first section, speaks of granting licenses to "qualified persons," and has so restricted the granting to such persons. The proviso to this section reserves the right of preference, however, to the proprietors of the lands adjoining to, or embracing the water course over which the ferry is proposed to be erected.

The second section requires, when such license shall be granted, the party receiving the grant shall give bond and security to be approved by the court, in a sum not less than $100, nor more than $500, payable to the county commissioners of the county, conditioned that "*he, she, or they*," will keep such ferry according to law. The third and fifth sec-

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tions provide how such ferries shall be kept, and imposes certain duties on their owners, particularly as to the expediting the passage of public messengers, and expresses, and inflicts penalties and fines for a non-observance of such requisitions.

The ninth section declares such privileges shall be exclusive, and the twelfth section gives certain privileges to ferry keepers, and exemption from the performance of militia, jury, and other duties, in consideration of giving free passage to public messengers and others. It can not then be doubted, that the legislature never intended to authorize the county commissioners' court to grant licenses to keep ferries to any other than natural persons. It is impossible to draw from the whole context of this act, or any other existing law on the same subject, in connection with the whole or any of the several parts thereof, the inference that a grant could be authorized to be made of a ferry license to a corporation.

It will not, we apprehend, be denied that in the enactment of legislative bodies, where persons are spoken of, any other than natural persons are intended, unless it be absolutely necessary to give effect to some powers already conferred on artificial persons, and which it is necessary should be exercised by them to carry into effect the objects contemplated in their grant or charter. (1) In the present case, however, the requisition of the bond, security and other acts required to be done, and penalties imposed for the non-observance of the provisions of the law, are such that they could scarcely be complied with by a corporation, and not in any way by the trustees in the present case, and evince most conclusively, that not even by implication, can it be contended, such a body could have been intended, as entitled to require the granting of a license to carry on a public ferry. *Hartford Fire Ins. Co.*, 3 Conn. Rep., 15. It is also impossible to conceive the idea that if the county court had the general powers to determine in what instances they might issue a license, and to whom, and that such an act was legally done, that the trustees in this case were in any way capable of taking the grant.

The act of incorporation, creating the trustees a body pol. itic, no where confers the least semblance of such a power, much less, an authority to delegate the right to others. The right to take such a grant is entirely beyond the sphere of their action, which relates to other duties connected with the town. The corporation is a public body, for certain defined and specified objects, and must act *within*, and can not legally in any instance, *transcend* its limits. Its orbit is defined, and

(1) See note to *Woodworth* v. *Paine's admr*, ante, 374.

in its action, it cannot revolve beyond it. It can not compromit its members by engaging in an act wholly unauthorized, and never in any way contemplated in its charter. To do that would be to expose the inhabitants of the town to possible onerous burdens, expenses and losses which might most seriously affect them. A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of the law, and derives all its powers from the act of incorporation, and is incapable of exerting its faculties only in the manner that act authorizes. 2 Cranch, 127, 167. (2)

The exclusive privilege of a ferry is a monopoly, and can it be seriously contended that monopolies may be conferred by implied powers, and received in a case where no right whatever is given to take, to the direct injury of another, on whom the law has already conferred the exclusive right?

It is too obvious to doubt that the county commissioners' court had no direct or even implied power to make the grant in question, and it is equally certain that the trustees of the town had not the least power conferred on them by their act of incorporation, to accept it. The license, we are satisfied, was absolutely void, as granted without authority, and consequently, the justification set up under a void license, necessarily fails.

The judgment of the circuit court is therefore affirmed; and the appellee must recover his costs in this court, and in the court below.

Judgment affirmed.

(2) A corporation must strictly pursue the law creating it, or giving it power to act. *Fitch et al.* v. *Pinckard et al.*, 4 Scam, 79.

A corporation which is a mere creature of the law, can only exercise such powers as are conferred upon it by the act of incorporation. *Trustees, &c.*, v. *McConnel*, 12 Ill., 140.

Corporations are artificial persons, created with limited powers and capacities, and subject to the general laws and legislation of the state, as natural persons are. *Bank of the Republic* v. *Hamilton County*, 21 Ill., 53.

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PHILIP HARGRAVE, Appellant, *v.* DAVID PENROD, Appellee.

APPEAL FROM UNION.

It is the duty of an officer to whom an execution is directed and delivered, to make reasonable exertions to levy it on the property of the defendant, and if he is guilty of gross negligence in this, he will be liable.

The mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point them out to him, on which to levy, is not sufficient to excuse the sheriff.

The right of action of a judgment creditor against a sheriff for not levying a *fi. fa.* is not taken away by his discharging the debtor from a *ca. sa.* issued at his instance, although such discharge might be a satisfaction of the judgment; the creditor's remedy against the sheriff was perfect before such discharge.

It is not error to permit clerical errors to be amended on trial.

Fee-bills are governed by the same rules as executions, and after ninety days they are *functi officio.*

The omission to state a sum at the end of the *narr.* as the damages, can be taken advantage of only in the court below. An objection on that account is purely technical.

THIS is an appeal from a judgment rendered in the Union circuit court, in favor of the appellee, and against the appellant, who sued the appellant in an action on the case. The damages were laid in the summons at $300. There were two counts in the declaration, both of which are substantially the same; in each of which the appellee complained, that on the 20th day of April, 1830, he recovered a judgment in the Union circuit court in his favor, against one William Lamar, for $147.06¼ damages and costs, upon which judgment on the 12th day of May in the same year, he sued out his *fieri facias* for the obtaining of satisfaction of said judgment, which writ was directed and delivered to the appellant as sheriff of Union county, to be executed; and that being such sheriff, and while he had the writ in his hands, Lamar had goods and chattels of which the money might have been made; of which goods, &c., the first count alleges, the appellant had notice, but the second count does not; and that appellant neglected to levy the execution on those goods, &c., whereby the appellee was deprived of the means of collecting his judgment, to his great damage, but no sum is named as the amount of the damage. To this declaration, the appellant pleaded, besides the general issue, the following special pleas, to wit: And for further plea in this behalf, the said defendant says *actio non*, because he says that he did levy on and sell, by virtue of said execution and for the satisfaction of the same, all the goods and chattels, &c., belonging to the said Lamar, and which were known and notified to the said defendant, all which, &c.

And for further plea in this behalf, the said defendant says,

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plaintiff aforesaid *actio non*, because he says, that after the return by this defendant into the office of the clerk of the circuit court, of the said writ of execution mentioned, and before the commencement of this suit, he the said plaintiff caused to be issued and put into the hands of this defendant as sheriff as aforesaid, a certain other writ of execution in his said plaintiff's favor, against the said William on said judgment, which writ is commonly called a writ of *capias ad satisfaciendum*, on which said writ, he, said Lamar, was arrested by his body and taken into the custody of this defendant; and after being and remaining in such custody for a long time, was by the said plaintiff discharged from custody and permitted to go at large; and this he is ready to verify, &c., wherefore, &c. To these pleas the plaintiff demurred generally, which the court sustained. The issue on the plea of not guilty was tried, and a verdict rendered for the appellee for $155.55, for which the court rendered judgment.

On the trial, the plaintiff, after reading to the jury the record of a judgment in the Union circuit court for $147.06¼ damages, and $21.06¼ costs, offered in evidence an execution for $147.06¼ *debt*, and $21.06¼ costs, to the reading of which to the jury, the defendant objected; whereupon the plaintiff moved the court for leave to amend said execution, by erasing the word *debt*, and inserting the word *damages;* which amendment the court permitted, and then admitted the execution in evidence, to which the defendant excepted. The defendant then offered in evidence a certain fee-bill, put in his hands as sheriff for collection, against Lamar, and in his hands at the same time the execution in the declaration mentioned was in his hands, which fee-bill, and the return thereon showed, that the defendant had levied it upon a certain horse belonging to Lamar, and sold the horse and applied the proceeds in satisfaction of the fee-bill. The levy on the horse was made after ninety days from the date of the fee-bill, as the defendant acknowledged before the court and jury. To the reading of this fee-bill in evidence, the plaintiff objected, because it was levied after the ninety days, which objection was sustained by the court; to which opinion of the court the defendant also excepted, and appealed to this court.

Baker, for appellant, insisted that the first special plea contains a sufficient answer to the plaintiff's declaration, and the facts stated in it are admitted to be true by the demurrer. If it be said that it lacks form, and that it amounts to the general issue, the answer is, that the objection can only be taken advantage of by special demurrer. 1 Ch. Pl., 498. 10 Johns.,

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289. 5 Bac. Abr., 370, and note [a] in margin. 8 Cranch, 30.

The second plea is a full answer to the declaration, and is a complete bar to a recovery in this case. It shows that subsequently to the return of the writ of *fieri facias*, the appellee has been satisfied the amount of his judgment against Lamar. He contended that taking Lamar into custody on the *ca. sa.*, and his discharge by the appellee, was a full, absolute and complete discharge and satisfaction of the judgment, and cited 4 Burow, 2482; 1 T. R., 557, 715. 6 ib., 525. Coxe's Dig., 582. 5 Johns., 364. 1 Dane's Ab., 591. 5 Com. Dig., 762. Toller's Exrs., 151. 2 East, 243.

The court ought to have permitted the defendant to read the fee-bill to the jury to show what disposition was made of the horse belonging to Lamar, and which was a principal article of property in his hands, in respect to which the defendant was charged. No time is expressly limited for the return of fee-bills put into the sheriff's hands for collection. Rev. Laws of 1827, pages 107, 207, 218; nor is any time specified in the fee bill within which it shall be returned. The law, it is true, declares that such fee-bill shall have the force and effect of an execution, and that the sheriff shall levy the same on the goods and chattels, &c., and proceed thereon in all things as on a writ of *fieri facias*. If it is admitted that the provisions of the statute give the party in whose favor the fee-bill issues, the right to call upon the sheriff to return it after ninety days, it does not follow that the sheriff can not act, and even make a levy by virtue of it *after that time*. Admitting that the fee-bill was *functus officio* after ninety days, still the court should have permitted the defendant to read it in evidence, because it was not competent for any person but the person against whom it was issued to make objection. If the fee-bill was put into the hands of the sheriff before the plaintiff's execution, it was entitled to a preference over the execution in being *first* satisfied out of Lamar's goods, as it became a lien upon his property from the time of its delivery to the sheriff. Rev. Laws, 1829, p. 86. And further the defendant might have shown a levy upon the horse under the plaintiff's execution, or any other put into his hands *after* the fee-bill and before its return. And if this identical horse was levied upon by the plaintiff's execution put into his hands after the fee-bill, it was the duty of the sheriff on selling it, to apply the money arising from the sale, in payment of the fee-bill; by prior delivery it was entitled to the preference. He further contended that the declaration was bad, as it did not claim any sum in damages.

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Grant, contra, contended that the demurrer to the two special pleas was correctly sustained, because the first plea was an insufficient answer to the declaration. A sheriff is bound, and presumed to know all the property subject to execution belonging to a defendant, or at least, to use reasonable diligence to ascertain it, and the plea excuses him on the ground that he levied upon and sold all of which he was notified, without showing any such diligence.

The second special plea is likewise insufficient, because the liability of Hargrave had been incurred before the issuance of the *ca. sa.* under which Larmar was taken into custody and discharged, and which is set up as the defense. The plaintiff's effort to obtain his debt from Lamar is no waiver of his remedy against the sheriff for the delay occasioned by his negligence in the discharge of his duty.

The exclusion of the fee-bill was correct, because as the fee-bill is to be proceeded on in all respects as a *fi. fa.*, and as a *fi. fa.* could not be levied after its return day, the levy under the fee-bill was illegal and void, and any person interested may make the objection, especially the appellee in this case.

The omission of the amount of damages in the declaration could be taken advantage of on special demurrer only.

Breese, in reply.

Smith J., *delivered the opinion of the court.* The appellant relies on the following points for a reversal of the judgment of the court below.

First. The error as alleged in sustaining the demurrer to the second and third pleas of the defendant in the court below.

Second. The variance between the execution given in evidence on the trial, and the one described in the declaration, and suffering the same to be amended, and given in evidence to the jury.

Third. That the fee-bill offered in evidence ought not to have been rejected.

Fourth. The omission of damages in the conclusion of the declaration of the plaintiff.

There is little difficulty in deciding on the questions arising under the demurrer. An essential ingredient is wanting in the first plea, to constitute it a good one. In no part of it does the defendant aver that he used any exertion or diligence to ascertain what chattels or estate the defendant in the execution had, nor whether he made the least inquiry in relation

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thereto. We can not doubt that it is the duty of an officer to whom an execution is directed and delivered, to make at least reasonable exertions to levy the same on the property and estate of the debtor, and that if he is guilty of gross negligence in this, he is liable. The mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point out the estate or effects of the debtor to him, on which to levy, is not sufficient to excuse him. (1) The demurrer was therefore properly sustained. Equally correct was the sustaining of the demurrer to the second plea.

The liability of the sheriff for his negligence had attached before the issuing of the *capias ad satisfaciendum*, and whether the voluntary discharge of the defendant therefrom operated as a satisfaction of the creditor's judgment or not, it could not take away the creditor's remedy against the sheriff for his negligence, which was perfect before such discharge. The right of action of the creditor against the sheriff for his misconduct was in no way affected by such discharge. The plea was then a defective defense, and wholly immaterial.

The second point of variance is not, in our judgment, tenable. The court had the right to suffer the amendment to be made, it being a mere clerical error, and the variance was, even without such amendment, unimportant; because the description of the judgment record set out in the declaration was only as inducement to, and not the gist of the action. Numerous authorities may be found of adjudged cases, supporting this doctrine.

On the third point, relative to fee-bills, the same rules are to govern as in cases of execution. They are declared by the statute creating them, to have the force and effect of an execution, and are to be returned in the same manner. (2) The

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(1) It is the duty of an officer having an execution in his hands against the property of a defendant, to make reasonable exertions to levy upon the property of the defendant in his county; and if he fails to use due diligence in the discharge of his duty in this respect, he is responsible for whatever loss or detriment the person who commits the execution to his hands may sustain, in consequence of such failure. *Dunlap* v. *Berry*, 4 Scam., 327.

In this case the circuit court instructed the jury, that if they believed the defendant in the execution had property in the county sufficient to pay the execution, or part thereof, and if the sheriff, by reasonable diligence and exertion, could have made the amount of the execution, or part thereof, they should find or the plaintiff. *Held*, that the instruction was correct. Id. 331.

A sheriff is not bound to notice bare assertions of individuals, as to their claim to property in the possession of a defendant in an execution; he is only required to notice legal claims, fairly exhibited. Ibid.

(2) A fee-bill is "process," and governed by the same rules as executions. *Redick* v. *Cloud's Adm'r*, 2 Gilm., 678. *Ferris* v. *Crow*, 5 Gilm., 96. *Newkirk* v. *Chapron*, 17 Ill., 344.

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ninety days having expired before the levy under the fee-bill, it was, necessarily *functus officio*, and, consequently, the levy void. It was then properly rejected.

The objection under the last point ought to have been taken advantage of, in the court below. It is merely and purely technical, and even then, it might be questioned whether the damages in the recital to the declaration, as appears in the record, has not cured the error, if it were one available in the court below. The judgment of the circuit court is affirmed with costs. (3)

Judgment affirmed.

CHAUNCEY BEEBE, Appellant, *v.* JOHN BOYER, Appellee.

APPEAL FROM GREENE.

Appeal dismissed if copy of the record is not filed at the time required by law.

Hall, for appellee, on the 8th day of December, being the 4th day of the term, filed the transcript of the record in this cause, and moved the court to dismiss this appeal, for the reason that the appellant had failed to file a copy of the record at the time required by law and the rules of this court, and cited the 12th Rule, and the 33d section of the Practice act, Rev. Laws of 1827, p. 319.

Per Curiam. Let the appeal be dismissed at the costs of the appellant.

Appeal dismissed.

If an officer neglects to return a fee-bill within ninety days from its date he becomes liable to pay it. *The People* v. *Roper*, 4 Scam., 560.

(3) Where the plaintiff showed, in the body of his declaration, a claim for damages greater than the verdict, but had omitted the *ad damnum*, at the end of the declaration, it was held to be cured by the verdict. *Burst* v. *Wayne*, 13 Ill., 599. *Mattingly* v. *Darwin*, 23 Ill., 618.

WILLIAM RAGER, Appellant, v. WILLIAM TILFORD, Appellee.

APPEAL FROM SANGAMO.

A correct construction of the 33d section of the Practice act, requires that a party must make application for further time to file the transcript of the record, in cases of appeal, within the three days within which the transcript should be filed.

W. Thomas, for the appellee, on the seventh day of the term presented to the court a transcript of the record and proceedings of the court below, and stated to the court that the transcript had been received by the clerk of the court by mail, on Saturday, the 6th day of the term; that it was not known whether the transcript had been made for the appellant or appellee, and thereupon moved the court to dismiss the appeal, for the reason that the appellant had failed to file a transcript of the record within the time required by law, and cited in support of his motion the 33d section of the Practice act, Rev. Laws of 1827, p. 319, and the 12th Rule of this court.

M'Roberts, contra, for appellant, made a cross-motion for leave to file the transcript presented to the court, as the transcript of the record, and stated that it was owing to the delay of the mail that it was not received here earlier.

Per Curiam. The court is of opinion that this appeal be dismissed. A correct construction of the 33d section of the Practice act, would require that a party must make application for further time to file the transcript, within the three days, within which the record should be filed. The words of the act are imperative; they are, "unless the party shall have obtained further time." As the appellant did not obtain further time, within the three days, his motion to file the transcript now is overruled.

Appeal dismissed.

