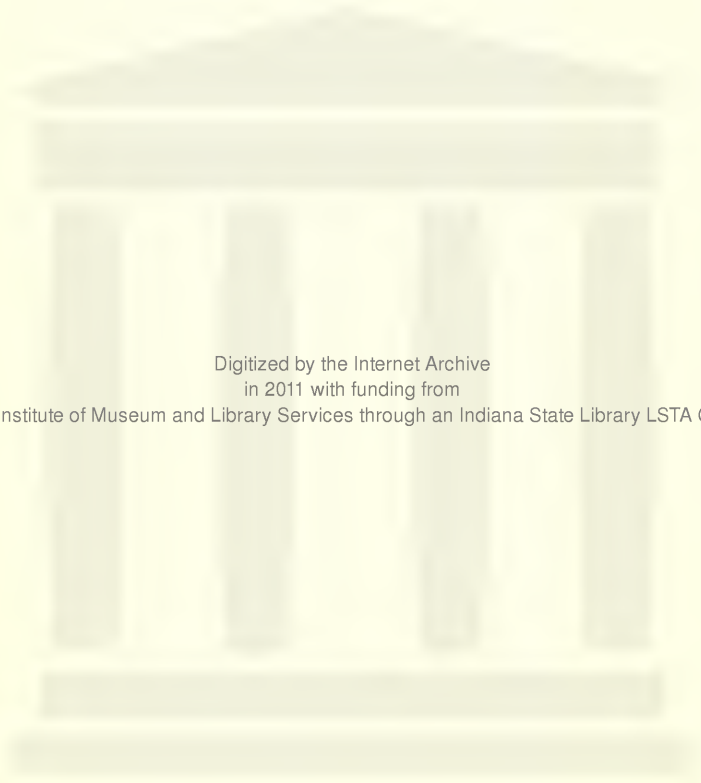

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

VOLUME II.

I SCAMMON:
UNDERWOOD'S EDITION.

ST. LOUIS, 1870:
W. J. GILBERT.
E. B. MYERS, CHICAGO.

Entered according to the Act of Congress, in the year 1840, by J. Young Scammon, in the Clerk's Office of the District Court of the United States for the District of Illinois.

Entered according to Act of Congress, in the year 1870, by W. J. Gilbert, in the Clerk's Office of the District Court of the United States for the Eastern District of Missouri.

W. J. Usrey, Printer,
Decatur, Ill.

PREFACE TO SECOND EDITION.

The first edition of SCAMMON'S and GILMAN'S, and from the 11th to the 18th volumes inclusive of Peck's, Illinois Reports, has been for some time exhausted, and a new edition of those volumes has become necessary to supply the increasing demand.

During my practice of the law in Illinois, I have, for my own convenience, annotated the Reports, noting at the time, the affirmance, reversal or modification of decisions, by Legislative act, or the decisions of the Courts; and it has been believed that the publication of an edition containing these notes would be of value to the profession. The original notes of Scammon are retained and are referred to by figures.

To avoid errors of reference in the later Reports and elementary works, this edition is word for word, line for line and page for page with the first edition, except that some palpable errors in the text have been corrected.

WM. H. UNDERWOOD.

Belleville Ill., Sept., 1869.

PREFACE.

It is due to the profession as well as to the Reporter, to state the circumstances under which this volume of Reports has been prepared for the press, and those attending its publication.

The undersigned received the appointment of Reporter at the close of the July term, 1839; consequently, in all of the cases argued before his appointment, he did not take notes of the points made or authorities cited, nor did he make any memoranda of the names of counsel. He has therefore been obliged to rely wholly upon the information afforded him by the papers on file in the clerk's office. He does not expect that he has given in all, perhaps not in a majority, of the cases, the points and authorities of counsel; for in very many cases no briefs were to be found. The practice of the Court to require an abstract of the case from the counsel for the appellant or plaintiff in error, while none is required of the appellee or defendant in error, has the effect to cause a brief to be filed by the counsel for the former, while the counsel for the latter usually content themselves with making their points and citing their authorities on the hearing.

In all cases where briefs could be found which contained matter of any importance, the points and authorities have been given in the report of the case.

In many of the cases, from the neglect of counsel to sign their names to their abstracts, and from the manner in which the docket has been kept, it has been difficult to ascertain, with precision, who appeared as counsel. Mistakes have doubtless occurred in this particular.

It was the original intention of the Reporter to include in this volume all the cases decided and not previously reported, up to the end of December term, 1839, and this design was not abandoned until the book was nearly printed, when it was ascertained that it would be impossible to include all those cases without swelling the book to an inconvenient size, and to one which would not correspond with subsequent volumes, if the Reports should be continued. He therefore was compelled, reluctantly, to defer many of those cases to a subsequent volume.

In determining upon the period from which the Reports should commence, he has been governed solely by the direction of the Court. This volume includes all the cases decided since the publication of Breese's Reports, down to December term, 1839, including a part of the cases decided at that term.

The collection of printed opinions published by Mr. Walters, was designed, as the undersigned was informed by Mr. Forman, who prepared the marginal notes to the same, only for temporary use, until they should be published in some more permanent form. That collection is cited in this volume sometimes as "Printed Opinions," and sometimes as "Forman." Continued ill health has much delayed the publication of this volume, and prevented the Reporter from bestowing that attention upon the work which its importance demanded, and which otherwise would have been given. He cannot therefore hope that it is so free from errors as could be desired. Yet he trusts that few, if any, mistakes will be found which the reader cannot readily correct. He has endeavored to report accurately and faithfully.

The references made in the work are those usually found in law books. It is only necessary to observe that the Revised Laws of 1833, have been uniformly cited as "R. L.," and the edition of the statutes published by Mr. Gale, in 1839, as "Gale's Stat."

The Reporter has spared no expense in endeavoring to get the book up in a style not unworthy of the Court and the State.

It is due to the Court to state that during almost the entire period included in these Reports, the Supreme Court was holden at a great distance from the residence of the Judges and most of

the members of the bar, and at a place but illy provided with accommodations, and in which a good law library was a desideratum not to be realized. The Court has, consequently, been often obliged to decide causes without that full argument and consultation of authorities which are afforded to the Judicial Tribunals of other States and countries.

The notes and references of the Reporter, though not so numerous and full as he desired to make them, he trusts will yet be found convenient to the profession.

The continuance of these Reports will depend upon the patronage of the profession. The work is published upon the responsibility of the Reporter, and it has cost him a large sum of money. Should they be continued, he hopes that the experience he has had in preparing this volume, will enable him to present to the public and to the profession, a more desirable production.

THE REPORTER.

CHICAGO, December, 1840.

JUDGES OF THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

FROM THE ADOPTION OF THE CONSTITUTION TO THE PRESENT TIME.

		Date of Comm'n.	*Date of Resig'n,*
JOSEPH PHILIPS,	Chief Justice,	Oct. 9, 1818	July 4, 1822.
THOMAS C. BROWNE,	Associate Justice,	do 9, do	
WILLIAM P. FOSTER,	Associate Justice,	do 9, do	do 7, 1819.
JOHN REYNOLDS,	Associate Justice,	do 9, do	
WILLIAM WILSON,	Associate Justice,	July 7, 1819,	
do do	Associate Justice,	Feb. 6, 1821, (1)	
THOMAS REYNOLDS,	Chief Justice,	Aug. 31, 1822,	
do do	Chief Justice,	Jan. 14, 1823, (1)	
WILLIAM WILSON,	Chief Justice,	do 19, 1825,	
SAMUEL D. LOCKWOOD,	Associate Justice,	do 19, do	
THEOPHILUS W. SMITH,	Associate Justice,	do 19, do	
THOMAS C. BROWNE	Associate Justice,	do 19, do	

ATTORNEYS GENERAL OF THE STATE OF ILLINOIS.

FROM THE ADOPTION OF THE CONSTITUTION TO THE PRESENT TIME.

	Date of Commission.	*Date of Resignation..*
DANIEL POPE COOK,	March 5, 1819,	Oct. 15, 1819.
WILLIAM MEARS,	Dec. 14, do	
SAMUEL D. LOCKWOOD,	Feb. 6, 1821,	Dec. 28, 1822.
JAMES TURNEY,	Jan. 14, 1823,	Jan. 7, 1825.
do do	do 15, 1825, (1)	Dec. 1828.
GEORGE FORQUER,	do 23, 1829,	
JAMES SEMPLE,	do 30, 1833,	
NINIAN W. EDWARDS,	Sept. 1, 1834,	
do do	Jan. 19, 1835, (1)	
JESSE B. THOMAS, Jr.,	Feb. 12, do	Dec. 8, 1835
WALTER B. SCATES,	Jan. 18, 1836,	do 26, 1836.
USHER F. LINDER,	Feb. 4, 1837,	June 11, 1838.
GEORGE W. OLNEY,	June 26, 1838,	Feb. 1, 1839.
WICKLIFFE KITCHELL,	March 5, 1839,	

(1) Re-commissioned, having first been appointed by the Governor.

CIRCUIT JUDGES OF THE STATE OF ILLINOIS,

FROM THE ADOPTION OF THE CONSTITUTION TO THE PRESENT TIME.

				Date of Comm'n.	*Date of Resig'n.*
JOHN Y. SAWYER,	JUDGE 1st	CIRCUIT,		Jan. 19, 1825,	Jan. 24, 1831.
SAMUEL McROBERTS,	do	2d	do	do 19, do	
RICHARD M. YOUNG,	do	3d	do	do 19, do	
JAMES HALL,	do	4th	do	do 19, do	
JAMES O. WATTLES.	do	5th	do	do 19, do	

Note. The above named Circuit Judges were legislated out of office, in 1827, and the Judges of the Supreme Court required to perform circuit duty, as follows: 1st Circuit, Justice Lockwood; 2d Circuit, Justice Smith; 3d Circuit, Justice Browne; and 4th Circuit, Chief Justice Wilson, *See* Revised Laws 1827, 119 § 4.

				Date of Comm'n.	*Date of Resig'n.*
RICHARD M. YOUNG,	JUDGE 5th	CIRCUIT,		Jan. 23, 1829,	Jan. 2, 1837
STEPHEN T. LOGAN,	do	1st	do	do 19, 1835,	1837.
SIDNEY BREESE,	do	2d	do	do 19, do	
HENRY EDDY,	do	3d	do	do 19, do	Feb. 10, 1835.
JUSTIN HARLAN,	do	4th	do	do 19, do	
THOMAS FORD,	do	6th	do	do 19, do	March, 1837,
ALEXANDER F. GRANT,	do	3d	do	Feb. do	
JEPTHAH HARDIN,					
WALTER B. SCATES,	do	3d	do	Dec. 26, 1836,	
JAMES H. RALSTON,	do	5th	do	Feb. 4, 1837,	Aug. 31 1839.
JOHN PEARSON,	do	7th	do	do 8, do	Nov. 20, 1840.
DAN STONE,	do	6th	do	March 4, do	
WILLIAM BROWN,	do	1st	do	do 20, do	
JESSE B. THOMAS, Jr.,	do	1st	do	July 20, do	Feb, 20, 1839.
WILLIAM THOMAS,	do	1st	do	Feb. 25, 1839,	
THOMAS FORD,	do	9th	do	do 25, do	
STEPHEN T. LOGAN,	do	8th	do	do 25, do	1839.
SAMUEL H. TREAT,	do	8th	do	May 27, do	
Do do	do	do	do	Jan. 31, 1840, (1)	
PETER LOTT,	do	5th	do	Sept. 9, 1839,	
Do do	do	do	do	Dec. 29, do (1)	

(1) Re-commissioned, having been first appointed by the Governor.

RULES.

SUPREME COURT OF THE STATE OF ILLINOIS,

DECEMBER TERM, 1839.

PRESENT,

HON. WILLIAM WILSON, CHIEF JUSTICE,
HON. THOMAS C. BROWNE,
HON. THEOPHILUS W. SMITH,
HON. SAMUEL D. LOCKWOOD,
} ASSOCIATE JUSTICES.

Ordered, That the following Rules be adopted for the regulation of the practice of this Court:

MOTIONS.

I. MOTIONS may be made immediately after the Orders of the preceding day are read, and the Opinions of the Court delivered; but at no other time, unless in case of necessity, or in relation to a cause, when called in course.

II. MOTIONS 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 shall make a second motion, until each member of the bar present, shall have had an opportunity to make his motion.

III. All special motions shall be entered with the Clerk, at least one day before the same shall be argued; and the counsel entering a motion, shall, at the same time, file a statement of the reasons on which the same is predicated.

IV. When a motion is intended to be based on matters which do not appear by the records, the facts must be disclosed and supported by *affidavit.*

SUPERSEDEAS.

V. 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 of the Court below, and the requisite bond be entered into, and filed in the office of the Clerk of this Court, according to law, with an assignment of errors written on, or appended to, the Record.

VI. When a WRIT OF ERROR shall be made a *Supersedeas*, the Clerk shall endorse upon said writ, the following words: "This Writ of Error is made a *Supersedeas*, and is to be obeyed accordingly;" and he shall thereupon file the writ of Error with the transcript of the Record, in his office. Said transcript shall be taken and considered as a due return to said writ; and thereupon it shall be the duty of the Clerk to issue a certificate in substance as follows, to wit:

"STATE OF ILLINOIS, ss.—

Office of the Clerk of the
Supreme Court.

I do hereby certify that a Writ of Error has issued from this Court, for the reversal of a Judgment obtained by

V.

in the Court of
at the
Term, A. D. 18 in a certain action of
which Writ of Error is made a *Supersedeas*, and is to operate as a suspension of the execution of the Judgment; and as such is to be obeyed by all concerned.

Given under my hand, and the Seal of the Supreme Court, at Springfield, this day of A. D. 18

Clerk."

WRITS OF ERROR.

VII. WRITS OF ERROR shall be directed to the clerk or keeper of the Record of the Court in which the judgment or decree complained of, is entered, commanding him to certify a correct trans-

cript of the Record to this Court; but when the plaintiff in error shall file in the office of the Clerk of this Court, a transcript of the 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 transcript shall be taken and considered as a due return to said writ.

PROCESS.

VIII. The PROCESS on Writs of Error, shall be a *Scire Facias* to hear errors, issued on the application of the plaintiff in error to the Clerk, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in Court, and show cause, if any he have, why the judgment or decree mentioned in the Writ of Error, shall not be reversed. If the *Scire Facias* be not returned executed. an *alias and pluries* may issue, without an order of Court.

IX. The first days of each term, and the third Mondays thereof, shall be return days, for the return of process.

X. The SCIRE FACIAS if sued out in vacation, shall be made returnable to the first day of the term, in case there be ten days between the issuing of the writ, and the said first day of the term, but if there be not ten days between the suing out of the writ, and the said first day of the term, then the *Scire Facias* shall be made returnable to the third Monday of the term.

XI. When the SCIRE FACIAS shall be sued out during the term, it shall be tested on the first day of the term, and made returnable to the third Monday thereof. In case ten days shall not have intervened between the service of the same, and the return day thereof, the Court may, on the application of the defendant, extend the time for joining in error, or for hearing, beyond the time allowed in other cases. If the Court shall not continue to sit until the third Monday after the first Monday of its session, the service of the *Scire Facias* on the defendant, if made before, or on, the return day, shall be deemed sufficient, and the cause shall stand continued to the next term.

XII. In proceedings in original actions relating to the Revenue, the process or notice of a motion, shall be served on the defendant, at least twenty days before the first day of the term. If there shall not be twenty days between the day of service, and the first day of the term, the cause may be continued on the application of the defendant.

XIII. In such original actions, if a declaration setting forth the cause of action, shall not be filed, at least twenty days before the first day of the term, the cause may be continued on the application of the defendant.

XIV. When it shall appear to the satisfaction of the Court, that a defendant is not an inhabitant of this State, or cannot be found, there shall be a day fixed for his appearance, and an order for publication made. Said order shall be published once a week, for four weeks successively, in some paper printed at the Seat of Government: the last publication shall be at least thirty days before the appearance day. After publication as aforesaid, and an affidavit thereof being filed with the Clerk, the said cause shall stand for hearing, as if the defendant had been regularly summoned by *Scire Facias*. (11 Ill. R. 4.)

DOCKETING SUITS.

XV. The Clerk shall set the causes for argument, in the order they shall be presented to the Court, except the causes for or against the People, which shall be set at the end of the civil causes.

ASSIGNMENT OF ERRORS.

XVI. When a WRIT OF ERROR, not operating as a *supersedeas*, shall issue, the plaintiff in error 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 shall be enquired into by the Court.

XVII. If the plaintiff in error shall fail to assign errors, as aforesaid, a rule may be granted against him; and if the errors be not assigned at the expiration of the rule, the cause may, on motion, be dismissed.

XVIII. When a SUPERSEDEAS is granted by the Court, it shall be the duty of the plaintiff in error, before the emanation of the writ, to file in the office of the Clerk of this Court, a true and complete transcript of the Record, and to assign his errors, so that the defendant may join in error, and go to trial at the same term of the Court. (13 Ill. R. 298.)

XIX. When a WRIT OF ERROR is made a *Supersedeas* in vaca-

tion, it shall be the duty of the plaintiff to file in the Clerk's office, on or before the third day of the next term thereafter, if there be ten days between the granting of said writ, and the sitting of the Court, a transcript of the Record upon which said Writ of Error is sued out duly certified to be full and complete, and an assignment of errors; but if there be not ten days between the making of the order for a *Supersedeas*, and the sitting of the Court, then said transcript and assignment shall be filed on or before the third Monday of the term, if the Court shall sit so long, so as to enable the defendant to join in error, and have a trial at the first term of the Court after the granting of the *Supersedeas*.

XX. The counsel for the plaintiff in error or appellant, shall furnish to each of the Justices of this Court, before the argument of the cause shall commence, an abstract or abridgment of such parts of the pleadings and proceedings as the counsel shall deem necessary to a full understanding of the errors relied on for a reversal of the judgment or decree complained of, together with a brief of the points and authorities intended to be relied on in the argument of the cause.

XXI. It shall also be the duty of the counsel for the plaintiff in error or appellant, to file in the Clerk's office, for the use of the defendant's counsel, a copy of said abstract or abridgment and brief, at least one day previous to the argument, when the cause is not argued on the first day of the term. If the rules in relation to the furnishing and filing of abstracts and briefs, be not complied with, the cause shall be either continued, or dismissed at the discretion of the Court. (See 3 Scam. R. 9.)

XXII. The defendant's counsel shall be permitted, if he be not satisfied with the abstract or abridgment by the plaintiff's counsel, to furnish each of the Justices of this Court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause. It shall also be the duty of the defendant's counsel, to furnish each of the Justices and the opposite counsel, at the commencement of the argument, with a brief of the authorities he intends to cite on the argument.

XXIII. In all cases, where errors are assigned, the assignment and joinder shall be written on, or directly appended to, the Record in the cause in which they are assigned.

XXIV. When a rule shall have been taken to join in error, the appellant or plaintiff in error, when such rule shall not have been complied with, may take a judgment by default, or may set down the cause for hearing *ex parte*, and the Court shall give such judgment as the case may warrant.

RE–HEARING.

XXV. Application for a RE–HEARING of any cause, shall be made by petition to the Court, signed by counsel, briefly stating the grounds for a re-hearing, and the authorities relied on in support thereof; notice of such intended application having been first given to the opposite party, or his counsel.

When a RE–HEARING is granted, notice shall be given to the opposite party, of the time when such re-hearing will be had.

RULES AND REGULATIONS

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF ILLINOIS,

NOVEMBER TERM, 1837.

I. Attorneys and Counsellors at Law who have been admitted to practice in the Supreme Court of this State, or in the District Court of the United States, shall be admitted to practice in this Court, on motion; and each person thus admitted, shall take an oath to support the Constitution of the United States, and that he will faithfully discharge his duties as an attorney and counsellor of this Court.

II. The first Monday of every month shall be a rule day in the Clerk's Office, on which rules may be taken, and defaults entered. [*Rescinded.*]

III. Where original process shall be served in any case thirty days before the commencement of the term, and declaration filed, and rule for plea taken, ten days before the term, the plaintiff shall be entitled to a trial unless good cause be shown for a continuance. [*Rescinded.*]

IV. Where the ground on which a motion for a continuance is made, shall not appear of record, it shall be reduced to writing, and sworn to by the party, or signed professionally by the counsel.

V. All formal objections to the taking of depositions, shall be stated in writing before the cause is called for trial, and if not so stated, shall be considered as waived.

VI. The same process shall be used in this Court, as is used in all like cases in the State Courts.

VII. Where a suit is brought by a non-resident, security for the costs of suit, shall be filed with the Clerk before the emanation of the writ.

VIII. After the opening of the Court, and before any case on the docket shall be called, motions shall be in order.

IX. All motions to set aside defaults entered at rules, shall be made on or before the second day of the term. [*Rescinded.*]

X. The Clerk shall issue a *venire facias* returnable to each term, commanding the Marshal to summon twenty-four persons to serve as traverse jurors, and twenty-four to serve as grand jurors.

XI. In all cases where, by the laws of this State, the plaintiff would be entitled to bail in the State Courts, he shall be entitled to bail in this Court.

JUNE TERM, 1838.

XII. In all cases where original process shall be served thirty days before the commencement of the term, and the declaration filed on or before the first day of the term, the plaintiff may take a short rule for plea, and shall be entitled to a trial at the same term, unless cause be shown for a continuance.

The rules adopted at the last term, establishing rule days, and to regulate the filing of pleadings, &c., are hereby abolished.

By an order of the Court at the term of June, 1838, the Marshal is commanded to summon forty-four jurors, and he is not to make designation whether petit or grand jurors.

A copy of all the Rules on record.

JAMES F. OWINGS.
Clerk of the Circuit Court of the United States for the District of Illinois.

Part 4 24 R.

TABLE OF CASES

REPORTED IN THIS VOLUME.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1832, AT VANDALIA.

PETER MENARD, Jr., plaintiff in error *v.* JOSEPH MARKS, administrator of GEORGE LOVE, deceased, defendant in error.

Error to Peoria.

A *scire facias* to foreclose a mortgage, may be issued before the expiration of one year from the decease of the mortgagor.
A *scire facias* to foreclose a mortgage, is a proceeding *in rem*, and not *an action* in the ordinary acceptation of that term.
A mortgage creditor has a *specific lien* on the mortgaged premises, which is not affected by the solvency or insolvency of the intestate's estate.
The objection that a *scire facias* to foreclose a mortgage, does not set out the mortgage in full, cannot be taken on a plea in abatement.

THIS cause was tried at the September term, 1832, of the Peoria Circuit Court. The material facts are contained in the opinion of the Court.

L. BIGELOW, for the plaintiff in error, relied upon the following points and authorities:

1. The proceeding, being entirely *in rem*, is not *an action* against the administrator, within the meaning of the statute of 1829; (1) and the statute 1825, (2) upon which the proceeding is founded, stands independent of the statute of 1829, and is in no wise affected by it.

2. In construing a statute, all its parts and provisions should

(1) R. L. 643; Gale's Stat. 711. (2) R. L. 376; Gale's Stat. 393

be compared, and a consistent and a reasonable exposition given to each part. Bac. Abr. *Statute*, I. 2, Holbrook v. Holbrook et al., 1 Pick. 258.

3. If divers statutes relate to the same subject, they ought to be all taken into consideration, in construing any one of them. Bac. Abr. *Statute*, I. 3 ; 1 Pick. *ubi sup.*

4. The intention of the legislature ought to prevail in the construction of a statute, if that intention can be collected from the whole law, or from other laws *in pari materia*, although it be contrary to the literal import of the words employed. United States v. Fisher, 2 Cranch 386, 399 ; 1 Pick. *ubi sup.*; Bac. Abr. *Statute*, I. 2, 5.

5. If the literal import of the words of a statute would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid those consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done. United States v. Fisher, *ubi sup.*; Bac. Abr. *Statute*, I. 2 ; Bryan v. Buckmaster, Breese's App. 22;

6. If general words are used in a statute, which import more than seems to be within the purview of the law, and those expressions can be restrained by others used in the same law, or in any other upon the same subject, they ought to be restrained. *Ibid* ; *Ibid.*

7. When a mortgagee seeks to obtain satisfaction of his debt by a sale of the mortgaged estate, pursuant to the provisions of the statute of 1825, the administrator of the mortgagor can have no interest whatever, as administrator in the subject-matter of the suit ; nor can his property, or that of the intestate in his hands, be at all affected by any judgment which the mortgagee may obtain in such proceedings. Stat. 1825, § 18 (1) *ubi sup.*; Stat. 1829, § 120. (2)

8. No new provision was enacted by the statute of July 1, 1829, § 97, (3) but the same law was in force at the time of passing the statute of 1825. Stat. Oct. 24, 1808, § 3.

T. Ford, for the defendant in error, cited 1 Chit. Plead. 270, 450.

Lockwood, Justice, delivered the opinion of the Court:

This is a *scire facias* issued against the defendant, as administrator, to obtain a sale of mortgaged premises, pursuant to the statute, Jan. 17th, 1825, entitled "*An act concerning Judgments and Executions.*" The mortgage was executed to the plaintiff by the defendant's intestate. Upon the return of the *scire facias*, the defendant, pleaded in abatement that the *scire facias* was issued within one year after the death of the intes-

(1) Gale's Stat. 393 ; R. L. 376. (2) R. L. 650 ; Gale's Stat. 716.
(3) R. L. 643 ; Gale's Stat. 711.

tate. To this plea the plaintiff demurred, and the defendant joined in demurrer. On the hearing of the cause in the Circuit Court, the demurrer was overruled, and the plea sustained, and thereupon judgment was given that the *scire facias* be abated and quashed. To reverse this judgment, a writ of error has been brought to this Court.

The only question presented by the pleadings, is, whether the 97th (1) section of the act passed 23d January, 1829, "*relative to Wills and Testaments, Executors and Administrators, and the settlement of Estates*," forbids the suing out of a *scire facias* to foreclose a mortgage, until after the expiration of one year from the taking out of letters of administration. By the 18th section of the act "*concerning Judgments and Executions*," passed 17th January, 1825, it is provided in substance, that if default be made in the payment of any sum of money, secured by mortgage on lands and tenements duly executed and recorded, it shall be lawful for the mortgagee to sue out a writ of *scire facias* from the clerk's office of the Circuit Court of the county in which said mortgaged premises may be situated, directed, &c., requiring the sheriff to make known to the mortgagor, or, if he be dead, to his heirs, executors, or administrators, to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage; and upon appearance, the Court is authorized to give judgment; but if the *scire facias* be returned *nihil*, an *alias scire facias* may be issued; and if the *alias* be returned *nihil*, or if the defendant appear and plead, or make default, the Court may proceed to give judgment with costs: "And also that the mortgaged premises be sold to satisfy such judgment, and may award or direct a special writ of *fieri facias* (2) for that purpose. PROVIDED, HOWEVER, that the judgment aforesaid shall create no lien on any other lands or tenements than the mortgaged premises, nor shall any other real or personal property of the mortgagor be liable to satisfy the same."

The *scire facias* authorized by the above section of the judgment and execution law, is not an action in the ordinary acceptation of that term; but is a proceeding *in rem.* [a] The judgment does not bind the administrator, nor does it affect in the least degree that portion of the intestate's estate that is committed to his charge. If a mortgage were to be delayed until one year after letters of administration were taken out, it would often happen that years would intervene before he could enforce his lien. No such consequences could have been intended by the legislature.

Administration, except in cases of insolvency, only extends to

(1) Gale's Stat. 711; R. L. 643 (2) Gale's Stat. 393; R. L. 376. (*a*) Carpenter *vs.* Mooers, 26 Ill. R., 162. Woodbury *vs.* Manlove, 14 Ill. R. 213. *Contra* in part 2 Tidd Prac. 1090.

the (1) personal estate; and the object in forbidding the bringing of an action against an administrator for one year after the taking out of letters of administration, was to enable the administrator to ascertain whether the estate of the intestate were insolvent, in which event the debts would be classed, and paid *pro rata*. The reason for giving this time to ascertain the situation of the estate, does not apply to a mortgage creditor, for he has a *specific lien* on the mortgaged premises, which is not affected by the solvency or insolvency of the intestate's estate. We are therefore of opinion that the demurrer to the defendant's plea, ought to have been sustained.

It was contended in the argument of this case, that the *scire facias* does not set out the mortgage in full. This objection, however, cannot be taken on a plea in abatement.(2)

The judgment of the Court below is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

(1) But see Act of March 1, 1833, Gale's Stat. 723; R. L. 659.
(2) *See* Marshall *v.* Maury, *Post.*

Bird M. Simpson, plaintiff in error *v.* Moses M. Rawlings, defendant in error.

Error to Marion.

A justice of the peace has no jurisdiction where the original amount of the demand exceeds one hundred dollars, though it may have been reduced below that sum by credits.

This cause was tried on appeal from a judgment of a justice of the peace of Marion county, before the Hon. Thomas C. Browne, at the September term, 1832, of the Marion Circuit Court.

Davis and Breese, for the plaintiff in error, cited:

R. L. 1827, 259 § 1; Breese 263, Ellis *v.* Snider; *Ibid.* 21, Clark *v.* Cornelius; *Ibid.* 153, Maurer *v.* Derrick; *Ibid.* 293, Blue *v.* Wier and Vanlandingham; 1 Chit. Plead. 298 n. 1, 357.

Eddy, for the defendant in error, cited:

1 Chit. Plead. 92 n. 4; 14 Mass. 99; 5 Cowen 195; 10 Serg. & Rawle 321; 12 Johns. 227; 1 Chit. Plead. 91, 104, 262; 3 Blac. Com. 155; Bul. N. P. 171; 3 Saund. 182 n. 1; 1 Bailey's Index 453; 1 Cranch 285, 286; 2 Stark. Ev. 123–302; Langham *v.* Boggs, 1 Missouri 476, 575; Buckner *v.* Amour, 1 Missouri 534; 1 Serg. & Rawle 19, 20, 21.

Simpson v. Rawlings.