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WILLIAM P. and T. M. BRYAN, Plaintiffs in Error, *v.* NATHANIEL BUCKMASTER, Defendant in Error.

ERROR TO MADISON.

A clerk has no right to insert in a fee-bill a charge for sheriff's commissions, when the sheriff himself, in his return, makes no such charge—he has no power to supply the omission.

When a sheriff sells property and realizes a part of the debt, he is entitled to commissions only on the sum made.

When the sheriff does not sell, if real estate is levied on, the appraisement will furnish an equitable rule by which to calculate the commissions.

In doubtful cases, if by giving a literal construction to a statute it will be the means of producing great injustice, and lead to consequences that could not have been anticipated by the legislature, courts are bound to presume that the legislature intended no such consequences, and give such a construction as will promote the ends of justice.

THIS was a motion made in the circuit court of Madison county, to quash a fee-bill of erroneous and incorrect charges, made by the defendant as sheriff of Madison county, on two executions—one issued under the act of 1819, and the other under the act of 1825. The objection to the fee-bill was, that the sheriff had charged half commission on the whole amount of the first execution, when nothing was made by it, the property not having been sold for want of bidders. The sheriff had also charged half commission on the whole amount of the second *alias* execution, on which the sum of $1666.66 was made by a sale of real estate. The court overruled the motion, and the plaintiffs sued out their writ of error.

Semple, for the plaintiffs in error, contended that the sheriff was only entitled to his fees for *levying* the first execution, and no commission; and was only entitled to half commission on the amount *made* on the second execution, and no commission for the remainder of the execution not satisfied. He cited Laws of 1819, p. 328, and Laws of 1825, p. 142.

Prickett, contra, insisted that the words of the acts of 1819 and 1825 referred to, would authorize the sheriff to charge half commissions on the whole amount of both executions.

Semple, in reply.

LOCKWOOD J., *delivered the opinion of the court.** This

* Justice SMITH did not sit in this cause.

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was a motion made in the circuit court of Madison county, to quash a fee-bill issued by the clerk of said court.

The fees complained of were, that the clerk had inserted charges for commissions on two executions issued in the court below, which were not returned by the sheriff on the executions; and also, for charging commissions on the whole amount of the executions, when only part of the amount had been levied and collected.

The circuit court refused to quash the fee-bill, and the case was brought into this court by writ of error.

The first question presented in this case is, whether the clerk had a right to insert in the fee-bill a charge for commissions, when the sheriff, in his return on the execution, made no such charge?

On the first execution, the sheriff, in his fee-bill indorsed on the back thereof, fees amounting to two dollars and thirty-three cents, yet the clerk, without any claim on record, charges the plaintiffs with forty-eight dollars and eighty-nine cents, for commissions; and on the second execution, the sheriff returned fees, including commissions of seventy-six dollars and twenty-four cents, to eighty dollars and twenty-four cents, and the clerk charged commissions amounting to one hundred and thirty-seven dollars and thirty-four cents.

By the statute regulating the fees of the several officers, it is made the duty of the clerk to keep a book, in which he shall set down the costs made by both parties, and when any officer shall require it, he is to make out a transcript from his fee-book, and deliver the same to the sheriff.

But how is the clerk to know what fees the sheriff is entitled to? There is no law on the subject, but the practice of sheriffs always has been to return on the process their fees, and in most cases it is absolutely impossible for the clerk to ascertain their fees in any other way. Should the sheriff not charge fees enough, or not charge any, it is his own loss, and the clerk has no authority to supply the omission. Doubtless the sheriff might, by application to the court, obtain leave to amend his return, but until this is done, the clerk has no power to charge either party with sheriff's fees.

The court has also been called on in this case, to settle the true construction of the statute regulating fees, passed in 1825. Laws of 1825, page 142. By that act, "a commission is given of five *per centum* on the first three hundred dollars, and for all above that sum, a commission of 2 1-2 *per centum: provided*, that in all cases, when the execution shall be settled by the parties, replevied, stopped by injunc-

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tion, or when the money is paid without sale, or the property levied on is not sold, only one-half of said commissions shall be charged."

Has a sheriff, under this provision, when an execution for five thousand dollars is levied on property worth but one thousand, a right to charge commissions on the whole amount of the execution, or only on the amount levied on?

Commissions are usually understood to mean a certain *per centage* on moneys received and paid over, and the legislature undoubtedly intended to pay sheriffs the value only of the services they rendered, with a reasonable compensation for their risk. Where they sell, and realize a part of the debt, they are only entitled to commissions on the sum made.

But if the sale be stopped by injunction, or the property levied on not sold, what shall be the rule?

If the sale be made, and only a part of the debt realized, he is only entitled to commissions on the sum made, and shall the sheriff be entitled to greater commissions when no sale takes place, and no money passes through his hands, and consequently, no risks incurred? This is both unreasonable and unjust, and we can not presume that the legislature intended to give more in a case where the *least* services were rendered. In doubtful cases, if by giving a literal construction to a statute, it will be the means of producing great injustice, and lead to consequences that could not have been contemplated by the legislature, courts are bound to presume that the legislature intended no such consequences, and give such a construction as will promote the ends of justice. (1)

There can be no doubt that the legislature never intended to give a commission on a greater sum than could have been realized from a sale, in cases where *no* sale takes place; and taking the whole clause together, this construction can be given to it, without doing violence to the language. Where no sale takes place, difficulties, it is true, may sometimes arise, in ascertaining the value of the property levied on. This difficulty, however, does not exist in the executions mentioned in the fee-bill. These executions were

(1) In construing statutes, we must be governed by the intention of the legislature, though not by some hidden intention, which the language of the law will not justify; but where the language is plain, and admits of no construction, we must take it as we find it. *Foley* v. *The People*, ante, p. 57.

Where the consequences of a particular construction of a constitution or law would render its operation mischievous, that construction should be avoided, provided it is susceptible of a different one. *The People* v. *Marshall et al.*, 1 Gilm., 689.*

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levied on real estate, and by the statutes of this state, in all cases of levies on real estate, the lands levied on must be appraised. This appraisement will furnish an equitable rule by which to calculate the commissions. Where personal property only is taken, it would be more difficult to furnish the rule, and when such a case arises, it will be time enough to decide it.

The fee-bill is therefore illegal in two respects: first, because it contains charges of commissions not returned on the executions by the sheriff, in whose hands they were placed for collection; and secondly, because commissions are charged on the amount of the executions, when the value of the property levied on appears from the appraisement to be less than the sum due on the execution. For these reasons, the judgment below must be reversed with costs, and the fee-bill quashed.

Judgment reversed.

DAVID G. BATES, Appellant, *v.* THOMAS JENKINS, Appellee.

APPEAL FROM JO DAVIESS.

A plea in abatement will lie, in a suit commenced by attachment.

The effect of a judgment of nons uit in an attachment case, is nothing more than the quashal of the attachment, and leaves the party to proceed *de novo.*

THIS suit was commenced in Jo Daviess county, by attachment on the affidavit of *Bates*, stating that Jenkins, Thomas McCrany and Charles Galloway, partners in trade, are justly indebted to him in the sum of six hundred dollars, for goods, wares and merchandise sold and delivered them, which said sum is now due, and that the said Thomas McCrany, Thomas Jenkins and Charles Galloway, have departed this state, with the intention of having their effects and personal estate removed without the limits of this state, and that the said Thomas McCrany, Thomas Jenkins and Charles Galloway, were considered citizens of this state at the time of contracting said debt. The cause was continued for several terms, until the May term, 1830, when the plaintiff filed a declaration in assumpsit for goods, wares, &c., and for money paid, laid out and expended, money lent and advanced, work and labor, &c. The defendant, *Jenkins*, came at Nov. term, 1830, and moved the court for leave to enter his appearance

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and give special bail, which motion the court sustained, and thereupon he executed his bond, and at the same time filed a plea in abatement, setting forth that at the time of the issuing the attachment against him, he had not departed from the state with the intention of having his effects and personal estate removed without the limits of the state, but that he was in the town of Galena, county of Jo Daviess, &c. To this plea there was a demurrer and joinder, which was overruled, and a judgment of *respondeas ouster* rendered against the plaintiff. The plaintiff then made default, and a nonsuit was entered against him, and a judgment rendered in favor of the defendant, *Jenkins,* for the costs, from which judgment *Bates* appealed.

Davis and *Blackwell,* for appellant, cited 1 Petersdorf, 262, 266, 300. Rev. Laws 1827, pages 45, 72. Am. Dig. of S. and W. Rep., 42. 3 Harris and McHen., 535.

W. Thomas, contra, contended that the appeal was improvidently taken, because the judgment of the court below does not amount to twenty dollars, exclusive of costs, nor relate to a franchise or freehold. Ante, 334.

The judgment is not final as to the matters in controversy between the parties. It does not bar the plaintiff of his right of action. It is not a judgment in bar.

The appellant having suffered a nonsuit, can not *now* take advantage of any error in the judgment or proceedings of the court below. Am. Dig., 205. He also contended that the affidavit was not such as the statute requires, and cited *Phelps* v. *Young*, ante, p. 327.

Blackwell, in reply.

Browne, J., *delivered the opinion of the Court.** This was an appeal from the circuit court of Jo Daviess, to reverse a judgment rendered in that court. The plaintiff below sued out an attachment against Thomas Jenkins, Thomas McCrany, and Charles Galloway, as partners in trade. Thomas Jenkins, one of the defendants, filed his plea in abatement, setting forth that he, one of the said defendants, at the time the said attachment was sued out in this case against him, had not departed from this state, with the intention of having his effects and personal estate removed without the limits of this state, but that this defendant was in the town of Galena,

* Chief Justice **Wilson** did not sit in this cause.

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county of Jo Daviess, and state of Illinois. This plea was sworn to, and concluded in the common form. The plaintiff's counsel demurred to this plea, which demurrer the court overruled.

The circuit court decided correctly, in overruling the demurrer to the defendant's plea in abatement. It is clear, that a plea in abatement will lie, in a suit commenced by attachment.

On the second point, we are of opinion that the effect of a judgment of nonsuit is nothing more than a quashal of the attachment, and leaves the party at liberty to commence *de novo*. It is no bar to any future proceedings. (1)

Judgment affirmed.

IGNATIUS R. SIMS, Appellant, *v.* JOHN HUGSBY, Appellee.

APPEAL FROM MORGAN.

A copy of a note filed with the declaration is no part of the record; though the clerk may incorporate it into the record, it does not become a part of it.

To make a note a part of the record, so that the court may notice it for any purpose, oyer must be craved of it.

HUGSBY brought his action of debt in the Morgan circuit court, against Sims and others, upon a writing obligatory for the payment of $450. Sims was alone served with process, and on being called, made default. The clerk assessed the damages, and the court rendered judgment for the sum so reported to be due by the clerk, amounting to $287.31½,

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(1) The statute now in force in relation to pleas in abatement in attachment suits in this state, is this: "In case any plea in abatement traversing the facts in the affidavit shall be filed, and a trial shall be thereon had, if the issue shall be found for the defendant, the attachment shall be quashed" Purple's statutes, p, 93, sec. 8. Scates' Comp., 229. And again: "The provisions of chapter one of the Revised Statutes, (entitled Abatement,) shall be applicable as well to proceedings in attachment as to other cases." Purple's statutes, p, 104, sec. 35. Scates' Comp. 236.

Pleas in abatement in attachment suits have frequently been sustained in this state. *White* v. *Wilson*, 5 Gilm., 21. *Walker* v. *Welch et al.*, 13 Ill., 675. *Eddy* v. *Brady*, 16 Ill., 306. *Ridgway* v. *Smith*, 17 Ill., 33. *Boggs* v. *Bindskoff et al.*, 23 Ill. In the last case cited the question was raised by the plaintiffs in the attachment, whether a plea traversing the affidavit was a plea in abatement and partook of the incidents of such a plea; and it was held by the court that it did.

In *Ridgway* v. *Smith*, 17 Ill., 33, it was held that such a plea should conclude to the country, and a common *similiter* forms the issue; the burden of proof is on the plaintiff to maintain the allegations of his affidavit; and if the verdict is for the defendant, the writ is quashed, and he is out of court.

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"part of the debt in the declaration mentioned." From this judgment Sims appealed, and assigned for error that the judgment is for more than the debt and interest due on the writing filed, and that there was no jury to inquire of damages, and that there could have been no damages, but only a judgment for the debt, as by the writing filed.

Hall, for appellant.

W. Thomas, contra.

WILSON, *Chief Justice, delivered the opinion of the Court.* From the record in this case, and a copy of the note which it contains, and which was the foundation of the original action, it appears that the judgment of the court below was rendered by default, for more than the plaintiff was entitled to recover; the clerk, in ascertaining the amount, having omitted to notice one of the credits indorsed on the note.

For this error, the defendant below asks for a reversal of the judgment.

The copy of the note and indorsement form no part of the record, and they do not become so, merely by the clerk's having inserted them. To have made the note part of the record, so as to enable the court to notice it for any purpose, the defendant should have craved oyer.

This not having been done, no error is apparent upon the face of the record, and the court can not look beyond it. Littell's Rep., 225.

If too large a judgment has been rendered against the appellant in the court below, his remedy is by motion there. The error complained of is rather the mistake of the clerk than the error of the court. In a case like the present, the law has assigned to the clerk the duty of assessing the damages, and if, in the discharge of that duty, he should allow either too much or too little, the court, under whose direction it is made, will, upon motion, correct it. To that court then, and not to this, the application should be made. 6 Mass. Rep., 272. 2 Wash. Rep., 173.

The judgment of the court below is affirmed with costs, and the cause remanded. (1)

Judgment affirmed.

(1) See *Browder* v. *Johnson*, ante, 96. *Giles* v. *Shaw*, ante, 219. *Bogardus* v. *Trial*, 1 Scam., 63 and *Harlow* v. *Boswell*, 15 Ill., 56, and note to *Reynolds* v. *Mitchell*, ante, p. 177.

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INDEX.

ABATEMENT.

1. A plea in abatement will not lie where a dormant partner is not sued. *Conley* v. *Good*, 137.

2. Variances between the writ and declaration can only be taken advantage of by plea in abatement; they are not reached by a general demurrer, nor can they be assigned for error. *Prince* v. *Lamb*, 3.8.

3. A plea in abatement will lie, in a suit commenced by attachment. *Bates* v. *Jenkins*, 411.

ABSENT AND ABSCONDING DEBTORS.

1. Under the attachment law, an affidavit stating that "J. C. is justly indebted to the plaintiff in the sum of $100, and that the said J. C. is privately moving his property out of the county," is insufficient to authorize an attachment against the goods of an absconding debtor. *Clark* v. *Roberts*, 285.

2. Where the proceedings are manifestly against a non-resident debtor, it is no objection that the affidavit does not state that "the defendant had departed from this state with the intention of having his effects and personal estate removed out of the limits of this state. *Phelps* v. *Young*, 328.

ACKNOWLEDGMENT OF DEED.

A purchaser's right under a sheriff's deed is not affected under the act of 1819, by its not being acknowledged in court—it is well acknowledged, if it be acknowledged before the circuit court of the county of which he is sheriff, and where the land lies. *Fail and Nabb* v. *Goodtitle, ex dem., &c.*, 201.

ACTION.

1. An action for slander is not taken away, though the statute creating the offense charged, be repealed. *French* v. *Creath, &c.*, 31.

2. Where an action is brought against several debtors, a recovery must be had against all or none, unless one or more of the defendants interpose a defense which is personal to himself, such as infancy or bankruptcy. *Kimmel* v. *Schultz and others*, 169.

3. No action can be maintained upon an instrument of writing for the payment of money, unless the instrument shows upon its face to whom it is payable. *Mayo* v. *Chenoweth*, 200.

4. A payee of a note, although he may have written an assignment on the back of it, can maintain an action thereon in his own name. *Brinkley* v. *Going*, 366. S. P. *Brinkley* v. *Going*, 367.

See Administrators, 4. Escape, 2.

ADMINISTRATORS.

1. If one of two administrators loans the money of the estate, he does it upon his own responsibility, and an action to recover it back should be brought in his name alone. *Thornton et al.* v. *Smiley and Bradshaw*, 34.

2. A judgment can not be rendered against the security in an administration bond, nor is he liable to an action until a *devastavit* by suit has first been established against the administrator. *Biggs and others* v. *Postlewait and others*, 198.

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3. An administrator has no power to charge the effects of his intestate by any contract originating with himself, and his contracts, in the course of his administration, or for the debts of his intestate, render him liable, *de bonis propriis*. *Vincent and Bertrand* v. *Morrison*, 227.

4. In an action on a judgment against administrators suggesting a *devastavit*, a judgment by default admits the truth of the allegation in the declaration, and a jury of inquiry is not necessary to ascertain the damages. *Greenup and Conway* v. *Woodworth*, 232.

5. An administrator has no power to compel an indentured servant to attend to his business; he has only the custody of the servant for safe keeping until his time of service can be sold. *Phœbe* v. *Jay*.

6. The act of 1823, regulating administrations and the descent of intestates' estates, &c., does not apply to the estates of those who died before the passage of the act; under that law the judgments obtained against the the deceased in his life time are to be first paid. *Jones' Administrators* v. *Bond*, 287.

S. P. *Woodworth* v. *Paine's Administrators*, 374.

AFFIDAVIT.

1. An affidavit of a juror who tried the cause will be received to prove improper conduct on the part of the jury. *Sawyer* v. *Stephenson*, 24.

S. P. contra *Forester and Funkhouser* v. *Guard, Siddall & Co.*, 74.

2. An affidavit setting forth the discovery of new testimony, should state the name of the witness, and also the facts he can prove. *Forester and Funkhouser* v. *Guard, Siddall & Co.*, 74.

3. If an affidavit on which an attachment issues does not comply with the requsitions of the statute, all the proceedings under it are void. *Clark* v. *Roberts*, 285.

4. Under the attachment law of 1827, which requires that the *amount* and *nature* of the indebtedness should be specified in the affidavit, it is sufficient to state therein that the non-resident "is justly indebted to the plaintiff in the sum of $——, by his certain instrument of writing, signed by him." *Phelps* v. *Young*, 327.

5. Upon an order for a change of venue and granted, but before the record is removed, an affidavit of the materiality of witnesses for the purpose of taking their depositions, is properly made in the circuit court of the county where the suit is brought, and the computation of time and distance must be made from that county. *Ibid*

6. Where the proceedings are manifestly against a non-resident debtor, it is no objection to the affidavit that it does not state that "the defendant has departed from this state with the intention of having his effects and personal estate removed without the limits of this state. *Ibid*, 328.

7. Further time will not be allowed to file the transcript of the record in an appeal, on an affidavit stating that it was owing to the negligence of the counsel that the record was not filed in time. *Smith* v. *James*, 292.

8. A sheriff's return may be contradicted by his own affidavit and that of defendant. *Kerr & Bell* v. *Whitesides*, 390

AGENT.

1. Notice of an equity to an agent is notice to his principal. *Bryan and Morrison* v. *Primm*, 59.

2. The agent of the Gallatin county Saline has no power to substitute another person in place of the original lessee; in case of a violation of the covenants, he should enter upon the demised premises, advertise them, and lease them to the highest bidder. *Owen and others* v. *Bond*, 128.

3. The usual and appropriate mode of executing a deed or other writing by an agent or attorney is, for the agent or attorney to sign his principal's name, and then his own as agent. *Mears* v. *Morrison*, 223.

AGREEMENT.

1. An agreement to pay the county commissioners of Randolph county a certain sum of money, provided they would build a court house on a particular

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lot is not binding for want of mutuality, although they do build the court house on the lot designated, the obligation to pay and to build, not being reciprocal. *County Commissioners of Randolph* v. *Jones*, 237.

2. A promise to pay the county commissioners to do an act which they are required to do by law, is against public policy, and therefore void. *Ibid.*

3. As a general rule, the *terms* of a written agreement can not be changed by parol, but the *time* of its performance may be extended. *Baker* v. *Whiteside*, 174.

ALTERATION.

An alteration made in a note, without the knowledge or assent of the payor, renders the note void; the proper plea in such case is, *non est factum*. *Pankey* v. *Mitchell*, 383.

AMENDMENTS.

1. Where the plaintiff amends in matters of form only, the defendant is not, for that reason, entitled to a continuance as a matter of course. *Scott* v. *Cromwell*, 25.

2. If parties appear and go to trial without a plea being put in, it is such an irregularity as will be cured after verdict by the statute of amendments. *Brazzle & Hawkins* v. *Usher*, 35.

3. Where a party amends his *narr.* by setting out the bond on which suit is brought as the statute requires, it is error in the plaintiff to take judgment at the same term, if a continuance is prayed for by defendant. *Rountree* v. *Stuart*, 73.

4. The omission in a writ of the words "The people of the state of Illinois to the coroner," &c., is a mere misprision of the clerk, and is amendable. *State Bank* v. *Buckmaster*, 176.

5. Clerical errors may be amended on the trial of the cause. *Hargrave* v. *Penrod*, 401.

APPEAL

1. An appeal will lie by consent from an interlocutory order dissolving an injunction. *Cornelius* v. *Coons and Jarvis*, 37.

2. The statute regulating appeals from a justice of the peace in providing that no continuance shall be allowed to either party after the second term, was not intended to prohibit the court from taking such cases under advisement after the trial. *Johnson* v. *Ackless*, 92.

3. In appeal cases where the judge acts both as court and jury, a bill of exceptions taken after the judgment of the court is rendered, is regular and in time. *Ibid.*

4. An appeal from a justice of the peace is assimilated to a suit in equity. *Conley* v. *Good*, 135.

5. Where a judgment is rendered by a justice of the peace for a greater amount than the defendant owes, his remedy is, not by an application to a court of equity, but by appeal to the circuit court. *Reynolds* v. *Mitchell*, 177.

6. In case of an appeal to the circuit court upon a trial of right of property, all the proceedings before the sheriff are to be transmitted, if they are not, the circuit court can not exercise jurisdiction. *Mason* v. *The State Bank*, 183.

7. The word "appeals" used in the 32d section of the practice act of 1827, applies equally to writs of error. *Clark* v. *Ross*, 334.

8. An appeal will not lie from the decision of a magistrate imposing a fine for a contempt. *Clark* v. *The People*, 340.

9. Ten per cent. damages will be allowed, where an appeal is evidently taken for delay. *Simms* v. *Klein*, 371.

10. On an appeal taken by the defendant, from the judgment of a justice of the peace, the circuit court can not rule the plaintiff to give security for costs. *Teague* v. *Wells*, 377.

11. If the transcript of the record on appeal is not filed within the time required by law and the rules of court, the appeal will, on motion, be dismissed. *Green* v. *McConnell*, 236.

S. P. *Green* v. *Atchison*, 191.

S. P. *Beebe* v. *Boyer*, 406.

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12. Further time to file record, on an affidavit, stating that it was through the negligence of counsel that the transcript was not filed in time, refused. *Smith* v. *James*, 292.

13. Application for further time to file the transcript must be made within the three days within which the transcript should be filed. *Rager* v. *Tilford*, 307.

APPEARANCE.

1. Appearance and pleading will cure voidable but not void process. *Coleen and Claypole* v. *Figgins*, 19.

2. The appearance of parties and going to trial without a plea, cures the defect, if any, arising from the want of a plea. The statute of amendments cures the irregularity. *Brazzle & Hawkins* v. *Usher*, 35.

3. The appearance of an attorney without authority, is good. *Rust* v. *Frothingham and Fort*, 331.

APPOINTMENT.

The governor can not make an appointment in the recess of the general assembly, unless the vacancy occurred since the adjournment of that body. *The People ex relat. Ewing* v. *Forquer*, 104.

APPRAISEMENT.

In a levy on real estate, the appraisement which the law requires to be made, furnishes a rule by which the sheriff may calculate his commissions. *Bryans* v. *Buckmaster*, 408.

ASSAULT AND BATTERY.

A warrant for a felony founded upon an affidavit which stated that "A. B. entered the inclosure of C. D. and carried off her grain," is no justification in an action for assault and battery and false imprisonment, neither to the officer who issued it, nor to the officer executing it, as the affidavit contains no words importing a felony. All the parties to such a warrant are trespassers. *Moore* v. *Watts and others*, 42.

ASSIGNMENT.

1. A note for the payment of a certain sum of money "which may be discharged in pork" is assignable. *Thompson* v. *Armstrong*, 48.

2. Our act making promissory notes, &c., assignable is not to be construed in the same way as the Stat. of Anne, as they are different in their objects and provisions. *Mason* v. *Wash*, 39

3. A payee of a note, although he may have written an assignment on it, can maintain an action in his own name on it, and his describing himself "assignee" of the person to whom he made the assignment, may be rejected as surplusage: the assignment by indorsement is in the control of the payee, and he may strike it out or not as he thinks proper. *Brinkley* v. *Going*, 366.

4. A bond for the conveyance of land executed on the 9th day of Jan., 1819, is not assignable. *Buckmaster* v. *Eddy*, 381.

ASSIGNOR AND ASSIGNEE.

1. In a case on an assigned note between maker and assignee, a consideration need not be averred. *Mason* v. *Buckmaster, assignee, &c.*, 27.

2. Under our statute, an assignor of a note is not liable unless due diligence by suit against the maker has been used where that course will obtain the money. *Mason* v. *Wash*, 39.

3. The assignor of a note for the payment of money or a specific article of property is not liable, unless due diligence has been used to recover of the maker. *Thompson* v. *Armstrong*, 48.

4. An averment of the insolvency of the maker is sufficient to excuse the use of due diligence. *Ibid.*

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5. The assignee of a note after it becomes due, takes its subject to all the equity existing between the original parties to it. *Bryan and Morrison* v. *Primm*, 59.

6. In a suit by the assignee against the assignor seeking to recover on the ground that he has used due diligence to recover of the maker, the rule is that he must show that he brought his action against the maker, at the first term of court after the note fell due. *Lusk* v. *Cook*, 84.

7. On a note made in Missouri and assigned there, the *lex loci* of Missouri as to the liability of the assignor is to govern. *Humphreys* v. *Collier and Powell*, 297.

ASSUMPSIT.

1. An undertaking by parol, by which a third person obtains credit, is collateral, within the statute of frauds and perjuries and not binding. *Everett* v. *Morrison*, 79.

2. In an action of assumpsit under the general issue, private incorporations must prove their corporate character. *Jones* v. *The Bank of Illinois*, 124.

3. A promise to pay the county commissioners of a county to do an act which they are required to do by law, is against public policy and therefore void. *County Commissioners of Randolph* v. *Jones*, 237.

4. A plea of payment is a good plea in an action of assumpsit, and without it evidence of counter demands can not be received. *Jones' Administrators* v. *Francis and others*, 165.

5. In an action of assumpsit upon a note evidently given to pay the debt of a third person, if there is no consideration for the promise expressed in the note, a consideration should be averred in the declaration, and the want of such averment is fatal. *Connolly* v. *Cottle*, 364.

ATTACHMENT.

1. If the affidavit upon which an attachment is issued, does not comply with the requisitions of the statute all the proceedings under it are void, and the attachment ought to be quashed. *Clark* v. *Roberts*, 285.

2. Under the attachment law of 1827 which requires that the amount and nature of the indebtedness should be specified in the affidavit, it is sufficient to state that the non-resident "is justly indebted to the plaintiff in the sum of $—— by his certain instrument in writing signed by him." *Phelps* v. *Young*, 327.

3. The effect of a judgment of nonsuit in an attachment case, is nothing more than the quashal of the attachment, and leaves the party to proceed *de novo*. *Bates* v. *Jenkins*, 411.

4. A plea in abatement will lie, in a suit commenced by attachment. *Ibid.*

ATTORNEY.

1. An appearance by an attorney without authority, is good. *Rust* v. *Frothingham and Fort*, 331.

2. A *supersedeas* bond executed by the attorney of plaintiff, without proof of his authority, is void, so far as the *supersedeas* is concerned. *Cromwell* v. *March*, 326.

See AGENT, CLIENT, and COUNSEL.

AUDITOR.

The notice of a motion by the auditor against a delinquent treasurer, under the act of 24th March, 1816, must be certain and specific, and must ask for a judgment. *Auditor* v. *Hall*, 392.

AWARD.

1. The circuit court can not arrest or interfere with the proceedings on an award, where the submission has been by bond or rule of court, except for the causes expressly stated in the statute, viz: that the award was obtained by "fraud, corruption, or undue means." *Chandler* v. *Gay*, 88.

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2. It is error for the circuit court to enter up judgment on an award under the act of 1819; the proper course is for a rule of court to be entered up on filing the submission and award, requiring the parties to abide by the award. A disobedience to this rule would be a contempt. *Ibid.*

3. Where parties agree to submit their differences to arbitration, and agree that "the award is to be entered of record and made a rule of court at the next term, and which award, when entered, is to have the force and effect of a "judgment," it is irregular and erroneous for the circuit court to enter up a judgment on the award. *Cromwell* v. *March*, 295.

4. Parties who agree to submit their cause to arbitration will be governed by their agreement, and if one party stands by and suffers judgment to be entered on the award to which technical objections could be made, the supreme court will not interfere to reverse the judgment. *Duncan* v. *Fletcher*, 323.

5. Where no fraud is charged or injustice alleged, the court will presume that the referee was sworn, if the fact does not appear on the award. *Ibid.*

BAIL AND BAIL BONDS.

Under the practice act of 1819, bail bonds should be taken to the sheriff, and suits on them should be brought in his name. The act gives him no power to assign them to the plaintiff in the action. *Hunter* v. *Gilham*, 82.

BAILABLE OFFENSES.

1. The words "any other offense which by law shall not be bailable" as used in the 40th section of the act defining the duties of justices of the supreme court, apply not to the ability of an offender to procure bail, but to the character of the offense. *Foley* v. *The People*, 57.

2. Larceny is an offense bailable by law. *Ibid.*

BANKRUPT LAW.

A discharge under the bankrupt law of New York is no bar to a suit brought here on a contract made before the discharge. *Mason* v. *Wash*, 39.

BANKS.

1. The receipt of the cashier of State Bank for money received of an individual, is evdience of a deposit by that individual. *State Bank* v. *Kain*, 75.

2. Where a private corporation sues to recover real property or upon a contract, it must, under the general issue, produce the act of incorporation. *Hargrave* v. *Bank of Illinois*, 122.

3. The act of indorsing a bill to a bank, does not admit that the bank is a corporation. *Ibid.*

4. The debtors to the State Bank can not raise the objection that the bank is unconstitutional. *Snyder* v. *State Bank*. 161.

5. The 22d section of the bank law is merely directory to the board of directors, and an omission by them to comply with it does not release the securities to a note executed to the bank for an accommodation. *Moreland and Willis* v. *The State Bank*, 263.

6. A debt due the State Bank is a debt due the state, which the state can release. *Ernst's Administrators* v. *Ernst*, 316.

See STATE BANK.

BILL IN EQUITY.

A bill may be dismissed in all cases on motion, when the court is satisfied there is no equity in it. *Edwards* v. *Beaird*, 70.

BILL OF EXCEPTIONS.

1. In appeal cases where the judge acts both as court and jury, a bill of exceptions taken after the judgment of the court is rendered, is regular and in time. *Johnson* v. *Ackless*, 92.

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2. The court can not notice a judgment record on which suit is brought, unless it is made a part of the record by bill of exceptions. *Kimmel* v. *Shultz and others*, 169.

3. A bill of exceptions can not be taken, unless the exceptions be made on the trial and before the jury is discharged, and it lies for receiving improper or rejecting proper testimony, or for misdirecting the jury on a point of law. *Clemson* v. *Kruper*, 210.

BOND.

1. A bond for the conveyance of land, executed on the 9th day of January, 1 19, is not assignable The statute of 1807 governs in such case. *Buckmaster* v. *Eddy*, 381.

2. The bond upon which a *supersedeas* was obtained, was executed by "M., atty. for the plaintiff;" and on a motion to dismiss the writ of error for that cause the court overruled it, bu quashed the *supersedeas*, and awarded a *procedendo*. *Cromwell* v. *March*, 326.

CAPIAS AD SATISFACIENDUM.

1. A *ca. sa.* issued upon a judgment is not void on its face, though it does not recite that the oath required by law to be made, was made before it issued, nor is necessary that the declaration for an escape on such *ca. sa.* should aver that the oath was made. *Lattin* v. *Smith*, 361.

2. The right of action of a judgment creditor against a sheriff for not levying a *fi. fa.*, is not taken away by the creditor's discharging the debtor from a *ca. sa.* issued at his instance, although such discharge might be a satisfaction of the judgment, the creditor's remedy against the sheriff being perfect before such discharge. *Hargrave* v. *Penrod*, 401.

CHANCERY.

1. A *suppressio veri* in relation to any important fact affords ground for the interference of a court of equity to annul the contract. *Bryan and Morrison* v. *Primm*, 59.

2. Though a bill for an injunction does not pray that the money be refunded, yet such relief can be granted, and a decree therefor is not erroneous. *Ibid.*

3. If a party neglects to make his defense at law, a court of chancery will not relieve him. *More and Bates* v. *Bagley, Borer and Robbins*, 94.

4. In chancery all the parties in interest, and whose rights may be affected, ought to be made parties to the bill, and if the court is called on to dispense with the proper parties, some reason therefor ought to be disclosed in the bill. *Gilham and others* v. *Cairns*, 16.

5. A party who asks equity must do equity; and when a party signed a note for specie, supposing it to be for state paper, though no fraud was practised, and a judgment was entered against him for the specie value of so much state paper as the note called for, chancery will not relieve against such judgment, as it is equitable. *Beaugenon* v. *Turcotte and Valois*, 167.

6. If a defendant neglects to avail himself of a legal defense, a court of equity will not relieve him. *Ibid.*

S. P. *More and Bates* v. *Bagley and others*, 94. *Hubbard* v. *Hobson*, 190.

7. Where a judgment is rendered by a justice of the peace for a greater amount than the defendant owes, his remedy is not by application to a court of chancery, but by appeal to the circuit court. *Reynolds* v. *Mitchell*, 177.

8. It is not error to dissolve an injunction and dismiss the bill, though all the defendants have not been compelled to answer. *Ibid.*

9. As a general rule, a court of equity will not relieve a defendant who has neglected to make his defense at law. But if he did not know of his defense until after the judgment, a court of equity will relieve. *Hubbard* v. *Hobson*, 190.

10. Where the circuit court sitting as a court of chancery grants a rehearing, the first decree is thereby vacated, and the case stands as if no decree had been rendered in the cause. *Finley and Creath* v. *Ankeny*, 250.

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11. Where a full and ample defense might be made at law, a court of chancery will not relieve. *Greenup and Conway* v. *Brown*, 252.

S. P. *Same* v. *Woodworth*, 254.

12. Rules of decision are the same in courts of chancery as in courts of law. *Moreland and Willis* v. *State Bank*, 263.

13. A court of chancery can not interfere to relieve against the oppressive or illegal acts of an officer in executing process, the remedy of the party injured is at law. *Beaird* v. *Foreman and others*, 285.