Lockwood, Justice, delivered the opinion of the Court:

Rawlings brought an action before a justice of the peace against Simpson, on a note for $110,47, on which note was endorsed a credit of $10,50, leaving a balance due on the note, of $99,97. On the 31st of March, 1832, the justice gave judgment for Rawlings for $99,97, and interest on that amount, to commence from the 11th day of August, 1831. From this judgment Simpson took an appeal to the Circuit Court of Marion county, where the judgment of the justice was affirmed. To reverse the judgment of the Circuit Court, a writ of error has been sued out to bring the cause into this Court, and the plaintiff in error assigns for error that the justice of the peace had no jurisdiction of the subject matter of the suit. By the "*Act concerning Justices of the Peace and Constables*," justices have jurisdiction "for any debt claimed to be due on a promissory note, contract, or agreement in writing, where the whole amount (1) of such written contract, agreement, or note, shall not exceed one hundred dollars."

The Court can put no other construction upon the statute above recited, than that the justice has no jurisdiction where, by the face of the note, a larger sum is stipulated to be paid than $100.

The credit endorsed on the note, did not render "the whole amount of the note" less than $100. This Court has frequently decided that where the plaintiff exhibited an account against the defendant for more than $100, but reduced the amount due to less than $100 by credits, that the justice had no jurisdiction; and we cannot perceive any distinction between those cases, and the one now before the Court. We are therefore of opinion that the judgment must be reversed because the justice of the peace had no jurisdiction of the cause.

Judgment reversed.

Note. Since the decision of this cause, an act has been passed giving to justices of the peace jurisdiction in cases where the original indebtedness exceeds one hundred dollars but has been reduced below that sum by fair credits. Gale's Stat. 425; R. L. 415. See, Hagunin v. Nicholson, decided December term, 1839. *Post.* 168. (*a*)

(1) Gale's Stat. 402. See also pp. 414. 425; R. L. 386, 401, 415.
(*a*) Kersoki vs. Foster, 20 Ill. R. 24. Raymond vs. Strobel, 22 Ill. R. 114.

John M. Feazle, plaintiff in error *v.* Bird M. Simpson and Jesse M. Wade, defendants in error.

Error to Marion.

The doctrine is well settled, that an action for malicious prosecution cannot be brought before the first suit has been legally determined; and it must be averred that the former suit terminated in the present plaintiff's favor. A legal conclusion of the suit must be shown. If the suit be proved not to have been determined in the manner alleged, it is a good ground of non-suit.
The issuing of the summons is the commencement of a suit.

This was an action on the *case* commenced January 16th, 1832, for the malicious prosecution of a suit by attachment, against the defendants in error, by the plaintiff in error, as agent of one John H. Gay. The declaration originally contained but one count, which averred that the plaintiff in error, "as agent of John H. Gay," on the 16th day of January, 1832, complained maliciously, and without any probable cause for so doing, before the clerk of the Circuit Court of Marion county, that the defendants in error were indebted to said John H. Gay, in the sum of $600, and were about to depart from this State, with the intention of having their effects and personal estate removed without the limits of the same, and thereby obtained a writ of attachment against them, &c., and by virtue of which the sheriff of said county attached sundry articles of personal property of the defendants in error, &c., &c.; and afterwards, to wit, at the following March term of said Court, said attachment was quashed, &c. The plaintiff in error demurred to the declaration, and the demurrer was overruled by the Court.

The defendants in error then amended their declaration by adding another count, like the first, except that the words "as agent of John H. Gay," were not inserted. To this second count, the plaintiff in error pleaded not guilty. The cause was tried at the September term, 1832, of the Marion Circuit Court, before the Hon. Thomas C. Browne and a jury, and judgment rendered against the plaintiff in error for fifty dollars and costs. From this judgment he prosecuted a writ of error to this Court.

On the trial in the Court below, the record of the suit of John H. Gay against the defendants in error, was admitted in evidence, though objected to by the plaintiff in error, who excepted to its admission.

Wm. H. Brown, for the plaintiff in error, contended that

1st. The action does not lie against Feazle, if it lies at all. Feazle is said to be an agent.

An agent is not in general liable to third persons, for a neglect,

non-feasance, or mal-feasance, when acting with the express or implied authority of principal. 1 Chitty 71–2.

No one can be liable for a tort or trespass as an agent. He is personally responsible.

An action for malicious prosecution cannot be supported against an attorney. 1 Chitty 71–2.

2d. An action does not lie in this case, it being a suit commenced by attachment. The remedy is alone upon the bond. R. L. 1827, 70.(1)

To sustain this action, there must be *an arrest.* The *gist* of the action is the *unfounded arrest.* 2 Chitty 599, and authorithorities there cited; 3 Sel. 939.

Suit does not lie where bail is not demanded. 2 Stark 921.

An action will not lie if there was a *cause of action*, (exception as to holding to bail for a greater sum than due.) Bul. N. P. 11, 12; 2 Stark, 910, note.

No action can be supported for malicious *suit.* 2 Chitty 599; 1 John. Dig. 16.

If an action will lie in this case, it should have been alleged that defendant *knew* either that no debt was due, or that plaintiffs were not going to depart. 3 Esp. Rep. 34; Bul. N. P. 12.

3d. It is not alleged that there *was not a probable cause of action.* This averment is necessary. 2 Chitty 599.

It is not alleged that the first suit was ever determined. Only said that the *process* was quashed and dismissed. 2 Chitty 604, and notes.

4th. This action was brought before the first was determined. New action cannot be brought until the first is disposed of. Bul. N. P. 12; 1 Saund. 228, note B; 2 Chitty 604.

The writ was sued out against F. on the 16th January, 1832, and the attachment dismissed March term, 1832.

The Court erred in permitting a record of *Gay v.* S. and Wade, to be read.

Walter B. Scates, for the defendants in error.

Lockwood, Justice, delivered the opinion of the Court:

Simpson and Wade commenced an action against Feazle in the Circuit Court of Marion county, for maliciously, and without probable cause, making a complaint that they were indebted to John H. Gay, and suing out of said Court an attachment against their goods and chattels. The summons in this cause was issued on the 16th Jan., 1832.[a] The declaration states that the attachment was issued on the 16th Jan., 1832, and that afterwards, at the March term, 1832, of said Circuit Court, the attachment was quashed and dismissed, being found "to be causeless, vexatious, and sued without any color of law to warrant the same." On the

(1) R. L. 85; Gale's Stat. 65. (a) Nelson *vs.* Cook, 19 Ill. R. 440.

trial of the cause, the plaintiff below offered in evidence the record in the suit of John H. Gay against the defendants, to prove the making of the complaint, the issuing of the attachment, and the dismissal of the same; to the introduction of which record, the defendant below objected; but the Court overruled the objection, and suffered the record to be given in evidence to the jury. To the reception of which testimony, the defendant below excepted, and the cause is brought into this Court by agreement of the parties.

Although other questions were raised in the court below, yet it is necessary *only* to decide whether the record given in evidence to the jury was admissible. On this point the doctrine is well settled, that an action for malicious prosecution cannot be brought before the first suit has been legally determined; and it must be averred, that the former suit terminated in the present plaintiff's favor, and a legal conclusion of the suit must be shown; and if the suit be not proved to have been determined in the manner alleged, it is a ground of nonsuit. (1)[a] The issuing of a summons is the commencement of a suit; and consequently, the record received in evidence, was inadmissable, as it would, if it were the record of the proceedings mentioned in the declaration, prove the termination of the former suit to have been long after the commencement of this suit. Such a fact could not contribute to support the action, and consequently the record ought to have been rejected. For this error the judgment must be reversed with costs.

Judgment reversed.

(1) See notes to 2 Chitty 603, and the authorities there cited.
(*a*) But see 4 Scam. R. 447.

Mary Clifton, plaintiff in error *v.* John L. Bogardus defendant in error.

Error to Peoria.

It is a general rule that all persons are competent witnesses who have sufficient understanding, and are not disqualified by interest, crime, or want of proper sense of moral obligation to speak the truth.

In a trial of the right of property, the defendant in execution is a competant witness for the claimant. The interest which disqualifies, must be in favor of the party calling the witness.

This cause was tried at the September Term, 1832, before the Hon. Richard M. Young and a jury, and a virdict rendered for the defendant. To reverse this judgment, Mary Clifton brought a writ of error in this Court.

L. Bigelow, for the plaintiff in error, cited the following authorities:

2 Stark. Ev. 398, 744 *et seq.*, 751; 3 Stark. Ev. 1355, 1647; Cushman *v.* Loker, 2 Mass. 108; Webster *v.* Lee, 5 Mass. 334; Baker *v.* Prentiss, 6 Mass. 430; Emerson *v.* Prov. Hat Man. Co. 12 Mass. 237; Bland *v.* Ausley, 2 Bos. and Pul. 331; Herbert *et al. v.* Herbert, Breese 278.

T. Ford, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:(1) Upon a judgment in favor of the defendant, Bogardus, against Moses Clifton, an execution was issued and levied on property claimed to be the property of Mary Clifton. Upon the trial of the right of property between Mary Clifton and Bogardus, in the Circuit Court, Moses Clifton was called by the plaintiff to support her title; but his testimony was rejected by the Court, because he was the debtor in the execution upon which the property was taken. This the error relied upon for the reversal of the judgment of the Circuit Court. It is a general rule that all persons are competent witnesses who have sufficient understanding, and are not disqualified by interest, crime, or want of a proper sense of moral obligation to speak the truth. It does not appear from the record of this cause, that any of these objections were applicable to the witness whose testimony was rejected by the Court. His being the debtor(2) against whom the execution was issued, did not make him a party in the trial of the right of property between Bogardus and Mary Clifton; and whatever interest he had in the result of that trial, was against the party producing him. If the decision had been in favor of the claimant, the property upon which the execution was levied, would have become exempt from its operation, and he would have remained liable for its satisfaction. If, on the contrary, it had appeared that the claim was not well founded, the property would have been taken in satisfaction of the execution: a debt for which he was bound would have been satisfied out of the property of a third person, and no legal liability would have been imposed upon him to answer over to that person for its value. The party producing him, was the only one that could have objected to his testimony.

The interest which disqualifies, must be in favor of the party calling the witness. The reverse of this position is true in the present case. The Court, therefore, erred in rejecting the testi-

(1) Browne, Justice, was not present at the argument of the cause.

(2) By the act passed January 30, 1835, it is provided, "that in no case of a trial of right of property," under the laws of this State, "shall the defendant in execution be a competent witness." Acts of 1835, 56; Gale's Stat. 588.

mony of the witness, and the judgment must be reversed with costs, and the cause remanded to the Court below.[a]

Judgment reversed.

(a) Miller vs. Dobson 1 Gil. R. 572; James vs. Stratton 32 Ill. R. 202 L. of 1867 p. 182.

Nathaniel Beezley, Assignee of Silas Beezley, plaintiff in error *v.* William A. Jones, defendant in error.

Error to Vermillion.

Deeds or obligations, containing mutual covenants, are not assignable.
One covenant in an obligation or contract containing several covenants, cannot be assigned without the other.
Semble, That instruments in writing for the conveyance of land, or for the performance of personal duties, are not assignable.

This was an action of *covenant* commenced in the Vermillion Circuit Court. At the October term, 1832, the cause was heard before the Hon. William Wilson, upon demurrer to the plaintiff's declaration, and judgment rendered for the defendant.

S. McRoberts, for the plaintiff in error, cited R. L. 1827, (1) 320: Breese 300; Chitty on Bills 5, 6, 7.

E. B. Webb, for the defendant in error, cited R. L. 1827, 320; Breese 300; 1 Blackf.. 148; 1 Peters' Cond. R. 416; 2 do. 307; Dig. South and West. Rep. 77.

Wilson, Chief Justice, delivered the opinion of the Court:

Silas Beezley covenanted by deed with William A. Jones, to lease to him a house, carding machine, and apparatus, for a specified time, and further agreed to be at the expense of repairing the machine in case of any failure. Jones, on his part covenanted to pay one hundred and seventy dollars rent, by instalments; and, at the expiration of the term, to return the machine, &c., in the same order he received them, the common wear excepted.

This deed is assigned, by endorsement, to the plaintiff, who sues, in his own name, for a breach of the covenant to pay the rent. The declaration is demurred to, and the demurrer sustained by the Circuit Court.

The question presented by the statement of the case, is whether the statute of (2) 1827, has made the instrument upon which this action is brought, negotiable. That statute makes not only bonds and notes for the payment of money, but also all written engagements for the payment or delivery of articles of personal property, or for payment of money in personal property, negotiable. Instruments of this sort, from the usual course of

(1) R. L. 482; Gale's Stat. 525. (2) R. L. 482; Gale's Stat. 525.

trade in this country, are more frequently made than notes for the payment of money. The convenience of trade, it was thought by the legislature, required that such instruments of writing should be negotiable; and they are made so by the express language of the legislature. But neither the language of the statute, nor the policy that occasioned its enactment embrace instruments in writing for the conveyance of land, or for the performance of personal duties; and the legislature never intended to impart a negotiable quality to a written agreement for the performance of perhaps twenty stipulations of different characters, merely because it contained one for the payment of money, or the delivery of an article of personal property.[a] The deed upon which this action is brought contains mutual covenants; those on the part of the defendant are to pay one hundred and seventy dollars rent, and at the expiration of his lease, to return the machine, &c. If the whole interest in this deed can be transferred by assignment to the plaintiff, he would be entitled to recover for a breach of either or both of these covenants, and the assignor would be left without a remedy for the detention or destruction of his property. This result was certainly never contemplated by either the assignor or assignee. Such a transfer is not authorized by the statute. Nothing more was intended to be transferred, than the simple covenant to pay one hundred and seventy dollars. The contract is indivisible, and one covenant cannot be assigned without the other. The recognition of such a principle, would work great injustice by multiplying actions, and enabling one party to a contract, to subject the other to the separate actions of as many different assignees as it might contain covenants. The judgment of the Court below is affirmed with costs.

Judgment affirmed.

(a) But could not this lease be assigned at common law by a lessor? 1 Chitty's Pl. 116 Buckmaster vs. Eddy Beecher's Breese R. 381 and notes.

JOHN REYNOLDS, Governor of the State of Illinois, plaintiff in error *v.* JAMES HALL, TIMOTHY GUARD, JOHN TILLSON, JR., CHARLES SLADE, FRANCIS PRINCE, CHARLES PRENTICE, JAMES B. CAMPBELL, ALFRED W. CAVARLY, and J. M. DUNCAN, defendants in error.

Error to Fayette.

The law in force at the time of the making of contracts, form a portion of their essence and they must be considered as entered into with reference to such laws, and be so construed.(a)

The contract of a surety is to be construed strictly, both in law and equity, and his liability is not to be extended by implication beyond the term of his contract.

—(a) Post. 417.

Reynolds *v.* Hall *et al.*

The sureties of the late State Treasurer, are not liable for his acts as Cashier of the old State Bank.
It is a well settled rule, that a surety cannot be held beyond the express term of his undertaking, as understood by the parties, when the contract was entered into.

This cause was tried at the October term, 1831, of the Fayette Circuit Court, before the Hon. Theophilus W. Smith. The verdict of the jury was in favor of the plaintiff in error, for the sum of fourteen hundred and fifty dollars and forty-eight cents. Judgment was rendered upon this verdict.

Alfred Cowles, for the plaintiff in error.

Cavarly and McRoberts, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

This was an action of *debt* brought against James Hall and his sureties, on his official bond, given for the faithful performance of his duties as Treasurer of the State of Illinois, to which office he had been elected on the 28th day of December, 1828, by the vote of the legislature. The bond is dated on the 16th day of January, 1829, and was approved by the plaintiff, in his executive character, on the 22d day of the same month. The condition of the bond, after reciting, that the defendant, James Hall, had been elected Treasurer of the State of Illinois for two years, is as follows: "Now, if the said James Hall shall well and faithfully perform the duties of his said office, for and during his said term, then this obligation shall be void; otherwise it shall be and remain in full force."

The defendants replied—1st. General performance. 2d. That the defendant, Hall, had faithfully accounted for and paid over all moneys received by him, for which his sureties as State Treasurer, were chargeable in this action, according to the tenor and effect of their bond. 3d. Set-off for certain sums, for which the State is indebted to said Hall for moneys deposited in Bank: and certain expenditures of said defendant for and on account of said State: to which the plaintiff rejoined and took issue.

On the trial of the cause, a report of the situation of the State Bank of Illinois, at Vandalia, dated on the 1st January, 1831, signed by the said Hall, as Treasurer, showing, among other things, that he had received, on account of said Bank, considerable sums from the Branch Cashiers of said Bank, in the notes of said Bank, was offered in evidence; to the admission of which report as evidence, the defendants objected; which objection was sustained, and to which opinion of the Court, in refusing to admit the report as evidence, the plaintiff excepted. The bill of exceptions contains other matters to which it is not necessary to refer, as the additional points reserved in the bill have been, on the argument, abandoned by the plaintiff's counsel. The only point

relied on, among the causes assigned for error, is the rejection of the report offered as evidence.

On the part of the sureties of Hall, who are co-defendants, it is insisted that no evidence of the receipts of the funds or effects of the State Bank, by Hall, by virtue of the act of the legislature of 22d January, 1829, or any subsequent law of the State imposing on Hall, the late Treasurer, the duties of Cashier of such Bank, could be introduced as legal evidence, to charge them with a liability in case of a misapplication of such effects or funds of the Bank, by the late Treasurer; and this is, as I understand, conceded to be the only point to be examined and determined.

In the consideration of this question, it is necessary to recur briefly to the Constitution of the State, creating the office of Treasurer, and the act of the legislature, defining his duties. The office of State Treasurer is created by the 21st section of the 3d article of the constitution; and the act of the 24th March, 1819, "*defining the duties of Auditor and Treasurer*," was the only law in force, at the time of the execution, delivery, and approval, and acceptance of the bond. The 7th section of the act requires the Treasurer to give bond in the sum of twenty thousand dollars, and the residue of its provisions relate to the performance of duties, in regard to the fiscal operations of the State Treasury, and nothing else.

Under this law, then, we are to determine the liabilities of the sureties, and whether they can be held responsible for other duties cast upon the Treasurer, by the act of 1829, after the execution, approval, and acceptance of the bond.

Without examining the question which might here arise, as to what duties might thus be cast upon the Treasurer, and their appropriateness, it will be sufficient to enquire into the character of the act of 23d Jan., 1829, entitled "*An act to amend an act, supplementary to an act establishing the State Bank of Illinois, approved January 10th*, 1825." By the 7th section of that act, it is declared, "that the Treasurer shall discharge all the duties required of the Cashier of said Bank, by the act establishing the State Bank of Illinois." From this provision, it is manifest that the legislature cast upon the Treasurer the office of Cashier, and thereby constituted the Treasurer Cashier of the Bank *de facto*. Having by law imposed this new office upon him, and created new liabilities and new duties, of a character not only unconnected with the office of Treasurer, but of a diversified and entirely different nature, can it be contended that the sureties on his bond are justly and legally responsible for his want of fidelity in the discharge of this new trust? It will be recollected that the Cashier of the Bank was required by law to give security in the sum of $50,000; and why, on the transfer of his duties, additional security from the Treasurer was not

required, it is not for this tribunal to determine. No increase of the Treasurer's bond was required; and it is inconsistent with the idea derived from the requirements of the law creating the Bank, to suppose that the sum of $20,000 required by the Treasurer's bond, would have been deemed sufficient, when these new and important and responsible duties were thus transfered, by a transfer of the office of Cashier.

The question then presented for consideration and decision, is, not whether it is within the bounds of legislative competency to impose additional duties on the Treasurer, connected with his office; nor whether those duties are appropriate or not; but whether, by law, there has not in fact been cast on the Treasurer an additional office, and he required to discharge the duties required by law of the former incumbent. If this be so, then it cannot be doubted that such of the defendants as are mere sureties of the Treasurer, cannot be holden responsible for the acts of the same individual in the performance of the duties of the office thus cast upon him. But if there can be a doubt entertained as to such an interpretation of the act of 1829, and whether or not it did not cast on the Treasurer a distinct and additional office, and the performance of its duties, still there is no rule of law better settled—one which has received the universal sanction of all tribunals—that the laws in force at the time of the making of contracts, form a portion of their essence, and that they must be considered as entered into with reference to such laws, and be so construed. The act of "24th March, 1819, defining the duties of Treasurer," was the only law in existence at the time of entering into the bond; and by it, the rights and liabilities of the respective parties must be ascertained and determined. The sureties, when they signed the bond and entered into the covenant, could not be supposed to look elsewhere to ascertain the nature and extent of their liability. They saw that $20,000 was the extent, and that the duties which were required of the Treasurer, related alone to the fiscal concerns of the State, as defined in that law, and not to duties appertaining to a moneyed institution of a varied and peculiar character. It will be apparent that they could not have anticipated that the legislature intended, or would have subsequently cast on the defendant, Hall, the office and duties which were in fact so cast, afterwards, upon him. Apart, however, from this view of the case, there is another which is considered decisive as to the extent of the liability of the sureties.

The contract of a surety is to be considered strictly, both in law and equity, and his liability is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obli-

gation, is he bound, and no further.(1) In a case, also, determined in the United States Court,(2) it was decided that under a bond given on the 4th December, 1813, conditioned for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties, who had been appointed under the act of July 22d, 1813, by the President, on the 11th of November, 1813, to hold his office until the end of next session of the Senate, and no longer, and was re-appointed to the same office, January 24th, 1814, by the President, by and with the advice and consent of the Senate, to hold his office during the pleasure of the President, for the time being, the liabilities of the sureties are restricted to the duties imposed by the collection acts, passed *antecedent to the date of the bond.*

The act of 1829 could not be retroactive in its operations, but was entirely prospective. Although it imposed new and additional duties on the Treasurer, of a character in nowise connected with the office of Treasurer, and which if it even be conceded, were mere duties appendant to the office of Treasurer, created by the act of 23d January, 1829, and was not the transfer of an additional office on him, and that in the character of Cashier, still the liabilities of the sureties could not be enlarged, or changed in any way, from what they actually were prior to the passage of this law.

As then the act of 1829 could in nowise interfere with the condition of the bond, could impose no new liabilities, nor in any way change its character, or extend its operations, by implication, I am of opinion, that the judgment of the Circuit Court should be affirmed.[a]

Separate opinion of LOCKWOOD, *Justice.* I concur in opinion, that the judgment of the Circuit Court ought to be affirmed, upon the ground that the sureties of the Treasurer could not have contemplated any such increase of their responsibility, as necessarily took place by transfering the duties of Cashier of the State Bank to the Treasurer. Such additional responsibilities not being within the intention of either of the parties to the bond when it was executed and accepted by the Governor, to hold the securities responsible for the acts of the Treasurer, growing out of his management of the affairs of the Bank, would violate a well settled rule, that a surety cannot be held beyond the express terms of his undertaking, as understood by the parties, when the contract was entered into.

Judgment affirmed.

(1) Miller *v.* Stewart, et al. 9 Wheat. 680. (2) U. S. *v.* Kirkpatrick, 9 Wheat. 729.
(*a*) Governor &c. *vs.* Ridgway, 12 Ill. R. 19 and notes. Sharp *vs*, Bedell, 5 Gil. R. 89.

WILLIAM A. BEAIRD, plaintiff in error *v.* MARY FOREMAN, administratrix of JOSEPH FOREMAN, deceased, defendant in error.

Error to St. Clair.

In proceedings against a sheriff, under § 30 of the practice act, by motion, for failing to pay over money collected by him on execution, the judgment should be for the amount collected, and interest thereon, at the rate of *twenty per centum per annum.*(*a*)

The remedy given by § 14 of the "*Act concerning Sheriffs and Coroners*," is a distinct remedy from that given by § 30 of the practice act; and it is in the option of the plaintiff in execution to resort to whichever he pleases.

THIS was a writ of error from the decision of the Hon. Theophilus W. Smith, made at the March term, 1828, of the St. Clair Circuit Court.

A. W. SNYDER and J. SEMPLE, for the plaintiff in error.

A. COWLES, for the defendant in error.

BROWNE, Justice, delivered the opinion of the Court:

THIS case is brought into this Court on a writ of error from the St. Clair Circuit Court. It appears from the record, that the defendant in the Court below, as sheriff of St. Clair county, had collected on an execution in favor of the plaintiff, against Joseph Chance, John Bird and William Kinney, defendants in a replevin bond, the sum of $155,28 1-2, which he did not pay over on request to the said plaintiff. A motion was thereupon made against the said sheriff, on due notice given under the 30th(1) section of the practice act of 1827, for judgement against him for said sum and 20 per centum thereon, from the time of collection till paid; and a judgment was accordingly rendered at the March term, 1828, against the said sheriff, in these words: "This day came the said plaintiff by her attorney, and satisfactory proof having been made to the Court, of the service of the notice according to law, and it appearing to the Court that the said defendant received the sum of $155,28 1-2, it being the debt specified in said execution, and that he has been requested to pay over the same to the plaintiff, and hath failed so to do; and the said defendant declining in open Court to make defence, it is therefore considered by the Court, that the said plaintiff do recover of the said defendant, the said sum of $155,28 1-2 for her debt, and also interest, to be computed thereon, at the rate of 20 per centum per annum, from the 14th August, 1827, being the return day of said execution, until paid, for her damages, for failing to pay over the said money." It is contended, in the assignment of errors, by the counsel for

(1) R. L. 494; Gale's Stat. 535. (*a*) Buckmaster *vs.* Drake, 5 Gil. R. 321.

the plaintiff in error, that this judgment is erroneous, because it awards 20 per centum per annum interest, as damages, instead of 20 per centum damages merely, upon the amount withheld: this position must be determined by the terms and intention of the statute which gives the remedy. By the act before referred to, a summary remedy is provided against sheriffs who shall neglect or refuse to return an execution, or who shall neglect or refuse to pay over money collected by them on execution. By giving such sheriff ten days' notice in writing, the plaintiff in the execution may have relief on motion in the Circuit Court, namely, an order upon the officer, and process of attachment, if necessary, to enforce it, when a return of the execution merely is sought; and when money has been collected, and withheld, a judgment may be rendered, after the proper steps, for the amount, with 20 per centum thereon, from the time of collection till paid. There being no question made by the assignment of errors, as to the regularity of such a judgment, the decision in this case must depend upon the construction of the words "20 per centum from the time of collection till paid." That this means interest to be computed at that rate, for the time the money is withheld, whatever that time may be, the Court has no doubt. The words "from the time of the collection till paid," would otherwise be insignificant and absurd. The legislature doubtless intended to take away from the sheriff all inducement to apply to his own use money collected by him; and a less rate of interest than 20 per centum in a country without usury laws, and where money is not more plenty than it ought to be, might not have removed the temptation which sheriffs sometimes very possibly fall into, to speculate upon the money of others in their hands. Common interest, with 20 per centum damages upon the amount when withheld for a long time, might, and in this State, often would, leave the sheriff a gainer by his breach of duty; and on the other hand, it might be no amends to the unfortunate plaintiff, who relied upon the prompt collection of his debt. Another provision of the statute, giving ten per centum, not as interest, but as damages, on the amount collected, has been referred to in the course of the argument, as having a bearing upon this point. It is section 14th(1) of an act of 1827, respecting sheriffs and coroners, and is an independent remedy applicable to the case, but which the defendant may not choose to pursue, the remedy being less efficacious. The two provisions are alternative. It is at the option of the plaintiff in the execution, to resort to whichever he pleases. When money has been retained but a short time, it would afford a more adequate satisfaction than the provision of the practice act, giving 20 per centum interest for the time the money was collected. In this view of the case, and the Court

(1) R. L. 576; Gale's Stat. 655.

can see it in no other, the two provisions are perfectly consistent and proper. They both look to the security of the party whose money is improperly withheld, and to the prevention of such conduct in officers, by wholesome damages. The judgment is therefore affirmed with costs.

Judgment affirmed.

JOHN BOWERS, plaintiff in error *v.* CLARK GREEN, defendant in error.

Error to Jackson.

A writ of error is a writ of right, and cannot be denied, except in capital cases.
A writ of error lies from the Circuit Court to the Supreme Court, although the judgment complained of be less than twenty dollars.
The case of Clark *v.* Ross Breese 261, is overruled.
Statute penalties are in the nature of punishments; and no inferior court or jurisdiction can give cognizance of any penalty recoverable under a penal statute, unless jurisdiction be given to it in express terms.
Justices of the peace have no jurisdiction in penal actions, except in cases where such jurisdiction is expressly conferred.

THIS case was tried before the Hon. Thomas C. Browne, at the October term, 1832, of the Circuit Court of Jackson county.

S. BREESE and A. COWLES, for the plaintiff in error.

D. J. BAKER and A. P. FIELD, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

Green sued Bowers before a justice of the peace to recover the penalty of $5 inflicted by the 14th section(1) of the "*Act regulating Mills and Millers*," passed 9th February, 1827, for taking more toll than is allowed by the 11th section of said act.

Green recovered before the justice, and the cause was removed by appeal to the Circuit Court of Jackson county, where the judgment of the justice was affirmed for $5. To reverse this judgment, the cause is brought into this Court by writ of error.

A preliminary objection has been raised, whether a writ of error will lie in a case where the recovery is under $20, exclusive of costs; and to support this objection, the case of Clark *v.* Ross(2) has been cited. If the decision of that case was correctly made, then the objection is well founded, and this cause ought to be dismissed for want of jurisdiction in this Court. The maxim *Stare decisis*, is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude

(1) R. L. 452; Gale's Stat. 464. (2) Breese, 261.

courts from investigating former decisions, when the question has not undergone repeated examination, and become well settled. Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for a number of years, it would be manifestly improper for a court to disturb questions thus settled. But the cause of Clark *v.* Ross, is the only case in which this Court have been called on to settle the right of parties to bring writs of error to this Court, and that decision has not, it is understood by the Court, given satisfaction to the bar.

Under these circumstances, I think it the duty of this Court to revise that decision. That decision is based upon the idea that writs of error are in their nature appeals, because the Constitution only gives this Court appellate jurisdiction, except in certain cases, and the legislature, by limiting appeals to cases where the judgment, exclusive of costs, should amount to $20, had used the word "appeals" in its broadest constitutional sense, and thereby included writs of error. Were the Court right in giving this construction to the word "appeals?" At common law, the only mode of removing a cause from an inferior court of record, to a superior court for reversal, was by writ of error, and this writ was a writ of right, which could not be denied except in capital cases. To obtian a writ of error, it is necessary to apply to the clerk of the Supreme Court, and then it does not operate as a stay of execution, unless an order is obtained from a Judge, for that purpose. From this statement, it is obvious that considerable delay would intervene before a writ of error could be obtained; and in the meantime an execution could be issued on the judgment, and a party, against whom an erroneous judgment had been given, might be put to considerable trouble and expense.