14. As a general rule, a court of chancery will not adjudge executions which are regular on their face, void, at least until an attempt is made in the court from which they issued, to obtain relief against them. *Ibid.*

CLERICAL ERRORS.

Clerical errors may be amended on the trial of the cause. *Hargrave* v. *Penrod*, 401.

CLERKS.

1. A *peremptory mandamus* will issue to a county commissioners' court, to compel the restoration of a clerk, the cause of whose removal is not stated on their records. *Street* v. *County Commissioners of Gallatin*, [illegible]0.

2. A clerk has no right to insert in a fee-bill a charge for sheriff's commissions, when the sheriff himself in his return makes no such charge; the clerk has no power to supply the omission. *Bryans* v. *Buckmaster*, 408.

3. Though a clerk may insert in the record a copy of the note on which suit is brought, it does not on that account form a part of the record. *Sims* v. *Hugsby*, 413.

CLIENT AND COUNSEL.

1. Where the relation of client and counsel is created, the counsel must contribute his own legal knowledge and assistance in the suit, and aid in conducting it to a final determination. *Cornelius* v. *Wash*, 98.

2. The confidence reposed in counsel is of a personal nature, and can not be delegated to another without the consent of the client. The client is entitled to receive the identical legal services he contracted for. *Ibid.*

COMMISSIONS.

See CLERKS, 1. SHERIFF, 8, 9, 10. FEES AND FEE-BILLS, 1, 2, 3.

CONFIRMATION.

See GOVERNOR'S CONFIRMATIONS.

CONSIDERATION.

1. In all special pleas to the consideration of a note, the manner of avoiding the obligation ought to be shown, a failure to do it is error. *Taylor* v. *Sprinkle*, 17.

2. A plea alleging a failure of consideration is insufficient without setting out wherein the failure consists. *Cornelius* v. *Vanorsdall, Assignee, &c*, 23.

3. In a case on an assigned note between maker and assignee, a consideration need not be averred. *Mason* v. *Buckmaster, Assignee, &c.*, 27.

4. A plea stating that the consideration has wholly failed without showing wherein, is bad. *Poole* v. *Vanlandingham*, 47.

5. The plea of "no consideration" is given by statute, and throws the *onus* on the plaintiff. *Ibid.*

6. A plea of failure of consideration without setting out how it has failed, is bad. *Bradshaw* v. *Newman*, 133.

7. See VENDOR AND VENDEE. 1.

8. A plea of failure of consideration should allege specially, in what the

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failure consists, and the extent of it, so that by knowing the extent, the court may be enabled to give judgment for the residue. *Simms* v. *Klein*, 302.

9. The statute authorizing pleas to the consideration of a note, enumerates four grounds of defense. 1. Where the note is made without any good or valuable consideration. 2. Where the consideration has wholly failed. 3. Where fraud and circumvention have been used in obtaining it, setting forth the facts which constitute fraud, &c., and, 4. Where there has been a partial failure of consideration, setting forth in what it consisted. *Ibid.*

10. In an action upon a note evidently given to pay the debt of a third person, if there is no consideration for the promise expressed in the note, a consideration should be averred in the declaration, and the want of such averment is fatal. *Connolly* v. *Cottle*, 364.

See PLEAS AND PLEADING, 21

CONSTABLE.

1. At common law, a justice may deputise any person he pleases to be his constable, and under the act of the 22d March, 1819, a magistrate can appoint a constable in a criminal case where there is a probability that the criminal will escape. *Flack and Johnson* v. *Ankeny*, 187.

2. A constable can not enter upon land and take in execution fruit trees standing and growing; they are a part and parcel of the freehold. *Adams and others* v. *Smith*, 283.

See OFFICE AND OFFICER, 1, 2.

CONSTITUTION.

A constitution can do what a legislative act can not, as it is the supreme, fixed and permanent will of the people in their original, sovereign and unlimited capacity, and in it are determined the condition, rights and duties of every individual of the community; from its decrees there can be no appeal, for it emanates from the highest source of power, the sovereign people. *Phoebe* v. *Jay*, 268.

CONSTRUCTION OF STATUTES.

1. In doubtful cases, if by giving a literal construction to a statute, it will be the means of producing great injustice and lead to consequences that could not have been anticipated by the legislature, courts are bound to presume that the legislature intended no such consequences; and to give such a construction as will promote the ends of justice. *Bryans* v. *Buckmaster*, 408.

2. A correct construction of the 33d section of the Practice Act, requires that a party should make application for further time to file the transcript of the record in cases of appeal, within the three days within which the transcript should have been filed. *Rager* v. *Tilford*, 407.

See CORPORATIONS, 1, 2.

CONTEMPTS.

The power to punish for contempts is incident to all courts of justice independent of statute, and the exercise of this power, resting in the sound discretion of the court can not be reviewed by the supreme court. *Clark* v. *The People*, 340.

CONTINUANCES.

1. Where the plaintiff amends in matters of form only, the defendant is not, for that reason, entitled to a continuance as a matter of course. *Scott* v. *Cromwell*, 25.

2. Granting continuances and new trials, rests in the discretion of the court, and a refusal of either can not be assigned as error, *Cornelius* v. *Boucher*, 32.

3. Where a copy of a note on which suit is brought, is filed with the declaration and an amendment of the *narr.* allowed by changing the word

"twenty" to "twenty-five" and adding the words "promise to pay," the defendant is not entitled to a continuance. *Crane* v. *Graves*, 66.

4. Where a statute declares that in a certain case a continuance shall be granted, it is error in the court to refuse it. *Rountree* v. *Stuart*, 73.

CONTRACTS.

1. A *supressio veri* in relation to any important fact affords ground for the interference of a court of equity to annul the contract. *Bryan and Morrison* v. *Primm*, 59.

2. A contract to pay a sum of money with twenty per cent. interest, is merged in the judgment rendered upon such contract, and the judgment is then controlled by the statute and not by the contract. *Masons* v. *Eakle*, 83.

3. The county commissioners of a county have no power to make a contract only as a court. *County Commissioners of Randolph* v. *Jones*, 237.

4. Where a contract is made with the state to print the laws, &c., for so much in state paper, "at its specie value when the same shall become due and payable," the amount to be paid by the state is not to be ascertained by an arbitrary valuation of the paper made by the officers of the state under a law passed subsequent to the contract, but by the market or current value of the paper. *Blackwell* v. *The Auditor*, 196.

CORPORATION.

1. Where a private corporation sues to recover real property or upon a contract, it must, under the general issue, produce the act of incorporation. *Hargrave* v. *The Bank of Illinois*, 1 2.

2. The act of indorsing a bill to a bank, does not admit that the bank is a corporation. *Ibid.*

3. Private incorporations must prove their corporate character, under the general issue in an action of assumpsit. *Jones* v. *The Bank of Illinois*, 124.

4. Counties are public corporations, and can be changed, modified, enlarged, restrained or repealed to suit the ever varying exigencies of the state; they are completely under legislative control. *Coles* v. *The County of Madison*, 154.

5. The ferry law of 12th February, 1827, does not authorize a county commissioners' court, to grant a ferry license to a corporation. *Betts* v. *Menard*, 395.

6. In a legislative act where "persons" are spoken of, none other than natural persons are meant. *Ibid.*

7 The act of incorporation creating the trustees of Kaskaskia a body corporate, no where confers the power upon them to take a grant of a ferry license. *Ibid.*

8. A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. *Ibid.*

COSTS.

1. If a non-resident gives bond for costs after the commencement of the suit but before the trial, it is sufficient. *White* v. *Stafford*, 67.

2. It is correct practice to discharge a security for costs and substitute another, in order that the discharged security may be a witness. *Kimmel* v. *Schwartz*, 278.

3. Neither the law nor the practice of the courts, require that the judgment should contain the amount of costs *in numero*. *Simms* v. *Klein*, 371.

COUNTY COMMISSIONERS.

The county commissioners of a county have no power to make a contract only as a court. *County Commissioners of Randolph* v. *Jones*, 237.

See Courts.

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COURTS.

1. It is discretionary with a court to hear evidence after the argument of a cause is opened by counsel. *Bloom* v. *Goodner*, 63.

2. It is irregular for the court to instruct the jury as to the weight of evidence *Humphreys* v. *Collier and Powell*, 297.

3. No particular form is required in the proceedings of a court, to render them an order or judgment; it is sufficient if they be final, and the party may be injured. *Wells* v. *Hogan*, 337.

4. The power to punish for contempt is an incident to courts of justice, independent of statute. *Clark* v. *The People*, 340.

5. The county commissioners' court is a mere creature of the statute, and though created by the constitution, its powers and duties are defined by the law, and in some instances are ministerial, and in others judicial. *Betts* v. *Menard*, 395.

6. A judgment will not be reversed if the court give instructions to the jury substantially as asked for. *Littletons* v. *Moses*, 393.

7. Upon a division of the court the judgment below is affirmed. *Kerr & Bell* v. *Whitesides*, 390.

See Corporations, 1.

CRIMINAL PROCEEDINGS.

A prisoner in a capital case, is considered as standing on all his rights, and waiving nothing on the score of irregularity; an agreement therefore between his counsel and the counsel for the people that the jury if they agree, may deliver their verdict to the clerk is irregular, and a verdict delivered in court under such an agreement in the absence of the jury, will be set aside for such irregularity. *Nomaque* v. *The People*, 145.

See Indictment. Surety, 5, 6.

DAMAGES.

1. A judgment in damages where the action is debt is erroneous. *Jones* v. *Lloyd, Serrill and Oakford*, 225.

2. A writ of inquiry is not necessary in any case where the damages can be ascertained by computation. *Rust* v. *Frothingham and Fort*, 331.

S. P. *Greenup and Conway* v. *Woodworth*, 232.

3. A tenant in common of a chattel who sues for a conversion of the same, is entitled to recover damages for his share or interest only. *Rolette* v. *Parker*, 350.

4. Ten per cent. damages will be allowed where an appeal is evidently taken for delay. *Simms* v. *Klein*, 302.

DEBT.

1. The plea of *nil debet* is not a good plea to an action of debt upon a record. *Chipps* v. *Yancey*, 19.

2. On a default in an action of debt, it is not necessary to have a jury to inquire of damages, unless required by the plaintiff. *Greenup and Conway* v. *Woodworth*, 232.

DECREE.

1. Though a bill for an injunction does not pray that the money be refunded, yet such relief can be granted, and a decree therefor is not erroneous. *Bryan and Morrison* v. *Primm*, 59.

2. When an injunction upon a judgment at law is dissolved, it is erroneous to enter a decree for the amount of the judgment at law. *Duncan* v. *Morrison and Duncan*, 151.

3. If the court, in looking into the whole record, find a decree has been entered in favor of a person not entitled to it, it will reverse it. *Hays' administrator* v. *Thomas and others*, 180.

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4. It is erroneous to enter up a decree upon the dissolution of an injunction against the security in the injunction bond for the amount of the judgment at law and the costs in that suit, and interest on the judgment with six per cent. damages and the costs of the suit in equity. *Hubbard* v. *Hobson*, 190.

S. P. *Crow's executors* v. *Prevo*, 216.

5. Where the circuit court sitting as a court of chancery, grants a rehearing, the first decree is thereby vacated, and the case stands as if no decree had been rendered in the cause. *Finley and Creath* v. *Ankeny*, 250.

See INJUNCTION, 8.

DEED.

1. A sheriff's deed which does not show on its face that the land was appraised and unsupported by proof that it was appraised, is insufficient to entitle the lessor claiming under it, to recover in an action of ejectment. *Curtis* v. *Doe ex. dem.*, 139.

2. A purchaser's right under a sheriff's deed is not affected under the act of 1819 by its not being acknowledged in court. It is well acknowledged, if it be acknowledged before the circuit court of the county of which he is sheriff, and where the land lies. *Fail and Nabb* v. *Goodtitle, ex. dem.*, &c., 201.

3. The usual and appropriate mode of executing a deed or other writing by an agent or attorney is, for the agent or attorney to sign his principal's name, and then his own as agent. *Mears* v. *Morrison*, 2[illegible]3.

4. A party who takes a *quit claim* deed for land, runs the risk of the goodness of the title. *Snyder* v. *Laframboise*, 343.

5. To render a deed for land valid and effectual, there must be both a delivery and an acceptance of the deed. A deed not delivered and accepted, though recorded, passes no estate. *Herbert and others* v. *Herbert*, 354.

DEFAULT.

1. It is erroneous to take a judgment by default when there are pleas filed by the defendant, in compliance with a rule against him to plead; in such case, the plaintiff has no right to have the defendant called. *Semple* v. *Locke*, 389.

2. A judgment by default set aside, after the term at which the judgment was rendered. *Kerr and Bell* v. *Whitesides*, 390.

DEMURRER.

1. After a demurrer is overruled, if the defendant rejoins to the replication and issue is taken thereon, it is a complete waiver of the demurrer. *Beers* v. *Philips*, 44.

2. After abandoning a demurrer, the decision upon it can not be assigned for error. *Ibid.*

3. A general demurrer to a *narr.* containing several counts, some of which are bad and one good, ought not to be sustained. *Lusk* v. *Cook*, 84.

4. So too when a count contains two distinct averments, one good and the other bad, the bad averment should be disregarded, as it does not vitiate the whole count, the rule is, *utile per inutile non vitiatur.* *Ibid.*

5. A variance between the instrument declared on and the one set out on oyer, is fatal on demurrer. *Taylor and Parker* v. *Kennedy*, 91

6. Motions, demurrers, &c., should be determined by the court in the order in which they are made, and a demurrer, while a motion to dismiss is undisposed of is a waiver of the motion, and a plea of the general issue, the demurrer being undisposed of, is a waiver of the demurrer. *Cobb* v. *Ingalls*, 233.

7. A demurrer by either party has the effect of laying open to the court not only the pleading demurred to, but the entire record for their judgment upon it as as to the matter of the law. *Phœbe* v. *Jay*, 268.

8. A demurrer will not reach a variance between the writ and declaration. *Rust* v. *Frothingham and Fort*, 331.

S. P. *Prince* v. *Lamb*, 378.

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DEPOSITIONS.

1. Upon an order for a change of venue and granted, but before the record is removed, an affidavit of the materiality of witnesses for the purpose of taking their depositions, is properly made in the circuit court of the county where the suit is brought, and the computation of time and distance must be made from that county. *Phelps* v. *Young*, 327.

2. It is not necessary that the magistrate should state the *time* and *place* of taking the depositions. *Ibid.* *Quere.*

DEPUTY.

1. At common law, a justice may authorize any person he pleases to be his officer, and under the act of 2d March, 1819, a magistrate can appoint a constable in a criminal case, where there is a probability that the criminal will escape. *Flack and Johnson* v. *Ankeny*, 187.

2. A return to a writ by a person who signs himself "Deputy sheriff," without stating "for A. B., sheriff," is erroneous. *Ryan* v. *Eads*, 217.

3. A deputy sheriff can only act in the name of his principal. *Ibid.*

DESCENT AND DEVISE.

M. devised by will his estate to his daughter R., but if she died before she came of age, then to his friend G. L. R. died before she came of age, and G. L. died before R. The devise to G. L is a good executory devise, and the estate passed to his heirs. *Ackless* v. *Seekright*, 76.

DEVASTAVIT.

See ADMINISTRATORS, 2, 5. SURETY, 1.

DISCHARGE.

A discharge under the bankrupt law of N. York, is no bar to a suit brought here on a contract made before the discharge. *Mason* v. *Wash*, 39.

DUE DILIGENCE.

1. Under our statute, an assignor of a note is not liable unless *due diligence by suit* against the maker has been used where that course will obtain the money. *Mason* v. *Wash*, 39.

2. The assignor of a note for the payment of money, or a specific article of property, is not liable, unless due diligence has been used to recover of the maker. *Thompson* v. *Armstrong*, 48

3. An averment of the insolvency of the maker is sufficient to excuse the use of due diligence. *Ibid.*

4. To excuse due diligence, an averment in the declaration that "at the time the note became due and payable, diligent search was made at the said county for the maker, for the purpose of demanding payment thereof, but that he could not be found." is insufficient. *Tarlton* v. *Miller*. 68.

5. In a suit by the assignee against the assignor, seeking to recover on the ground that he has used due diligence to recover of the maker, the rule is, that he must show that he brought his action against the maker at the first term of the court after the note fell due. *Lusk* v. *Cook*, 84.

EJECTMENT.

1. A sheriff's deed which does not show on its face that the land was appraised, and unsupported by proof that it was appraised, is insufficient to entitle the lessor claiming under it, to recover in an action of ejectment. *Curtis* v. *Doe ex dem.*, 139.

2. A purchaser's right under a sheriff's deed is not affected under the act of 1819, by its not being acknowledged in court—it is well acknowledged if it

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be acknowledged before the circuit court of the county of which he is sheriff and where the land lies. *Fail and Nabb* v. *Goodtitle ex dem.*, 201.

3. Prior possession is evidence of a fee, and although the lowest, unless rebutted by higher, it must prevail. *Herbert and others* v. *Herbert*, 354.
4. A prior possession short of twenty years under a claim of right, will prevail over a subsequent possession of the same time where no other evidence of title appears on either side. *Ibid.*
5. A prior possession of less than twenty years without any other evidence, is *prima facia* evidence sufficient to put the tenant on his defense. *Ibid.*
6. Where the title to land is divested by operation of law, as in sales under execution, the possession of the defendant is not such an adverse possession as will defeat the deed and render it inoperative. *Ibid.*

ENDORSEMENT.

See Assignment 3.

ERROR.

1. Irregularity in swearing a jury if not objected to at the time, can not be assigned as error. *Cornelius* v. *Boucher*, 32.
2. Granting or refusing new trials and continuances can not be assigned as error. *Ibid.*

S. P. *Sawyer* v. *Stephenson*, 24.

S. P. *Littletons* v. *Moses*, 39?.

3. After abandoning a demurrer the decision upon it can not be assigned for error. *Beers* v. *Philips*, 44.
4. If a replication departs from the declaration, it is error. *Collins and Collins* v. *Waggoner*, 51.
5. In a suit against a sheriff for money had and received, an assessment of damages by the court without the intervention of a jury, is error. *Whiteside* v. *Bartleson*, 71.
6. It is error in the court to render a judgment by default where a plea is filed and unanswered. *White* v *Thompson*, 72.
7. Where a statute declares that in a certain case a continuance shall be granted, it is error in the court to refuse it. *Rountree* v. *Stuart*, 73.
8. It is error for the circuit court to enter up judgment on an award under the act of 1819; the proper course is for a rule of court to be entered up on filing the submission and award, requiring the parties to abide by the award. *Chandler* v. *Gay* 88.
9. Where an injunction upon a judgment at law is dissolved, it is erroneous to enter a decree for the amount of the judgment at law. *Duncan* v. *Morrison, &c.*, 151.

S. P. *Hubbard* v. *Hobson*, 190.

10. Where a party defendant appears and pleads by attorney without process, it is error to proceed to judgment against those who have been served, without also taking judgment against him who thus appeared by attorney. *Ladd and Taylor* v. *Edwards*, 182.
11. It is erroneous upon the dissolution of an injunction, to enter up a decree against the security in the injunction bond for the amount of the judgment at law and the costs in that suit, and interest on the judgment and six per cent. damages, and the costs of the suit in equity. *Hubbard* v. *Hobson*, 190.

S. P. *Crow's executors* v. *Provo*, 216.

12. A return to a writ by a person who signs himself "Deputy sheriff," without stating "for A. B., sheriff," is erroneous. *Ryan* v. *Eads*, 217.
13. A judgment in damages where the action is debt is erroneous. *Jones* v. *Lloyd and others*, 225.
14. It is too late after a judgment has been rendered on a bond and a *fi. fa.* issued to object that the party did not sign the bond. It is therefore erroneous to quash an execution issued on such judgment upon an affidavit affirming the non-execution of the bond. *Clary* v. *Cox and others*, 235.

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15. The supreme court will not entertain a writ of error on a judgment founded on a *tort*, after the death of the *tort feasor*. *Barrett and wife* v. *Gaston's executor*, 255.

16. It is erroneous to take a judgment by default where the declaration has not been filed ten days before court, unless by consent. *Gore* v. *Smith*, 267.

17. A writ of error will not lie where the judgment, exclusive of costs, is less than twenty dollars. *Clark* v. *Ross*, 334.

18. The word "appeals," in the thirty-second section of the practice act of 1827, applies equally to writs of error. *Ibid.*

19. Variances between the writ and declaration can not be assigned for error. *Prince* v. *Lamb*, 378.

20. A judgment rendered for "interest on the amount," without stating what the amount is, by way of damages, is uncertain and therefore erroneous. *Ibid.*

21. It is not error to permit clerical errors to be amended on the trial. *Hargrave* v. *Penrod*, 40..

22. Writ of error with *supersedeas* will not be dismissed, though the bond on which the *supersedeas* was obtained, was executed by the authority of the attorney, and no proof of his authority to execute it. *Cromwell* v. *March*, 326.

See DEFAULT, 1.

ESCAPE.

1. The sheriff releasing a convict, under an act of the legislature, committed for forgery, where one-half of the fine imposed goes to the person attempted to be defrauded by the forgery, is not liable in an action for an escape brought by such person against him. *Rankin* v. *Beaird*, sheriff, 163.

2. A *ca. sa.* issued upon a judgment is not void on its face, though it does not recite that the oath required by law to be made was made before it issued, nor is it necessary that the declaration for an escape on such *ca. sa.* should aver that the oath was made. *Lattin* v. *Smith*, 361.

EVIDENCE.

1. A certificate of the register of a land office is not evidence. *Fail and Nabb* v. *Goodtitle ex dem*, 201.

2. The certificate of the sheriff of the sale of land without producing the judgment and proving the regularity of the sale is no evidence of title in the purchaser. *Curtis* v. *Swearingen*, 207.

3. Any evidence that tends to prove a promise to take a case out of the statute of limitations should be left to the jury with instructions from the court as to the law thereon. *Mellick* v. *De Seelhorst*, 221.

4. Proof of an actual payment of part of a debt barred by the statute of limitation will be sufficient evidence for the jury to infer a promise to pay the balance. *Ibid.*

5. The execution of a note is not evidence of a settlement of all demands due from one party to the other, anterior to the date of the note. *Ankeny* v. *Pierce*, 289.

6. Parol evidence can not be received of the contents of records or written instruments, if they are in the power of the party to be produced. *Humphreys* v. *Collier and Powell*, 297.

7. A record from another state is conclusive evidence of the debt claimed— it imports absolute verity, and nothing can be alleged against it. *Rust* v. *Frothingham and Fort*, 331.

8. Where there is a total failure of title on a sale of land, and no circumstances are proved to induce a jury to believe that the vendor has acted dishonestly, it is not *prima facia* evidence of fraud. *Snyder* v. *Laframboise*, 343.

9. The supreme court will not protect a party who stands by and permits improper evidence to be given to the jury. *Ibid.*

10. The rule of law is, that where there is a community of interest and design, the declarations of one of the parties are evidence against the rest, and this rule is not confined to cases of civil contract. *Ibid.*

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11. Prior possession is evidence of a fee, and although the lowest unless rebutted by higher, it must prevail. *Herbert and others* v. *Herbert*, 354.

12. A prior possession of less than twenty years without any other evidence, is *prima facie* evidence sufficient to put the tenant on his defense. *Ibid.*

13. A grantor in a deed who has no interest in the suit, and who has made no covenants, is, upon general principles, a competent witness. *Ibid.*

14. The possession of a note, though indorsed by the payer, is, unless the contrary appear, evidence that he is the *bona fide* holder of it. *Brinkley* v. *Going*, 366.

See Ejectment, 4.

EXECUTION

1. An execution issued upon a judgment for "20 per cent. interest from its rendition," will be quashed for irregularity. *Masons* v. *Eakle*. 83.

2. A party can not, on motion, quash his own execution, if it be regular. *Taylor* v. *Winters*, 130.

3. An execution indorsed that "state paper" would be received in discharge of it, can not on motion of the plaintiff be quashed, so as to enable him to take out another execution without such indorsement. *Ibid.*

4. See Error, 14.

5. Registered servants are goods and chattles, and may be sold on execution. *Nance* v. *Howard*, 242.

6. After the time of the replevy of a judgment has expired the plaintiff may, if he chooses, issue an execution on the original judgment without noticing the security in the replevy. *Finley and Creath* v. *Ankeny*, 250.

7. If an execution has issued irregularly and informally, the most speedy and easiest mode to obtain relief, is to apply to a judge to stop all proceedings on it, until an application can be made to the circuit court to arrest or vacate the proceedings of the sheriff. *Greenup and Conway* v. *Brown*, 252.

8. A constable can not enter upon land, and take in execution fruit-trees standing and growing—they are a part and parcel of the freehold. *Adams and others* v. *Smith*, 28 .

9. The oldest execution first delivered to the officer, binds the personal property, though issued upon a junior judgment. An execution returned "not levied," is *functus officio*. *Garner* v. *Willis*, 568.

10. If a purchaser at a sheriff's sale takes possession of the property purchased without the consent and against the command of the officer, though the purchaser be the plaintiff in the *fi. fa.* under which the sale is made, he is a trespasser. *Ibid.*

11. The defendant in an execution who desires a levy upon any particular tract of land, should exhibit to the officer all the evidences of his title to it—the officer is not obliged to take any loose memorandum of title which the defendant may show him. *Beaird* v. *Foreman and others*, 385.

12. It is the duty of an officer to whom an execution is directed and delivered, to make reasonable exertions to levy it on the property of the defendant, and if he is guilty of gross negligence, he will be liable. *Hargrave* v. *Penrod*, 401.

13. Fee-bills are governed by the same rules as executions, and after 90 days they are *functi officio*. *Ibid.*

14. When a sheriff sells property on execution, and realizes a part of the debt, he is entitled to commissions only on the sum made. *Bryans* v. *Buckmaster*, 408.

See Capias ad satisfaciendum. Clerks, 2. Sheriff, 6, 9, 10. Appraisement. Office and Officer. Chancery, 14.

EXECUTORS AND ADMINISTRATORS.

See Administrators.

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FALSE AFFIRMATION.

Fraud vitiates every contract, but every false affirmation does not amount to a fraud. *Sims* v. *Klein*, 302.

FALSE IMPRISONMENT.

See SLAVES AND SERVANTS, 3. PLEAS AND PLEADINGS, 17

FEES AND FEE-BILLS.

1. A clerk has no right to insert in a fee-bill a charge for sheriff's commissions, when the sheriff himself, in his return, makes no such charge. *Bryans* v. *Buckmaster*, 408.
2. When a sheriff sells property, and realizes a part of the debt, he is entitled to commissions only on the sum made. *Ibid.*
3. When he does not sell, if real estate is levied on, the appraisement will furnish an equitable rule by which to calculate his commissions. *Ibid.*
4. Fee-bills are governed by the same rules as executions, and after 90 days they are *functi officio*. *Hargrave* v. *Penrod*, 401.

FERRIES.

1. The ferry law of 1827 (Feb. 12) does not authorize a county commissioners' court to grant a ferry license to a corporation. *Betts* v. *Menard*, 395.
2. The act of incorporation, creating the trustees of Kaskaskia a body corporate, no where confers the power to accept a grant of a ferry license. *Ibid.*
3. The legislature never intended to authorize the county commissioners' court to grant licenses to keep ferries, to any other than natural persons. *Ibid.*

FINES.

See CONTEMPTS. RETAILING.

FORCIBLE ENTRY AND DETAINER.

1. The statute in relation to forcible entry and detainer requires that all the jury should sign the verdict. A mere clerical mistake, omitting the name of one of the jurors, can not operate to reverse a judgment. *Bloom* v. *Goodner*, 63.
2. Under the act of 1819, actual force is necessary to constitute a forcible detainer, and the inquisition can be held at any other place than the premises. *Ibid.*
3. The proceedings under the statute for forcible entry and detainer, being summary, and contrary to the course of the common law, must strictly conform to the requisitions of the statute. *Wells* v. *Hogan*, 337.
4. A complaint made in writing before two justices of the peace, that the complainant "is entitled to the possession of a house and lot in the town of G., wherein one Wells lives, and that said Wells refuses to give possession of said house and lot, though he has been notified to do so in writing," is insufficient. *Ibid.*
5. In order to give the justices jurisdiction in such case, the plaintiff ought to state such facts as would show that the relation of landlord and tenant existed, and a holding over after a demand made in writing by the landlord. *Ibid.*

FOREIGN LAWS.

The laws of another state must be pleaded or proved; the courts of this state can not *ex officio* take notice of them. *Mason* v. *Wash*, 39.

FORGERY.

A person whose name is forged is a competent witness to prove the forgery, although upon conviction he receives one-half of the fine imposed. His credibility is left to the jury. *Noble* v. *The People*, 54.

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FRAUD.

1. It is not an indictable fraud to seperate the condition from the penalty of the bond—it is not such an act as common prudence can not guard against. *Wright* v. *The People*, 102.
2. Fraud vitiates every contract, but every false affirmation does not amount to a fraud. *Sims* v. *Klein*, 302.

See Sale of Land, 2, 3, 5. Warranty, 1.

FRAUDS AND PERJURIES.

An undertaking by parol by which a third person obtains credit, is collateral, within the statute of frauds and perjuries, and not binding. *Everett* v. *Morrison*, 79

See Consideration, 6.

GOVERNOR'S CONFIRMATION.

1. A confirmation made by the governor of the North-West Territory on the 12th February, 1790, to a person claiming a tract of land in said territory, is, under the resolutions and instructions of congress of June and August, 178[illegible], valid, and operates as a release on the part of the United States of all their right. *Doe ex dem*, &c. v. *Hill*, 304.
2. Under the power to confirm, the governor was not limited to any definite number of acres, but could confirm to the extent claimed by the settler. *Ibid.*
3. A confirmation made by the governor can not be nullified by any act of congress. *Ibid.*
4. In order to show the deed of confirmation, it is not necessary that any evidence should be given of title to the land, because the power of the governor was plenary, and his decision on the claims presented to him is binding on the United States. *Ibid.*
5. By the deed of cession of 1784 from Virginia to the United States, congress was obliged to confirm the settlers in their possessions and titles. *Ibid.*

GUARANTEE.

See Frauds and Perjuries.

HEIRS AND DEVISEES.

1. Where a person dies leaving no issue or father, but a mother, brothers and sisters, the mother is heir to her son's whole estate. *Hays' administrator* v. *Thomas and others*, 180.
2. And indenture of a negro or mulatto, entered into in pursuance of the act of 17th, September, 1807, is not terminated by the death of the master, but passes to his legatees, executors or administrators, but not to the heir at law. *Phœbe* v. *Jay*, 268.

ILLEGAL CONTRACT.

A promise to pay the county commissioners of a county to do an act which they are required to do by law, is contrary to public policy and therefore void. *County Commissioners of Randolph* v. *Jones*, 237.

INDENTURE.

1. Indentures of negroes and mulattoes executed under the act of 17th September, 1807, though void under that act, are rendered valid by the third section of the sixth article of the constitution of this state. *Phœbe* v. *Jay*, 268.
2. In a plea to an action of assault and battery, &c., brought to try the plaintiff's right to freedom, justifying under an indenture entered into with the plaintiff, it is not necessary that it should state, or that the master should prove that every requisition of the statute was complied with before the execution of the indenture. In such case the *onus probandi* rests with

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the plaintiff, and he may show in a replication to the plea, facts inconsistent with the validity of the indenture. *Ibid.*

3. An indenture entered into under the act of 1807, is not terminated by the death of the master, but passes to his legatees, executors or administrators, but not to his heir at law. *Ibid*

See Master and Servant.

INDICTMENT.

1. If an indictment does not aver the year to be the year of our Lord, and does not contain the words "in the name. and by the authority of the people of the state of Illinois," it is bad. *Whiteside and others* v. *The People*, 21.
2. In an indictment for a riot, the facts constituting the riot should be clearly set forth. *Ibid.*
3. An indictment without being indorsed "a true bill," and signed by the foreman, is nullity. *Nomaque* v. *The People*, 145.
4. All objections to the form of an indictment must be made before trial, and an omission to state in an indictment that it was found upon the "oaths" of the grand jury is matter of form only, and can not be assigned for error. *Curtis* v. *The People.*
5. In an indictment for an assault and battery with an intent to kill, it is necessary that the intent should be alleged to be unlawful and felonious. *Ibid.*
6. Where there are two or more counts in an indictment, one of which is good and the rest bad, and a general verdict of guilty, the judgment shall stand. *Ibid.*

See Recognizance, 1, 2.

INFANT.

An order of court appointing the next friend of an infant plaintiff, is unnecessary. *French* v. *Creath, &c.*, 31.

INJUNCTION.

1. An appeal will lie, by consent entered of record, from an interlocutory order dissolving an injunction. *Cornelius* v. *Coons and Jarvis*, 37.
2. Though a bill for an injunction does not pray that the money be refunded, yet such relief can be granted and a decree therefor is not erroneous. *Bryan and Morrison* v. *Primm*, 59.
3. An injunction ought not to be allowed for more of the judgment than the complainant shows to be unjust. *Duncan* v. *Morrison and Duncan*, 151.
4. Where an injunction upon a judgment at law is dissolved, it is erroneous to enter a decree for the amount of the judgment at law. *Ibid.*
5. It is right to dissolve an injunction and dismiss the bill without compelling an answer from all the defendants. *Reynolds* v. *Mitchell*, 177.
6. It is erroneous upon the dissolution of an injunction to enter up a decree against the security in the injunction bond for the amount of the judgment at law and the costs in that suit, and interest on the judgment and six per cent. damages and the costs of the suit in equity. *Hubbard* v. *Hobson*, 190

S. P. *Crow's executors* v. *Prevo*. 216.

7. If a bill for an injunction contains on its face no equity, it will be dissolved on motion. *Crow's executors* v. *Prevo*, 216.
8. Where the plaintiff in a *fi. fa.* and the officer executing it, are made parties to a bill for an injunction by the defendant therein, if they do not participate in the acts of the officer in making the levy, &c., they need not answer the bill; the answer of the officer is sufficient to authorize the court to proceed and make a decree. *Beaird* v. *Foreman and others*, 385.

INQUIRY, WRIT OF.

1. The long and uniform practice in this state has been to execute writs of inquiry in the presence of the court. *Bell and Bell* v. *Aydelott*, 45.

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2. In a suit against a sheriff for money had and received, an assessment of damages by the court without a jury, is error. *Whitesides* v. *Bartleson*, 71.

3. In an action on a judgment against administrators suggesting a *devastavit*, a judgment by default admits the truth of the allegations in the declaration, and a jury of inquiry is not necessary to ascertain the damages. *Greenup and Conway* v. *Woodworth*, 232.

4. A writ of inquiry is not necessary in any case where the damages can be ascertained by computation. *Rust* v. *Frothingham and Fort*, 331.

INQUISITION OF PROPERTY.

To authorize an inquiry by the sheriff into the right of property, it is necessary there should be a taking of personal property by a writ of execution regularly issued at the suit of a plaintiff against a defendant, and a claim interposed by a third person. *Mason* v. *The State Bank*, 183.

INSOLVENT.