To remedy this evil, it is fairly presumable that the legislature gave the additional remedy by appeal. By taking an appeal, which is done when the judgment is rendered, the effect of the judgment is entirely suspended until the appeal is decided. From this view of the subject, I am satisfied that the legislature, in authorizing parties to take "appeals," used that term as descriptive of the mode, and only intended to give a more expeditious and less expensive means of taking a cause from an inferior to a superior court. An appeal ought therefore to be considered as a cumulative remedy, and consequently any restrictions upon the right to use the remedy, cannot with propriety be extended to other modes of redress provided by law. This consideration is fortified by the consideration that, by an act passed January 19th, 1829, entitled "*An act* regulating the Supreme and Circuit Courts,"(1) which act seems not to have been noticed by

(1) R. L. 149; Gale's Stat. 169.

the Court in the former case, the remedy by appeal and error, are noticed as different modes of bringing causes into this Court.

Another consideration is entitled to great weight in arriving at a correct result on this question; and that is, that much injustice must necessarily result from the decision in Clark v. Ross, if adhered to. Many cases might be stated, where a party would be entirely deprived of redress where manifest injustice has been done in the Court below. I will only state one case to illustrate the great impropriety of sustaining the decision of Clark v. Ross. A brings an action on a note for $1,000, and the Court below, by an erroneous decision, reduces the debt under $20; or by such wrong decision, verdict is given for the defendant. Now, if the case of Clark v. Ross is to be deemed law, A, in the supposed case, would be entirely without remedy. Can it be supposed that the legislature intended any such injustice? And ought this Court to sustain a decision, unless compelled by express legislative enactment, which will produce such results? The old and salutary rule of the common law, that a writ of error is a writ of right, and cannot be denied, except in capital cases, ought not to be abolished by implication and construction, and particularly where it is evident that the legislature could not have contemplated its repeal. We are therefore clearly of opinion, that the case of Clark v. Ross ought to be overruled.

Having disposed of this preliminary question, I come to the assignment of errors in this cause. The first assignment is that a justice of the peace had no jurisdiction of the subject matter of this suit. The statute giving the penalty, authorizes the party injured to sue for the penalty, in any court having cognizance thereof. The question here arises, have justices of the peace any jurisdiction over penal actions. By a careful examination of the several cases enumerated in the general act giving justices of the peace jurisdiction, I am satisfied the legislature only intended —and such is the obvious import of the act—to confine their jurisdiction to actions arising on contract. An action for debt for a penalty inflicted by statute, can in no sense be considered as an express or even an implied contract. Statute penalties are in the nature of punishments, and persons who incur their liabliities, are considered as *tort feasors*.(1)

In relation to what courts have recognizance of penal actions, the following rule is laid down in Espinasse on Penal Statutes, to wit: "With respect, however, to statues giving jurisdiction, a difference must be observed as to the superior and inferior courts. *The courts above may have jurisdiction by implication*, as in the cases of penal statutes mentioned before, such as Rex. v. Mallard ante fol. 9, prohibiting any matter of public concern under a penalty, but without appropriating it, and which is a debt

(1) Coles v. Madison Co., Breese 115.

due to the crown and recoverable in the Court of Exchequer. That might be sued for in the courts above, though they are not named:—*but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute by implication.* They must be expressly mentioned in the statutes themselves, and cognizance given to them in express terms." Jurisdiction not having been given expressly to justices of the peace, we are of opinion that the justice in this case had no jurisdiction, and the judgment of the Circuit Court, for this reason, must be reversed with costs. Other errors have been assigned and argued, but the Court not being entirely satisfied relative to them, give no opinion.

Judgment reversed.

ELI B. CLEMSON and ISRAEL WATERS, appellants *v.* The President and Directors of the STATE BANK OF ILLINOIS, appellees.

Appeal from St. Clair.

It would be clearly unjust to permit a party to assign his mistakes as error. Where C. and W. are joined as defendants in a suit, and process served only on C., and the defendants' attorney in a demurrer to the declaration, used the language "defendants come by their attorney, and defend," &c. but in the subsequent pleadings used only the name of C., held that he did not thereby enter W.'s appearance.

It is not error for the Court to give final judgment against the defendant, upon sustaining the plaintiffs' demurrer to a bad plea.

The granting or refusing an application to withdraw a plea and plead *de novo*, rests in the discretion of the Court.

A writ of inquiry is never necessary where the damages can be ascertained by computation.

J. SEMPLE, for the appellants.

A. COWLES and T. FORD, for the appellees.

LOCKWOOD, Justice, delivered the opinion of the Court:

This is an action of *covenant* brought by The President and Directors of the State Bank of Illinois, on a sealed note, against Clemson and one Waters. Several errors have been assigned, which will be noticed in their order. The first error assigned, is, that judgment was given against Clemson alone, when it ought to have been given against both defendants. It appears by the return on the writ, that Clemson only was served with process. The defendants' attorney, in a demurrer to the declaration, used the words "defendants come by their attorney, and defend," &c. but in the subsequent pleadings, the defendants' attorney used only

the name of Clemson. Was here such an appearance on the part of Waters, as compelled the plaintiffs to consider him in court? We think not. As Waters was not served, it evidently was a mistake on the part of the attorney, in using a plural noun and verb, instead of a singular one,—and a mistake which the Court would have permitted him to amend. The defendants' attorney did not apply to the Court to correct the mistake, but corrected it himself in the subsequent pleadings. It would be clearly unjust to permit a party to assign his own mistakes as errors to reverse a judgment.

The second error assigned, is, "that the Court below gave judgment on the plaintiff's demurrer in chief, when the judgment should have been *respondeas ouster.*" When a plea is filed, the plaintiff replies, either by taking issue, or setting up new matter in avoidance—or demurs. If the plaintiff demurs to defendant's plea, the law arising on the case is referred to the Court, and if the plea furnishes no legal defence to the action, the judgment is always either interlocutory or final, according to the nature of the action. The only mode given to the defendant to contest the facts set out in the declaration, is by applying to the Court for leave to withdraw the bad plea, and plead *de novo*, which application rests in the discretion of the Court to grant or refuse. No motion having been made for leave to withdraw the plea, and plead again, the defendant elected to abide by the goodness of his plea, and he cannot now assign for error, that the Court ought to have given judgment of *respondeas ouster.*

The third error assigned, is, "that the Circuit Court ordered the clerk to assess the damages, when by the law of the land the said Court should have awarded a writ of inquiry." On the argument it was urged that the copy of the note appended to the declaration, contains no date, and consequently the clerk had no time from which to calculate interest. By examining the declaration, however, it is there averred that the note was made and delivered on the 23d day of June, 1825, and by the decision of the case of Sims *v.* Hugsby,(1) the copy of the note is not a part of the declaration, consequently this furnishes no objection to the clerk's assessing the damages. If the clerk made any mistake in assessing the damages, the proper remedy was, by applying to the Court below to correct it. It was also urged on the argument, that by the statute, the clerk could only assess damages where a default for not pleading had been entered. In the case of Rust *v.* Frothingham and Fort,(2) this Court decided that a "writ of inquiry is never necessary where the damages can be ascertained by computation." The third assignment of error therefore furnishes no ground for reversing the judgment. The judgment is affirmed with costs.

Judgment affirmed.

(1) Breese's App. 27 (2) Breese, 258.

LEWIS BAILEY, administrator of STEPHEN BENEDICT, deceased; plaintiff in error *v.* JAMES B. CAMPBELL, defendant in error.

Error to La Salle.

It is not in the power of a party to except to the opinion of the Court refusing instructions unless he move them himself.
A party cannot assign for error that which makes in his own favor, except under peculiar circumstances.

L. BIGELOW, for the plaintiff in error.

T. FORD, for the defendant in error.

BROWNE, Justice, delivered the opinion of the Court:

This is an appeal brought from the Circuit Court of La Salle county. The following points are presented to this Court by the bill of exceptions. The defendant in the Court below, moved for several instructions, which it is not necessary here to recite. They were all refused but one, to which no exception is taken in the argument. The jury on the trial in the Circuit Court, found a verdict for the defendant, and the plaintiff brings the record into this Court, such as it is. By the refusal of the Court to grant instructions prayed for by the defendant, it would be contrary to all practice, in common cases, for the plaintiff to be prejudiced. It is not in his power to except to the opinion of the Court refusing instructions, unless he moves them himself; and it is a well settled principle, that a party cannot assign for error that which makes in his own favor, unless it be under peculiar circumstances. This Court can see nothing in this record which should take it out of the common rule. The judgment is therefore affirmed with costs.

Judgment affirmed.

EDWARD HUMPHREYS, appellant *v.* GEORGE COLLIER and PETER POWELL appellees.

Appeal from Randolph.

After issue taken on the facts contained in the declaration, it is sufficient for the plaintiff, by proof, to sustain the material averments contained therein.
The assignor of a negotiable instrument, assigned after it became due, under the statute relative to promissory notes, &c., is liable to his assignee, where the maker of the instrument is insolvent at the time of the assignment and so continues up to the time of action brought, although no suit has been prosecuted against the maker.

Instructions to the jury, should be founded upon the evidence in the case; and where there is no evidence upon which to base the instructions, it is error to give them.

THE appellees instituted a suit in the Randolph Circuit Court against the appellant, as assignee of the following note:

"$181. Five months after date, I promise to pay Edward Humphreys, or order, the sum of one hundred and eighty-one dollars in cash, for value received, this third day of April, 1822.

"Attest, SAML. SMITH. ELIAS BARCROFT. [L. S.]"

On this note were the following endorsements:

"Received, 4th June, 1823, of William Rector, eighty dollars in part of the within order.

"$80. J. B. THOMAS."

"Pay the within balance of one hundred and one dollars to Messrs. Collier and Powell. ED. HUMPHREYS."

The first count in the declaration states the making of the note by Barcroft, and the assignment to the appellees, and then avers that, at the time of the assignment, Barcroft "had not the means of paying the balance due on said note by the ordinary process of law; nor could he, said Barcroft, be compelled by process of law, to pay and satisfy the same; nor would a suit against Barcroft, to recover said balance, have been availing to the said plaintiffs by reason of a want of property by said Barcroft, liable to execution to satisfy the same."

The declaration also contained a count for goods, wares, and merchandise sold and delivered, and the usual money counts. The defendant in the Court below, the appellant, pleaded the general issue to the whole declaration, and payment to all but the first count. The cause was tried at the September term, 1832, before the Hon. Theophilus W. Smith and a jury, and a verdict rendered for the appellees for $133. Judgment was entered upon this verdict, and an appeal taken to this Court.

A bill of exceptions was taken in the Court below, which is as follows:

"Be it remembered that at the September term of this Court, on the trial of the issue joined in this cause, after the hearing of the testimony on the trial of the said issue, the plaintiffs by their counsel moved the Court to instruct the jury as follows:

1st. In a suit by the assignee of a bond against the assignor, upon a written assignment, parol evidence is not admissible to show that the assignee took it without recourse, on the assignor, this being no part of the written contract, when the writing of assignment shows no such thing.

2d. That the written assignment on a note must be resorted to, to show what the contract is between the assignee and assignor, as to future liability.

3d. Where a contract is in writing, conversations previous, and leading to it, cannot be given in evidence.

4th. That the law of Missouri in regard to the liability of the assignor in this case, is to govern the case.

5th. That by the laws of Missouri, a suit need not be instituted by the assignee, against the maker, if such suit would be unavailing; and that the insolvency of the maker at the time of the assignment, and continued, dispenses with diligence.

6th. That by those laws no notice to assignor is necessary.

7th. That when a note is endorsed, it is like a bill of exchange, the assignor being the drawer, and the maker of the note the drawee; and if it is shown that the drawee had no effects of the drawer in his hands, notice is not necessary.

8th. That by the laws of Missouri, the insolvency of the maker of a note gives a recourse, without notice, upon the assignor.

9th. That insolvency may be proved by common report.

10. That a note of a third person, taken in payment for goods sold and delivered, which turns out to be worth nothing, is no payment, and the party can resort to his contract for goods sold.

11th. That the salary of an officer cannot be levied on by execution.

12th. That in determining cases of insolvency, the law regards only the ability of a person to pay by coercion or compulsion of law, and not voluntary or friendly payment.

13th. That in a case of notorious insolvency in the maker of a note, a resort can be had immediately by the assignee on the assignor, who has not protected himself by his assignment.

Which instructions, except the first above specified, the Court gave as asked—and also instructed the jury, that if said Barcroft, at the time of the assignment of the said note to the plaintiffs, was insolvent, such insolvency excused them from demanding payment thereof from the maker, prior to their bringing suit on such assignment or endorsement against said defendant.

The defendant, by his counsel, before the Court gave the foregoing instructions, objected to the Court's noticing the laws of Missouri—because they were not proved in any other way before the Court, than by the Judge's having in his hand the printed report of this case—when in the Supreme Court—as contained in Sidney Breese's Reports, which objection the Court overruled.

The said defendant also, on said trial, moved the Court to instruct the jury: 1st. That if they are of opinion that the plaintiffs received the note of Barcroft in payment of the goods purchased

at the time it was endorsed by the defendant, at their own risk, they have no claim on the defendant, either as purchaser of their goods, or as endorser of the note.

2d. That should they be of opinion that the note of said Barcroft was not received in full payment of the goods purchased by the defendant of the plaintiffs, at the time it was endorsed, at their own risk, that then before the plaintiffs can recover in this case against the defendant as an endorser of the note, the plaintiffs must prove a demand of payment from Barcroft, and notice to the defendant, or, at least, that they demanded payment of Barcroft.

The first of which instructions, asked by the defendant, the Court gave as asked, but refused to give the second, instructing the jury, that in cases of insolvency of the maker, of the note after endorsement and before suit brought, neither demand of payment or notice of refusal to defendant, was necessary: to all which several opinions of the Court, the said defendant by his counsel excepts, and prays that this his bill of exceptions may be signed and sealed by the Judge, and made part of the record in this case, which is done accordingly.

THEO'S. W SMITH. [L.S.]"

The appellant assigned for error,—

1. The said Collier and Powell, in the first count of the declaration aforesaid, do not set forth any cause of action against the said Edward, because they do not allege a prosecution for, or a demand of payment of, the said writing obligatory in said first count described, of and from the said Elias Barcroft, the maker thereof.

2. The Court erred in instructing the jury that if the said Barcroft, at the time of assigning said writing obligatory to the plaintiffs, was insolvent, such insolvency excused them from demanding payment thereof from the maker, prior to their bringing suit on such assignment or endorsement, against said defendant.

3. The Court erred in instructing the jury, that "the laws of Missouri in regard to the liability of the assignor in this case, are to govern the case," when there was no proof before the Court, that the contract sued on between said plaintiffs and defendant, was made in the State of Missouri.

4. The Court erred in noticing the laws of Missouri when those laws were not proved by any competent evidence.

5. The Court erred in instructing the jury "that a note of a third person, taken in payment for goods sold and delivered, which turns out to be worth nothing, is no payment, and the party can resort to his contract for goods sold," &c.

6. The Court erred in instructing the jury "that in a case of notorious insolvency in the maker of a note, a resort can be had

immediately by the assignee on the assignor, who has not protected himself by his assignment.

7. The Court also erred in refusing to give to the jury the second instruction asked for by the defendant, and in instructing the jury that "in case of the insolvency of the maker of the note, after endorsement, and before the suit brought, neither demand of payment, or notice of refusal to defendant, was necessary."

8. The Court erred in instructing the jury, that by the laws of Missouri "the insolvency of the maker of a note, at the time of the assignment and continued, dispenses with diligence."

D. J. Baker, for the appellant.

S. Breese, for the appellees.

Smith, Justice, delivered the opinion of the Court:

This was an action brought by the appellees against the appellant, in the Circuit Court of Randolph, as the assignor of a promissory note of hand, under seal, to recover the balance due at the time of the assignment, and still remaining unpaid. The declaration alleges the making of the note, and the assignment and delivery to Collier and Powell; and then specially avers, that at the time of such assignment, there existed a total inability of the maker to pay the same, and that payment could not be coerced by the ordinary course of law; that a suit would have been unavailing to compel the maker to pay the same, by reason of his total want of property to be reached by an execution upon any judgment which might have been obtained by suit against him on said note; that the maker has not paid or caused the said balance to be paid to them, or any part thereof, but has wholly refused, of all which the appellant had notice. To this count was added a count for goods, wares, and merchandise sold and delivered, and the usual money counts. The defendant in the Court below, pleaded the general issue, and payment to the second and third counts; to which plea of payment, there was a replication and issue.

During the progress of the trial, various instructions were prayed for by both plaintiffs' and defendant's counsel in the court below. It is not esteemed important for the consideration of the present case, to examine the correctness of but two, which are contained in the bill of exceptions. The first was prayed for by the defendant's counsel, and is as follows: "That, should the jury be of opinion that the note of said Barcroft was not received in full payment of the goods purchased, by the defendant, of the plaintiffs, at the time it was endorsed, at their own risk, that then before the plaintiffs can recover in this case against the defendant, as endorser of the note, the plaintiff must prove a demand of payment from Barcroft, and notice to the defendant, or at least

that they demanded payment of Barcroft." The refusal of the Circuit Court thus to instruct the jury, is assigned for error, and we are now to consider whether it is in fact so. An obvious answer is to be given to this objection; no rule is certainly better settled, than that which holds a party to the proof only of the material averments in his declaration. We shall look in vain into the first count, for an averment that a demand of payment was made, and notice of non-payment given to Humphreys. The plaintiffs have based their right to recover, not on the ordinary liabilities of an assignor of a note or sealed instrument of writing, for the payment of money, but on the avowed insolvency of the maker at the time of the assignment of the note in question; and have framed the count on the note upon such a supposed state of facts. It is therefore most manifest, that to have required proof of demand and notice, would have been to have required proof of matters not in issue, but entirely foreign to the issue. The defendant having taken issue on the facts contained in the declaration, it was sufficient for the plaintiffs, by proof, to sustain the material averments therein contained; and they could not be called on to prove more. If demand and notice were necessary and material averments, the defendant should have demurred to the declaration, and not pleaded in chief. But as the declaration is evidently framed with a view to that portion of our statute relating to promissory notes, bonds, due-bills, and other instruments in writing, making them assignable, which requires due diligence to be used to first collect the amount from the maker by suit, except where the institution of such suit would have been unavailing, it may become necessary and proper to consider whether, under the second section of that act, in relation to a case of notorious insolvency, when the note becomes due, demand of payment from the maker, and notice of non-payment to the assignor, are necessary to be averred and proven before a party shall be entitled to recover.

From a consideration of the causes which gave rise to the laws which exist in, and govern, states and countries greatly commercial, it will be evident that many of the principles applicabable to a commercial people, in the negotiation of assignable, endorsable, and transferable paper securities, and instruments for the payment of money, would but illy suit the condition of a people so purely agricultural as we are; and hence the impolicy of adopting the principles and rules of decision which have been made in states and counties that have adopted the law of merchants in relation to negotiable paper. It must be recollected, that the British decisions are not only different, for the reasons assigned, but the statutes of Anne, under which most of them have been made, differ in material points from ours. We are not only, then, restricted from adopting their rules where inapplicable, but we

are prohibited by the express terms of our own laws, which have been framed and adopted, doubtless, as being more congenial to our modes of transacting such negotiations, and as better calculated to insure equitable and legal liabilities between parties. The construction of that portion of our statute, it would seem, is of easy interpretation. If the suit, which it requires to be prosecuted, as the evidence of the means of diligence, would have been unavailing, then it is declared—the assignee may maintain an action against the assignor, as if due diligence, by suing, had been used.

Now, in what case, more than in the case of an absolute and entire insolvency of the maker of a note or bond, can it be imagined that a suit would be unavailing? It seems difficult to conceive a case more apposite or more comprehensive in its nature: indeed, it might be said to have been the very case to which the exception of the statute was intended to apply; and as the statute has also made the same exception in cases where the maker has absconded or left the State, it cannot, perhaps, be so readily perceived what other state of facts could well exist to meet the application of a further exception. Satisfied that such were the object of its framers, we are bound to consider that, in cases of notorious insolvency of the maker of an assignable instrument, contemplated by our statute, after it becomes due, and so continuing up to the time of action brought, the assignor must be liable to his assignee.[a]

On the second point of instructions, which were asked by the plaintiffs, in relation to the laws of Missouri, as applicable to the case before the Court, it is proper to remark, that it nowhere appears in the declaration, nor, indeed, in any part of the record, that the note or assignment was made in Missouri; nothing appears in the bill of exceptions to show that there was any evidence that the assignment or transfer of the note took place there; and yet such must doubtless have been shown by evidence, for on that ground alone could it be imagined that the Circuit Court would have instructed the jury that the laws of Missouri, as to the contract, were to govern them. If this had appeared, and we could see with judicial eyes that the contract was made there, then doubtless the instructions, as to those laws, would have been correct. In the absence, however, of that fact, and much as it is to be regretted that omissions of this character, (if it be one in the present case,) which might have been remedied in a moment, should become available here, to destroy the fruits of a recovery; still, as there is no discretion left under such circumstances, the judgment of the Court below is reversed, and the cause remanded to the Circuit Court for further proceedings, not inconsistent with this opinion.

Judgment reversed.

(a) Bledsoe v. Graves, 4 Scam. R. 382

THOMAS Y. BATES, appellant *v.* ERASTUS WHEELER, appellee.

Appeal from Madison.

A bill in equity to enforce the specific performance of a contract, must show a complete performance of all the stipulations on the part of the complainant, to entitle him to a decree.
He who seeks equity, must do equity.

J. SEMPLE and S. BREESE, for the appellant.

A. COWLES, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

THE appellant filed his bill in equity in the Court below, to compel a specific performance of a contract in writing, entered into between him and the defendant, by which the defendant covenanted to convey a good title to certain real estate lying in the military tract of this State. The complainant, in his bill, alleges, "that he has *paid* the whole consideration of said land, and that he has frequently demanded a deed of the defendant." The case does not require a specific enumeration of its progress and determination in the Court below; it is sufficient to say, for the purpose of its present consideration, that it was put at issue by a replication to the defendant's answer, testimony taken, and finally heard, on bill, answer, replication, exhibits, and evidence of several witnesses, whose testimony is embodied in the form of depositions. At the hearing, the Circuit Court dismissed the bill, and adjudged that the complainant should pay costs to the defendant. From this judgment the complainant appealed; and we are now to determine whether the Circuit Court erred in the rendition of its decree.

The enquiry on the merits and equity of the complainant's case, demands an examination into the allegation of his bill—whether the consideration money has been paid, or the terms and condition upon which the defendant had engaged to make the conveyance, have been complied with; for it will not be denied, that unless such is evidenced by the proof in the cause, or has been admitted by the defendant in his answer, the complainant has no right whatever to demand a specific performance of the contract. What then, is the testimony? It appears that the consideration for the land in question, was a certain mare, and five dollars in a note on an individual, payable in plank. This animal and the note are to be delivered to defendant, and upon which the conveyance is to be made. The mare is delivered, but is again returned (but refused to be received by the complainant) on the alleged ground of a deceit—being said

to be defective. It is not proposed to enquire into the truth or reality of the alleged deceit; nor whether, indeed, it was practised, inasmuch as the proof incontestably shows—and it is indeed established also by one of the complainant's witnesses—that the note for five dollars was a part of the consideration; and that the complainant has failed to establish the delivery of the note in question, or the payment thereof, or an offer so to do to the defendant. This was a precedent condition, the performance of which was essential, before the complainant could seek a compliance, on the part of the defendant, in the conveyance of the land. He who seeks equity, must do equity; and as the failure of the complainant to comply with the bargain, has been plainly established, the decree on the merits and equity of the case, seems very apparent.[a]

The other point of jurisdiction, it is not necessary to examine, as if this Court should be of opinion that the bill could alone have been filed in the county in which the land lies, that would then produce no other beneficial result to the defendant, than now arises from a decision on the equity of the cause. The decree of the Circuit Court is affirmed with costs.

Decree affirmed.

(*a*) Doyle *vs.* Teas 4 Scam. R. 203.

JONATHAN CHURCH and DANIEL RAYNER, administrators of the estate of JAMES RAYNER, deceased, plaintiff in error *v.* GILMAN JEWETT and SAMUEL BAILEY, administrators, and MARY BAILEY, administratrix, of WILLIAM ALEXANDER, deceased, defendants in error.

Error to Monroe.

A judgment for *costs* cannot be rendered against an administrator in his personal character.

J. SEMPLE, for the plaintiffs in error.

S. MCROBERTS, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

Various causes have been assigned for error in this case. After an attentive examination of them, it is not perceived that any of them are tenable, but the last; and that regards the form of the judgment. It is a judgment for costs against the plaintiffs in the Circuit Court, in their personal character. This is manifestly erroneous. The judgment of the Circuit Court is reversed and modified here so as to affect the plaintiffs only in their representative character as administrators.[a]

Judgment reversed.

(*a*) Welch *vs.* Wallace 3 Gil. R. 497.

THOMAS P. CLARK, plaintiff in error *v.* EBENEZER HARKNESS, defendant in error.

Error to Adams.

The Circuit Courts are limited in their jurisdiction to the several counties in which they are erected, except in cases where such jurisdiction is expressly extended. In order to give a Circuit Court jurisdiction, where the process issues, to a different county from that in which the action is instituted, there should be a special averment in the declaration, of one of the causes enumerated in the act of 1828.

The facts upon which the jurisdiction arises, must be either expressly set forth, or in such a manner as to render them certain by legal intendment.(*a*)

THIS was an action of *debt* on an award, commenced in the Circuit Court of Adams county, October 6th, 1830. The summons was directed to Morgan county, and made returnable to the October term, 1830. At this term, the defendant appeared by attorney, and moved the Court to quash the summons, because no certain sum was set forth in said writ as the debt claimed by the plaintiff. This motion was overruled, and the defendant then filed an affidavit of fraud in obtaining the award sued on; and afterwards, at the May term, 1831, judgment was rendered against the defendant for want of a plea, for $87 debt, and $13,78 damages assessed by the clerk, with costs of suit. Subsequently, and at the same term of the Court, the defendant. upon affidavit filed, moved the Court to set aside the default, This motion was continued till the October term, 1832 and then overruled by the Court, the Hon. Richard M. Young presiding. The defendant excepted.

T. FORD and M. MCCONNELL, for the plaintiff in error.

A. W. CAVARLY, for the defendant in error.

SMITH, Justice, delivered the opiniou of the Court:(1)

This was an action of *debt* commenced on an award, in the Circuit Court of Adams county. The summons was directed to the sheriff of the county of Morgan, and made returnable to the Circuit Court of Adams county, and is in the usual form except that the amount of the debt claimed is not specified.

Among several points made is one of importance, which goes to the jurisdiction of the Circuit Court. It is contended that the Circuit Court of Adams could not entertain jurisdiction of the cause, because it does not appear from the record, that the cause of action arose in that county, or that the debt was specifically payable there. It is obvious, on general principles, as well as law, that the Circuit Courts are limited in their jurisdiction to the

(1) WILSON, Chief Justice, did not sit in this cause.
(*a*) But see Kenney *vs.* Greer 13 Ill. R. 432 and notes.

several countries in which they are erected, unless there shall be, by some particular law, an express power extending that jurisdiction in specified and enumerated cases. With respect to the emanation of process, and the power to reach defendants who reside out of the particular county in which the Court exists, and to compel their appearance, it is necessary to examine the act of the legislature of 30th December, 1828.(1) By the provisions of that act, which is emendatory of the "*Act concerning Practice in Courts of Law*," of 1827, it is provided, that "it shall not be lawful for a plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in cases where the debt, contract, or cause of action accrued in the county of the plantiff, or where the contract may have, specifically, been made payable." By this provision, it was intended to change and restrict a practice, which existed under the act of 1827, of compelling the appearance of a defendant in any county in the State, where a creditor might elect; a most oppressive and injurious practice, which was intended to be prohibited in future. It would, perhaps, be proper, before a writ emanates, that the officer of the Court from which it is prayed, where it is sought to compel the attendance of a person from another county, should require an affidavit of the party, or his agent or attorney, that the cause of action accrued there, or that the contract was specifically payable there according to the provisions of the act of 1828. It is not intended, in construing this provisions, to say, that because this was not done in the present instance, that there is a want of jurisdiction; but stilll it is essential, in my judgment, that there should be a special averment in the declaration, of one of the causes enumerated in the act of 1828, to give jurisdiction. A Circuit Court, though an inferior Court, in the language of the Constitution, still I am willing to concede, is not so held by the common law, nor the statutes of the State confering its jurisdiction. The caution and jealousy with which the acts of inferior tribunals have been viewed, is not applicable to them; but they are, on the contrary, to be viewed with a spirit of enlarged and enlightened liberality, in favor of the regularity of their proceedings. A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of causes generally, but of such only as arise within the county.

Now, from the face of the writ in this case, the fair presumption is that the Court has not jurisdiction; but that the case is without its jurisdiction, the writ being directed into another county. This renders it necessary—because the proceedings of no Court can be deemed valid, further than its jurisdiction appears, or may be fairly presumed—to set forth upon the record, the facts which give jurisdiction expressly, or such as by

(1) R. L. 145; Gale's Stat. 166.

legal intendment may render that jurisdiction certain. If we apply this reasoning to the case before us, we shall look in vain into the record for an averment of the existence of any one of the causes enumerated in the act of 1828, upon which the Circuit Court could exercise the jurisdiction specially given in such cases. It was necessary that the causes which gave the Court the right to entertain jurisdiction, should have been specially set forth; and as that has not been done, it seems to follow, as a consequence, that the cause was without its jurisdiction.

A course of decisions in the Supreme Court of the United States, in regard to the alienship and residence and citizenship of suitors in the Circuit Courts of the United States, which are considered analogous in principle, has been adopted; and by which it is declared, that "the facts upon which the jurisdiction arises, must be either expressly set forth, or in such a manner as to render them certain by legal intendment." In the case of Turner, administrator *v.* Bank of North America, where a note was drawn by the defendants, in favor of Biddle & Co., who were described "as using trade or merchandise in partnership together, at Philadelphia, or North Carolina," it was declared, the description of the premises, contained no averment that they were citizens of a State, nor any which by legal intendment could amount to such averment, and that it was error.(1)

I am of opinion that the judgment of the Circuit Court of Adams, be reversed, for want of jurisdiction.