1. An averment of the insolvency of the maker of a promissory note is sufficient to excuse the use of due diligence. *Thompson* v. *Armstrong*, 48.

2. The insolvency of the maker of a note may be proved by facts tending to show such insolvency, connected with general reputation as to that point. *Humphreys* v. *Collier and Powell*, 298.

INTEREST.

1. A contract to pay a sum of money with twenty per cent. interest is merged in the judgment rendered upon such contract. *Masons* v. *Eakle*, 83.

2. It is not essential, to entitle a party to recover interest on a judgment rendered in another state and sued on here, that the declaration should allege that by the laws of the state where the judgment was rendered, interest is recoverable. *Prince* v. *Lamb*, 378.

See Error, 20.

JOINT DEBTORS.

1. Where a suit is brought against several joint debtors, a recovery must be had against all or none, unless one or more of the defendants interpose a defense which is personal to himself, such as infancy or bankruptcy. *Kimmel* v. *Shultz and others*, 169.

2. If a suit is brought against three or more obligors in a bond, on some of whom process is not served, the regular practice is to take judgment against those on whom process is served, and proceed by *sci. fa.* against those not served. *Ladd and Taylor* v. *Edwards*, 182.

JUDGMENT.

1. A contract to pay a sum of money with twenty per cent. interest is merged in the judgment rendered upon such contract, and the judgment is then controlled by the statute and not by the contract. *Masons* v. *Eakle*, 83.

2. After a final judgment is entered, the court has no power, at a subsequent term, to set it aside and direct a nonsuit to be entered, and if the court had the power to set aside the judgment, it ought to direct a new trial and not a nonsuit. *Morgan* v. *Hays*, 126.

3. Judgment will be rendered against him who commits the first error in pleading. *Snyder* v. *State Bank*, 161.

4. A judgment rendered in a sister state is to be regarded here in the same light as it would be in the state where it was rendered. *Kimmel* v. *Shultz and others*, 169.

5. An entire judgment against several defendants can not be affirmed as to one and reversed as to the others, and the same rule should prevail as to plaintiffs. *Hays' administrator* v. *Thomas and others*, 180.

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6. A judgment can not be rendered on a verdict for eight hundred dollars in damages where the action is debt. *Jones* v. *Lloyd and others*, 225.

7. In such case the judgment ought to be for the amount of the debt found to be due and the damage sustained, which damages would be the amount of interest on the sum found by the jury as debt. *Ibid.*

8. A judgment rendered for "interest on the amount," without stating what the amount is, by way of damages, is uncertain, and therefore erroneous. *Prince* v. *Lamb*, 378.

9. Where the supreme court have the power to render such a judgment as the court below ought to have rendered, it will do so without sending the parties back for that purpose. *Ibid.*

10. It is error to take a judgment by default, when the defendant has complied with a rule to plead. *Semple* v. *Locke*, 389.

11. Judgment by default set aside, after the term at which it was rendered. *Kerr and Bell* v. *Whitesides*, 390.

12. When the court is divided in opinion, the judgment of the court below is affirmed. *Ibid.*

13. Notice of motion by auditor against a delinquent treasurer, must ask for a judgment. *Auditor* v. *Hall*, 392.

14. A judgment will not be reversed if the court give instructions to the jury, substantially as asked for. *Littletons* v. *Moses*, 393.

See CAPIAS AD SATISFACIENDUM. ATTACHMENT, 1. REPLEVY, 2. COSTS, ADMINISTRATORS, 7. INTEREST, 2.

JURISDICTION.

1. A justice of the peace has no jurisdiction where the account exceeds one hundred dollars, though it may be reduced by credits to a sum less than one hundred dollars. *Clark* v. *Cornelius*, 46.

S. P. *Ellis* v. *Snider*, 336. *Blue* v. *Weir and Vanlandingham*, 372.

See *Maurer* v. *Derrick*, 197.

2. Where a justice has jurisdiction, but proceeds erroneously, he is not liable as a trespasser, but where he has not jurisdiction, he is. *Flack & Johnson* v. *Ankeny*, 187.

3. Although the accounts of the plaintif may, originally, have amounted to more than one hundred dollars, yet, if the defendant admits a balance to be due to plaintiff of less than one hundred dollars, and promises to pay it, a justice of the peace has jurisdiction. *Maurer* v. *Derrick*, 197.

4. Consent can not give jurisdiction. *Foley* v. *The People*, 57.

5. Where it appears from the account of the plaintiff that he claims less than one hundred dollars before a justice of the peace, the justice is not ousted of his jurisdiction, though a witness should prove that the plaintiff is entitled to more than one hundred dollars. *Ellis* v. *Snider*, 336.

6. Before a justice of the peace, the plaintiff's statement of his claim must govern as to jurisdiction. *Ibid.*

See JUSTICE OF THE PEACE, 7. OFFICE AND OFFICER, 2.

JURORS AND JURY.

1. Swearing the jury is matter of form, and an irregularity in swearing them not objected to at the time, can not be assigned as error. *Cornelius* v. *Boucher*, 32.

2. An opinion formed, but not expressed, does not disqualify a jury. *Noble* v. *The People*, 54.

3. The statements of jurors ought not to be received to impeach their verdict. *Forester and Funkhouser* v. *Guard Siddall & Co.*, 74.

S. P. contra *Sawyer* v. *Stevenson*, 24.

4. It is an act of great indiscretion in a court to permit the jurors to go at large after they are sworn, as well before the trial, as after. *Nomaque* v *The People*, 145.

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5. The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. *Snyder* v. *Laframboise*, 343.

JUSTICE OF THE PEACE.

1. A justice of the peace has no power to investigate an account exceeding one hundred dollars, though it may be reduced by credits to a sum less than one hundred dollars. *Clark* v. *Cornelius*, 46.
2. Where a justice of the peace has jurisdiction, but proceeds erroneously, he is not a trespasser, but where he has not jurisdiction, he is. *Flack & Johnson*, v. *Ankeny*, 187.
3. At common law a justice of the peace can deputize any person he pleases to be his officer. *Ibid.*
4. Although the accounts of the plaintiff may originally have amounted to more than one hundred dollars, yet, if the defendant admits a balance to be due to plaintiff of less than one hundred dollars. and promises to pay it, a justice of the peace has jurisdiction. *Maurer* v. *Derrick*, 197.
5. If a justice of the peace officiously, and without any complaint on oath or of his own knowledge, issues his warrant to apprehend a person, he will be liable in an action of trespass. *Flack* v. *Harrington*, 213.
6. Before a justice of the peace, the plaintiff's statement of his claim must govern as to jurisdiction. *Ellis* v. *Snider*, 336.
7. In order to give the justices of the peace jurisdiction in an action of forcible detainer, the plaintiff should state in his complaint that the defendant wilfully, and without force, holds over the premises after the time has expired for which they were leased to him. *Wells* v. *Hogan*, 337.
8. If a justice of the peace in punishing for a contempt, acts maliciously or oppressively, he can be punished by indictment or impeachment but no appeal lies from his judgment imposing a fine for a contempt. *Clark* v. *The People*, 340.

KASKASKIA.

The act of incorporation creating the trustees of Kaskaskia a body corporate, no where confers the powers on them to take a grant of a ferry license. *Betts* v. *Menard*, 395.

LANDLORD AND TENANT.

1. A tenant is estopped from denying the title of his landlord. *Ankeny* v. *Pierce*, 262.
2. If a tenant enters upon and enjoys leased premises, though his landlord may have no title, the tenant has no right to complain of his landlord until after an eviction. *Ibid.*
3. In proceedings under the statute for forcible entry and detainer, the complaint should show that the relation of landlord and tenant exists. and a holding over after a demand made in writing by the landlord. *Wells* v. *Hogan*, 337.

LARCENY.

Larceny can not be committed of goods and chattels found in the highway where there are no marks by which the owner can be ascertained—one ingredient of larceny is wanting in such case, to wit: a felonious taking. *Tyler* v. *The People*, 293.

LAWS.

See Foreign Laws. Statutes.

LEX LOCI.

The laws of the country where the contract is made must govern its construction and determine its validity. *Bradshaw* v. *Newman*, 133.

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LIEN.

The act of 1819 laying a tax on certain property, makes no distinction between residents and non-residents—the lien attaches on the property, and not on the person. *Edwards* v. *Beaird*, 70.

LIMITATIONS. (STATUTE OF.)

1. An unqualified promise to pay a debt barred by the statute, will take it out of it. *Mellick* v. *De Seelhorst*, 221.
2. Where the promise to pay is accompanied with a qualification, it rests with the plaintiff to do away the qualification. *Ibid.*
3. An acknowledgment that the debt is still due is sufficient. *Ibid.*
4. So also proof of an actual payment of part of the debt will be sufficient evidence for the jury to infer a promise to pay the balance. *Ibid.*
5. To take a case out of the statute of limitations, proof that the defendant promised to pay the debt is insufficient without evidence of the original consideration of the indebtedness. *Kimmel* v. *Schwartz*, 278.
6. The promise to pay a debt barred by the statute only removes the bar, and leaves the case to be proved as if no statute had been pleaded. *Ibid.*
7. The rule as to what proof is required to take a case out of the statute of limitations is this; the promise to pay must be absolute and unqualified, and must not be extended by implication or presumption, beyond the express words of the promise. *Ibid.*
8. In an action of slander, if the words were spoken within one year before the repeal of the statute of limitations, the old statute will be no bar. *Naught* v. *Oneal*, 37.
9. An action of assumpsit was commenced in 1822, upon a contract made in 1812, to which the statute of limitations was pleaded—this statute was passed in 1819, and is no bar to such action. *Tufts* v. *Rice*, 64.
10. *It seems*, that if the five years had run under the territorial government it might have been pleaded in bar. *Ibid.*

See EVIDENCE, 3.

MANDAMUS.

1. A premptory *mandamus* will issue to a county commissioners' court to compel it to restore a clerk the cause of whose removal is not stated on their records. *Street* v. *County Commissioners of Gallatin*, 50.
2. The court will not grant a *mandamus* to a person to do an act where it is doubtful whether he has the right by law to do such act or not. *The People ex relat. Ewing* v. *Forquer*, 104.
3. Where a person is in office by color of right and exercising the duties thereof, a *quo warranto* is the proper remedy for another person claiming the same office, and not a *mandamus*. *Ibid.*
4. When the return upon a rule to show cause why a mandamus should not issue contradicts the facts set out in the affidavit upon which the rule is granted, it seems that this court has no power to ascertain the real facts, as the legislature have provided no mode by which they are to be tried and determined. *The People, &c.*, v. *Forquer*, 104.

MASTER AND SERVANT.

An indenture by a free negro woman entered into in 1804, and not signed by the master is void. The 13th section of the act of 1807 does not embrace cases where the master and servant did not agree upon the time of service before the clerk. *Cornelius* v. *Cohen*, 131.

See SLAVES AND SERVANTS, 1.

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MORTGAGE.

A return of two *nihils* to a *scire facias* to foreclose a mortgage, is equivalent to an actual service, even though the defendant might have been personally served. *Cox* v. *McFerron*, 28.

See SCIRE FACIAS, 2, 3.

MOTION.

1. The notice of a motion by the auditor against a delinquent treasurer must be certain and specific, and must ask for a judgment. *Auditor* v. *Hall*. 392.

2. Appeals dismissed on motion, if transcript of the record is not filed within the time required by law. *Green* v. *McConnell*, 236.

S. P. *Green* v. *Atchison*, 391.

S. P. *Bebee* v. *Boyer*, 406.

NEGROES AND MULATTOES.

The act of 1807 respecting the introduction of negroes and mulattoes into the territory, is void, as being repugnant to the sixth article of the ordinance of 1787. *Phœbe* v. *Jay*, 268.

NEW TRIAL.

1. Granting new trials rests in the sound discretion of the court and a refusal to grant one can not be assigned as error. *Sawyer* v. *Stephenson*, 24.

S. P. *Cornelius* v. *Boucher*, 32.

2. An affidavit, on a motion for a new trial setting forth the discovery of new testimony, should state the name of the witness and also the facts he can prove. *Forrester and Funkhouser* v. *Guard, Siddall & Co.*, 74.

3. On the production of affidavits proving that one of the jurors had made up his mind against the prisoner, though he swore that he had not formed an opinion, if the fact is discovered after the trial, a new trial will be granted. *Nomaque* v. *People*, 145.

4. A refusal to grant a new trial can not be assigned as error. *Clemson* v. *Kruper*, 210.

S. P. *Collins* v. *Claypole*, 212.

S. P. *Street* v. *Blue*, 261.

S. P. *Adams and others* v. *Smith*, 283.

S. P. *Vernon, Blake & Co.*, v. *May*, 294.

S. P. *Littleton* v. *Moses*, 393.

NEXT OF KIN.

1. The computation of the civilians is adopted to ascertain who are next of kin to an intestate. *Hays, administrator* v. *Thomas and others*, 180.

2. Where a person dies leaving no issue or father, but a mother brothers and sisters, the mother is heir to her son's whole estate, being next of kin. *Ibid.*

NON EST FACTUM.

Non est factum is the proper plea to an action on a note which has been altered, without the knowledge or assent of the maker of the note. *Pankey* v. *Mitchell*, 383.

NONSUIT.

The effect of a judgment of nonsuit in an attachment case, is no more than the quashal of the attachment, and leaves the party to proceed *de novo*. *Bates* v. *Jenkins*, 411.

NOTES, FORM OF.

See PROMISSORY NOTES, 1, 7. ALTERATION.

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NOTICE.

1. Notice of an equity to an agent is notice to his principal. *Byran and Morrison* v. *Primm*, 59.
2. The notice of a motion by the auditor against a delinquent treasurer must be certain and specific, and must ask for a judgment. *Auditor* v. *Hall*, 392.
3. The mere want of knowledge of a debtor's having estate or effects, or an averment that the plaintiff did not give him notice of property on which to levy, is not sufficient to excuse the sheriff. *Hargrave* v. *Penrod*, 401.

OATHS.

1. Swearing a witness by the uplifted hand is a legal swearing independent of the statute. *Gill* v. *Caldwell*, 53.
2. Oaths are to be administered to all persons according to their opinions and as it most affects their consciences. *Ibid.*

OFFICE AND OFFICERS.

1. An officer acts at his peril—he is bound to obey the mandate of the writ, and if he proceeds to execute it, he is bound to complete the execution of it. *Laitin* v. *Smith*, 361.
3. It is sufficient to justify an officer executing process, that the magistrate had jurisdiction—he is not bound to examine into the validity of the proceedings, or regularity of the process. *Ibid.*
3. If an officer acts illegally or oppressively in executing process, the remedy against him is at law, and a court of equity can not interfere. *Beaird* v. *Foreman and others*.
4. It is the duty of an officer to whom an execution is directed and delivered, to make reasonable exertions to levy the same on the property of the defendant, and if he is guilty of gross negligence in this, he will be liable. *Hargrave* v. *Penrod*, 401.

See JURISDICTION, 2. JUSTICE OF THE PEACE, 5. SECRETARY OF STATE. ESCAPE, 1.

ORDINANCE.

1. The ordinance of 1787 is still binding upon the people of this state unless it has been abrogated by "common consent." *Phœbe* v. *Jay*, 26 .
2. The act of congress accepting the constitution of this state and admitting it into the Union, abrogated so much of the ordinance of 1787 as is repugnant to that constitution. *Ibid.*
3. The act of 17th Sept., 1807, is repugnant to the ordinance of 1787. *Ibid.*

OYER.

1. By our statute, oyer must be given of all writings on which suit is brought, whether sealed or not, as the makers are bound to deny their execution under oath. *Mason* v. *Buckmaster, assignee, &c.*, 27.
2. Oyer can not be demanded of a record. *Giles* v. *Shaw*.
3. To make a note on which suit is brought a part of the record, to enable the court to look at it for any purpose, oyer must be craved of it. *Sims* v. *Hugsby*, 413.

PARTNERSHIP.

1. If one of several partners promise individually to pay a debt, he will not be allowed to show that it was due from himself and his copartner jointly. *Coniey* v. *Good*, 135.
2. An appeal from a justice of the peace is assimilated to a suit in equity, and in equity, partners are jointly and severally liable, and therefore proof that another person was the partner of the defendant if offered by the defendant, is inadmissible in such case. *Ibid.*

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3. A debt due individu lly by one partner, can not be set off in an action to recover a partnership debt. *Gregg* v. *James and Philips*, 143.

4. A payment to one partner is payment to both unless strictly forbidden. *Ibid.*

PARTIES.

1. A party to a negotiable note, where there is no fraud, can not impeach it either at law or in equity. *Duncan* v. *Morrison, &c.*, 151.

2. In chancery, all the parties in interest, and whose rights may be affected, ought to be made parties to the bill. *Gilham and others* v. *Cairns*, 164.

3. The rule of law is, that where there is a community of interest and design, the declarations of one of the parties is evidence against the rest. *Snyder* v. *Laframboise*, 343.

PAYMENT.

1. A payment to one partner is payment to both, unless strictly forbidden. *Gregg* v. *James and Philips*, 14 .

2. A plea of payment is a good plea in an action of assumpsit, and without it, evidence of counter demands can not be received, and the words "and the plaintiff doth the like," is not a traverse to it. *Jones' administrators* v. *Francis, &c.*, 165.

PENALTY.

The legislature have the power, by an act of their own, to release a penalty accruing to a county, after verdict, but before judgment. Such an act is not unconstitu ional, it being neither an *ex post facto* law, or law impairing the obligation of contracts. *Coles* v. *County of Madison*, 154.

PLEAS AND PLEADING.

1. A declaration in an action of trespa s, for taking and carrying away "four hor es, the property of the plain iff," is sufficiently certain and descriptive of the property taken *Beaumont* v. *Yantz*, 26.

2. The plea of *nil debet* is not a good plea to an action of debt upon a record. *Chipps* v. *Yancey*, 19.

3. A plea alleging a failure of consideration is in ufficient if it does not set out wherein the failure consists. *Cornelius* v. *Vanorsdall*, 23.

4. An omission of a colloquium in a declaration for sl nder in charging the pl intiff with swea ing a lie. is fatal. *Blair and wife* v. *Sharp*, 30.

5 The plea of *nil debet* is a good plea to all actions of debt upon simple contracts. *Poole* v. *Van andingham* 47.

6. A plea stating that the consideration has wholly failed, without saying wherein, is bad. *Ibid.*

7. The plea of "no consideration" is given by statute, and throws the *onus* on the plaintiff. *Ibid.*

8. To excuse due diligence, an averment in the declaration that "at the time the note became due and payable, diligent search was made at the said county for the maker, for the purpose of demanding payment thereof, but that he could not be found," is insufficient. *Tarlton* v. *Miller*, 68.

9. A plea stating "that the consideration of the note was for an improvement on public land in Arkansas," without averring that by the laws of that territory such improvements were not permitted, is bad. *Bradshaw* v. *Newman*, 133.

10. A plea of failure of consideration, without setting out how it has failed, is bad. *Ibid.*

11. Any defense of a dilatory character must be taken advantage of on the trial before the justice of the peace. *Conley* v. *Good*, 135.

12. The words "and the plaintiff doth the like," is not a traverse of a plea of payment. *Adm nistrators of Jones* v. *Francis and others*, 165.

13. A plea of payment is a good plea in an action of assum sit, and without it, evidence of counter demands can not be received. *Ibid.*

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14. To a declaration on a contract to convey a lot of ground by deed, if $125 was paid at a certain time, a plea that no demand was made for the deed, and that defendant was always ready and willing to execute it, and that he offered to make the deed according to his covenant, and the plaintiff objected, and said when he wished the deed he would apply for it, is *good*. *Baker* v. *Whiteside*, 174.

15. In a declaration on a note of the following form, "Six months after date I promise to pay S. Bond and P. Menard, agents for Warren Brown, the sum of $19.25, for value received, witness my hand and seal," &c., the plaintiffs described themselves as "agents for W. B.," it was held to be merely *descriptio personarum*, and that those words "as agents," &c., might be rejected as surplusage. *Bond and Menard* v. *Betts, Administrator*, 205.

16. A variance between the record declared on, and the one produced in evidence, can be taken advantage of by the plea of *nul tiel record*. *Giles* v. *Shaw*, 219.

17. When the defendant in an action of trespass, assault and battery, and false imprisonment, justifies under a certificate granted by a justice of the peace in pursuance of an act of congress respecting fugitives from labor, the plea must show that all the facts existed at the time of granting the certificate contemplated by that act. *Fanny* v. *Montgomery et al.*, 247.

18. The plea should also state affirmatively to whom the certificate was given whether the person claiming the fugitive, or his agent, and if the agent, his name. *Ibid.*

19. In a plea to an action of assault, battery, &c., brought to try the plaintiff's right to freedom, justifying under an indenture entered into with plaintiff, it is not necessary that it should be stated, or that the master should prove, that every requisite of the statute was complied with before the execution of the indenture. In such case, the *onus probandi* rests upon the plaintiff, and he may show in a replication to the plea, facts inconsistent with the validity of the indenture. *Phœbe* v. *Jay*, 268.

20. If two or more of the pleadings be bad, the court will give judgment against him who commits the first error. *Ibid.*

21. A plea to an action on a note for the payment of money, alleging that it "was obtained by fraud and circumvention, in this," that "the plaintiff represented himself to be the owner of 100 head of hogs, and 54 head of cattle, running in the neighborhood of his farm, and that they were worth $300, being the property for which the note was given, when in truth plaintiff had not that number, nor were they good and valuable as represented," is bad, inasmuch as it does not allege that plaintiff used any means to deceive or circumvent defendant, and it was in his power, by ordinary precaution, to have ascertained the value and number. *Sims* v. *Klein*, 302.

22. A plea of failure of consideration should allege specially, in what the failure consists, and the extent of it. *Ibid.*

23. Precision as to the extent of the failure of the consideration is necessary to enable the court to give judgment for the residue. *Ibid.*

24. A demurrer will not reach a variance between the writ and declaration. *Rust* v. *Frothingham and Fort*, 331.

25. A plea to an action of debt upon a record, stating that "the defendant had not been served with process, had never appeared, or authorized an attorney to appear for him," would be good, yet if the record shows he did appear, the record can not be contradicted by evidence. *Ibid.*

26. In an action of slander, if the words were spoken within one year before the repeal of the statute limiting such action, the old statute will be no bar. *Naught* v. *Oneal*, 36.

27. An action of assumpsit was commenced in 1822, upon a contract made in 1812, to which the statute of limitations was pleaded—this statute was passed in 1819, and is no bar to such action. *Tufts* v. *Rice*, 64.

28. *It seems* if the five years had run under the territorial government, it might have been pleaded in bar. *Ibid.*

29. The omission to state a sum at the end of the *narr.* as the damages, can be taken advantage of only in the court below; an objection on that account is purely technical. *Hargrave* v. *Penrod*, 401.

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30. A plea in abatement will lie, in a suit commenced by attachment. *Bates* v. *Jenkins*, 411.

See DEFAULT, 1. ESCAPE, 2. CONSIDERATION, 6. ASSIGNMENT, 3. VARIANCE, 7.

PRACTICE.

1. When the plaintiff amends in matters of form only, the defendant is not for that reason entitled to a continuance as a matter of course. *Scott* v. *Cromwell*, 25.

2. A return of two *nihils* to a *sci. fa.* to foreclose a mortgage, is equivalent to an actual service even though the defendant might have been personally served. *Cox* v. *McFerron*, 28.

3. An order of court appointing the next friend of an infant plaintiff, is unnecessary. *French* v. *Creath, &c.*, 31.

4. Swearing the jury is matter of form, and if not objected to at the time, an irregularity in the manner of swearing them can not be assigned as error. *Cornelius* v. *Boucher*, 32.

5. If parties appear and go to trial without a plea being put in, it is such an irregularity as will be cured after verdict by the statute of amendments. *Brazzle & Hawkins* v. *Usher*, 35.

6. After the decision of the court overruling the demurrer, if the defendant rejoins to the replication, and issue is taken thereon, it is a complete waiver of the demurrer. *Beers* v. *Philips*, 44.

7. The long and uniform practice in this state has been to execute writs of inquiry in the presence of the court. *Bell and Bell* v. *Aydelott* 45.

8 If a replication departs from the declaration, it is error. *Collins and Collins* v. *Waggoner*, 51.

9. Swearing a witness by the uplifted hand is a legal swearing, independent of the statute. *Gill* v. *Caldwell*, 53.

10. It is discretionary with the court to hear evidence after the argument of a cause is opened by counsel. *Bloom* v. *Goodner* 63.

11. Where a copy of a note on which suit is brought is filed with the declaration, and an amendment of the *narr.* allowed by changing the word "twenty" to "twenty-five," and adding the words "promise to pay," the defendant is not entitled to a continuance. *Crane* v. *Graves*, 66.

12. If a non-resident gives bond for costs after the commencement of the suit, but before the trial it is sufficient. *White* v. *Stafford*, 67.

13. A bill may be dismissed in all cases on motion, when the court is satisfied there is no equity in it. *Edwards* v. *Beaird*, 70.

14. In a suit against a sheriff for money had and received, an assessment of damages by the court without the intervention of a jury, is error. *Whiteside* v. *Bartleson*, 71.

15. It is error in the court to render a judgment by default when a plea is filed and unanswered. *White* v. *Thompson*, 72.

16. Where a party amends his *narr.* by setting out the bond on which suit is brought as the statute requires, it is error for the plaintiff to take judgment at the same term, if a continuance is prayed for by defendant. *Rountree* v. *Stuart*, 73.

17. The statements of jurors ought not to be received to impeach their verdict. *Forrester, &c.*, v. *Guard, Siddall & Co.*, 74.

18. An affidavit setting forth the discovery of new testimony should state the name of the witness, and also the facts he can prove. *Ibid.*

19. Under the practice act of 1819, bail bonds should be taken to the sheriff, and suits on them should be brought in his name. The act gives him no power to assign them to the plaintiff in the action. *Hunter* v. *Gilham*, 82.

20. After a final judgment is entered, the court has no power at a subsequent term, to set it aside, and direct a nonsuit to be entered, and if the court had

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the power to set aside the judgment, it ought to direct a new trial, and not a nonsuit. *Morgan* v. *Hays*, 126.

21. Any defense of a dilatory character must be taken advantage of on the trial before the justice of the peace. *Conley* v. *Good*, 135.

22. Courts ought not to permit the jurors to go at large after they are sworn—neither before the trial nor after, until they have rendered their verdict. *Nomaque* v. *The People*, 145.

23. Judgment will be rendered against him who commits the first error in pleading. *Snyder* v. *State Bank*, 161.

24. An entire judgment against several defendants can not be affirmed as to one, and reversed as to the others, and the same rule should prevail as to plaintiffs. *Hays, admr.* v. *Thomas and others*, 180.

25. If a suit is brought against three or more obligors in a bond, on some of whom process is not served, the regular practice is to take judgment against those on whom process is served, and proceed by *sci. fa.* against those not served. *Ladd and Taylor* v. *Edwards*, 182.

26. Where a party defendant appears by attorney and pleads, without process, it is error to proceed to judgment against those who have been served, without also taking judgment against him who thus appeared by attorney. *Ibid.*

27. If such defendant should die after plea filed and before judgment, his death should be noticed on the record. *Ibid.*

28. A defense at law, if a legal one, must be made before judgment. *Crow's ex'rs* v. *Prevo*, 216.

29. Any evidence that tends to prove a promise to take a case out of the statute of limitations should be left to the jury with instructions from the court as to the law thereon. *Mellick* v *De Seelhorst*, 221.

30. Motions, demurrers, &c., should be determined by the court in the order in which they are made, and a demurrer, while a motion to dismiss is undisposed of, is a waiver of the motion, and a plea of the general issue, the demurrer being undisposed of, is a waiver of the demurrer. *Cobb* v. *Ingalls*, 233.

31. All objections to the form of an indictment must be made before trial. *Curtis* v. *The People*, 256.

32. It is erroneous to take judgment by default, unless by consent, where the declaration has not been filed ten days before court. *Gore* v. *Smith*, 267.

33. It is irregular for the court to instruct the jury as to the weight of evidence. *Humphreys* v. *Collier and Powell*, 297.

34. An appearance by attorney without authority is good. *Rust* v. *Frothingham and Fort*, 331.

35. A writ of inquiry is not necessary in any case where the damages can be ascertained by computation. *Ibid.*

36. The rule in relation to the charge to the jury is, that it be positive and specific, and that nothing be left to inference. *Snyder* v. *Laframboise*, 343.

37. It is correct to substitute another person as security for costs, and then permit the discharged security to testify. *Kimmel* v. *Schwartz*, 278.

38. Neither the law nor the practice of the courts require that the judgment should contain the amount of costs *in numero*. *Simms* v. *Klein*, 371.

39. Where the supreme court have the power to render such a judgment as the court below ought to have rendered, it will do so without sending the parties back for that purpose. *Prince* v. *Lamb*, 378.

40. A correct construction of the 33d section of the Practice Act, would require that a party must make application for further time to file the transcript of the record, in cases of appeal within the three days within which the transcript should be filed. *Rager* v. *Tilford*, 407.

41. To make a note on which suit is brought a part of the record, oyer must be craved. *Sims* v. *Hugsby*, 413.

See Appeal, 1, 2, 3. Amendment. Attorney. Default, 1, 2. Execution, 1. Motion, 1. Inquiry, Writ of, 3. Error, 14. Assignment, 3. Sheriff, 4.

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PRIORITY.

Under the act of 1823, regulating administrations and the descent of intestate's estates, judgments obtained against the intestate in his lifetime are to be first paid. *Jones' Adm'rs* v. *Bond*, 287.

S. P. *Woodworth* v. *Paine's Adm'rs*, 374.

PROCEDENDO.

Upon the quashal of a *supersedeas*, a *procedendo* will be awarded to the court below. *Cromwell* v. *March*, 326.

PROCESS.

See SHERIFF.

PROCHIEN AMY.

An order of the court appointing the next friend of an infant plaintiff is unnecessary. *French* v. *Creath, &c.*, 31

POSSESSION, PRIOR AND ADVERSE.

See EJECTMENT, 3, 4, 5, 6.

PROFERT.

Profert need not be made of unsealed writings. *Mason* v. *Buckmaster, Assignee*, 27.

PROMISSORY NOTES.

1 No particular form is necessary to make a note, but the writing must show an undertaking or engagement to pay, and to a person named in it, or to bearer or holder of the instrument. *Smith, for the use, &c.* v. *Bridges*, 18.

2. Our act making promissory notes, &c., assignable, is not to be construed in the same way as the statute of Anne, as they are different in their objects and provisions. *Mason* v. *Wash*, 39.

3. An averment of the insolvency of the maker of a note is sufficient to excuse the use of due diligence. *Thompson* v. *Armstrong*, 48.

4. A note for the payment of a certain sum of money "which may be discharged in pork," is assignable. *Ibid.*

5. A party to a negotiable note where there is no fraud, can not impeach it, either at law or in equity. *Duncan* v. *Morrison, &c*, 151.

6. If either the maker or assignee of a note is to suffer a loss, natural equity points to the maker as the party on whom the loss should fall. *Ibid.*

7. No action can be maintained upon an instrument of writing for the payment of money, unless the instrument shows upon its face, to whom it is payable. *Mayo* v. *Chenoweth*, 200.

8. The possession of a note by the payee is, unless the contrary appears, evidence that he is the *bona fide* holder of it. *Brinkley* v. *Going*, 366.

See ALTERATION. PLEAS AND PLEADING, 9. ASSIGNMENT, 3. ACTION, 4.

QUO WARRANTO.

Where a person is in office by color of right and exercising the duties thereof, a *quo warranto* is the proper remedy for another person claiming the same office, and not a *mandamus*. *The People, &c.* v. *Forquer, Secretary of State*, 104.

RECEIPT.

The receipt of the cashier of the state bank for money received of an individual is evidence of a deposit by that individual. *State Bank* v. *Kain*, 75.

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RECOGNIZANCE.

1. Upon indictment found, a recognizance entered into by a person as surety for the appearance of the party indicted, who has not been served with process, and who does not appear, is not obligatory upon such person. *The People* v. *Slayton*, 329.

2. Where a person indicted has once entered into a recognizance, a separate one afterwards from a surety might be binding. *Ibid.*

RECORD.

1. The plea of *nil debet* is not a good plea to an action of debt upon a record. *Chipps* v. *Yancey*, 19.

2. The supreme court will not look at things the clerks of the circuit courts may without authority and irregularly, incorporate into the record. *Crowder* v. *Johnson*, 96.

3. An indorsement of the costs on the back of the record, though signed by the clerk, is no part of the record. *Giles* v. *Shaw*, 125.

4. The certificate of the judge, omitting to state that "the attestation (of the record) is in due form," is insufficient. *Ibid.*

5. Where a record is not the foundation of the action, a variance between the description of it in the *narr.* and the one produced, is immaterial. *Nowlin* v. *Bloom*, 128.

6. The court can not notice a judgment record on which suit is brought, unless it is made a part of the record by bill of exceptions. *Kimmel* v. *Shultz and others*, 169.

S. P. *Rust* v. *Frothingham and Fort*, 331.

7. A record from another state is conclusive evidence of the debt claimed—it imports absolute verity, and nothing can be alleged against it. *Rust* v. *Frothingham and Fort*, 331.

8. A fact stated in a record can not be contradicted by evidence *dehors* the record. *Ibid.*

9. When the whole record on its face is so imperfect as not to warrant the entering of the judgment, it will be reversed. *Bennet & Judy* v. *Schermer & Co.*, 352.

10. The note on which suit is brought, though inserted by the clerk in the record, is no part of the record. *Sims v. Hugsby*, 413.

See Appeal, 1, 2, 3. Pleas and Pleading, 25.

RELEASE.

1. The legislature have the power, by an act of their own, to release a penalty accruing to a county, after verdict but before judgment. *Coles* v. *County of Madison*, 154.

2. The legislature can by an act release a person from imprisonment who has been convicted of forgery, though one half the fine imposed goes to the person attempted to be defrauded by the forgery. *Rankin* v. *Beaird, Sheriff*, 163.

3. A confirmation made by the Governor of the North-west territory, operates as a release on the part of the United States of their title to the land thus confirmed. *Doe, ex dem, &c.* v. *Hill*, 304.

4. A debt due the State Bank is a debt due the state, which the state can release. *Ernst's Adm'rs* v. *Ernst*, 316.

5. A debt due the State Bank by mortgage, is a debt due the state, which the state can release. *Ernst's administrators* v. *The State Bank*, 86.

See Surety, 4.

REPLEVIN.

To maintain the action of replevin, there must be an unlawful taking from the actual or constructive possession of the plaintiff. *Wright* v. *Armstrong*, 172.

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REPLEVY.

1. Upon all contracts made before the first of May, 1821, the defendant had a right to replevy for three years, unless the plaintiff indorsed on the *fi. fa.* that paper of the state bank of Illinois would be received in discharge of the execution. *Collins, &c.*, v. *Waggoner*, 51.