Judgment reversed.

Note.—See Keys *v.* Collins, *Post*; Baeubien *v.* Brinckerhoff, and note, 2 Scam.

(1) 4 Dallas, 8. *See* 1 Peters' Cond. Rep. 208, notes; Gordon's Dig. ed. of 1837, 125, 128.

Samuel Scott, appellant *v.* John Thomas, appellee.

Appeal from St. Clair.

There is no distinction in law between a promise to pay the debt of another, and a promise to do some collateral act by which such payment might be obtained. The circuity of the process, does not vary the principle.(*a*)

Where the moving consideration for the promise, is the liability of a third person, there the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, there the superadded consideration makes it a new agreement, which is not within the statute.

A parol promise to pay the debt of another, is void.

This was an action of *assumpsit* commenced in the St. Clair Circuit Court, by the appellee against the appellant.

The cause was tried at the April term, 1831, before the Hon.

(*a*) Baptist Church, &c., *vs.* Hyde, 40 Ill. R. 150.

Theophilus W. Smith and a jury, and a verdict rendered for the appellee for $114,40. Judgment was rendered on this verdict, and an appeal taken to this Court.

J. Semple, for the appellant, cited 8 Term R. 80; 1 Bur. 373; 1 Bos. & Pul. 158; 4 Barn. & Ald. 601—2; 5 East 10; 2 Saund. P. & E. 547; 1 Starkie 10; 2 Taunt. 38; 6 East 602; 2 Saund. P. & E. 902; 4 Johns. 422; Am. Dig. 168. § 15, 16; 5 Cranch 142; 7 Johns. 205; 8 Johns. 29; Am. Dig. 260, § 20, 23.

As to the mode of raising the question presented in this case, he cited 4 Johns. 237; 10 Johns. 141; 1 Chitty Pl. 471, 475; 1 Wilson 305; 3 Johns. 210; 4 Mass. 378.

D. Blackwell, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:(1) The declaration of Thomas, the plaintiff below, contains three counts. The first charges that William Biggs and William Biggs, Jr., were indebted to him by note, and that in consideration that he would forbear until the next term of the Court, to sue on the same, that Scott, the defendant, promised if the Biggs did not pay it, that he would; and that he, Thomas, did forbear to sue, but that neither the Biggs nor Scott had paid the same. The second and third counts charge that in consideration of forbearance to sue the Biggs on said note, the defendant promised, if the Biggs did not pay it by the next Court, that he, defendant, would foreclose a mortgage which he held from the Biggs, upon a tract of land, and that the plaintiff might buy it in for $1,25 per acre, if it would not sell for more; and after satisfying his own debt, pay the surplus, if any, over to defendant; and that he did forbear to sue, and that the note was not paid, and the defendant did not foreclose his mortgage, and permit the plaintiff to buy in the land, and satisfy his debt. To all these counts, the defendant pleaded, 1st, non-assumpsit; 2d, that the promises, if made, were by parol, and therefore void by the statute of frauds and perjuries. To the second plea, the defendant demurred, and the Court sustained the demurrer. A trial was had on the plea of non-assumpsit, and a verdict and judgment given for the plaintiff. Several exceptions were taken to the instructions given to the jury, and to the opinion of the Court in refusing to give instructions asked for. It will be unnecessary to notice these exceptions, as the question raised by the decision of the Court upon the demurrer to the declaration, will settle the case.[a] In the argument of this case, a distinction was attempted to be drawn between a promise to pay the debt of another, and a promise to do some collateral act by which such payment might be obtained. No such distinction, however, is recognised by any of the cases relied on, nor does any

(1) Smith, Justice, dissented from the opinion of the Court.

(a) *Quære.*—In declaring upon a contract within the Statute of Frauds, it need not be alleged that the contract was in writing. 1 Chitty Pl. 222.

such exist. If the act promised to be done, is in its consequences to operate as a discharge of the debt of another, the circuity of the process by which that object is proposed to be effected, does not vary the principles of the case.

The promise, as charged in the second and third counts of the declaration, was in effect to pay the debt of the Biggs, but out of a particular fund, and in a particular way, in consideration of forbearance. This agreement is clearly within the statute of frauds and perjuries. The distinction in relation to promises under that branch of the statute applicable to this case, is that where the moving consideration for the promise is the liability of the third person, there the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, as where he gives up some lien or security, there the superadded consideration makes it a new agreement, for the performance of which no third person is liable, and consequently, it is not within the statute.[a]

In the present case, the only moving consideration for the defendant's undertaking, is the liability of the Biggs. No advantage can accrue to the defendant; his promise is a collateral one, and being by parol, is void, under the statute.(1)

The judgment of the Court below, is reversed with costs.

Judgment reversed.

(*a*) Eddy *vs.* Roberts, 17 Ill. R. 507, and notes. and Post 210.
(1) Fish *v.* Hutchinson, 2 Wilson, 94.

DAVID MARSTON, plaintiff in error *v.* JOHN R. WILCOX, defendant in error.

Error to Hancock.

Courts of Probate have power to revoke letters of administration obtained through fraud.
The right to enquire whether a fraud has been practiced, is a necessary incident to the power given by statute "to hear and determine the right of administration."

ON the 7th day of June, 1831, the Probate Judge of Hancock county, granted letters of administration to John R. Wilcox, upon the estate of Morrill Marston, deceased, he claiming to be a creditor of said estate.

Subsequently, and after the expiration of six months from the decease of the intestate, David Marston, a brother of the deceased, applied to the Judge of Probate of Hancock county, to revoke the letters granted to Wilcox, upon the ground that Marston was no creditor of the deceased, and that the letters were obtained by

his fradulently representing himself to be such. The Court of Probate revoked the letters, and appointed David Marston administrator of the estate, as next of kin.

Wilcox appealed to the Circuit Court, and at the October term, 1832, the Circuit Court, the Hon. Richard M. Young presiding, reversed the decision of the Judge of Probate, upon the following grounds, as the bill of exceptions shows:

"That inasmuch as the Court of Probate was a court of special limited jurisdiction, created by our statute only, it cannot have or exercise any other or greater power and discretion than is particularly specified and permitted by the acts of our General Assembly, from which it derives its existence; and that consequently, the Judge of Probate cannot revoke the letters of administration, except for some of the causes enumerated in the statute; and that in the present case, the only remedy which remained to the said David Marston, who claims to be the next of kin of the deceased, after letters of administration were granted to the said Wilcox, was by taking an appeal from the original order of the Court of Probate, appointing the said Wilcox administrator as aforesaid, within ninety days after the same was made; and that he cannot now, by an original application in this way, cause the said letters to be revoked, notwithstanding the said Wilcox may in fact have obtained his letters of administration by fraud, and although he may not have been a creditor of the estate of the deceased, as was at that time supposed."

A. Williams, for the plaintiff in error.

Pugh and Whitney, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

The only question presented in this case for consideration, is whether a Judge of Probate, after he has granted letters of administration, can revoke them upon the ground that they were obtained by fraud. The "*Act relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates*," passed January 23d, 1829, is very broad in giving jurisdiction to Courts of Probate. By the 15th section of that act, Courts of Probate, "shall hear and determine the right of administration of estates of persons dying intestate; and to do all other things touching the granting of letters testamentary, and of administration, and the settlement of estates according to right and justice, in such manner as may be prescribed by law."(1)

On an application in this case, the Court of Probate decided that Wilcox, the administrator, had obtained the letters of administration by fraudulently representing that he was a creditor of the intestate, when in truth he was not—and proceeded to revoke

(1) R. L. 616; Gale's Stat. 690.

the letters. Upon appeal to the Circuit Court, that Court decided that the Court of Probate was a court of special limited jurisdiction created by statute; and that it could not have or exercise any other or greater power and discretion than is particularly specified and permitted by the acts of the General Assembly, from which it derives its existence; and upon that ground, reversed the decision of the Court of Probate, without investigating the facts of the case.

The position of the Circuit Court is undoubtedly correct, that Courts of Probate are created by statute, and to the statute we must look to ascertain the extent of their jurisdiction. But has not the Circuit Court put too limited a construction upon the extent of the jurisdiction conferred on Courts of Probate? When the legislature vested in Courts of Probate the power to "hear and determine the right of administration," it necessarily conferred all those incidents which are necessary to arrive at a correct determination. The granting of administration is necessarily an *ex parte* proceeding, and consequently the Court of Probate is liable to be imposed on by applicants for administration. If, then, letters be obtained by a fraudulent representation, is it not a necessary incident to the right "to hear and determine," that the Court should have power to enquire whether any such fraud has been practised? We think the right to enquire whether a fraud has been practised, is a necessary incident to the jurisdiction conferred by the statute. In England, the courts which have authority to grant letters of administration, are courts of inferior and limited jurisdiction; yet it has there been frequently decided, that, "If administration be granted to a wrong party, in such case the Ordinary may repeal it, and grant it to another, for he has not executed his authority; and it is a power incident to every court to rectify its errors."(1) It also appears by a note in Toller, that in Pennsylvania, "The Register's Court has a right to revoke letters of administration where they have issued improperly, and direct new letters to issue to the proper person."(2) From these authorities, and from the reason of the case, we are of opinion that the Circuit Court erred in reversing the decision of the Court of Probate, upon the ground assumed by the Circuit Court, and consequently the judgment of the Circuit Court must be reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

Note—Since the decision of this case, an act has been passed, giving to the Courts of Probate power to revoke letters of administration in all cases where the same have been granted "upon any false pretence whatever." R. L. 657; Gale's Stat. 721—2.

(1) Toller's Executors, 123, and authorities there cited.

(2) 4 Serg. and Rawle, 201.

John L. Bogardus, plaintiff in error *v.* John G. Trial, defendant in error.

Error to Peoria.

In a special demurrer, the particular exception intended to be relied on, should be minutely set forth.
A copy of a note filed with, or attached to a declaration, is no part of the declaration.
A count on a promissory note, and a count for goods, wares, and merchandise sold and delivered, may be joined in the same declaration.
In order to take advantage, on demurrer, of a variance between the note set out in the delaration, and the copy of the note filed with the same, *oyer* should be craved, and the note set out *in hæc verba*, in the demurrer.

This was an action of *assumpsit* commenced in the Peoria Circuit Court by the plaintiff in error against the defendant in error. The first count in the declaration is as follows:

"John L. Bogardus, plaintiff in this suit, complains of John G. Trial, defendant in this suit, in a plea of the case; for that whereas the said defendant, by his promissory note in writing, his own proper hand being thereunto affixed, dated the second day of November, in the year eighteen hundred and twenty-nine, for value received, promised to pay the said plaintiff the sum of fifty dollars, when he, the said defendant, should be thereunto afterwards requested."

The second is the usual count for money had and received, and for goods, wares, and merchandise sold and delivered. The copy of the note attached to the declaration, is in the following words:

"For value received, I promise to pay to John L. Bogardus, or his order, two hundred bushels of corn, to be delivered on or previous to the twenty-fifth day of December next, at my field, at such times as he shall call for it, he giving me one day's notice for each load of his team. As witness my hand, this 2d day of November, A. D. 1829. It is understood, that, in default of delivering the corn as above, I promise to pay the deficit in cash at twenty-five cents a bushel.

"John G. Trail. [L.S.]

"Attest, Augustus Langworthy,
"Francis Heebener."

L. Bigelow, for the plaintiff in error.

T. Ford, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:(1)

This was an action on the case, in *assumpsit*. The declaration contains two counts: one on a promissory note, payable, as de-

(1) Wilson, Chief Justice, did not sit in this cause.

scribed in the declaration, on demand; the second is the usual count, for money had and received, and for goods, wares, and merchandise sold and delivered. The defendant filed a special demurrer, and simply assigned for causes of demurrer, 1st. The first count is insufficient and informal; 2d. There is an improper joinder of actions; 3d. The second count is defective. The rule in relation to special causes of demurrer, is too well settled to allow this general and indefinite mode of specifying the causes. Where the objection goes to form and not substance, the particular exception intended to be relied on, should be minutely set forth. Here it is barely alleged that the first count is "insufficient and informal," but in what that informality and insufficiency consists, is not shown. The second ground is to the joinder of the counts, and is therefore not a special, but a general and substantive cause of demurrer. Is it however, well taken? I think not. Both the counts are in assumpsit, and are held to be joinable by the universal authority of all courts. The defendant's counsel, probably, in making this exception, adverted to the copy of the note appended to the declaration, which is in reality a covenant under seal, and the original of which, it is true, on the trial, could not have been given in evidence under either of the counts in the declaration; but which could not be used as causes of demurrer, to show a variance between the count and the note declared on. The copy exhibited with the declaration being considered, by repeated adjudications, no part of the declaration, to have shown the variance, *oyer* should have been craved, and the note set out *in hæc verba* in the demurrer; and then the variance would have been manifest.* The third cause of demurrer is not sustainable; for although in point of form, the count may be defective, still it is substantially good. The defect in point of form is not shown, and is therefore not available.

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings, to the Circuit Court of Peoria.

Judgment reversed.

(*a*) Gatton *vs.* Dimmitt 27 Ill. R. 400. *Contra.*

EDWARD MCKINLEY, plaintiff in error *v.* JAMES BRADEN, administrator of David Gregory, deceased, defendant in error.

Error to Madison.

Under the general issue, in an action by an administrator, proof that the plaintiff had received letters of administration upon the estate of his intestate, is un-

necessary. The fact whether he was or was not an administrator, is not put in issue.

J. Semple, for the plaintiff in error.

D. Blackwell, for the defendant in error.

This cause was tried at the June term, 1830, of the Madison Circuit Court, before the Hon. Theophilus W. Smith and a jury, and a verdict rendered for the defendant in error, the plaintiff in the Court below, for $28. Judgment was rendered upon this verdict, and a writ of error presented to this Court.

The bill of exceptions is as follows:

"Be it remembered that at the June term, 1830, the above cause came on for trial; the plaintiff proved by a witness, that the mare in question was the property of David Gregory, deceased, at the time of his death, and after his death came into the possession of Polly Gregory, the widow of said David Gregory, deceased; he proved also, by the same witness, that the same mare came into the possession of the defendant, who sold the same to one Bennet Nowlin, and applied the proceeds of the sale to his own use; and also, by the same witness, that the said mare was worth $25. The defendant then offered to prove that he bought the said mare of the wife of the plaintiff, which was objected to by the plaintiff, and the objection sustained by the Court. The plaintiff then proved by Howard, Findley, and Cooper, that the said mare was worth $45. Findley did not say that he had ever seen the plaintiff in possession of said mare, but when he saw her, she was in possession of the defendant. Cooper stated that when he saw the said mare, which was more than two years and six months ago, she was standing with plaintiff's horses under some trees near Braden's house, and he considered her in Braden's possession; but he had never seen the plaintiff in actual possession of the said mare, either riding, working, or otherwise using or exercising acts of ownership over her; and this was all the testimony produced on either side. The defendant then moved the Court to instruct the jury, that unless they believed from the testimony, that the plaintiff had proven that he was administrator of David Gregory, they must find for the defendant, which instruction the Court refused to give, to which the defendant excepts, &c. The Court then instructed the jury, that if they believed from the testimony, that the plaintiff had at any time been in actual possession of the said mare, and that the defendant converted her to his own use, either by selling her, or refusing to deliver her when demanded, they must find for the plaintiff, unless they believe that the defendant had shown title to the said mare by purchase or otherwise, from some person authorized to sell the same, and that it was unnec-

essary for the plaintiff to prove that he was administrator; to all which the defendant excepts, &c."

SMITH, Justice delivered the opinion of the Court:(1)

This was an action of trover and conversion, for a horse. The plaintiff sues in his representative capacity. The declaration is in the usual form, except that the possession of the plaintiff, is alleged to be in his right as administrator. The defendant demurred to the declaration. This demurrer was overruled. The defendant then pleaded four several pleas. The plaintiff demurred to the first, third, and fourth pleas. On the joinder in demurrer, and after argument, the Court adjudged those pleas bad, and overruled the demurrer to the second plea; on which an issue was made, trial had, and verdict rendered for defendant. Afterwards the Court set aside the verdict because the issue on the second plea was an immaterial one; and by the consent of the parties, a repleader was awarded, instead of entering a judgment *non obstante veredicto*. The defendant then pleaded the general issue, and the cause was tried, and a verdict rendered for the plaintiff. On the second trial of the cause, the defendant asked the Court to instruct the jury, that unless they believed, from the testimony, that the plaintiff had proven that he was administrator of David Gregory, they must find for defendant; which instruction was refused: but the Court instructed the jury that if they believed, from the testimony, that the plaintiff had at any time before suit brought, been in the actual possession of the animal, and that the defendant converted it to his own use, either by selling or refusing to deliver it up when demanded, they ought to find for the plaintiff, unless they believed that the defendant had shown title to the animal, by purchase or otherwise, from some person authorized to sell, and that it was unnecessary for the plaintiff to prove that he was administrator.

Various and numerous causes have been assigned for error, arising out of the demurrers, pleas, and the judgment of the Circuit Court thereon, and in awarding a repleader. After an attentive examination of the several grounds relied on as causes of error, we are inclined to believe the judgment of the Circuit Conrt correct on all the points raised under the form and matters of pleading. As to the award of the repleader, it was a matter of consent, and manifestly for the benefit of the defendant, as otherwise, on setting aside a verdict on an immaterial issue, the rule is to enter judgment for the plaintiff, notwithstanding the verdict. Of this, then, he cannot complain.

On the exception to the opinion of the Court on the instructions given, we see no cause to doubt its correctness. The only supposed inaccuracy is, doubtless, in relation to that part which

(1) LOCKWOOD, Justice, dissented from the opinion of the Court.

decides that the letters of administration need not be produced. Had the plaintiff declared, as he might have done, on his possession, without averring it to be in his representative character, if the fact was that he had actual possession, he would have been entitled to recover, on the further proof of a conversion, without showing his right as administrator, to the property. May not, then, this allegation of his being administrator, be considered as altogether an unnecessary and immaterial averment, and therefore not required to be proven? But as the plaintiff had made profert of his letters of administration, and the defendant had not replied that he was not administrator, that fact was not in issue, and consequently need not be proven: but it must, by not denying it, and pleading the general issue, have been admitted by the defendant. The character in which the plaintiff sued, was not questioned, and therefore it was unnecessary to be proven.[a]

We are satisfied the cause has been decided correctly, and the judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(*a*) Ballance *vs.* Frisby 2 Scam. R. 63.

The County of Madison, plaintiff in error *v.* Joseph Bartlett, defendant in error.

The People of the State of Illinois, plaintiffs in error *v.* Joseph Bartlett, defendant in error.

Error to Madison.

Interest is the legal damages or penalty for the unjust detention of money.
A county is not bound to pay interest on county orders.
A county order for "$16,50, or its equivalent in State paper," is an order for $16.50, or so many State paper dollars as will amount to that sum, at their current value.

These causes were tried upon an agreed case made by the parties, before the Hon. Theophilus W. Smith, in the Madison Circuit Court, at the October term, 1831, and judgments were rendered in favour of Bartlett.

A. Cowles, Edwards, and Prickett, for the plaintiffs in error, cited Acts of 1823, 210 § 19 and 20; Acts of 1827, 335, § 30 and 38(1); idem § 18 and 19; Acts of 1831, 126;(2) Acts of 1819, 299; 2 Am. Dig. 332; Chitty on Cont. 195; 2 Comyn

(1) R. L. 520, 522 § 30 and 38; Gale's Stat. 567, 568.
(2) R. L. 528, § 5; Gale's Stat. 573.

on Cont. 206, note; 3 Cond. Repts. 15; 1 Cond. Repts. 376; 2 do. 189, 195; Acts of 1827, 105, § 13(1)

J. Semple, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:(2)

These causes come into this Court, upon agreed cases from the Madison Circuit Court. Two questions are presented for our consideration: First, Is the County of Madison bound to pay interest on county orders, from their date until paid, drawn in the following manner, to wit: "September Term of the Commissioners' Court, 1822. Ordered that David Sweet be allowed $8 for eight days attendance, as Constable, upon the Circuit Court of Madison County, at May Term, 1820, as per order of the Circuit Court. Attest, Joseph Conway, Clerk." Second, Is said county bound to pay interest from date until paid, and advance on county orders drawn in the following manner, to wit: "December Term of the Commissioners' Court for Madison county, 1825. Ordered that William Moore be allowed the sum of One Dollar, or its equivalent, in State paper, for services as a Judge of a special election last month, as per voucher filed. Attest, Hail Mason, Clerk." Or, in other words, when State paper was worth, when the order issued, only one-third of a dollar, is the county bound, in discharge of such order, to pay three dollars in money, and interest on three dollars, from the date of the order until paid?

It appears from the agreed cases, that there was no money in the County Treasury from the year 1820, until the year 1830, during which time all the orders in controversy were issued. It further appears from the cases, that Bartlett was Treasurer of the county of Madison, and that as Treasurer, he settled with the sheriff, without the consent of the Commissioners' Court, and allowed him interest on specie orders, and interest and advance on equivalent orders, so that if he was justified in making the allowances of interest and advance, the county would fall in debt to the County Treasurer in the sum of $870,86, for which sum he would be entitled to judgment. But if the Court should be of opinion that the county was not bound to pay interest on specie orders, and advance and interest on equivalent orders, then, by the cases, the Court is to render judgment against Bartlett for $790, "It is further agreed by the cases, that the taxes for 1828 were due 1st December, 1828, the taxes for 1829 were due 1st March, 1830. It is also agreed that the said Treasurer paid in when due, 1st December, 1828, $871,06, which he had received from the sheriff on the tabular form for 1828, on which no interest or advance was claimed. That he also paid in, in like

(1) R. L. 168. § 13; Gale's Stat. 197.
(2) Smith, Justice dissented from the opinion of the Court.

manner, on the tabular form of 1829, $726,80, on which no interest or advance was claimed." Other stipulations and facts are contained in the agreed cases, which it is not material to notice.

Is a county bound to pay interest on county orders, from the day of their issuing until paid? In order to a full understanding of this question, it will be proper to enquire into the nature of the indebtedness of the counties, which require the issuing of the orders in question.

By law, the counties are compelled to allow county officers compensation for their services, which are generally fixed and ascertained; but the greatest portion of their indebtedness arises from contracts to build and repair court-houses, jails, and bridges, and for supporting paupers. For these and similar county expenses, it is evident that the county has no fixed or settled rule to regulate the amount it will have to pay. In these cases, the sum agreed to be paid will necessarily depend, in a great measure, upon the time that will probably intervene between the period of rendering the labor or services, or furnishing materials, and the payment of the money. If payment is likely to be delayed for a long and uncertain time, the county will be under the necessity of agreeing to pay a much higher price for labor, services, and materials, than it would if it were certain that the money would be in the treasury, when the time of payment should arrive. Consequently the price of labor or property will always be in proportion to the risk and delay of payment. It is also proper here to enquire, what is meant by the word "interest?" At common law, interest is the consideration or price that is agreed between parties, to be paid for the use of money for a stipulated time. At common law, if no agreement for interest be made, it cannot be recovered, although the payment of the debt should be unreasonably delayed. The following case settles this principle, to wit: the case of Challie *v.* the Duke of York; K. B. Sittings after Easter Term, 46, Geo. 3d, at Weston, MSS., which was an action of assumpsit for wine sold and delivered, and for money due on an account stated. On the trial, it was proved that the wine was delivered in the year 1799, and in the year 1800 the account was stated and settled by an agent of the Duke, and the sum of £300 was admitted to be due to the plaintiff. Upon this evidence the counsel for the plaintiff claimed interest upon this sum from the time of the settlement of the account, to the day on which the plaintiff would be entitled to final judgment; and in support of this claim a case in 3d Wilson's R. 205 was cited. But Lord Ellenborough, Ch. J., before whom the case was tried, said, "Interest is never allowed for goods sold, or on an account stated, except there be an express agree-

ment, or the money is to be paid on a particular day; and I believe the case cited has never been acted upon."(1)

This case, decided by Lord Ellenborough, is precisely analogous to county orders. These orders are a mere liquidation of the sum due, on a settlement of accounts against the county, but without fixing any time for payment. They are therefore, only to be considered as an authority for the holder to receive the money whenever it is in the County Treasury. To remedy this defect of the common law, interest is given by statute in certain specified cases, from the time that the debt becomes due, until payment is actually made. Hence the statute interest may properly be defined to be the legal damages or penalty for the unjust detention of money.

From this view of the subject, it will appear that in the greater part of the cases where counties contract debts and issue their orders for payment or compensation, the probability of delay or uncertainty in the time of payment, has been estimated in the enhanced price agreed on for the services, work, or materials contracted for. In all such cases, then, it would be manifestly improper to allow interest; for interest by statute, is allowed as damages for the unjust detention of money; and here these damages have been considered by the parties, in the extra price agreed on. But as it is not in the power of this Court to discriminate between the cases where the order was drawn for services to which the law affixed a stipulated price, and where the county contracted with individuals upon such terms as could be agreed upon; it becomes the duty of the Court to decide this question upon legal principles. It is, however, to be regretted, that the Court, in their researches, have been able to find but one adjudged case that is in point. It is true, that some cases were referred to in the argument, as authorities, to show that in some of the States, interest had been allowed against the State. One of these cases was for money lent the State, on an express contract to pay interest; another was to recover from the State, on a breach of warranty contained in deed, and was decided upon principles applicable to that description of cases. In the third case, the facts are too loosely stated, to furnish us with the reasons of the Court for allowing interest; consequently, these authorities can have no application here. This dearth of analogous adjudged cases, renders it the duty of the Court, to apply such general principles to the case, as they shall deem apposite.

It is a principle of the common law, that the government, and by parity of reasoning, a county, cannot be guilty of laches. It is also well settled, that a State is not barred by a statute of limitation, unless expressly named.[a] Interest is not given by the common law, for a failure to pay money when it is due

(1) 2 Comyn on Cont. 206, Note.

(*a*) Post. 107.

unless the parties have so agreed, and is only allowed by statute when the party neglects to pay at the time stipulated, and is then given, in the nature of a penalty for the violation of a contract.(1) Apply these principles to the question under consideration. The law does not impute laches, or even improper conduct, to a State or county, and hence it will not presume that the county has not done every thing within its power to enable itself to comply with its contracts and duties. Nor will the law inflict a penalty, or give damages, against a county for not paying its debts, when it is manifestly out of its power to do so. Counties are limited corporations, and can only levy a tax to a limited amount. When the law gives a penalty or damages against a corporation, or even against an individual, for the non-performance of a given action or duty, it is done to stimulate and quicken the performance of a reasonable and possible thing. The law never gives a penalty, or even damages, for the non-performance of impossibilities. Again, the statute of this State, which allows interest to creditors "for all the moneys after they become due," does not by name include the State or counties. From this omission, is it not fairly inferrible, that had the legislature intended to compel the State or counties to pay interest where they have not contracted to do so, that they would have been specially named? This inference is strongly supported by the fact that the legislature in 1819, passed a statute requiring interest to be paid on Auditor's warrants. If Auditor's warrants bore interest by the general statute regulating interest, this special act would have been unnecessary. The general practice of the community, is also some evidence of what the law is on a given subject. Has interest, then, been generally allowed on county orders? We understand not. And it appears from the agreed cases, that on the orders received by the sheriff, of the people in payment of taxes, (which by law he was compelled to put down in a tabular form, and to pay the identical orders so received, into the County Treasury,) the sheriff did not allow interest to the persons of whom he received them, nor did he claim it of the Treasurer. Is not here strong evidence, not only of the understanding of the people that these orders did not bear interest, but an implied admission by the Treasurer and sheriff, that the law did not allow it. If the law had allowed interest on these orders, it was the duty of the sheriff to have allowed it to the payers. The only adjudged case, analogous to the present one, that is recollected by the Court, is the case of Beaird *v.* the Treasurer of this State, decided at the June term of this Court, 1825. In that case Beaird applied to the Court for a mandamus to the Treasurer, requiring him to pay interest on Auditor's warrants, which motion was refused upon

(1) 3 Atkins 736.

the principles above laid down, that the State was not bound to pay interest unless in cases where she had contracted to do so. From the best consideration that we have been able to give this subject, we can come to no other conclusion, than that a county is not bound to pay interest on county orders, in the absence of an express contract to pay it.[a] The Court, in coming to this conclusion, do not intend to controvert the position, as a general rule, that a party is bound, in conscience, to pay interest, whenever he withholds payment of a liquidated sum of money, after it becomes due; but insist that the rule, for the reasons before given, does not apply to the State, or either of its counties. It might also with propriety be insisted, that the financial means of the respective counties to discharge their contracts, were or could have been known by those persons, who, either as officers or individuals, became creditors to the county. They may therefore be presumed to have consented to receive the payment of their claims, whenever the revenues of the county would enable it to pay its debts. If this is a reasonable presumption. and it seems to be, then the time of payment of these county orders did not arrive until there was money in the treasury to pay them; and provision is made by statute to pay orders according to their seniority.

The second question presented for our consideration, is whether Bartlett was justifiable in allowing to the sheriff the advance he did, on the equivalent orders? In order fully to understand the effect of the settlement made by these officers, I will take the first order mentioned in exhibit A, and made part of the agreed case. The order was issued at the June term, 1825, for $16,50, equivalent to $49,50; interest on the equivalent, $14,10, making $63,60. Here, then, is a county order, issued in June, 1825, for $16,50, converted by this magical word "equivalent," within five years, to the sum of $63,60. Can it for a moment be supposed that the Commissioners for the county of Madison contemplated binding their county to pay such an enormous advance on so small an amount? The very statement of the case is sufficient to show the absurdity of such a supposition; and even if they had made such a contract, it would have been so improvident an act on the part of the county, that a court of equity would have set it aside. But the County Court made no such contract as to justify the allowance made by the Treasurer to the sheriff. The order simply means, that when it is presented for payment, if the Treasurer is under the necessity of paying it in State paper, then he shall pay the State paper to the holder of the order, at the market price of State paper. It was optional with the county either to pay the $16,50 in specie, or if the amount was paid in a depreciated currency, then that currency was to be paid at such a rate as to make it equivalent to specie. If A

(a) County of Pike *vs.* Hosford, 11 Ill. R. 176.

execute his note for one hundred State paper dollars, and he is sued on it, all that can be recovered is the value of one hundred State paper dollars when the note becomes due, and interest on that value till judgment. Such have been the uniform decisions of the Circuit Courts upon this subject, and the correctness of the decisions have never been questioned. That the real amount mentioned in these orders could only be recovered, seems so clear, that it would be a waste of time to consider the question any further.

The Court, therefore, are of opinion that in the case of the People for the use of Madison County, they are entitled to have the judgment below reversed, and recover against Bartlett the sum of seven hundred and ninety dollars, with costs, and that the judgment in the case of Madison County *v.* Bartlett, be also reversed with costs. and that the causes be remanded to the Madison Circuit Court for judgment, according to the stipulations of the agreed cases.

Judgment reversed.

JOHN ROSS and JOB ROSS, plaintiffs in error *v.* GEORGE REDDICK, defendant in error.

Error to Peoria.

Statutes defining the boundaries of counties, are public acts, and courts are bound judicially to take notice of them,

In an action of trespass *quare clausum fregit*, proof that the trespass was committed upon the premises described in the declaration, by the number of the section, township, and range (the said premises being in the proper county), is sufficient without evidence that the premises are situated in the county where the action is brought,

The official certificate of the Register of a Land Office, to any fact on record in his office, is competent evidence of such fact.

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 waived.

THIS cause was tried before the Hon. Richard M. Young and a jury, at the September term, 1832, of the Peoria Circuit Court.

On the trial in the Court below, the following certificate was admitted as evidence on the part of the plaintiff, though objected to by the defendants, and its admission is one of the errors assigned:

"LAND OFFICE, QUINCY, ILLINOIS, Aug. 2d, 1832.

I do certify that George Reddick, of Peoria county, Illinois, did on this day, in this office, prove a right of pre-emption to the East half of the S. W. Qr. Sec. 27, T. 10, N., R. 8 E. 4

principal meridian, under the provisions of the act of Congress of the 5th of April, 1832.

SAML. ALEXANDER, *Register.*"

Judgment was rendered for the plaintiff in the Court below, for $8,81 1-4 and costs.

M. MCCONNELL, for the plaintiffs in error, cited Stat. 1827, 199 ;(1) Stat. 1825, 85 ; Laws of U. S. 1373, § 3.

L. BIGELOW, for the defendant in error, cited acts 1825, 85 ; 1. Blac. Com. 85, 86 ; 1 Stark. Ev. 162–3 ; 1 Chit. Plead. 159, 163, 197, 201, 360, 438, 440 ; Bac. Abr. *Evidence*, F., *Statute* L.; Commonwealth *v.* Inh. Springfield, 7 Mass. 9 ; Portsmouth Livery Co. *v.* Watson *et al.*, 10 Mass. 91 ; Acts 1827, 199 ; Cutts *et al.*, *v.* Spring *et al.*, 15 Mass. 135 ; 3 Stark. Ev. 1436 *et seq.*; Brazzle *et al.* *v.* Usher, Breese 14 ; Clap *v.* Draper, 4 Mass. 266 ; Rehoboth *v.* Hunt, 1 Pick. 224.

BROWNE, Justice, delivered the opinion of the Court.

This was an action of *trespass quare clausum fregit*, brought by the defendant in error against the plaintiffs in error, before the Circuit Court of Peoria county. The land that the trespass was committed on, is described in the declaration by the number of the section, township, and range. On the trial in the Court below, the plaintiff proved that the trespasses complained of, were committed on the tract of land described in the declaration, but introduced no evidence to show that the land was situated in the county of Peoria. The county of Peoria was formed by an act of the legislature, passed January 13th, 1825,(2)

In that act, the limits of Peoria county are formed and described by reference to the lines of the public surveys. The statute defining the boundary of the county, is a public one, and the Courts are bound judicially to notice it.

The official certificate of the Register of a Land Office, to any fact on record in his office, is competent evidence of such fact, and is made so by the act of 1827.(3)

The certificate of the Register of the Land Office went to show the right of pre-emption in the plaintiff to the land in question. It appears that issue was joined upon two of the pleas filed by the defendants, but the other plea was not joined. If several pleas be pleaded, one of which is not answered,—and particularly where the matter may be given in evidence under the general issue,—and the parties go to trial without any objection on the part of the defendant, that such plea remains unanswered, it will be considered as waived, or the irregularity will be cured by the verdict of the jury.(a) The Court is therefore of opinion

(1) R. L. 280 ; Gale's Stat. 287. (2) Acts of 1825, 85, 86.
(3) Acts of 1827, 199 ; R. L. 280 ; Gale's Stat. 287. R. S. 232.
(*a*) Spencer *vs.* Langdon, 21 Ill. R. 192.

that the judgment of the Circuit Court of Peoria county be affirmed with costs.

Judgment affirmed.

HUGH CHRISTY, and MORNING, his wife, appellants *v.* WILLIAM H. MCBRIDE, administrator of Samuel Wilson, deceased, appellee.

Appeal from Randolph.

If an administrator act honestly and prudently, though there be a loss to, or a total diminution of the intestate's estate, he will not be liable.

Where M., an administrator in Illinois, employed an agent in Virginia, to collect a demand due to his intestate's estate from a resident in Virginia, and the agent collected the money and appropriated the same to his own use, but never accounted for it to M.: *Held*, that as M. had been guilty of no misconduct, and had acted in good faith, he was not laible for the loss of the money.

Quere. Is an administrator in this State bound to collect demands due his intestate's estate, from residents of other States?

THIS cause was originally instituted in the Court of Probate of Randolph county, by Christy and wife, in her right as one of the heirs at law and distributee of Samuel Wilson, deceased, against McBride, administrator of the estate of said Wilson, to recover of him her distributive share of said estate, after all legal demands should be satisfied. On the trial before the Court of Probate, the administrator exhibited his account current, showing a balance in his hands, of $190,63 3-4, belonging to the heirs. The plaintiffs then proved that in addition to said balance of $190,63 3-4, McBride, as administrator, had obtained three notes made to said Wilson, the intestate, in his lifetime, by one John Kingley, of Washington county, Virginia, and amounting, with interest, to more than $800, and that said McBride, through his agent, one Charles Tate, had collected said notes, and that said Tate had appropriated the money to his own use, and that he, Tate, was insolvent, and unable to pay the amount to McBride. That McBride acted honestly, and in good faith, in sending said notes to said Tate; and before he sent them, he consulted with William C. Greenup, clerk of the County Commissioners' Court of Randolph county, and was by him advised to send the notes to Tate for collection, but that he had no personal knowledge of said Tate. That Tate, when the notes were sent to him, or about the time, was reputed to be in solvent circumstances, and had been, or was then, sheriff of Washington county. The Court of Probate, on this state of facts, decided that McBride was not liable for any part of this money so col-

lected by Tate, to the heirs and distributees of said Wilson, deceased. To which opinion, a bill of exceptions was tendered by said Christy and wife, and signed, and an appeal taken to the Circuit Court of Randolph county, where said judgment of the Court of Probate was affirmed, and a bill of exceptions tendered and signed, and the case brought to this Court by appeal. The cause was heard in the Circuit Court before the Hon. Theophilus W. Smith, at the September term, 1831.

S. Breese and D. Blackwell, for the appellants, contended.

1. Every person acting in a fiduciary character, is responsible to his *cestui que trust* for that which may be committed to his care by law, and nothing but inevitable accident will excuse him. 5 Vesey, Jr. 794, 800; 4 Dane's Abr. 270, 271.

2. An administrator is responsible if his agent embezzle the assets of the estate. 1 Dane's Abr. 590, Art. 16; 6 Mod. 93; Toller's Exrs. 426.

3. Upon general principles, the principal is responsible for the acts of his agent. Livermore on Agency, *passim.*

4. The appropriation of money collected by the agent of the administrator, is a collection and appropriation by the administrator himself, upon the maxim, *qui facit per alium, facit per se.*

5. The administrator would be liable, without doubt, if he had gotten this money into his own possession, and the case is not altered by its being in the possession of a person of his own selection, who proves dishonest. Coxe's Dig. 48, § 27.

6. The case shows that McBride did not use due caution in the selection of his agent, nor did he select one whose business it is to collect notes, and he is therefore liable for such want of caution. Coxe's Dig. 318, § 27.

7. The loss of the money having happened by the act of the administrator, who ought to have used more than ordinary caution, it is more conformable to the principles of right and justice, that he should lose, than that the heirs and distributees should incur a loss, though he may not have been guilty of fraud. Coxe's Dig. 316, § 6, 7, 8, &c.; Breese 113, Duncan *v.* Morison and Duncan.

8. The administrator, by trusting Tate, took security inferior to Kingley, the maker of the notes; and having thereby brought a loss on the estate, he is liable. Hunter *v.* Bryant, 2 Wheat. 32; Coxe's Dig. 13.

9. The evidence shows that McBride did not take the same care, or use the same caution in regard to the notes, that a moderately careful man takes of his own affairs, and he is therefore liable for ordinary neglect. Coxe's Dig. 80, *Bailment;* Jones on Bailment 68, 69, 168.

10. The only cases known to the law, where an executor or

administrator is discharged for losses, are, where he may be robbed, or where the stock falls, or funds fail, in which he, with good faith, has invested the funds of the estate, or where, acting in compliance with law, a loss inevitably happens. 1 Dane's Abr. 270, 271 ; 4 Caines' Cas. in Error 96 ; 5 Vesey, Jr. 794, 800.

11. The loss thus incurred by the administrator, fixes a *Devastavit* upon him, for which he is chargeable.

D. J. Baker and Hall, for the appellee, contended,

1. "Where there is manifest fidelity and ordinary diligence displayed, courts will reluctantly enforce the rigid rules of law." 2 Wheaton's Rep. 32. "An administrator is not answerable if he lend money on security, good at the time, if it fail, or vest it in the funds, and they fail." "If rent be due on a lease, and the tenant become insolvent, and the executor release the rent, and give him a sum of money to quit possession, and in all this, evidently acts for the benefit of the estate, he shall be allowed both." "The principle of this last case will be found to apply to a very great number of cases in which the executor acts *honestly and prudently*, though there be a loss too, or diminution of, the testators estate or rights." See 1 Dane's Abr. 590 and the authorities there referred to.

"If an executor lend money on real security, which at the time there was no reason to suspect, and afterwards such security prove bad, he shall not be chargeable with any loss any more than he would have been entitled to the produce of it, if it had been sufficient." Toller's Exrs. 481 ; 1 P. Wm. 141.

"So where A., an executor, paid the assets into the hands of B., his co-executor, with whom the testator was wont to keep cash as his banker, on failure of B., the Court held that A., ought not to suffer for having trusted him whom the testator trusted in his life-time, and at his death appointed one of his executors." *Ibid.* "Generally speaking, although if an executor release or compound a debt, he shall be charged, yet if he appear to have acted for the benefit of the estate, he shall not be charged." Toller's Exrs. 482 ; 3 P. Wm. 381.

"So, a co-executor who proved, but never acted, having received a bill by post, on account of the estate, and transmitted it immediately to the acting executor, was held not to be responsible for the administration of the property." Toller's Exrs. 486.

As to an executor's vesting money in the funds, or loaning it on security deemed sufficient, and losses accruing to the estate thereby, with which he is not chargeable, see Toller's Exrs. 428. "He has an honest discretion to call in a debt bearing interest, if he conceives it to be in hazard." *Ibid.* "Nor is an adminis-

trator bound to plead the statute of limitations in bar of a demand against the intestate." Toller, 429.

2. Administrations, though they may be trusts coupled with an interest, are in some sense *agencies*, and are more like other *agencies* under our laws than they were formerly under the laws of England, or now are. These trusts, for the purposes of argument, and so far as the present case is considered, may be regarded as agencies with discretionary power. The law is, that "if a discretionary power be allowed to an agent, he is bound to act according to the best of his judgment for the benefit of his employer." 1 Wash. C. C. R. 455.

"A factor is bound to ordinary diligence in relation to the property confided to him; where his orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct." 2 Gallis, 13.

SMITH, Justice, delivered the opinion of the Court:

In this case the only question to be determined is the liability of the administrator for the amount of the notes collected of the debtor of the intestate, (who resided in Virginia,) through his agent, and the misapplication of those funds by the agent, after collection. It is contended, by the appellants, that by law an administrator is responsible if his agent embezzle the assets of the estate; and that the funds being used by Tate, who afterwards became insolvent, is equivalent to an embezzlement; and that therefore the administrator, in the present case, is liable. The case cited in support of this principle, and referred to in Toller, and in Dane's Abridgment, is not borne out in the case in 6 Modern, to which they refer. The only question decided by the Court, and the only one before them, was a question of costs; and as the party might in that case, have sued, without describing himself as administrator, it was held he should pay costs. It is admitted, and the facts in this case show, that the administrator has acted prudently and honestly; that his agent at the time he was employed, was a person of reputation and property; and although he became afterwards insolvent, and used the money collected, there is no evidence of negligence on the part of the administrator in the use of the proper means to collect the money of his agent. If an administrator has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his trust, he ought not to be held answerable for losses which could not have been foreseen, and which ordinary precaution may not guard against. The general principle which seems to run through all the authorities, as to his liability, recognise the doctrine, that if he acts honestly and prudently, though there be a loss to, or diminution of, the testator's estate or rights, he will not be liable. (1) [a]

(1) 1 Dane's Abridg. 590; Toller's Ex. 481; 1 P. Wms. 141; 3 P. Wms. 381.
(*a*) Rowan *vs.* Kirkpatrick, 14 Ill. R. 12; Bond *vs.* Lockwood, 32 Ill. R. 212.

Where there is manifest fidelity and ordinary diligence displayed, the rigid rules of law will be reluctantly enforced.(1) Another view might be taken of the case: the administrator could not, in his fiduciary character, have sued these notes unless he had taken out letters of administration in Virginia. It no where appears that he did so; but the case shows, on the contrary, that the debt must have been collected in the name of the agent. Until the administrator had received the money, could it be considered as assets in his hands? and is he chargeable at all, in his representative character, until this appears? Whether he would be personally liable under a supposed interference with the collection of debts not warranted by his character of administrator, out of this State, it is not proper now to determine. But we very much doubt whether he was legally bound to have made the collection of the notes in Virginia; and if not compelled so to do, may not the parties, in the present instance, have mistaken their remedy? [a]

On a review of the whole case, and considering the powers of the Probate Court to adjust settlements like the present, upon the broad principles of equity, we are of opinion that the Circuit Court did not err in affirming the judgment of the Court of Probate, and that the judgment of the Circuit Court be affirmed with costs.

Judgment affirmed.

(1) 2 Wheat. 32.
(*a*) People, &c., *vs.* Peck, 3 Scam. R. 119; Judy *vs.* O'Kelly, 11 Ill. R. 211; United States, &c., *vs.* Coxe, 18 How. U. S. R. 100, and cases therein cited.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1833, AT VANDALIA.

LEWIS PANKEY, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Johnson.

Perjury consists in falsely swearing to a fact material to the point in issue, before a tribunal having legal authority to enquire into the cause or matter investigated.
A grand jury have no power to enquire whether an officer has been guilty of taking illegal fees for the service of process.

W. G. GATEWOOD, for the plaintiff in error.

J. SEMPLE, Attorney General, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

This case comes before the Court on a writ of error. The plaintiff in error was indicted, tried, and convicted on a charge of perjury, in the Circuit Court of Pope county. A new trial was afterwards awarded, the *venue* in the case changed to Johnson county, where a second trial and conviction was had. The plaintiff in error, while the case was pending in the Circuit Court of Pope, and before pleading to the indictment, interposed a motion to quash the indictment, which was overruled by the Court: afterwards a bill of exceptions to the decision of the Johnson Circuit Court was taken by consent of parties; and in which is embodied the evidence given in the cause on its trial in the Circuit Court of Johnson county.

Pankey v. The People.

The indictment avers, that at a regular term of the Circuit Court of Pope county, before the grand jurors, regularly empannelled and sworn to enquire in and for said county, a certain complaint was made by one Lewis Panky, against one John W. Womack, for taking illegal fees as constable, in order to found an indictment against said Womack, as a constable of the said county, to be found by said grand jury; and that the said Lewis Pankey, being of lawful age, and being first duly sworn by the foreman of the said jury, the said foreman having lawful authority to administer the oath in that behalf, on being interrogated of and concerning the taking and receiving of said illegal fees, and whether the services for which such fees were taken, had been performed at the request, and by the consent of the said Lewis Pankey, he, the said Lewis, unlawfully and maliciously, intending to induce the jurors to find such bill of indictment against the said Womack, and to injure the said Womack, did falsely, knowingly, and corruptly, by his own act and consent, depose and give in evidence, among other things, before the said jurors, in substance and to the effect "that he, the said Lewis Pankey, did not agree nor give orders to the said Womack, constable as aforesaid, to summon a jury in his case with Daniel Vineyard, before that time tried, nor was it his, the said Lewis Pankey's, wish to have a jury to try it;" whereas in truth and in fact the said Lewis did agree and give orders to the said constable to summon a jury in his case with Daniel Vineyard, and was anxious and willing that his said case should be tried by a jury. It further avers, that the matter thus alleged to have been sworn to, was material to the point of enquiry in issue before the grand jury, in this, that if the said Lewis had not agreed or given orders to the said constable to summon such jury, then the said Womack was guilty of taking illegal fees from the said Lewis; but if he had given such orders and agreed that the said constable should summon a jury, then the said constable was not and had not been guilty of taking such illegal fees.

It will be perceived from this recital of the averments in the indictment and assignment of the perjury, that two questions naturally present themselves as subjects of direct enquiry, and upon which the correctness of the decision of the Circuit Court, in refusing to quash the indictment, must necessarily depend. Those questions are, whether the grand jury had any legal authority to institute an enquiry and examination into the act of Womack, as a constable, for the taking of illegal fees as a criminal and indictable offence; and the materiality of the testimony given by Pankey before the grand jury in relation to the enquiry with reference to the alleged taking of such illegal fees.

It will not be doubted that one of the essential ingredients necessary to constitute legal perjury, is that the tribunal or body

before whom the false swearing is alleged to have been committed, must have legal authority and power to enquire into the cause or matter investigated. Apply this principle then to the case before us. From whence could the authority of the grand jury be deduced to institute an enquiry into an officer's taking illegal fees for the service of process? It is not a criminal act, nor could an indictment be founded thereon, be the fact of taking illegal fees ever so clearly established. A remedy has been provided by the infliction of a penalty for such acts; but the modes of proceeding to enforce such penalty are entirely of a civil nature. How, then, could the grand jury have had jurisdiction over the subject matter of the enquiry? It is too evident to doubt that it was a subject of enquiry which they had neither the rightful authority to examine, nor upon which to found an indictment, let the facts have ever so clearly established the actual taking of illegal fees. But it will be also perceived by the second point, the assignment of the perjury is made to consist in falsely stating that Pankey had not agreed nor given orders to the constable, Womack, to summon a jury in his case with Daniel Vineyard, before that time tried, nor was it his, the said Pankey's wish to have a jury.

In what manner could it possibly have been material for Pankey to have stated whether he had or had not given such orders to the constable, or whether he, Pankey, had or had not wished to have had a jury. If the enquiry in the case of Pankey with Vineyard, was a legal one before a justice of the peace, having a right to try the controversy, then the legality of a constable's fees could in no way depend upon a request to the constable to summon a jury—because it is the justice of the peace who alone determines the issuing of the *venire*, which is the authority for the constable to summon a jury. Could then this enquiry be a material one for the consideration of the grand jury, to enable them to determine whether the constable had or had not been guilty of taking illegal fees? The legality or illegality must alone depend on the fact, whether the justice had or had not given the officer authority to summon a jury, and whether or not, such services had been rendered, and the fees charged and received. It is evident that the facts charged to have been sworn to before the grand jury, were in every particular, immaterial, to the enquiry, had it been a proper subject of investigation before it; and although they may have been entirely false, still it could not have been the commission of legal perjury, because of its *immateriality*.

If the Court were to look into the bill of exceptions, in an examination of the correctness of the decision made on the motion to quash in the Circuit Court, which would be clearly improper, because that decision is to be alone tested by the posi-

tion of the cause as it then stood, it would then perceive that the case with Vineyard, was an arbitration about an alleged libel before a justice of the peace, who had not the slightest jurisdiction to examine into it; and that, consequently, the constable could have had no legal authority to summon a jury in the case, and might well, therefore, have been guilty of charging illegal fees, when the proceedings before the magistrate were wholly void.

As we are clearly of opinion that the Circuit Court erred in not quashing the indictment for the reasons stated, the judgment of the Circuit Court of Johnson county is reversed, and the prisoner is to be discharged.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, for the use of WILLIAM LEE D. EWING, plaintiffs in error *v.* WILLIAM MILLER and IGNATIUS R. SIMMS, defendants in error.

Error to Morgan.

For a breach in the condition of the bond of an executor, an action may be maintained against any one or more of the obligors in such a bond. The common law in this particular is changed by statute.

It is not necessary to establish a *devastavit* previous to executing a suit on an executor's bond. The statute has dispensed with the proof of a *devastavit*.

The statute of Wills gives an action against the obligors in an executor's bond, in cases of neglect or refusal to comply with any of the provisions of the law governing the conduct of the executor, as also in cases where one or more of the covenants in his bond are violated.

THIS was an action of *covenant* commenced in the Morgan Circuit Court by the plaintiff in error against the defendants in error upon an executor's bond.

The breaches assigned in the declaration, are as follows:

"And the said People say that the said William Miller has not paid the judgment aforesaid, or any part thereof, to the said William Lee D. Ewing, although often requested so to do, but has devastated and wasted the estate, goods, chattels and effects of the said Benjamin P. Miller, deceased, of whom he, the said William, was executor as aforesaid.

And the said People aver that the said William Miller (and the said Simms) have otherwise broken their covenants and have not kept and performed the same in this, that the said William Miller did not return to the office of the Court of Probate of said county within three months after the date of his letters testamentary, a true and perfect inventory and valution of the

personal estate of the said Benjamin P. Miller, deceased neither did the said William Miller return to the said office of the Court of Probate of said county, a true and perfect inventory of all moneys, judgments, bonds, promissory notes, and open accounts, or other evidences of debts of the said estate, neither has the said William Miller filed in the said Probate Office, a true and perfect statement and list of titles to estates as well real as personal, equitable or legal, neither has the said William Miller exhibited to the Court of Probate and filed in the said office, any information or statement showing the kind, quantity, quality or value of said real estate as by the laws of the land he, the said William, as executor, was bound to do, but he, the said William Miller, has received and taken possession of the real and personal estate of the said Benjamin P. Miller, deceased, and has sold and disposed of the real estate of the said estate of the said Benjamin P. Miller, deceased, and received and wasted the proceeds thereof, and has failed and refused to pay the said William Lee D. Ewing the amount of the judgment aforesaid, although often requested so to do.

And the said People say that the said defendants have not kept their covenants, but have broken the same in this, the said William Miller did not as executor of the said Benjamin P. Miller, deceased, exhibit to the said Aaron Wilson, Judge of the Court of Probate of said county, at the first term of said Court of Probate which was in session after the expiration of one year from the date of his said letters testamentary, a true and perfect account of all his actings and doings as executor as aforesaid and then and there proceed to settle the affairs and business of said estate, as by his bond and obligation aforesaid, and by the laws of the State of Illinois he was bound to do; but although twelve months have long since expired since the appointment of the said William Miller as executor, and since the date of his said letters testamentary, yet he has not settled with the said Court of Probate the business and affairs of said estate, or paid to the said William Lee D. Ewing the debt and judgment aforesaid, or any part thereof, although often requested so to do.

And the said People of the State of Illinois, protesting that the said defendants, Miller and Simms, have not kept, fulfilled or performed any thing in their said bond and obligation, or by the laws of the State as the said Miller was bound to do and perform, and that the said debt and judgment and costs in favor of the said Ewing, remained totally in arrear and unpaid to him, said Ewing, contrary to the tenor and effect, true intent and meaning of the said indenture and the laws of the State aforesaid, to wit, at the county and Circuit aforesaid.

And so the said People say, that the said William Miller and Ignatius R. Simms (although often requested so to do) have not

kept their said covenants so by them made as aforesaid, but have broken the same, but to keep the same with the said People, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said People one thousand dollars, and therefore this suit is brought for the use of the said William Lee D. Ewing as aforesaid, to wit, at the county and Circuit aforesaid.

M. McConnell,
Attorney for the People and Ewing."

Judgment was given *pro forma* for the defendants upon demurrer to the declaration, and the cause by agreement was brought into this Court.

L. Davis and S. McRoberts, for plaintiffs in error, relied upon R. L. 650, § 121, (1); idem. 632, § 132, (2); idem. 634, § 65,(3)

William Thomas, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:(4)

This case is submitted for the decision of this Court, on a written agreement, the parties thereby waiving the service of process, and entering their appearance and filing a record of the cause. By an inspection of the record, it appears that it was an action of covenant on an executor's bond, against the defendants, in the Morgan Circuit Court, and that only two of the obligors in the bond have been sued. The declaration avers the appointment of Miller as executor, and that he took upon himself the burthen of the administration and executorship of the testator; and that he, with the other defendant, and one Waller Jones, then and there made and entered into a bond which is in exact conformity with the form prescribed by the statute of the State, in such cases, and which is set out in *hæc verba*. It is then avered, that the defendants have not kept their covenants in the bond contained, but have broken the same, because the relator, Ewing, recovered, by default, a certain judgment against Miller, as executor, for the sum of eight hundred and thirty-four dollars in the Morgan Circuit Court, at the May term of said Court, 1838, with costs of suit, to be levied of the goods and chattels of the testator, in the hands of the executor to be administered; upon which judgment an execution had been issued and returned *nulla bona*. The declaration then avers a nonpayment by defendant, Miller, of such judgment, and that he has wasted and devastated the estate, and goods, and chattels, and effects of the testator. It then assigns various breeches of the condition of the bond in not returning an inventory and valuation of the personal estate of the testator, and the not perform-

(1) Gale's Stat. 716. (2) Gale's Stat. 718. (3) Gale's Stat. 703—4.
(4) Lockwood, Justice, dissented from the opinion of the Court.

ing the general requirement of the obligation of the bond, and avers that the defendant, Miller, has sold and wasted the estate of the testator. It also alleges that no settlement of the estate has been made in the Court of Probate of Morgan county, although one year had elapsed from the date of the letters testamentary, as by the law he was bound to have done; nor has any account of the actings and doings of the executor been presented to such Court. To this declaration there was a general demurrer, and also an admission or agreement, that Waller Jones executed the bond with the other defendants, and that he was jointly bound with the other defendants in the bond; that he was still living, and that the defendants might take advantage of the non-joinder of Jones upon the demurrer, as though a plea in abatement had been filed. At the request of the parties a judgment *pro forma* was rendered, sustaining the demurrer.

On this statement of the case, two points seem to be presented for consideration.

1. Whether the declaration is substantially good; and whether, under our laws, the action on the bond can be maintained for a breach of its conditions.

2. Can the action be sustained against two of the obligors only?

On the first point, it is not perceived why the declaration is not sufficient. It contains all the necessary recitals and averments, and the breaches seem to be well assigned.

The statute relative to wills and testaments, in force July, 1829, in the one hundred and thirty-second section, provides, "That whenever any executor or administrator, shall fail to comply with the provisions of that act, or shall fail to comply with any, or all the covenants in his bond, an action may be forthwith instituted and maintained on such bond against the principal or securities, or both; and the failure aforesaid shall be a sufficient breach to authorize a recovery in the same manner, as though a *devastavit* had been previously estabished against such executor or administrator."

This section gives the action, in cases of neglect or refusal to comply with either of the provisions of the law which controls and governs the conduct of the executor, as also, in cases where he shall violate any one or more of the covenants in the bond, and has dispensed with the proof of a *devastavit*, according to the course of the common law.

Upon the second point, it appears only necessary to observe that the right to sue any one or more of the obligors in the name of the People, for the use of any person who may be injured by the neglect or improper conduct of the executor, is expressly given by the provisions of the sixty-fifth section of the same act. There can, then, be no irregularity or error, in not joining

Jones, one of the obligors, and it could form no valid objection on demurrer, nor be cause of abatement. The statute has, in this particular, changed the common law rule as to the joinder of parties.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion. The plaintiffs in error recover their costs.

Judgment reversed.

WILLIAM LINN, plaintiff in error, *v.* THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, defendants in error.

Error to Jackson.

The Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question "the validity of a statute of, or an authority exercised under any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity."

Where the Supreme Court of the United States has decided that a State law violates the Constitution of the United States, the judges of the respective States have no right to overrule or impugn such decision.

The bills issued by the old State Bank of Illinois, were "bills of credit" within the meaning of the Constitution of the United States; and a note given in consideration of such bills is void, and cannot be collected by law.

The case of Snyder *v.* the State Bank of Illinois, Breese, 122, is overruled.

This was an action of debt instituted by the defendants in error in the Jackson Circuit Court, against the plaintiff in error, upon a sealed note.

The declaration is in the usual form.

The defendant in the Court below, the plaintiff in error, filed the following pleas:

"And the said defendant comes and defends the wrong and injury, when, &c., and craves *oyer* of the said supposed writing obligatory in the said plaintiffs' declaration mentioned, and it is read to him in these words: "Twelve months after date I promise to pay to the President and Directors of the State Bank of Illinois, at their Branch Bank at Brownsville, for the use of the People of said State, four hundred and fifty dollars for value received. Witness my hand and seal this 13th July, 1822.

"Witness Jo. Duncan. WILLIAM LINN, [L. S.]"

which being read and heard, the said defendant says that the said plaintiffs ought not to have or maintain their said action against him, this defendant, because he says that the said writing

obligatory was sealed and delivered by him to the said plaintiffs for the notes or bills issued and emitted by the said President and Directors of the said State Bank of Illinois, under and by virtue of an act of the General Assembly of the said State, entitled "*An Act establishing the State Bank of Illinois*," passed in the year of our Lord 1821, which said act of the General Assembly is here inserted, and made a part of this plea.