2. After the time of the replevy of a judgment has expired, the plaintiff may, if he chooses, proceed on his original judgment, without issuing against the security in the replevy. *Finley & Creath* v. *Ankeny*, 250.

3. The act of the 22d March, 1819, respecting replevin bonds, declaring that such bonds shall be executed to the sheriff, does not mean that the sheriff shall be the obligee in such bonds, the word "executing" meaning nothing more than a making and delivery to the officer named. Such bonds are properly made payable to the plaintiff in the original action. *McLean* v. *Emerson*, 320.

4. In a replevy bond, the fees of the officer are correctly inserted, and it being for *more* than double the amount of the judgment does not vitiate it. *Ibid.*

RETAILING.

The fine against a retailer of spirituous liquors for selling without a license by a less quantity than one quart, can not, under under the act of 1827, exceed ten dollars. *Johnson* v. *The People*, 351.

RIOT.

In an indictment for a riot, the facts constituting a riot should be clearly set forth. *Whitesides and others* v. *The People*, 21.

SALE OF LAND, &c.

1. The certificate of the sheriff of the sale of land, without producing the judgment and proving the regularity of the sale, is no evidence of title in the purchaser. *Curtis* v. *Swearingen*, 207.

2. In a sale of land where there is no fraud, and the vendee has taken a deed with covenants, such deed will be considered a sufficient consideration for notes executed for the purchase money of said land. *Vincent and Bertrand* v. *Morrison*, 227.

3. In a sale of land where there is no fraud and no warranty, the vendee can not recover back the purchase money. *Snyder* v. *Laframboise*, 343.

4. A party who takes a quit claim deed on the sale of land, runs the risk of the goodness of the title. *Ibid.*

5. Where there is a total failure of title on a sale of land, and no circumstances are proved to induce a jury to believe that the vendor has acted dishonestly, it is not *prima facie* evidence of fraud. *Ibid.*

See EJECTMENT, 3, 4, 5, 6. DEED, 5. EXECUTION, 10.

SCIRE FACIAS.

1 A return of two *nihils* to a *scire facias* to foreclose a mortgage is equivalent to an actual service, even though the defendant might have been personally served. *Cox* v. *McFerron*, 28.

2. An averment in a *sci. fa.* issued to foreclose a mortgage given to the state bank, that "S. made his note to the plaintiff for $760," is sufficient to imply that he borrowed and received that amount. *Snyder* v. *State Bank*, 161.

3 It is regular, under the act of 1825, concerning judgments and executions, to proceed to foreclose a mortgage for money borrowed of the state bank, by *scire facias*. *State Bank* v. *Moreland*, 282.

SECRETARY OF STATE.

The secretary of state is not obliged to countersign and seal a commission which the governor has no power by law to issue, and he may rightfully refuse to do it. *The People ex relat. Ewing* v. *Forquer*, 104.

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SET OFF.

1. Debts to be set off, must be mutual, and between the parties to the record. *Gregg* v. *James & Phillips*, 143.

2. A debt due individually by one copartner can not be set off in an action to recover a partnership debt. *Ibid.*

SHERIFF.

1. In a suit against a sheriff for money had and received, an assessment of damages by the court without the intervention of a jury, is error. *Whiteside* v. *Bartleson*, 71.

2. Under the practice act of 1819, bail bonds should be taken to the sheriff, and suits on them should be brought in his name. That act gives him no power to assign them to the plaintiff in the action. *Hunter* v. *Gilham*, 82.

3. A sheriff who seizes goods on a *fi. fa.* has a special property in them, and may maintain trespass or trover against a wrong doer. *Garner* v. *Willis*, 368.

4. A sheriff's return in this form, "I. R. Simms summoned by reading," and signed by the sheriff, and dated, is sufficient. *Simms* v. *Klein*, 371.

5. A sheriff's affidavit, and that of the defendant, received to contradict his return upon a summons. *Kerr and Bell* v. *Whitesides*, 390.

6. The mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point them out to him, on which to levy, is not sufficient to excuse the sheriff. *Hargrave* v. *Penrod*, 401.

7. The right of action of a judgment creditor against a sheriff for not levying a *fi. fa.* is not taken away by his discharging his debtor from a *ca. sa.* issued at his instance, although such discharge might be a satisfaction of the judgment. *Ibid.*

8. A clerk has no right to insert in a fee-bill a charge for sheriff's commissions, when the sheriff himself has made no such charge in his return. *Bryans* v. *Buckmaster*, 408.

9. When a sheriff sells property and realizes a part of the debt, he is entitled to commissions only on the sum made. *Ibid.*

10. Where the sheriff does not sell, if real estate is levied on, the appraisement will furnish an equitable rule by which to calculate the commissions. *Ibid.*

See Office and Officer. Execution. Escape, 1. Evidence, 2. Sale of Land, 1.

SLANDER.

1. An omission of a colloquium in a declaration for slander in charging the plaintiff with swearing a lie, is fatal. *Blair & wife* v. *Sharp*, 30.

2. An action for slander is not taken away, though the statute creating the offense charged be repealed. *French* v. *Creath, &c.*, 31.

3. To say of a plaintiff in an action of slander that "he, or somebody, had altered the credit, or indorsement, on a note from a larger to a less sum, and that the note would speak for itself," is not actionable. *Ingalls* v. *Allen*, 300.

See Limitations, Statute of, 1.

SLAVES AND SERVANTS.

1. Registered servants are goods and chattels, and can be sold on execution. *Nance* v. *Howard*, 242.

2. Servants are taxed, not by poll, but by valuation. *Ibid.*

3. Where the defendant in an action for trespass, assault and battery, and false imprisonment, justifies under a certificate granted by a justice of the peace in pursuance of the act of congress respecting fugitives from labor, the plea must show that all the facts existed at the time of granting the certificate, contemplated by that act. *Fanny* v. *Montgomery, et al.*, 247.

4. An administrator has no power to compel an indentured servant to at-

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tend to the ordinary business of the administrator—he has only the custody of the servant for safe keeping, until his time of service can be sold. *Phœbe* v. *Jay*, 268.

See INDENTURE, 2.

STATE BANK.

A debt due the state bank secured by mortgage, is a debt due the state, which the state can release. *Ernst's administrators* v. *The State Bank*, 86.

See BANKS.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES.

1. An action for slander is not taken away, though the statute creating the offense charged be repealed. *French* v. *Creath, &c.*, 31.
2. Our act making promissory notes, &c., assignable, is not to be construed in the same way as the statute of *Anne*, as they are different in their objects and provisions. *Mason* v. *Wash*, 39.
3. All statutes having one object in view, and acting on one system, ought to be taken together and compared in the construction of them, and this rule applies though some of the statutes may have expired, or are not refered to in the other acts. *Nance* v. *Howard*, 245.
4. A statute enumerating things or persons of an inferior dignity, shall not be construed to extend to those of a superior dignity. *Woodworth* v. *Paine's Administrators*, 374.
5. In a legislative act, where "persons" are spoken of, none other than natural persons are intended. *Betts* v. *Menard*, 395.
6. In doubtful cases, if by giving a literal construction to a statute, it will be the means of producing great injustice, and lead to consequences that could not have been anticipated by the legislature, courts are bound to presume that the legislature intended no such consequences, and give such a construction as will promote the ends of justice. *Bryans* v. *Buckmaster*, 408.
7. Construction of 33d sect. of the Practice Act of 1827. *Rager* v. *Tilford*, 407.
8. The repeal of a statute does not affect rights acquired under the repealed statute. *Naught* v. *Oneal*, 36.

See LIMITATIONS, STATUTE OF, 1, 2, 3. FERRIES, 1, 2.

SUPERSEDEAS.

See ERROR, 3. BOND.

SURETY.

1. A judgment can not be rendered against a surety in an administration bond, nor is he liable to an action, until a *devastavit* by suit has been first established against the administrator. *Biggs and others* v. *Postlewait and others*, 198.
2. It is error in the court to enter up a decree against the surety in an injuction bond, upon the dissolution of the injunction, for the amount of the judgment at law and the costs in that suit, and interest on the judgment, with six per cent. damages, and the costs of the suit in equity. *Hubbard* v. *Hobson*, 190.

S. P. *Crow's ex'rs* v. *Prevo*, 216.

3. After the time of the replevy of a judgment has expired, the plaintiff may, if he chooses, proceed on his original judgment, without issuing against the surety in the replevy. *Finley and Creath* v. *Ankeny*, 250.
4. Mere delay to sue does not release the surety of a note, and the risk of the solvency of the principal is assumed by the surety. *Moreland and Willis* v. *State Bank*, 263.
5. Upon indictment found, a recognizance entered into by a person as surety for the appearance of the party indicted, who has not been served with

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process, and who does not appear, is not obligatory upon such person. *The People* v. *Slayton*, 329.

6. Where the person indicted has once entered into a recognizance, a separate one afterwards from a surety might be binding. *Ibid.*

TAXES.

1. The act of 1819 laying a tax on certain property, makes no distinction between residents and non-residents—the *lien* attaches on the property, and not on the person. *Edwards* v. *Beaird*, 70.
2. A poll tax is inhibited by the constitution of this state. *Nance* v. *Howard*, 242.
3. Servants are taxed, not by *poll*, but by valuation. *Ibid.*

TENANTS IN COMMON AND JOINT TENANTS.

1. Joint tenants may make a subdivision of time for the exclusive occupancy of the whole of a tract of land. *Curtis* v. *Swearingen*, 207.
2. A tenant in common of a chattel who sues for a conversion of the same, is entitled to recover damages for his share or interest only. *Rolette* v. *Parker*, 350.

TIME.

1. Joint tenants may make a subdivision of time for the exclusive occupancy of the whole of a tract of land. *Curtis* v. *Swearingen*, 207.
2. As a general rule the *terms* of a written agreement can not be changed by parol, but the *time* of its performance may be extended. *Baker* v. *Whiteside*, 174.
3. Upon a change of venue, the computation of time and distance must be made from the county in which suit is brought. *Phelps* v. *Young*, 327.

TITLE TO LAND.

Upon principles of natural justice, a person ought not to be compelled to part with his title to land, until he has received what he has contracted to take for it, nor should a person receive a title until he has paid what he has agreed to pay for it. *Allison and others* v. *Clark*, 348.

See EVIDENCE, 2, 8. GOVERNOR'S CONFIRMATIONS. SALE OF LANDS, &c., 1, 2, 4, 5. EJECTMENT, 3, 4, 5, 6. DEED, 5. EXECUTION, 11.

TORT.

The supreme court will not entertain a writ of error founded on a judgment for a *tort* after the death of the *tort feasor*. *Barrett and wife* v. *Gaston's executor*, 255.

TREASURER.

The notice for a motion by the auditor against a delinquent treasurer, must be certain and specific, and must ask for a judgment. *Auditor* v. *Hall*, 392.

TREES GROWING.

Fruit trees standing and growing can not be taken in execution—they are part and parcel of the freehold. *Adams and others* v. *Smith*, 283

TRESPASS.

1. A declaration in an action of trespass for taking and carrying away "four horses, the property of the plaintiff," is sufficiently certain and descriptive of the property. *Beaumont* v. *Yantz*, 26.
2. A warrant for a felony founded upon an affidavit which stated "that A. B. entered the close of C. D. and carried off her grain," is no justification to the officer who issued it in an action of assault and battery and false imprisonment, nor to the officer executing it, as the affidavit contains no words importing a felony—all the parties to such warrant are trespassers. *Moore* v. *Watts and others*, 42.

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3. Trespass will lie if the process of a court is abused, or if, after it has done its office, the officer proceeds to act under color of it by direction of the plaintiff—they both become liable as trespassers. *Collins* v. *Waggoner*, 186.

4. Where a justice of the peace has jurisdiction, but proceeds erroneously, he is not a trespasser, but where he has not jurisdiction, he is. *Flack and Johnson* v. *Ankeny*, 187.

5. If a justice of the peace officiously, and without any complaint on oath or of his own knowledge, issues his warrant to apprehend a person, he will be liable in an action of trespass. *Flack* v. *Harrington*, 213.

6. If a purchaser at a sheriff's or constable's sale, takes possession of the property purchased, without the consent and against the command of the officer, though the purchaser be the plaintiff in the *fi. fa.* under which the sale is made, he is a trespasser. *Garner* v. *Willis*, 368.

TRIAL.

If parties appear and go to trial without a plea being put in, it is such an irregularity as will be cured after verdict by the statute of amendment. *Brazzle and Hawkins* v. *Usher*, 35.

TROVER AND CONVERSION.

1. A tenant in common of a chattel, who sues for a conversion of the same, is entitled to recover damages for his share or interest only. *Rolette* v. *Parker*, 350.

2. A sheriff or constable who has seized goods on a *fi. fa.* has a special property in them, and may maintain trover for them. *Garner* v. *Willis*, 368.

VARIANCE.

1. A variance between the instrument declared on, and the one set out on oyer, is fatal on demurrer. *Taylor and Parker* v. *Kennedy*, 91.

2. A variance between the record declared on, and the one produced in evidence, is fatal. *Giles* v. *Shaw*, 125.

3. Where a record is not the foundation of the action, a variance between the description of it in the *narr.* and the one produced, is immaterial. *Nowlin* v. *Bloom*, 138.

4. A variance between the record declared on, and the one produced as evidence, can be taken advantage of by the plea of *nul tiel record*. *Giles* v. *Shaw*, 219.

5. A variance between the writ and declaration can not be reached by a demurrer. *Rust* v. *Frothingham and Fort*, 331.

6. A variance between the description of a note, and the one produced in evidence, is fatal. *Connolly* v. *Cottle*, 364.

7. Variances between the writ and declaration can only be taken advantage of by plea in abatement—they are not reached by a general demurrer, nor can they be assigned for error. *Prince* v. *Lamb*, 378.

VENDOR AND VENDEE.

1. In a sale of land where there is no fraud, and the vendee has taken a deed with covenants, such deed will be considered a sufficient consideration for notes executed for the purchase money of said land. *Vincent and Bertrand* v. *Morrison* 227.

2. In a sale of land where there is no fraud and no warranty, the vendee can not recover back the purchase money. *Snyder* v. *Laframboise* 343.

3. A party who takes a *quit claim* deed, runs the risk of the goodness of the title. *Ibid.*

4. Where there is a total failure of title on a sale of land, and no circumstances are proved to induce a jury to believe that the vendor has acted dishonestly, it is not *prima facie* evidence of fraud. *Ibid.*

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VENUE.

Upon an order for a change of venue and granted, but before the record is removed, an affidavit of the materiality of witnesses, for the purpose of taking their depositions, is properly made in the circuit court of the county where the suit is brought, and the computation of time and distance must be made from that county. *Phelps* v. *Young*, 327.

VERDICT.

1. An agreement between a prisoner's counsel, in a capital case, and the counsel for the people, that the jury, if they agree, may deliver their verdict to the clerk, is irregular, and a verdict delivered in court under such an agreement, in the absence of the jury, will be set aside for such irregularity. *Nomaque* v. *The People*, 145.

2. A prisoner has a right to the presence of the jury, when they deliver their verdict, as he is entitled to have them polled, and a verdict is not final until pronounced and recorded in open court. *Ibid.*

3. A special verdict should find facts—not the evidence of facts. *Vincent and Bertrand* v. *Morrison*, 227.

WARRANT.

1. A warrant for a felony founded upon an affidavit which stated "that A. B. entered the close of C. D. and carried off her grain," is no justification in an action of assault and battery, and false imprisonment, either to the officer issuing it, or to the officer executing it, as the affidavit contains no words importing a felony—all the parties to such warrant are trespassers. *Moore* v. *Watts and others*, 42.

2. A warrant which states in substance that A. B. had made complaint on oath that C. D. and others had violently assaulted and beaten him, and the officer required to arrest them and bring them before the justice, contains every thing essential to a valid warrant. *Flack and Johnson* v. *Ankeny*, 187.

WARRANTY.

1. In a sale of land where there is no fraud and no warranty, the vendee can not recover back the purchase money. *Snyder* v. *Laframboise*, 343.

2. A party who takes a *quit claim* deed on the sale of land, runs the risk of the goodness of the title. *Ibid.*

WILLS AND TESTAMENTS.

By the ordinance of 1787, but two of the subscribing witnesses to a will are required to prove it, and a will attested by three, one of whom is a devisee in the will, and proved by the other two, is valid. *Ackless* v *Seekright*, 76.

WITNESS.

1. A person whose name is forged is a competent witness to prove the forgery, although upon conviction he receives one-half of the fine imposed. His credibility is left to the jury. *Noble* v. *The People*, 54.

2. All persons who believe in the existence of a God and a future state, though they disbelieve in a punishment hereafter for crimes committed here, are competent witnesses. *Ibid.*

3. A grantor in a deed who has no interest in the suit, and who has made no covenants is, upon general principles, a competent witness. *Herbert, &c.* v. *Herbert*, 354.

See Depositions. Venue. Wills and Testaments.

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WRITS.

1. Appearance and pleading will cure a voidable, but not a void writ. *Coleen & Claypole* v. *Figgins*, 19.

2. The omission in a writ of the words "The People of the State of Illinois to the coroner," &c., is a mere misprision of the clerk, and is amendable. *State Bank* v. *Buckmaster*, 176.

3. A return to a writ by a person who signs himself "Deputy Sheriff," without stating "for A. B., sheriff," is erroneous and void. *Ryan* v. *Eads*, 217.

4. An officer acts at his peril—he is bound to obey the mandate of the writ, and if he proceeds to execute it, he is bound to complete the execution of it. *Lattin* v. *Smith*, 361.

WRIT OF ERROR.

See Error, 3. Bond.

WRIT OF INQUIRY OF DAMAGES.

See Inquiry, Writ of.

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