By which said act the said notes or bills of said Bank are not redeemable or payable by said Bank until after the expiration of ten years from and after the passage of said act incorporating said Bank, and from and after the time said notes or bills should be emitted and issued by said Bank, which said notes or bills were issued or emitted on the day of July, 1821, and the emission and delivery thereof by the said plaintiffs to this defendant were the sole and only consideration for the said writing obligatory so executed as aforesaid, and for no other consideration whatever was the said writing obligatory executed, sealed, and delivered by the defendant to said plaintiffs; which said notes or bills so emitted, issued, and delivered as aforesaid, by the said plaintiffs to this defendant, are bills of credit within the true intent and meaning of the Constitution of the United States: and so the said defendant says, that the said writing obligatory in the said plaintiffs declaration mentioned, was sealed and delivered by this defendant to the said plaintiffs, whithout his having received of and from said plaintiffs, any good or valuable consideration therefor, and this he is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain their said action thereof against him this defendant, &c.

S. Breese, for defendant.

And for further plea in this behalf "the said defendent says that the plaintiffs aforesaid ought not to have or maintain their aforesaid action against him, because he says that heretofore, to-wit, at the term of the Circuit for Jackson county, State of Illinois, in the year of our Lord
the said plaintiffs impleaded the said defendant in a certain plea or action of *scire facias* on a mortgage executed by this defendant to said plaintiffs, for securing the payment of the same indentical sum of money in the said declaration mentioned; and such proceedings were thereupon had in said Court in that action, that afterwards, to wit, at the May term, 1825, of said Court, the said plaintiffs by the consideration and judgment of said Court, recovered against said defendant the sum of $167,75, and costs, it being the amount due upon said mortgage, which was given to secure the payment of the note on which this suit is brought, whereof the said defendant is convicted, as by the records and proceedings remaining in said Court will more fully and at large appear; which said judgment still remains in full force and effect.

not the least reversed or made void, all which the said defendant is ready to verify by the record, wherefore he prays judgment if the said plaintiffs ought to have or maintain their said action against him this defendant.

S. Breese, for defendant.

To each of these pleas a demurrer was filed, which was sustained by the Court, and a judgment rendered for the plaintiffs in the Court below, for $351,95 and costs.

The cause was tried at the October term, 1831, before the Hon. Thomas C. Browne.

S. Breese and D. J. Baker, for the plaintiffs in error.

J. Semple, Attorney General, for the defendant in error, contended,

1st. This Court has no jurisdiction to declare a law of the State legislature unconstitutional and void, and to disregard it.

2d. If this Court has such a power, the law is valid and not repugnant to the Constitution either of the United States or of the State of Illinois.

3d. Admitting the law to be void or repugnant to the Constitution, yet the contract founded on the law is obligatory on the parties.

Lockwood, Justice, delivered the opinion of the Court:

This is an action of *debt*, brought on a sealed note, executed by Wm. Linn to the plaintiffs below. The defendant in the Court below, pleaded that the writing obligatory was sealed and delivered by him to the plaintiffs, for and in consideration of bills issued and emitted by the plaintiffs, under and by virtue of an act of the legislature of the State of Illinois, entitled "*An act establishing the State Bank of Illinois*," and that the emitting and issuing said bills by said Bank, under and by authority of said act, was a violation of the 10th Section of the 1st Article of the Constitution of the United States, which forbids a State to "emit bills of credit."

To these pleas the plaintiffs below demurred, and judgment was given in the Circuit Court in favor of the Bank. To reverse this judgment, the defendant below has brought a writ of error to this Court.

The main question presented by this case for the consideration of this Court, is whether the act establishing the State Bank, so far as said act authorized the issuing of the bank bills which formed the consideration of the sealed note sued on, is a violation of the Constitution of the United States.

To support the position that the issuing the bank bills mentioned in the plea, is a violation of the Constitution of the United States, the counsel for the plaintiff in error cited the case decided

in the Supreme Court of the United States of Craig, *et al. v.* The State of Missouri.(1)

This Court recognises the correctness of the doctrine that the Supreme Court of the United States is the proper and constitutional forum to decide and finally to determine all suits where is drawn in question "the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity."

The decision of the demurrer in the Court below necessarily drew in question the validity of the statute establishing the State Bank of Illinois; and that decision being in favor of its validity, brings this cause within the doctrine above acknowledged. And although the question involved in this case is of immense importance to the people of this State, and affects interests of great magnitude, yet the duty that devolves on this Court is a very plain one. It is simply to ascertain what the Supreme Court of the United States has decided in an analogous case, and then decide in accordance with the decision of that Court. When the Supreme oCurt of the United States have decided that a State law violates the Constitution of the United States, the judges of the respective States have no right to overrule or impugn such decision. State judges are sworn to support the Constitution of the United States, and that instrument in its 6th Article declares, that "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land, and the judges in every State shall be bound thereby; anything in the constitution or laws of any State to the contrary notwithstanding."

As then this Court is bound to conform its decisions on questions relative to the unconstitutionality of State laws, to the decisions of the Supreme Judicial Tribunal of the nation, it becomes necessary to ascertain what that Court has decided in the case of Craig *et al. v.* The State of Missouri.[a] Chief Justice Marshall, who delivered the opinion of the majority of the Court, investigates the questions "What is a bill of credit?" and "What did the Constitution mean to forbid?" in his usual lucid and forcible manner. He says that a bill of credit "in its enlarged and perhaps literal sense, may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay

(1) 4 Peters 411.
(a) Smoot *vs.* Lafferty 2 Gil. R. 334. Lalor *vs.* Wattles 3 Gil. 226. People &c., *vs.* McCall 43 Ill. R. 286.

money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood. At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium, was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and 'bills of credit' signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt throughout the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution that 'No State shall emit bills of credit.' If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a State government, for the purpose of common circulation.

"What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the Auditor and Treasurer of the State, are to be issued by those officers to the amount of $200,000, of denominations not exceeding $10, nor less than 50 cents. The paper purports on its face to be receivable at the Treasury or at any loan office of the State of Missouri in discharge of taxes or debts due to the State.

"The law makes them receivable in discharge of all taxes or debts due to the State, or any county or town therein, and of all salaries and fees of office to all officers, civil and military, within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption. It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denomination of the bills, from $10 to 50 cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes and debts to the government and to corporations and a

salaries and fees, would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the Auditor and Treasurer to withdraw annually one-tenth of them from circulation. Had they been termed 'bills of credit,' instead of certificates, nothing would have been wanting to bring them within the prohibitory words of the Constitution.

"And can this make any real difference? Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act, are as entirely 'bills of credit,' as if they had been so denominated in the act itself.

"But it is contended, that though these certificates should be deemed 'bills of credit,' according to the common acceptation of the term, they are not so in the sense of the Constitution, because they are not made a legal tender."

"The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all 'bills of credit,' not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution therefore considers the emission of 'bills of credit,' and the enactment of tender laws, as distinct operations, independent of each other, which may separately be performed. Both are forbidden. To sustain the one because it is not also the other; to say that 'bills of credit' may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause, as if it had been entirely omitted. We are not at liberty to do this."

"The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender; and that therefore the general words of the Constitution may be restrained to a particular intent." "Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this Court would not feel itself authorized to disregard the plain meaning of words, in search of

a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do think that the history of our country proves either that being made a tender in payment of debts is an essential quality of 'bills of credit,' or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a Court to convert a general into a particular prohibition."

The Chief Justice, after giving several examples taken from the history of the United States, and several of its members, of issues of paper money, some of which were made a tender in payment of debts, and others not, and showing the evils that resulted to the country from their emission, and that the evils with which their emission was fraught, did not depend upon their being made a legal tender,—and contending that all these issues of paper money were alike "bills of credit," comes to the conclusion, that the certificates issued by the loan office in Missouri, were "bills of credit," in the sense of the Constitution, and consequently their emission was forbidden by that instrument. The Chief Justice then enquires, "Is the note executed by Craig, valid, the consideration of which consisted in lending to him of these loan-office certificates? He says, "It has been long settled, that a promise made in consideration of an act forbidden by law, is void. It will not be questioned, that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now, the Constitution of the United States forbids a State to 'emit bills of credit.' The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices; but the issuing of them, the putting of them into circulation, which is the act of emission, the act that is forbidden in the Constitution. The consideration of this note is the emission of bills of credit by the State.

"The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States." The Chief Justice after citing a number of decisions to show that the bonds and notes given on illegal considerations, are void, says that a "majority of the Court feel constrained to say, that the consideration on which the note in this case (the case of Craig *v.* the State of Missouri) was given, is against the highest law of the land, and that the note of itself is utterly void."

Having thus ascertained what the Supreme Court of the United States has decided in the case referred to, the question here arises; is there such a difference between the certificates issued by the loan-office in Missouri, and the bills issued by the Bank established in this State, as to exempt these bills from being con-

sidered "bills of credit" within the meaning of the Constitution of the United States.

A concise review of a few of the provisions of the "*Act establishing the State Bank of Illinois*" will show a very close and striking resemblance. The bank was to be owned by the State. The cashiers were to give bond with securities for the use of the State, for the faithful discharge of the duties of their office. The Bank was to issue notes or bills to the amount of $300,000, in bills not exceeding $20, nor less than $1, and their form is prescribed. They were to bear two per cent. interest, and to contain a promise to pay.

The bills thus to be issued were to be receivable at all times for debts due the State, or to any county, or to the Bank. The $200,000 of bills as soon as they could be prepared for "Missouri," were to be loaned to the citizens of the State, and the loans were to be made in the different counties according to population. All the revenues, lands, town lots, funds, and other property of the State were "pledged" for the redemption of the bills, and the legislature "pledged" themselves at the expiration of ten years for the passage of the act, to redeem all bills to be issued by virtue of the act, in gold and silver. The Bank was also required to withdraw from circulation, annually, one-tenth part of the whole amount of the bills issued.

From this statement of the prominent features of the bank law, it clearly appears that our Bank and the Missouri loan-office, although called by different names, were similar in their objects, and both were established for the purpose of emitting a paper currency to circulate as money in the respective states. The issuing of these bills, is, according to the decision of the Supreme Court of the United States, emitting "bills of credit," and a violation of the Constitution of the United States. It is also to be remarked in relation to the act establishing our State Bank, that it is obnoxious to the charge of attempting to force the bills of the Bank into circulation by staying creditors from collecting their debts for three years, unless they would receive these bills in payment.

It results from this review of the provisions of the bank law, that it contains objectionable features not found in the Missouri loan-office law; and there can be no doubt if this case were presented to the Supreme Court of the United States, that that Court would decide that the bills issued by the State Bank of Illinois, were "bills of credit," and that the sealed note on which this action was brought, was given for an illegal consideration, and therefore null and void.

Such being the opinion of this Court, we are compelled to say that the judgment of the Circuit Court must be reversed.

As the decision now given conflicts with the decision of this

Court in the case of Snyder *v.* The President and Directors of the State Bank of Illinois,(1) it is proper to notice the circumstances under which that decision was made. This Court there say, "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. This decision was made in 1826, and before the decision in the Supreme Court of the United States, and under circumstances that did not afford this Court an opportunity to investigate authorities to any extent. Similar decisions had been made in Missouri and Kentucky, and it was understood, in other States. The error, therefore, which the Court fell into in that case, was as far as the information of the Court extended, a common one. A further apology might be offered for the error, in the consideration that after all the light that time and fuller investigation had shed upon the subject, one, at least, if not more of the Judges of the Supreme Court of the United States entertain the same opinion.

Judgment reversed.

Note. The case of Craig *et al. v.* The State of Missouri, was decided in 1839, by a bare majority of the Court. The Supreme Court of the United States then consisted of John Marshall, William Johnson, Gabriel Duvall, Joseph Story, Smith Thompson, John McLean, and Henry Baldwin.

Justices Thompson, Johnson, and McLean did not assent to the opinion of the Court in that case. 4 Peters 425.

In 1837, the case of Briscoe *et al. v.* The Bank of the Commonwealth of Kentucky, came before the Supreme Court of the United States. The following points were decided in that case, by the Court consisting of Roger B. Taney, Joseph Story, Smith Thompson, John McLean, Henry Baldwin, James M. Wayne, and Philip P. Barbour. Justice Story alone dissented from the opinion of the Court.

"On the 29th of November, 1820, the legislature of Kentucky passed an act, establishing a bank, by the name of 'The Bank of the Commonwealth of Kentucky.' The first section of the act, declares that the bank shall be established "in the name and behalf of the Commonwealth of Kentucky;" under the direction of a president and twelve directors, to be chosen by the legislature. The second section enacts, that the president and directors shall be a corporation, capable of suing, and being sued, and of purchasing, and selling every description of property. The third section declares the bank to be, exclusively, the property of the commonwealth. The fourth section authorizes the issuing of notes; and the fifth declares the capital to be two millions of dollars: to be paid by all moneys afterwards paid into the treasury for the vacant lands of the State, and so much of the capital stock as was owned by the State in the Bank of Kentucky; and as the treasurer of the State received those moneys, he was required to pay them into the bank. The bank had authority to receive money on deposite, to make loans on good personal security, or on mortgage; and was prohibited increasing its debts beyond its capital. Limitations were imposed on loans, and the accommodations of the bank were apportioned among the different counties of the State. The bank was, by a subsequent act, authorized to issue three millions of dollars; and the dividends of the bank were to be paid to the treasurer of the State. The notes of the bank were issued in the common form of bank notes; in which the bank promised to pay to the bearer on demand, the sum stated on the face of the note. The pleadings excluded the Court from considering that any part of the capital had been paid by the State; but in the argument of the case, it was stated, and not denied, that all the notes which had been issued, and payments of which had been demanded, had been redeemed by the bank. By an act of the legislature of Kentucky, it was required that the notes of the bank should be received on all executions by

(1) Breese 122.

plaintiffs, and if they failed to endorse on such execution, that they would be so received, further proceedings on the judgment were delayed for two years. The Bank of the Commonwealth of Kentucky instituted a suit against the plaintiffs in error, on a promissory note for which the notes of the bank had been given, as a loan, to the drawers of the note. The defendants in the suit claimed that the note given by them was void, as the same was given for the notes of the bank, which were "bills of credit" issued by the State of Kentucky; against the provisions of the Constitution of the United States; which prohibits the issuing of "bills of credit" by the States of the United States: and that the act of the legislature of Kentucky, which established the bank, was unconstitutional and void. By the Court,—The act incorporating the Bank of the Commonwealth of Kentucky, was a constitutional exercise of power, by the State of Kentucky; and the notes issued by the bank are not bills of credit, within the meaning of the Constitution of the United States.

The definition of the term "bills of credit," as used in the Constitution of the United States, if not impracticable, will be found a work of no small difficulty.

The terms bills of credit, in their mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial country. In the early history of banks, it seems their notes were generally denominated "bills of credit;" but in modern times they have lost their designation, and are now called either bank bills, or bank notes. But the inhibitions of the Constitution apply to "bills of credit," in a limited sense.

The definition of a bill of credit, which includes all classes of bills of credit emitted by the colonies and States, is a paper issued by the sovereign power, containing a pledge o its faith, and designed to circulate as money.

If the legislature of a State attempts to make the notes of any bank a tender, the act will be unconstitutional; but such attempt could not affect, in any degree, the constitutionality of the bank. The act which related to the receiving the notes of the Bank of the Commonwealth of Kentucky, was not connected with the charter.

The federal government is one of delegated powers: all powers not delegated to it, or inhibited to the States, are reserved to the States or to the people.

A State cannot emit bills of credit, or in other words, it cannot issue that description of paper to answer the purposes of money, which was denominated before the adoption of the Constitution, bills of credit. But a State may grant acts of incorporation for the attainment of these objects, which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation on its exercise by the States, in respect to the incorporation of banks, in the federal Constitution.

At the time of the adoption of the Constitution, the "Bank of North America," and "the Massachusetts Bank," and some others were, in operation. It cannot therefore be supposed that the notes of these banks were intended to be inhibited by the Constitution, or that they were considered as "bills of credit," within the meaning of that instrument. In many of their most distinguishing characteristics, they were essentially different from bills of credit, in any one of the various forms in which they were issued. If then the powers not delegated to the federal government, nor denied to the States, are retained by the States or the people: and by a fair construction of the term "bills of credit," as used in the Constitution, they do not include ordinary bank notes; it follows, that the power to incorporate banks to issue these notes, may be exercised by a State.

A uniform course of action, involving the right to the exercise of an important power by the State government for half a century, and this almost without question; is no unsatisfactory evidence that the power is rightfully exercised.

A State cannot do that which the federal Constitution declares it shall not do. It cannot "coin money." Here is an act inhibited in terms so precise, that they cannot be mistaken. They are susceptible but of one construction. And it is certain that a State cannot incorporate any number of individuals, and authorize them to coin money. Such an act would be as much a violation of the Constitution, as if money were coined by an officer of the State under its authority. The act being prohibited, cannot be done by a State directly or indirectly.(a) The same rule applies to bills of credit issued by a State.

To constitute a "bill of credit" within the Constitution, it must be issued by a State, on the faith of the State, and designed to circulate as money. It must be a paper which circulates on the credit of the State; and so received and used in the ordinary business of life. The individual or committee who issue it, must have power to bind the State; they must act as agents, and of course not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a State cannot emit. The notes issued by the Bank of the Commonwealth of Kentucky have not these characteristics.

(a) If the question were *res integra* the States would not, upon a sound construction of the Constitution be authorized, to incorporate banks. 3 Story Com. § 1364, and see 1 Kent Com. * 408, note *a*.

When a State emits bills of credit, the amount to be issued is fixed by law; as also the fund out of which they are to be paid, if any fund be pledged for their redemption: and they are issued on the credit of the State, which in some form appears upon the face of the notes, or by the signature of the person who issues them.

No sovereign State is liable to be sued without her consent. Under the articles of confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on a bill of credit against a State; and it is certain that no suit could have been maintained on this ground, prior to the Constitution.

The case of Craig *v.* The State of Missouri, 4 Peters 410, is not authority to sustain the claim that the notes of the Bank of the Commonwealth were bills of credit. The decisions in that case applied to obligations of an entirely different character.

There is no principle decided by this Court, in the case of Craig *v.* The State of Missouri, which at all conflicts with the views presented by the Court in this case. Indeed the views of the Court are sustained and strengthened, by contrasting the present case with that.—11 Peters 257.

The County of Vermilion, appellant, *v.* William Knight, appellee.

Appeal from Vermilion.

Where the County Commissioners of V. County contracted with K., a physician, to render medical services to a pauper, but neglected to have a record made of such contract, held that the contract might be proved by parol evidence.

It is not necessary for a party who has rendered aid to a person acknowledged as a pauper by the County Commissioners, and at their request to prove that such person was entitled to aid under the laws provided for the support of the poor.

Where a declaration against a country contained two counts, one of which charged that the contract was entered into with the "*Commissioners of said county*," and the other charged that the contract was entered into with the "*county, by its Commissioners*," held there was no misjoinder of counts or parties.

The County Commissioners' Court has no jurisdiction to determine civil causes between individuals or corporations.

The County Commissioners, when acting as a court, can bind the county by fair contract.

This cause was tried at the April term, 1833, of the Vermilion

Circuit Court, before the Hon. William Wilson and a jury, and a verdict and judgment rendered for the appellee for $140, and costs.

S. McRoberts, for the appellant, cited 1 Bibb, 114, 272, 501; Acts of 1827, 108, 310, § 3; Chit. Plead. 215, 229, 235, 357; 1 Term R. 141; Arch. Plead. 21—70; 6 Term R. 557; Acts of 1829, 33; Acts of 1827, 309, 310; Road Law, 340, § 1, 13, 14, 15, 2, 5, 12, 16, 17, 20, 22; 1 Littell 10; Acts of 1827, 309; Acts of 1831, 113; 3 Cond. R. 311; 3 Johns. 23, 26; 8 Johns. 223; 1 Cond R. 19—20; Jones *v.* Coms. of Randolph, Breese 104, 106; 3 Term R. 38, 39, 40; 7 Term R. 266, 272; 1 Salk. 329; 9 Johns. 287, 290.

J. Pearson, for the appellee, cited the statutes on the subject of Co. Com. Courts; 3 Blac. Com. 22 or 25; 10 Johns. 188, 243, 249, 378; 3 Espinasse R. 91; 3 Bos. and Pul. 247; 1 Comyn on Cont. 19 or 23, 35.

Smith, Justice, delivered the opinion of the Court:

The appellee instituted a suit in the Circuit Court of Vermillion county, against the appellant, and declared in *assumpsit*. The declaration contained three counts: the first alleges that the appellee, being a physician and surgeon, and exercising such profession, entered into a contract with the Commissioners of said county, to employ his skill and art in his profession, upon the body of one Ludington, who then and there was treated and considered in the county by such Commissioners, as a pauper, and was afflicted with various diseases: with a condition thereto annexed, that unless the said pauper was benefitted and relieved by his, the appellee's skill and medical aid, he was to receive no compensation; but if he was so benefitted and relieved, the appellee was to receive a reasonable compensation. There is an averment that such skill and medical aid were exercised and rendered, and that the pauper was greatly relieved and benefitted thereby, and that the appellee reasonably deserved to have, for such services, the sum of three hundred dollars.

The second count avers, that the said appellee was employed by the county, through its Commissioners, to render his skill and attendance on said pauper, so considered and treated as such by said Commissioners, who was afflicted with disease; and that in consideration thereof, the said county became indebted to the said appellee in the sum of one hundred and eighty dollars, which it undertook and promised to pay.

The third count is a *quantum meruit*, for the like services rendered.

To these counts, the appellant pleaded, first, the general issue; and secondly, a special plea of exclusive original jurisdiction in

the County Commissioners' Court of Vermilion county, to hear and determine what compensation the said appellee was entitled to for such services, by way of *bar* to the action: to which second plea there was a demurrer and joinder.

The Circuit Court sustained the demurrer to the second plea, and the issue of the first was tried, and a verdict was rendered for the plaintiff. On the trial of the cause, the plaintiff offered *parol* evidence of the special contract entered into by the County Commissioners' Court of Vermilion county, the records of that Court at which the contract was alleged to have been made, not showing any contract between the plaintiff and defendant. To the admission of this evidence, the counsel for the defendant objected, on the ground that the records of the County Commissioners' Court, or some writing duly authenticated, was the only admissible evidence to establish the contract to bind the county. The Circuit Court overruled the objection, and permitted the evidence to go to the jury; and also instructed the jury, that if the County Commissioners, acting as a court, did make the contract sued on, the county was bound, though the same did not appear on the record, or in any other writing under the seal of the Court. It further appears, in the bill of exceptions, that the witnesses who proved the contract, were the Commissioners who were in office at the time the contract was made, but were then (at the time of trial) out of office. The defendant excepted to the decisions of the Court.

The errors assigned are—1st. That there is a misjoinder of parties and counts; 2d. That the plaintiff should have averred specially in his declaration all those facts necessary to show that the person who received the medical aid was a pauper, and that the county had become legally chargeable with his support; 3d. That the demurrer to the second plea was improperly overruled; 4th. That the Circuit Court erred in admitting *parol* evidence of the acts of the Commissioners' Court; 5th. The Circuit Court erroneously instructed the jury, that, if the Commissioners, acting as a court, did not make the contract sued on, the county was bound, though the same did not appear on the records, or in any other writing under the seal of the Court.

The several grounds of error will be considered. The first, alleging a misjoinder of parties and counts, it may be proper to remark, is supposed to be based on the use of the terms "*the County Commissioners*," and "*the county, by its Commissioners*," in the several counts of the declaration; indeed such is the ground assumed by the counsel in support of the errors. It is not perceived how this can be said to be a misjoinder of parties and counts; the cause of action set out in each, is clearly the same, though charged in different ways. The right of action is in the same plaintiff, and against the same defendant; for

although, out of abundant caution, the pleader may have charged the contract to have been made, in one count by the County Commissioners, and in another by the county through its Commissioners, still, it is substantially the same thing; for whether the county, by its Commissioners, or the county, by its own name, be charged with the contract, the liability is the same.

The constitution, indeed, expressly names them Commissioners, and through all the legislative acts, when spoken of, the term County Commissioners, is used as frequently as "County Commissioners, Court." They are known by the law as a public corporation, created for the purpose of superintending the business of the county in relation to its fiscal and local concerns; and although an act of the legislature directs that suits shall be carried on against the county by its particular name, still the Commissioners are its public, acknowledged, lawful agents to manage all its interests. The objection, then, that the plaintiff has joined different parties or causes of action, in right of different parties in the declaration, is not made out.

The second ground, the want of the special averments, is not well taken. The County Commisioners were by law, at the time of the making of the alleged contract, specially charged with the care and superintendence of all paupers in their county; and when they had adjudged that a person was entitled to relief, and employed an individual to afford the aid required, as between the county and the person so employed, it was conclusive and final on the county. The person employed was not by any means bound to enquire into the correctness of their determination; it was sufficient that they had authority to afford the relief, and when they had determined that it was proper, the county was bound to their contract, they having the authority to make it.

This is not the case of an action on an implied request, where the services had been rendered to one having gained a legal settlement, and who, in consequence of such settlement, would be entitled to such relief, and with the expense of which the county would be charegable. In such a case, it will not be doubted, that to entitle a party to recover, it would be necessary to aver and prove all the facts necessary to show that the party to whom the relief was extended, was a pauper, whom the county was legally bound to support and take care of.

On the three last points, it may be proper to notice, that as they are in some measure connected, they may with propriety be considered together.

Before entering on the question of the propriety of the admission of parol evidence, the grounds arising on the demurrer may be disposed of. The appellant contends that the County Commissioners' Court had exclusive original jurisdiction to determine

what sum was due for services rendered, and that, therefore, the Circuit Court had no power to enquire into the cause of action. To obviate this objection, we need only recur to the Constitution of the State, which, in creating the office of County Commissioner, declares that the "*time of service, power, and duties, shall be regulated and defined by law*;" and that the object of its creation is expressly "*for the purpose of transacting county business.*" Here, then, no power was given to adjudicate on contracts, and more particularly so where the county itself was one of the contracting parties. But if a doubt could remain, that no such grant was ever given by the Constitution, it is removed by a recurrence to the powers and duties as prescribed by legislative enactment, which show, at once, the sense in which the legislative power understood that part of the Constitution which created the office.—By the 9th section of the act establishing the Court of County Commissioners, passed the 22d March 1819, (1) it is provided, "That there shall be nothing contained or construed in this act, to give the said Court any original or appellate jurisdiction in civil or criminal suits or actions wherein the State is party, or any individuals, bodies politic or corporate, are parties." This provision at once excludes all idea of jurisdiction in the case before the Court. The demurrer was, therefore, correctly decided.

In the consideration which might be given to the admission of the parol testimony, on the supposition that it conflicts with settled rules of evidence in regard to records, or the written evidence of courts of record, it will be perceived that a long and perhaps uninteresting examination of powers and duties of the County Commissioners' Court, as they have been practically understood, might be made; but how far that might tend to elucidate the accuracy of the decision, is not perceived; nor, indeed, could it be possible or necessary to investigate the questions, whether this court is, in the legal sense of the term, a court of record; and whether it is marked by those constituent features which properly characterize a court of record, under the well known terms of *actor*, *reus*, *judex*.

It is by no means esssential to a correct determination of the question arising on the admission of the evidence, or of the instructions of the Court, that it should be determined whether the County Commissioners' Court was or was not a Court of record, or a public corporation with specified and defined powers; because, while it is distinctly admitted that they could enter into no contract which could bind the county, except while setting as a court or corporation, it does not necessarily follow that the evidence of that contract must at all events be proved by a record of the fact upon their minutes. It is true under the general rules

(1) R. L. 143; Gale's Stat. 162.

of evidence, that the highest evidence of which the fact is susceptible and within the power of the party to produce, should be adduced; but then there are exceptions to all general rules, and they arise from the very necessity of the particular cases. Now, shall it be pretended, that in this case the plaintiff should have been held to the production of the record of a fact of which it is admitted that there was no written evidence whatever, and which the defendant in the action had been the very cause of preventing from being made? The County Commissioners, when the contract was made, either through design, accident, or ignorance, did not cause a record or minute of the contract to be made; and hence it is seriously contended that the plaintiff could not recover, because he does not adduce that which does not exist, and which, being an act he could not do himself, he could neither control or prevent from being omitted to be done. To have excluded parol evidence, under such circumstances, would have been an act of great injustice—the means of defeating a recovery, by the defendant's own wrong. The contract was made—it was the duty of the County Commissioners to have reduced the contract to writing—but, because they have omitted their duty, is the defendant to take advantage of this misfeasance or non feasance of its own agents? To do this, would be to make the rule of evidence subservient to the purpose of injustice. No rule of evidence is better settled, than that a party may give parol evidence of a writing, if it be destroyed or lost. And why is it so? It is because it is beyond the ability of the party to produce it. Does not, then, the reason of the rule apply with equal, if not greater force here. It surely must. Suppose, in this case, a record of the contract had been made, and by accident the book containing it had been lost or destroyed, would it be denied that parol evidence might be given? Was the engagement of the Commissioners to pay for the services, less a contract, because they did not do their duty, and cause it to be entered on record? Certainly not. But the case shows that the identical individuals who, as Commissioners, made the contract, are the witnesses by whom it was established; and there could have been no danger that they could not declare accurately what that engagement was.(a) It is, however, urged, that a *mandamus* would have been the proper remedy to have been resorted to in the first instance, to get the record evidence, and by which to compel the County Commissioners to have put it on the records. And would not parol proof here, also, have been resorted to, to establish what that instrument was, which the Commissioners would be called on to record? But it will be perceived that those who made the contract, were out of office, and that, consequently, their evidence would have to be used to establish the contract. It is then clear that the evidence was properly admitted.

(a) Rouse *vs.* County of Peoria, 2 Gil. R. 99. City contracts by City of Alton *vs* Mulledy, 21 Ill. R. 76.

This reasoning is directly applicable to the charge of the Court, and equally sustains its correctness. The contract was made as a court, but, from the necessity of the case, parol evidence was only let in to establish what the record of the Court could not, because the contract was improperly omitted to be entered on the record, as the law certainly intended it should have been.

Judgment affirmed with costs.

Judgment affirmed.

John Woods, plaintiff in error *v.* Peter Hynes, defendant in error.

Error to Adams.

The consideration of a negotiable note cannot be impeached in the hands of an innocent assignee, who received the note before it became due.

The fraud which will vitiate a note in the hands of an innocent assignee, must be *in obtaining the making or executing* of the note.(1) Fraud in relation to the consideration, or in the contract upon which the note is given, is not sufficient.(*a*)

Where the issue is wholly immaterial, the verdict of the jury will be set aside. The rule is, that where matter, be it never so well pleaded, could signify nothing, judgment may, in such cases, be given as by confession.

This action was tried at the October term, 1832, of Adams Circuit Court, before the Hon. Richard M. Young. The note upon which the action was brought, is as follows:

"Quincy, 18th October, 1831.

"On or before the 15th of March, 1832, I promise to pay unto David Wilkin or order, the sum of one thousand dollars, lawful money of the United States, without defalcation, being for value received, as witness my hand and seal the above date.

Peter Hynes. [L.S.]

Witness:
S. W. Rogers,
Willard Keyes."

"Pay the within to Mr. John Woods, or his order or assigns.
St. Louis, Nov. 21st, 1831. David Wilkin."

The defendant in the court below filed the following plea:

"And the said Peter Hynes comes and defends the wrong and injury, when and where, &c. and for plea says, that the said plaintiff (*actio non*) because he says that the said David Wilkin, the person to whom the said writing obligatory was made, used fraud and circumvention in obtaining the said writing from this defendant—that the said Wilkin, being a stranger in this country,

(1) Mulford *v.* Shepard, decided Dec. term, 1839, *post*. 583.

(*a*) 3 Chitty's Pl. 963, note; Young *vs.* Ward 21 Ill. R. 236; Foster *vs.* Minard 26 Ill. R. 494.

came to the town of Quincy with a quantity of goods boxed up in boxes and crates,—that the said Wilkin, in order to practice fraud and circumvention in the sale of the said goods with advantage and benefit to himself, represented himself, in the town of Quincy, to be a religious man and a member of the Presbyterian Church, in consequence whereof this defendant believed the said Wilkin to be an honest man, who would take no advantage, and use no deception in a trade,—that the said writing was executed by this defendant to the said Wilkin, in consideration of the sale of the said goods from the said Wilkin to this defendant. That at the time of the sale of the said goods, and of the execution of said note, the said Wilkin, notwithstanding all his said pretences to religion and sanctity, did falsely and fraudulently, and with an intention to deceive and circumvent this defendant, represent to this defendant, that the said goods, so boxed and crated up as aforesaid, were of a good quality, and that they were equal in quantity to be of value to the amount of said writing. Yet this defendant in fact says that the said goods were greatly and scandalously inferior in quality to what they were represented to be by the said Wilkin, and were greatly and scandalously deficient in quantity, to what they were represented to be by the said Wilkin, so that they were in nowise of value to the amount of the said note; and the said defendant says that so soon as he ascertained the aforesaid deficiencies in the said goods, this defendant tendered the said goods back to the said Wilkin, but the said Wilkin refused to receive the same, all which this defendant is ready to verify, wherefore, he prays judgment, &c.

FORD, RALSTON & WHITNEY,
Deft's. Attorneys."

A. WILLIAMS, for the plaintiff in error.

J. W. WHITNEY, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *debt*, on a sealed note for one thousand dollars, which is made payable to order. By the declaration it appears that the plaintiff became the assignee of the note before it became due. To the declaration, which is in the usual form, the defendant pleaded a special plea that the note in question was obtained by fraud and circumvention, and alleged that the goods for which it was given were less in quantity and deficient in quality, from what they were represented by one Wilkin, the payee of the note. To this plea there was a general demurrer and joinder. The Court overruled the demurrer, adjudging the plea sufficient; the plaintiff took issue on the plea; a trial was had, and a general verdict for the defendant, and judgment in his favor for costs.

To reverse this judgment, the plaintiff prosecutes this writ of error. It will be apparent that the plea would have been no bar to the action on the note in the hands of an innocent endorsee or assignee, as has been repeatedly adjudged; nor has the 6th section(1) of the act of the General Assembly of this State, given the right to interpose such a defence where there is a mere deficiency in the quality or quantity of the article sold, as between the maker and the assignee. It declares that, "if any fraud or circumvention be used in obtaining the making or executing any instrument," the note shall be void not only between the maker and payee, but also in the hands of every subsequent holder.

The present case does not come within this provision; the fraud, as attempted to be charged, consists in the contract itself, and not in the obtaining the making of the note. If a person represent a note to contain a particular sum, when, in truth, the amount is much greater, here would be a case contemplated by the statute; the note would be void not only between the maker and the payee, but also in the hands of every subsequent holder. That, however, is not the case here, for the plea admits a consideration, but denies a consideration to the extent of the face of the note, because of a deficiency in the quantity and quality of the articles sold, which it alleges were represented to be of full value. It will not be denied that the plaintiff was entitled to recover the value of the goods, even if he had stood in the place of the original payee, but being an innocent holder before the note became due, it is most clear that the matters of the plea would be no legal defence to the action. The issue, then, was a wholly immaterial one, and the verdict, on that ground, ought to be set aside. The Circuit Court ought to have sustained the demurrer; but it will be seen from the pleadings in the cause, when the demurrer to the plea was overruled, the plaintiff replied, and took issue on the plea. The question on the demurrer might probably not now be regularly before the Court for its decision, yet as the issue tried was one wholly immaterial to the question before the Circuit Court, this Court is bound to reverse the judgment, and to render a judgment for the plaintiff, notwithstanding the verdict of the Court below. The rule is that when the matter, be it never so well pleaded, could signify nothing, judgment may, in such cases, be given as by confession.(2)[a]

The clerk of this Court will assess the damages on the note, which is the interest, and render a judgment for the debt and damages so computed, with the costs of this Court, and the Circuit Court of Adams county.

Judgment reversed, and final judgment rendered.

(1) R. L. 484; Gale's Stat. 527.
(2) 2 Ld. Raym. 924; 1 Stra. 394; 2 Doug. 749; authorities cited in 2 Petersdorff's Abridg.
(a) Hitchcock vs Haight, 2 Gil. R. 604.

Note. 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.* Phillips, Breese 19.

A plea of general issue, the demurrer being undisposed of, is a waiver of the demurrer. Cobb *v.* Ingalls, Breese 180.

After issue taken on the facts contained in the declaration, it is sufficient for the plaintiff, by proof, to sustain the material averments contained therein. *Ante* 52. By pleading to the declaration, the defendant waives his demurrer. Buckmaster *v.* Grundy, decided Dec. term, 1836, *Post*.

It is not the duty of the Circuit Court, of its own motion, to set aside an immaterial issue. A motion to set aside such issue must be made in the court where the verdict is rendered. Burlingame *et al. v.* Turner, decided Dec. term, 1838, *Post*.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, plaintiffs in error *v.* GEORGE BROWN and CHARLES STEPHENS, defendants in error.

Error to Clinton.

A debt to the State Bank of Illinois, is a debt due to the State, and is not barred by the statute of limitations.

THIS cause was tried at the April term, 1833, of the Clinton Circuit Court, before the Hon. Theophilus W. Smith, and a judgment rendered for the defendants, upon which the plaintiffs brought a writ of error.

J. SEMPLE, Attorney General, and A. COWLES, for the plaintiffs in error, cited,—Breese 247; Breese's Appendix 31: Madison Co. *v.* Bartlett, *Ante* 67; Bal. on Lim. 18.

SNYDER and THOMAS, for the defendants in error.

BROWNE, Justice, delivered the opinion of the Court:

This is an action of *assumpsit* brought on a note given to the plaintiffs for the use of the people of this State. The defendants pleaded the statute of limitations, to which plea the plaintiffs demurred, and the Court below overruled the demurrer and gave judgment for the defendants. The error relied on to reverse the judgment, is, that the statute of limitations does not apply to debts due the bank. In the case of Moreland and Willis *v.* The State Bank of Illinois,(1) this Court held that the directors of the bank did not act for their own benefit; and their omission and neglect did not work an injury to the State;—and at the December term, 1824, in the case of the administrators, widow, and heirs of F. Ernst, deceased *v.* The State Bank of Illinois,(2) this Court decided that a release from all debts due to this State, was a release of debt secured by mortgage to the said bank. By the

(1) Breese 203. (2) Breese's App. 31.

statute creating the State Bank, it is declared that it shall belong to the State of Illinois. Hence it follows that the people of Illinois are the real plaintiffs, and are alone entitled to the benefit of a recovery. The president and directors are in no way benefitted or injured by the proceedings of the bank Are the people then barred by the statute of limitations? This question though not directly before the Court, was incidentally decided in the case of Madison County v. Bartlett,[a] at the last term of this Court. The Court there say, "It is a well settled principle that a State is not barred by a statute of limitations, unless expressly named;" and we see no reason to change the opinion thus expressed. The Court below therefore erred in overruling the demurrer to the defendants' plea. The judgment below is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

(a) Ante 67. Angell on Lim., Sec. 58.

THOMAS CROCKER, plaintiff in error *v* HERMAN GOODSELL, and LUKE KEYES, defendants in error.

Error to Adams.

Where by a contrac' C. and K. were to build a mill for C., and four months after the contract should be completed, C. was to pay t em $150. Held that they could not sustain an action for the $150 until the expiration of four months from the time the services were offered to be performed, although they were prevented from completing the contract by the conduct of C.

Whether a written contract containe a condition precedent or not, is a question of law for the Court to decide; and it is not a matter for the consideration of the jury.

ON the 19th day of November, 1830, Goodsell and Keyes instituted a suit in the Adams Circuit Court, against Crocker, upon the following agreement:

"This article of agreement made and entered into this seventh day of May, in the year of our Lord one thousand eight hundred and thirty, between Thomas Crocker of the first part, and Herman Goodsell and Luke Keyes of the second part, all of Adams County and State of Illinois, Witnesseth: That the party of the first part doth agree to pay the said party of the second part one hundred and fifty dollars, when the said party of the second part do complete a saw-mill in a workmanlike manner for the said party of the first part; and the said party of the first part doth agree to pay the said party of the second part, the sum of one hundred and fifty dollars in four months after the mill shall be completed; and the said party of the first part doth agree to

board the said party of the second part and find them a reasonable quantity of liquor, and to haul the timber to the place, and to find all necessary irons for the said mill as fast as the said party of the first part can conveniently, and the said party of the first part doth agree to clean out a suitable place for said mill. And the said party of the second part do agree to put in a forebay, and the said party of the first part is to find plank for that purpose.

(Signed.) THOMAS CROCKER,
H. GOODSELL,
LUKE KEYES."

The declaration was in *assumpsit*, and contained three counts. The first, after stating the contract, averred that the plaintiffs "did enter upon and commence the said work, and for that purpose did procure and find all labor and tools necessary for performing the same, and did the same, in part, according to the tenor and effect of said agreement, and have always been ready and willing to perform and complete the whole of the said work in pursuance of the said agreement, of all which said premises the said defendant hath had notice, to wit, at Adams county aforesaid, on the twentieth day of June, in the year aforesaid. Yet the said plaintiffs in fact say that the said defendant contriving and wrongfully intending to injure the said plaintiffs, did not nor would perform his said promises and undertakings, but thereby craftily and subtlely deceived the said plaintiffs in this to wit, that the said defendant did not nor would furnish the plank necessary in erecting and completing the said forebay connected with the said mill; that the said defendant did not nor would provide the necessary irons for performing and completing the work of the said mill; and that he the said defendant did not nor would pay the said sums of one hundred and fifty dollars in the said agreement specified or either of them, or any part of them, to the said plaintiffs, but on the contrary hath hitherto wholly neglected and refused so to do, to wit, at Adams county aforesaid, on the twenty-fifth day of June in the year aforesaid; and the said defendant further disregarding the said agreement and his said several promises and undertaking afterwards, on the twelfth day of October in the year aforesaid, at Adams county aforesaid, did not nor would permit or suffer the said plaintiffs to proceed to complete the said work, and then and there wholly hindered and prevented them from so doing, to wit, on the twentieth day of October, in the year aforesaid, at Adams county aforesaid."

The second contains an averment of the completion of the contract on the part of the plaintiffs; and the last is the usual count for labor and services.

The defendant pleaded the general issue, and a trial was had at

the May term, 1831, and a verdict rendered for the plaintiffs for $200.

A bill of exceptions was taken, which is as follows: "Be it remembered that on the trial of this cause, after the evidence had been concluded both on the part of the plaintiffs and defendant, the defendant's counsel moved the Court to instruct the jury, 'That the completion of the mill and forebay, is a condition precedent, and if the plaintiffs have failed to prove the performance of said work, they cannot recover the specific price agreed to be paid by said contract for the said services. And if they are entitled to recover at all, they cannot recover the last payment, until four months from the time the plaintiffs did the last work on the said mill;' which instruction the Court refused to give, and decided that, that part of the instruction asked for, in relation to the completion of the mill and forebay, and its being a condition precedent, was a matter for the consideration of the jury; and that an absolute performance, in point of fact would not be necessary to be proved, provided an offer had been made by the plaintiffs to perform the work, and the defendant by his conduct had prevented their doing it. The defendant's counsel further moved the Court to instruct the jury—'That if the said plaintiffs were entitled to recover from the said defendant, the said specific price without completing the work for which it was to be paid, their right to sue for the last payment in said agreement mentioned did not accrue until four months after they, the said plaintiffs, did the last work on said mill, in pursuance of the said contract,' which instruction the Court also refused to give: To which said several opinions of the Court, the said defendant by his counsel excepts, and prays that this his bill of exceptions may be signed, sealed and made a part of the record.

Exceptions allowed.

(Signed) RICHARD M. YOUNG, (L.S.)

A. WILLIAMS, for the plaintiff in error.

J. W. WHITNEY, for the defendants in error.

BROWNE, Justice, delivered the opinion of the Court:

This is a writ of error brought here from the Adams Circuit Court, to reverse a judgment of that Court. The case stands thus: after all the evidence had been closed, the defendant's counsel moved the Court to instruct the jury, "That the completion of the mill is a condition precedent; and if the plaintiffs have failed to prove the performance of said work, they cannot recover the specific price agreed to be paid by said contract for said services. And if they are entitled to recover at all, they cannot recover the last payment until four months from the time the plaintiffs did the last work on said mill"—which instructions the Court refused to

give. It is very clear, that the Court below erred in refusing to give the instructions called for by the defendant's counsel. By the contract, most assuredly the performance of the work was a condition precedent, and the plaintiffs below bound themselves to to wait four months after the completion of the mill, and this they did not do.[a] This Court are of the opinion that the judgment below be reversed with costs, and the cause remanded to the Circuit Court of Adams county.

Judgment reversed.

(a) See post 410, Heaton vs. Kemper, 2 Scam. 367.

LEWIS BAILEY, Administrator of Stephen Benedict, deceased, plaintiff in error *v.* JAMES B. CAMPBELL, defendant in error.

Error to La Salle.

In order to enable an administrator to maintain an action for the use and occupation of a farm the plaintiff, or his intestate, must have been the owner of the premises, or there must have been an express contract on the part of the defendant to pay rent.

If the Court, in giving instructions to the jury, use an ambiguous word, but at the same time the language of the statute, the party who desires more explicit instructions upon the meaning of the term, should ask such explanations as he may deem necessary. If he fail to do so, it is too late to complain in the Supreme Court.

A judgment for *costs* cannot be rendered against an administrator.

The bill of exceptions in this case shows that Bailey, the plaintiff in error, made improvements upon a lot of public land, by cultivating the same, and erecting a dwelling house thereon, previous to the year 1829, and that he afterwards sold his improvements to his intestate. The intestate leased the same for one year, to one Bartholomew, who leased the same to one McKernan, who sold the improvements to the defendant, Campbell, who occupied and improved the premises during the years 1829, 1830, and 1831.

The cause was tried at the April term, 1831, of the La Salle Circuit Court, and a judgment rendered for the defendant, for costs.

The instructions given to the jury, appears in the opinion of the Court.

L. BIGELOW, for the plaintiff in error, relied upon the following points and authorities:

1. Where a lessee continues in possession after the expiration of his term, he may be treated as impliedly agreeing to become tenant from year to year, on the terms of the original lease, and

will be liable to the lessor in an action for use and occupation, upon an implied contract. 2 Blac. Com. 147, n. 3, and 151, n. 5; 1 Cruise's Dig. 282; Chitty on Cont. 96; Ellis *v.* Paige *et al.*, 1 Pick. 43; Brewer *v.* Knapp *et al.*, do. 332; Abeel *v* Radcliffe, 13 Johns. 297; same *v.* same, 15 do. 505; 2 Comyn on Cont. 518.

2. An under-lease, or conveyance of the whole term by the lessee, amounts to an assignment of the lease. Bac. Abr., *Leases*, &c., L. 3; 2 Blac. Com. 327, n. (57); and 3 do. 171—2; 4 Cruise's Dig. 111; Phillips *v.* Rothwell, 4 Bibb, 33; Cox *v.* Fenwick, do. 528; 2 Saund. Plead. 627.

3. If a term by assigned be the lessee, the assignee stands in his place, and is liable to the lessor for the rent in the same manner and to the same extent that the lessee would be. Benson *v.* Bolles, 8 Wend. 175.

4. A tenant is not permitted to dispute his landlord's title, whether such tenant be the original lessee or assignee. Chitty on Cont. 99; 2 Stark. Ev. 533;—3 do. 1517; 2 Blac. Com. 327; Phillips *v* Rothwell, 4 Bibb, 33; 2 Pirtle's Dig. 37, § 3, 5, 7, 9.

5. An action for use and occupation, may be maintained upon an implied, as well as on an express, contract. Chitty on Cont. 106, n. †, and 107, n. (k.); 3 Stark. Ev. 1517; 2 Comyn on Cont. 512 *et seq.*; 2 Saund. Plead. 890—3, 627; Osgood *v.* Dewey, 13 Johns. 240; Hull *v.* Vaughan, 6 Price 157; Jacks *v.* Smith, 1 Bay 315; Smith *v.* Sheriff, do. 443; Calvert *v.* Simpson, 1 J. J. Marsh. 548; Stat. Feb. 13, 1827, § 1(1)

6. A person who has made or bought improvements upon a tract of public land, which entitle him to a pre-emption under the laws of the United States, has a right of possession against all except the United States, and may be regarded as the owner of the land within the act concerning landlords and tenants. 1 Saund. Plead. 454, 464; 2 do. 866; Ross *et al.*, *v.* Reddick, decided Dec. term, 1832; (2) Davis *v.* Mason, 4 Pick. 156.

7. The holding over of a lessee or his assignee, is not a *disseizin* of the lessor, unless he request possession and it be refused him; and not even then, except at his election, he having a right to treat such wrongful detention as a *disseizin*, if he chooses to do so, for the sake of his remedy. 1 Cruise's Dig. 280; 5 do. 357, 373; 3 Blac. Com 170—3; Taylor *v.* Horde, 1 Burr. 60; Ricard *v.* Williams *et al.*, 7 Wheat. 59; Com'th *v.* Dudley, 10 Mass. 403.

8. The death of a lessor does not operate as a determination of the tenancy. Chitty on Cont. 102, 103; 2 Blac. Com. 150, n. 4; 1 Cruise's Dig. 285, 255.

9. The owner of improvements on public land, has no such estate as will descend to his heir; but the same, together with

(1) R. L. 675; Gale's Stat. 435. (2) *Ante* 73.

the rents thereof, will belong to his executor or administrator. Perhaps the estate is a mere chattel interest. Stat. Feb. 15, 1831; (1) Toller, 179, 437, and authorities there cited; Lombard v. Ruggles, Amer. Jurist, xx. 485.

T. Ford and Davis, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

This is an action of *debt* for the use and occupation of a farm. The bill of exceptions states that it was proved or admitted on the trial, that the farm was public land on which improvements had been made and sold to the plaintiff's intestate, who leased the same to one Bartholomew, who leased the same to one McKernan; and that McKernan sold the improvements to the defendant, who entered and occupied the farm; for which occupation this action is brought. On this state of facts, the judge instructed the jury, that "the plaintiff or his intestate must have been the owner of the land, or that there must have been an express contract on the part of the defendant to pay rent, in order to entitle the plaintiff to recover." To which instruction the plaintiff excepted. The jury returned a verdict for the defendant, and judgment was entered thereon against the plaintiff for costs. To reverse this judgment, the cause has been brought to this Court by writ of error.

Was the instruction wrong? If it is intended to support this action under the "*Act concerning Landlords and Tenants*," the instruction being in the language of the statute, was right. If the word "owner," as used in the statute, is ambiguous, it was the duty of the plaintiff to have asked for such explanation of the term as he deemed necessary; not having asked for any explanation, it is too late to complain in this Court. Do the facts render the instruction wrong at common law? In order to maintain an action at common law for use and occupation, it is necessary to prove either that the defendant entered the premises by permission of the plaintiff, or that the actual relation of landlord and tenant existed. In this cause we must understand from the case, that the improvements were sold to the defendant, and that he purchased in the expectation of becoming the absolute owner of the improvements, and not the tenant of any person. Will the law presume that improvements purchased in this manner, created the relation of landlord and tenant, and imply that the entrance of the defendant was by permission of the plaintiff? We think not; for such presumption would entirely contradict the facts of the case. If the proof had established the fact that the defendant knew when he purchased the improvements in question, that seller was a tenant, there can be no doubt that under such a state of the case, the law would have raised every

(1) R. L. 420; Gale's Stat. 434.

necessary presumption to prevent the defendant from availing himself of his own want of good faith, to defeat the action. The Court, therefore, is clearly of opinion, that the facts in this case would not have justified the Court in charging the jury that the plaintiff was entitled to recover without proving either an express contract to pay rent, or an admission on the part of the defendant, that he be held as tenant of the plaintiff.* In arriving at this result, the Court does not intend to deny the doctrine, that a "tenant is not permitted to dispute his landlord's title, whether such tenant be the original lessee or his assignee;" for, in our opinion, the facts do not warrant the idea that any such relation existed; nor do we intend to controvert the position that "a purchaser cannot obtain a better title than his vendor had." This doctrine, however, could not in this case raise either an express or implied promise on the part of the defendant, to pay rent.

Although the Court does not perceive any error in the charge of the judge, yet as the judgment is given for costs, it must be reversed. The suit was brought by an administrator, in the right of his intestate. In such a case the statute "*Concerning Costs*," does not give costs against the plaintiff.(1)

For this error, the judgment must be reversed so far as giving costs is concerned, and affirmed in other respects. The costs of this Court are divided between the parties.

Judgment reversed, and judgment rendered in this Court.

(a) Post 210, Gray v. Rawson, 11 Ill., R. 528.

(1) A judgment for *costs* cannot be rendered against an administrator in his personal character. *Ante* 55.

JOHN CARSON, appellant, *v.* WILLIAM CLARK, appellee.

Appeal from Sangamon.

In order to bar a subsequent action before a justice of the peace, on the ground that a prior suit between the same parties has been determined by a justice, it must be shown that the demands, in both suits, were of such a nature that they might be consolidated into one action, and that the first suit was tried.

To constitute a valid contract, it must be made by parties competent to contract, and be founded on a sufficient consideration. If the consideration be past and executed, it can then be enforced only upon the ground that the consideration or service was rendered at the request of the party promising.

A promise to pay for improvements made upon the public lands, will not bind the promisor if made after the purchase of the same.

A purchaser of land from the government, is under no moral or legal obligation to pay for improvements made thereon before his purchase and without his request.

The pre-emption laws of the U. S., cannot be construed as invitations to settle upon the public lands.

THE appellee, William Clark, brought an action against the appellant, before a justice of the peace of Sangamon county, which

was appealed to the Circuit Court, where a judgment was rendered in favor of the appellee for $69,87.

The cause was tried at the April term, 1830, before the Hon. Samuel D. Lockwood.

J. Semple, for the appellant.

S. T. Logan, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:(1)

The bill of exceptions, or rather demurrer to evidence, in this case, presents this state of facts.

The plaintiff below made an improvement on the land of the United States which the defendant afterwards purchased of the government, and, after the purchase, promised the plaintiff to pay him the value of his improvements. It further appears from the evidence, that the plaintiff had, prior to the commencement of this suit, instituted an action before a justice of the peace, upon another demand, without having joined this one with it, though it was at the time a subsisting demand. The first suit was never tried, but was compromised by the parties, and dismissed.

Upon this evidence, the Court below gave judgment in favor of the plaintiff, for the value of the improvements.

The first error assigned to reverse this decision, is, that the first suit commenced by the plaintiff, is a bar to this action. To support this assignment of error, it must appear that the first suit was tried; otherwise it will not be a bar to a subsequent action; and it must also be shown that the demands were of such a nature that they might be consolidated into one action. Neither of these points are made out by the evidence; and as the defendant holds the affirmative of the issue as to this ground of defence, it was incumbent upon him to make them out. The suit was dismissed without trial, and there is no evidence as to the extent of the demands in either suit. The Court cannot supply this defect, and by implication impose upon the party a forfeiture of his claim, or take from him the right of prosecuting it in the ordinary way.

The second assignment of error presents this question: Was the promise of the defendant founded on a sufficient consideration? or, Was it not made without any such consideration, and therefore void?

To constitute a valid contract, it must be made by parties competent to contract, and be founded on a sufficient consideration. If the consideration for the promise be passed and executed, it can then be enforced only upon the ground that the consideration or service was rendered at the request of the party promising. This request must be averred and proved, or the moral obligation

(1) Lockwood, Justice, dissented from the opinion of the Court.

under which the party was placed, and the beneficial nature of the service, must be of such a character that it will necessarily be implied; as a promise by a master to pay his servant for past services. Here the inference is strong that the service was rendered at his request.

Or if a debt is due in conscience, a promise to pay will be binding: as where a father promised to pay for the maintenance of a bastard child. So, too, a promise founded upon an antecedent legal obligation will be valid, as a promise to pay a debt barred by a statute of limitations. Here the legal obligation is voidable, but the moral duty remains unimpaired, and constitutes a good consideration. Test the present case by the broad principle to be deduced from the examples cited, and where will be found any legal or moral obligation on the part of the defendant to constitute a sufficient consideration for his promise? The plaintiff entered upon and improved the land of the government. The motive by which he was actuated in doing so, was entirely selfish, and the act itself unauthorized by law. The defendant was at the time a stranger to the transaction; he had no interest in the land, and was no more benefitted, nor for ought that appears, more likely to be benefitted by it, than any other person. A request then cannot be inferred in the absence of all motive, and the request must be made, or the circumstances from which it is to be implied, must exist prior to, or be concurrent with, the act which constitutes the consideration. Whatever benefit might accrue to the plaintiff by reason of improvements upon the land he acquired by purchase from the government, he did not receive from the defendant, by virtue of his promise, either title or possession. The land, with the improvements thereon, passed to him by the sale from the government. His promise, then, to pay for that for which he had already paid, and to which he had received a perfect title, was without any consideration.

If there is a moral obligation on the part of any one to make compensation to the plaintiff for the value of his improvements, it is on the part of the government, and under the view of the case it is contended, that the defendant as alienee of the land, incurred all the obligation and liability of the government, his alienor. But there is no principle upon which this position can be maintained. It is true, there are some covenants which run with the land; but between such and the promise here set up, there is not one point of analogy. A purchaser from the government has not entailed upon him other or greater incumbrances or liability, than he would be subject to in purchasing from an individual. Suppose, then, that in the present case the improvements had been made at the special instance and request of the alienor. This would have imposed upon him a legal obligation to make an adequate compensation, but surely his alienee would

incur no such obligation. If then this legal liability would not be imposed by a transfer of the land, it follows conclusively, that a moral duty which is regarded, both in law and ethics, as entirely personal, would not flow from it. If, however, it should be considered that the defendant was under the same obligation as his alienor, would it, when coupled with his subsequent promise, impose upon him a legal obligation?

To determine this question, it is necessary to enquire whether there are any acts on the part of the government, from which a request to enter upon and occupy the public land is to be implied; or whether the act itself can be regarded as meritorious. As to the first branch of the enquiry, it is said that the pre-emption laws which have been passed from time to time, amount to a license and invitation to enter upon and occupy the land of the government. There would be much force in this reasoning, if these acts, granting a prior right of purchase to the occupant, were all the legislation relative to the public lands. But they are not. Whatever presumption they may afford in favor of a license by the government, is met and rebutted by the fact that there is a general law of Congress, which has been in force since the year 1807, forbidding, under severe penalties, all intrusion upon the public lands. And I understand, that in pursuance of the instructions of the Commissioner of the General Land Office, this law has been enforced in numerous instances. These pre-emption laws, then, can be regarded in no other light than as acts of grace, exempting such as at the time come within their provisions, from penalties which they had previously incurred,—but not as repealing or abrogating the general prohibition. If, then, there is no license to settle upon the public lands, but on on the contrary it is forbidden, can the act of doing so be considered meritorious, or of that beneficial nature which would impose a moral duty on the government? It is not every benefit that may result to one, from the act of another, that will create this duty either in morality or conscience. The nature of the benefit, the manner in which it is conferred, or the motive which induced it, may be repugnant to the feelings and wishes of the person who is benefitted thereby. And no principle of law will sanction the idea that a moral obligation can be imposed upon another against his will. All the circumstances of the transaction must be of such a nature as pre-suppose a request, otherwise it will not be a good consideration for a promise. The case cited, where one man shot another, with the intention of killing him—but so far from succeeding in his design, the wound cured him of the dropsy, with which he was at the time afflicted—is an illustration of the principle that a benefit may be conferred without creating a moral or legal obligation to pay for it.

Under every aspect of the case, I am of opinion that the pro-

mise of the defendant below, was not founded on any legal or moral obligation, which is recognized as constituting a sufficient consideration for such a promise.

The judgment of the Court below is reversed with costs.

Judgment reversed.

REUBEN CLARK, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Hamilton.

A prisoner is entitled to a change of *venue*, whenever by petition verified by affidavit, he brings himself within the requisitions of the statute. The obligation of the judge to allow it, is imperative, and admits of the exercise of no discretion.
The value of the property burned, must be stated in an indictment for arson.

THIS action was tried at the March term, 1833, of the Hamilton Circuit Court, before the Hon. Thomas C. Browne.

The jury returned a verdict of guilty against Reuben Clark, the plaintiff in error, and the Court gave sentence that he should be imprisoned in the county jail, three weeks, pay a fine of $360 and the costs of the prosecution, and that he should be publicly whipped thirty-nine lashes on his bare back.

The errors assigned, are,

1. The refusal of the Court to grant a change of venue.
2. The refusal of the Court to quash the indictment

WALTER B. SCATES, for the plaintiff in error, made the following points, and cited the annexed authorities:

1. The indictment does not charge the crime to have been committed with a *felonious intent.*

2. It does not state the value of the property burned.

3. There is error in the judgment of the Court in over-ruling the defendant's motion for a change of venue.

At common law the venue must be laid where the offence was committed. 1 Chit. C. L. 177, 178; 4 Blac. Com. 303.—And at common law the venue was matter of substance. 1 Chit.C. L. 177.—And so strict was the law in this respect, that where an offence was commenced in one county, and consummated in another, it could be tried in neither (except some crimes, as larceny in some cases). 1 Chit. C. L. 178; 4 Blac. Com. 303.

But this strictness has been remedied by statutes, so that the defendant may be tried where the death happened, or the guilt was contracted, or the offence consummated, or where the offender was apprehended, or in the adjacent county, or in any county. 1 Chit. C. L. 179, 180, 181, 182. But notwithstanding this

great strictness of the common law, the court possessed a discretionary power to change the venue when a fair and impartial trial could not be had in the county. 1 Chit. C. L. 201, 327, 494, 495. The courts at common law, possessed the like power in civil cases. 1 Tidd's Pr. 548–9. A *certiorari* lay at common law, to remove an indictment at any time before trial, which was one mode of changing the venue. 1 Chit. C. L. 327, 371, 378. 4 Blac. Com. 320, 321. See further as to venue, 2 John. Dig. 276, 278.

Penal statutes must be construed strictly, and in favor of life and liberty. 4 Blac. Com. 86, 89, and notes; 4 Blac. Com. 373, 240 (note 10,) 375–6, 397, 401; 1 Chit. C. L. 218; Foster's C. L. 78, 355–8. 1 Am. Dig. 269; 2 Am. Dig. 285, 495; 2 East. C. L. 592–3, 614–15, 629; Stat. 10, 11 Wm. 642–3, 1099.

In capital cases, the defendant stands upon all his rights, and cannot consent to his prejudice. Breese 109. Foster 126, 355–6;—and by the Constitution of this State, an impartial trial by jury is secured to every man. § 9, Article 8.—See also Foster C. L. 398.—And the statute providing the mode of changing the venue is peremptory—that the court *shall* award a change, when the application is made in the mode and for the causes set out in the statute.(1)

There is error in the judgment of the Court in over-ruling the defendant's motion to *quash*, and sustaining the indictment.

Arson is felony at the common law. 4 Blac. Com. 94, 221–2; 2 East C. L. 1015, 1021; and must be malicious. 4 Blac. Com. 222; 2 East C. L. 1019, 1033.

The criminal intention must accompany the act, and from the intention alone, is it determinable whether the act be criminal or innocent. It is alone punishable, being the very gist of the charge, and certain technical words *alone* express that intention according to the different *degrees* of guilt, and they cannot be supplied by any circumlocution or inference. 1 East C. L. 446–7. As in burglary a mere breaking and entry, does not constitute and complete the offence, but it is necessary to charge and prove a *felonious intent*; and that charge is contained *alone* in the words *burglariously* and *feloniously*. 1 Chit. C. L. 172, 242–3; 4 Blac. Com. 307, 338–9: Foster's C. L. 108: 2 East C. L. 513–14, 778, 816, 1015, 1021, 1028–9, 1033.

The same doctrine applies to other felonies.

Not guilty puts in issue not only the *facts*, but the *intent* of the party, and *feloniously* in felony is the *gist* of the charge. 4 Blac. Com. 338–9: Breese 197, 198, 199: 1 Chit. C. L. 471–2, 242, 245, 251*a*.

Felonies must be charged to be committed *feloniously*: but if an act be charged to be committed *feloniously*, and it amount to

(1) R. L. 607: Gale's Stat. 682.

a trespass only, the indictment will be bad. 1 Chit. C. L. 172, 242, 245; 1 East C. L. 346: 4 Blac. Com. 307, 334.

If a statute create an offence, or changes a common law offence, or alters the punishment, to inflict the statutory punishment, its language must be pursued in describing the offence; and it must likewise possess the common law requisites in charging the *intent*. 1 Chit. C. L. 281, 276, 282, 218; 1 Hale P. C. 174; 4 Blac. Com. 208, 307, 338; Bac. Abr. *Indict.* G. 1; 1 East. C. L. 346, 414, 412–15–20; 2 East C. L. 576–7, 706, 985. 1006–7; 1106–7, 116–7; Breese 197.

The same rules apply to indictments under statutes as at common law. 1 Chit. C. L. 275, *et seq.*

And all the precedents at common law and under statutes, support this doctrine. 4 Blac. Com. 307, 335, 338–9, 347, and appendix 2, 4: 1 East C. L. 346, 345, 414, 412, 415–20; 2 East C. L. 512, 513, 783, 979, 987, 1007, 1021, 1034; 1 Chit. C. L. 172, 242; Breese 197–9.

Acts derogatory to the common law, are construed strictly. 1 Blac. Com. 89.

Our statute has not repealed the common law in its technicality in charging the *intent* to determine the degree of guilt; but if at all, only in the description of the offence or acts that constitute it. C. Code, § 58, 152; 1 East C. L. 412, 414–20; 2 East C. L. 577, 804–5, 1061–2,—and the defendant cannot be convicted of felony under this indictment, but only of a misdemeanor. 1 Chit. C. L. 637–8; 2 East C. L. 1030–31; R. L. C. Code, § 59:—for the indictment cannot be amended. 1 Chit. C. L. 279: 1 Stark. Ev. 252–3; 1 same, 250, A. E. note 1: R. L. 67, § 14.

All the rules (with that exception, &c.) that apply to civil pleadings, apply with greater strictness to criminal; and an indictment should be as clear, explicit, and certain as a declaration. 1 Saund. 250 *d. e.* note 1; 1 Stark. 252–255: 1 Chit. Pl. 216–257, 255: 4 Blac. Com. 306–7, and notes: 1 Chit. C. L. 169–175. 280–1; Breese 4.

The indictment is defective in not stating the value of the property, as, if the property be valueless, it would be no offence; the law requiring the Court to pronounce judgment of fine at least to the amount of the value of the property. R. L. 133, § 58; 2 East C. L. 778: 1 Stark. Ev. 252–55; 1 Chit. Pl. 216–37, 255; 4 Blac. Com. 306–7, and notes: 1 Chit. C. L. 169–175, 280–1; 1 Saund. 250 *d. e.* note 1; Breese 4.

Where several are indicted together, and the joint prosecution appears oppressive, the court may in its discretion *quash* the indictment. 1 Chit. C. L. 269:—for it does not deprive them of any right, not even of their full number of challenges. 1 Chit, C. L. 535; and if they refuse to join in their challenges, they must be tried separately: *ibidem*: Foster's C. L. 21, 106–7.

J. Semple, Attorney General, for the defendants in error.

Wilson, Chief Justice, delivered the opinion of the Court:

The plaintiff in error was indicted with three others for the crime of *arson*. Upon the calling of the cause, he moved the Court for a change of venue. The motion was founded on an affidavit in the usual form, and assigned for cause, that he could not receive a fair trial in the county in which the cause was pending, because of the prejudice of the minds of the inhabitants of said county against him. One of the other persons included in the same indictment, was arrested, but did not join in the motion for a change of venue. The motion was overruled by the Court. A motion was then made to quash the indictment, which was also overruled, and exceptions taken to the opinion of the Court on both the motions.

The decision of the Court on the first motion was clearly erroneous. The Constitution secures to every person charged with an indictable offence, a trial by jury, and in order that this trial may be a fair and impartial one, the law has given to the accused many privileges, and amongst these the right to a change of venue is in some instances the most important: and when, by petition, verified by affidavit, the accused brings himself within the requisitions of the statute, the obligation of the judge, or court, to allow it, is imperative, and admits of the exercise of no discretion on account of any supposed inconvenience that may result from the exercise of the privilege.[a]

It is argued that if the venue should be changed on the application of one of several defendants indicted jointly, it would be difficult, if not impossible, to try the others, as the indictment would have to be sent to the adjoining county with the accused. It is unnecessary to enquire whether any, or what inconvenience may arise from a change of venue under such circumstances. Whatever it might be, can be avoided by preferring separate indictments against each. This practice I am aware, is unusual, but it is better upon every principle of justice, that it should be adopted, than that the State's Attorney should, by his own act, be permitted to withhold from a party an important privilege, which has been secured to him by the law, as one of the means of obtaining impartial justice.

The next enquiry is whether the Court erred in overruling the motion to quash the indictment, and in afterwards rendering judgment upon the verdict of the jury.

The indictment does not allege the value of the building charged to have been burned. This would probably be unnecessary at common law, as a fine formed no part of the punishment for the offence. The statute, however, under which the indictment is found, has changed the common law in this respect: a

(a) McGood *vs.* Little 2 Gil. R. 42; Barrows *vs* People 11 Ill. R. 121.

fine equal in value to the property burned, is imposed as part of the punishment for the offence.* The indictment, then, should have charged the value of the property destroyed, otherwise it could not properly have been enquired into by the jury. It would form no part of the issue which they were sworn to try. In this respect, then, the indictment is defective; and the Court erred in overruling the motion to quash it, and in rendering judgment upon the verdict of the jury.

There are other exceptions taken to the sufficiency of the indictment, but it will be unnecessary to notice them, as, for the reasons already assigned, the judgment of the Court below must be reversed, and the prisoner ordered to be discharged.

Judgment reversed, and prisoner discharged.

Note. See Berry *v.* Wilkinson *et. al.*, decided Dec. term, 1834. *Post.* 165.

The following act was passed Feb. 28th, 1839:

Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That hereafter, changes of venue shall not be granted after the first term of the court at which the party applying might have been heard, unless the party so applying shall show that the causes for which the change is asked, have arisen, or come to his, her or their knowledge, subsequent to the term at which the application might have been made; and shall also have given to the opposite party ten days' previous notice of his or their intention, to make such application, except in cases where the causes have arisen or come to the knowledge of the party making the application within less than ten days of making the same.

Sec. 2. In civil causes wherein there are two or more plaintiffs or defendants, a change of venue shall not be granted unless the application is made by or with the consent of all the parties, plaintiffs or defendants, as the case may be; and in criminal cases, where this application is made by a part of the defendants, and is granted, a copy of the indictment, and not the original, shall be transmitted to the court to which the change of venue is ordered; and the copy, certified by the clerk to be correctly made, shall stand as the original.

Sec. 3. All questions concerning the regularity of proceeding in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute the judgment, shall be considered as waived after trial and verdict.

(*a*) Our Statute in this respect is changed; Rev. Stat. 45 p. 159.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS.

DELIVERED

DECEMBER TERM, 1834, AT VANDALIA.

JOHN MITCHELTREE, appellant *v.* MATTHEW SPARKS, appellee.

Appeal from Schuyler.

A mistake in making up the record of a cause may be corrected at a term subsequent to that at which the same was disposed of.
The name "Nathan" was erased, and "Matthew" inserted, in a record at a subsequent term.(*a*)

At the December term, 1833, of this Court, the judgment of the Court below was reversed by default; but in making up the record, the name of "Nathan Sparks" had been inserted in the place of "Matthew Sparks," wherever the name of the appellee occurred.

At this term of the Court, comes the said appellant, by Ford, his attorney, and suggests to the Court, that in the entry of the order made at the last term of this Court, there is error in this: That the name of the said appellee is written "Nathan Sparks," whereas it should have been written "Matthew Sparks," and enters a motion to amend accordingly: and it appearing to the Court by an inspection of the record aforesaid, that such error exists. It is therefore considered by the Court, that said motion be granted, and the order aforesaid amended in conformity therewith: and that a copy of said order as amended, together with a copy of this order, be certified to the Circuit Court of Schuyler county.

(*a*) Post 113; Cook *vs.* Wood, 24 Ill. R. 295.

The People of the State of Illinois, *ex relatione* Julius C. Wright *v.* Josiah Lamborn, an Attorney and Counsellor at Law.

A lawyer employed to defend a suit, is not authorized to consent to the entry of a judgment against his client, without his assent. His doing so, is a violation of the confidence reposed in him, and if done with a corrupt intent, involves such a degree of moral turpitude, as would authorize the Court to strike his name from the Roll of Attorneys.(*a*)

An alteration of the process of the Court, between its delivery by the clerk to the party or his attorney, and its reception by the sheriff, is illegal, and highly improper.

In general, where the complainant is not the person injured, application for a rule against an attorney to show cause why his name should not be stricken from the Roll, should be based upon the affidavit of some person who shall affirmatively allege the truth of the charges preferred against the attorney and not merely his belief in the truth from the information of others.

This was a rule against Josiah Lamborn, an attorney and counsellor of the Supreme Court, to show cause why his name should not be stricken from the Roll of Attorneys.

Julius C. Wright, the relator, filed an affidavit in the nature of an information, in this Court, against the defendant, containing five distinct charges of mal-conduct in office, as an attorney and counsellor at law.

The first alleged that one Benjamin Green recovered a judgment before a justice of the peace, of Morgan county, against the relator, and that by the advice of Lamborn, he appealed said cause to the Circuit Court, and employed him to conduct his defence. That Lamborn, so far from complying with his duty as attorney for Wright, "corruptly agreed with one Washington Weeks (the person who claimed the right and ownership of said judgment) and without the knowledge and consent of the said Wright, but for the purpose of obtaining a compromise of other matters with the said Weeks, in which the said Lamborn was interested, but in which the said Wright had no interest," &c. &c. that "the said judgment of said justice of the peace should be affirmed."

The second charged the defendant with deserting his client after having received a retainer, and going over to his client's adversary, and assisting him to defraud his client.

The third was for altering the date of an execution from the 26th day of June, to the 26th day of July; and agreeing with the defendant, for his own gain, to delay the collection of his client's debt, upon the defendant in the execution paying him twenty-five per centum per annum interest on the amount of the execution, so long as he delayed its collection: and for delaying the collection of the execution for several months.

The fourth charged that the defendant was employed and fully paid by one Catlin, to defend a suit for him, and that after being

(*a*) People *vs.* Harvey, 11 Ill. R. 577.

so paid, he "went to the plaintiffs in said suit, and tendered them his services as attorney to prosecute said suit against said Catlin for them, stating to the said plaintiffs, that as he had been employed by said Catlin, he knew all the secrets of his defence, and was better able thereby to defeat the same."

The fifth charged that said defendant after being employed as an attorney by one Berry, deserted his client, and, without his knowledge, went over to his opponents, and conducted the cause for them.

The relator stated in his affidavit, that he knew nothing of any of the charges, of his own knowledge, except the first, but that he learned them from the information of others, and he believed the same to be true.

The defendant appeared in Court in person, and by counsel, waived the issuing of process against him, and pleaded not guilty.

N. W. Edwards, Attorney General, for the People.

S. Breese, for the defendant.

Wilson, Justice, delivered the opinion of the Court:

The office of an attorney and counsellor at law, is one of great responsibility. To the lawyer is confided the cause of his client, and in the issue of that cause may be involved property, life, liberty, and character. It results, then, from the magnitude of the interest committed to him, that he may be the means of much good, or of extensive mischief. When actuated by high and honorable motives, the innocent may with confidence look to him for protection, and the injured for redress. But by basely betraying his trust, he becomes a scourge to society, and a stain to a profession every where esteemed honorable. Courts of justice ought, therefore, from a just sense of their own honor and integrity, as well as from a regard to the interest of the community, to be cautious whom they admit to administer in their temples, and firm in expelling from their portals, those whose conduct would pollute the judicial altar.

In this case, five charges are exhibited against the defendant. In relation to the first charge, the Court is of opinion that a lawyer employed to defend a suit, is not authorized to consent to the entry of a judgment against his client without his assent; that his doing so, is a violation of the confidence reposed in him, and if done with a corrupt intent, involves such a degree of moral turpitude, as would authorize the Court to strike his name from the Roll of Attorneys. Although the evidence establishes the fact that the defendant confessed a judgment in the case of Wright, without his knowledge or consent, still as it is not satisfactorily shown that the motive which induced the act, was corrupt and criminal, nor that Wright, the defendant in the

action in which the consent to an affirmance of the judgment was given by defendant, was injured thereby,—he not having, as far as the testimony shows, any legal defence in that cause,—and as the defendant may possibly have misconceived his powers, we are of opinion that the first charge and specification are not made out.

The Court, however, deems it proper and necessary to say, that while the proof does not authorize the finding of the specifications and charges proved, still the defendant's conduct is not free from censure.

The testimony in relation to the second charge is so inconclusive, and involved in so much confusion and obscurity, that it furnishes no data upon which to form an opinion unfavorable to the defendant. He is therefore acquitted of that charge.

The Court cannot sanction the alteration of the execution mentioned in the third charge. From the evidence, the inference is strong that it was made by the defendant, and the Court, on the presumption of the case, might so consider it ; yet, as we do not perceive any criminal motive on the part of the defendant, to make the alteration complained of, and as no injury resulted from the alteration to either of the parties in the suit,—and inasmuch as it is not manifest that any was intended, the Court consequently acquits the defendant of this charge ; but wishes it to be distinctly understood, that an alteration of the process of the Court, between its delivery by the clerk to the party or his attorney, and its reception by the sheriff, is illegal, and highly improper. The Court does not consider that part of the third charge sustained by proof, which accuses the defendant of corruptly bargaining with Green, to receive 25 per cent. interest for his own benefit.

With reference to the fourth charge, the counsel for the defendant, in the argument admitted that he had been guilty of an indiscretion in his conduct, in the offer he made to Berry, of his services in a suit in which he had been employed on the other side, provided his client would release him. The Court feels constrained to say, that an act of this kind is highly censurable, although there may have been an absence of a corrupt motive, and the offer may have proceeded from a want of reflection, and a just sense of the position an advocate occupies when retained by his client. Nothing, in our judgment, is more undignified and degrading, than for a lawyer to solicit business of those who are litigating ; but more especially do they consider it derogatory to professional propriety, for an attorney, after he is in possession of his client's secrets, to intimate a willingness to go over to the opposite side, either with or without the consent of his client. If the conduct of a client should be so dishonorable or improper, as to warrant the advocate in withdrawing from his cause, yet a

just sense of the delicacy of his position, and a regard for the honor and character of the profession, should admonish him not to intimate or express a willingness to be employed by his client's adversary, and particularly not to act for him in advance. As it appears from the evidence, that the defendant never refused his services to Catlin, nor abandoned his case, he is necessarily acquitted of the fourth charge.

The Court is of opinion that the proof is insufficient to sustain the fifth charge. The defendant is therefore acquitted.

The information in this case, it will be seen, contains five charges. Wright, the relator, is the only person charged to have been injured by the alleged misconduct of the defendant. He appears in the character of a complainant. The other persons alleged to have been injured by the conduct of the defendant, either do not appear at all, or such as do, in most instances, express in their examination (whatever may have been their declarations elsewhere) their satisfaction with the professional conduct of the defendant in their causes. From these facts thus developed, the Court, from a sense of justice, and with a view of discouraging applications that cannot be supported by proof, wish it to be understood, as a general rule, that they will not favor applications of this character, where the party alleged to have been injured by the misconduct of the attorney, shall not be the complaining party, and the facts charged are not supported by the oath of that party, or some other person who shall affirmatively allege their truth, and not merely their belief of their truth from the information of others. In laying down this general rule, the Court does not mean to be understood, that there may not be a case of circumstantial evidence which might justly call for its interposition, but the inference from the facts sworn to, should be strong and overpowering, and the invaded rights of the injured individual demand the investigation, before the party should be called upon to answer the accusation. It is not upon every idle rumor put forth with the garb and semblance of truth, aided by feelings of hostility, that a member of the profession should be arraigned for supposed misconduct. It is the duty of the Court to guard with vigilance every member of the bar from such assaults, while at the same time it should not shrink from inflicting exemplary punishment upon those who are guilty of acts of delinquency.

From a consideration of all the circumstances of this case, the Court cannot refrain from admonishing the defendant, of the necessity which in its opinion exists, that he should hereafter guard his reputation with a jealous watchfulness, and that the indiscretions which have been committed may not be repeated. It is also hoped that while every member of the bar may feel a deep interest in the reputation of the profession, that no one will

too readily listen to charges and accusations against their professional brethren, nor be their accusers without good cause.

The rule to show cause is discharged.

Rule Discharged.

Justice BROWNE dissents from the opinion of the Court, so far as it intimates that any of the charges have been in part sustained; in his opinion, the prosecution has failed to prove the acts charged, as well as to show a corrupt and criminal motive.

DAVID DITCH, plaintiff in error *v.* ELVIRA L. EDWARDS, executrix of NINIAN EDWARDS, deceased, defendant in error.

Error to Monroe.

A return to a summons signed by a person as "deputy sheriff," without using the name of the sheriff, is erroneous and void.(*a*)

If judgment be rendered by default, against a defendant who has not been served with process, the proceedings are *coram non judice*. But the reversal of such a judgment does not affect the rights of the plaintiff below.

A cause will not be remanded, where the proceedings in the Court below are *coram non judice*.

J. B. THOMAS and D. PRICKET, for the plaintiff in error.

N. W. EDWARDS, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This is a writ of error to the Monroe Circuit Court. The error relied on, is that the summons is returned by a person who signs his name as deputy sheriff, without using the name of the sheriff. At the return term, a judgment was rendered by default. This was clearly erroneous according to the decision in the case of Ryan *v.* Eads.(1) The defendant's counsel, on the argument, conceded that the judgment must be reversed, but requested that the cause might be remanded to the Circuit Court for further proceedings. This Court has power to remand causes for further proceedings, where there remains anything in the Court below that is legal. In this case, so far as the defendant below is concerned, (he not having appeared, and there being no service by the sheriff,) the cause must be considered as *coram non judice*, and consequently there can be nothing to remand. The reversal of the judgment below, however, cannot impair the rights of the plaintiff below; if she has a cause of action, it still exists, and is in no wise impaired by the judgment below, and its reversal in this Court. The judgment is reversed with costs.

Judgment reversed.

(*a*) *Post* 332; But see Timmerman *vs.* Phelps 27 Ill. R. 496; Banks *vs.* Banks 31 Ill. R. 164.

(1) Breese 118.

JAMES L. WICKERSHAM, plaintiff in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Clay.

Acts of official misconduct by justices of the peace, done with corrupt motives, are indictable offences.
An indictment charging that the defendant, a justice of the peace, took up certain estray animals, specifying the number and kind, and corruptly caused the same to be appraised before himself as such justice, is substantially good.
Courts will reluctantly interfere to set aside a verdict and grant a new trial, where the proceedings have been regular.
The fact that the names of two petit jurors are the same as those of two grand jurors does not show that they are the same persons.
Objections to jurors, if known, should be made before trial.

THIS cause was tried at the March term, 1833, of the Clay Circuit Court.

S. BREESE, for the plaintiff in error, cited Nomaque *v.* The People, Breese 109; Bibb's and Hardin's Reports, *passim*.

N. W. EDWARDS, Attorney General, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

Wickersham was indicted for malfeasance in office as a justice of the peace. The indictment charges that he took up certain estray animals, specifying the number and kind, and corruptly caused them to be appraised before himself as such justice. A motion to quash the indictment, was made in the Circuit Court before pleading, but on what particular ground does not appear. A jury trial was had, and verdict of guilty, upon which judgment of fine and removal from office was rendered, upon the recommendation of the jury. None of the evidence is preserved, nor were any instructions asked of the Court. A motion for a new trial was made, and the reasons filed.

The plaintiff in error has assigned for error, that the indictment contains no indictable offence, and that the Circuit Court erred in refusing a new trial from the facts appearing on record.

On the first point we are to enquire, whether an act of an official character, done by a justice of the peace, with a corrupt intent, is an indictable offence, and whether the indictment charges the commission of such an act with such an intent. By the 110th section(1) of the act relative to criminal jurisprudence, passed in 1833, it is expressly provided, that justices of the peace, may, for corrupt acts of oppression, partiality, or malfeasance in office, be indicted, and upon conviction, they shall be fined and removed from office, upon the recommendation of the jury. From this

(1) R. L. 195; Gale's Stat. 218.

From this provision of that act, it cannot then be doubted, that acts of official misconduct by justices of the peace, done with corrupt motives, are indictable offences. Whether the acts charged in the indictment to have been committed, amount to official misconduct, and whether or not they are charged to have been done with a corrupt intent, and are sufficiently and certainly averred, will be ascertained by comparing the averments with the law regulating the mode of proceedings in the taking up of estray animals.

The indictment charges the accused with taking up the animals and *corruptly causing them to be appraised before himself*. To authorize an appraisement, the party taking up the estray, is to make oath of the fact before a justice of the peace, who is then to issue his warrant to a constable to summon three appraisers, who are to be sworn before a justice, faithfully and impartially to value the estray. These are the facts which are charged under the term, "*appraised before himself*," used in the indictment to have been corruptly done. Whether the acts were done ignorantly, or for corrupt purposes, would necessarily depend on the evidence exhibited on the trial, but that such acts would, in a case where the justice was a party interested, be illegal, we cannot doubt; and that they would, if done with a corrupt intent, be an act of malfeasance in office, seems equally certain. The indictment is then substantially good, although it might have been more formal and particular in setting out specifically each illegal and corrupt act embraced in the general allegation of "causing the animals to be corruptly appraised before himself."[a] As to the other ground in refusing a new trial, it will be seen that according to the decisions of this Court, it has been adjudged in several civil cases, that the exercise of the power to grant or refuse a new trial, is an act of sound legal discretion, and that with the exercise thereof, this Court will not interfere. The case of the Indian *Nomaque*, decided in this Court in 1825, has been cited as establishing a distinction in favor of granting new trials in criminal cases. From an examination of that case, it well be perceived, that all the Court say, is, that in its opinion, the Circuit Court ought, on the facts which were before it, to have granted a new trial; but it does not intimate that this Court ought to grant one. It will also be perceived that this point formed no ground of the reversal of the judgment in that case; for the proceedings were pronounced *coram non judice*, because the bill of indictment was not endorsed "a true bill," verified by the signature of the foreman of the grand jury. There is, however, a marked difference between the exercise of this power in a civil and in a criminal case.

(a) Jones vs. People, 2 Scam. R. 477.

In a civil case the jury are the judges of the facts only, but in a criminal one, they are not only the judges of the facts, but of the law, under the direction of the Court. Courts will reluctantly interfere to set aside a verdict and grant a new trial, where the proceedings have been regular, and no misconduct has happened in the jurors, merely because the jury may be supposed to have mistaken the law of the case, or may have judged mistakenly with regard to the weight of the evidence.

If this be true with reference to this exercise of this discretionary power in the Court where the accused is tried and asks for a new trial, upon what principle can this Court be required to reverse a decision made, in the exercise of this discretion, under such views of this power?

The reasons on which the new trial was asked for in the Circuit Court, are of extrinsic facts, in reference to the jury after they were charged with the case of the accused, and because two of the petit jurors were members of the grand jury who found the bill of indictment and consented thereto.

The record presents no evidence whatever of the facts alleged, except that on the panels of the jury, the names of the two jurors are similar, but whether they are the same persons, does not appear, nor that the jurors consented thereto, nor that the defendant did not know of the objection before trial, and consequently this Court could not judge of the merits of the application for a new trial, did the Court suppose the present case exempt from the application of the principles laid down.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. This Court, previous to the passage of the act of July 21, 1837, (Gale's Stat. 540.) repeatedly decided that an application to set aside a default, or to grant a new trial, was an application addressed to the sound discretion of the Court where the judgment was rendered, and that the decision of the Court upon such application, could not be assigned for error.

Garner *et. al. v.* Crenshaw, decided Dec. term, 1824, *post;* Sawyer *v.* Stephenson, Breese 6; Cornelius *v.* Boucher, do. 12; Clemson *v.* Kruper, do. 162; Collins *v* Claypole, do. 164; Street *v.* Blue, do. 210; Adams *et. al. v.* Smith, do. 221; Vernon *et. al. v.* May, do. 229; Littletons *v.* Moses, Breese's App. 9.

The second section of that act provides that, "Exceptions taken to opinions or decisions of the Circuit Courts, overruling motions in arrest of judgment, motions for new trials, and for continuance of causes, shall hereafter be allowed; and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding."

This section, however, does not give the right to assign for error a decision of a Circuit Court *granting* a new trial, &c. It relates only to the decisions of the Courts *overruling* the motions therein contained. See a case decided Dec. term, 1839. (*a*)

(*a*) It only relates to civil cases. Pate *vs.* People, 3 Gil. R. 662; Martin *vs.* people, 13 Ill. R. 543. In 1837 it was extended to criminal and penal cases. L. of 1837 pp. 28 and 108.

NATHANIEL HARMISON, plaintiff in error, *v.* REUBEN CLARK, JACOB CLARK, Senr., and LUCY CLARK, his wife, and JACOB CLARK, Jr., defendants in error.

Error to Franklin.

Exceptions taken upon the first trial, a new trial being granted and had, cannot avail the party excepting. In order to be available, the exceptions should have been renewed on the last trial (if the same ground of exceptions occurred).
An application to set aside a judgment by default, or to grant a new trial, is an application addressed to the discretion of the Court, and the decision of the Court upon such application, cannot be assigned for error.
A party cannot assign that for error, which was for his own benefit.

THIS is an action of *trespass* issued by Harmison against the above named defendants, together with Hiram Clark and Abraham Clark. Upon the two last no service of process was had, nor was there any appearance entered by them. The declaration contained, as at first filed, two counts, the first of which charged that on the 11th of March, 1832, with force and arms, at the county of Franklin, the defendant broke and entered the close of the plaintiff, and set fire to, and burned and destroyed one mill-house, one barn, two corn-cribs, one stable, 1000 bushels of corn, one wagon, &c., of the value of 1000 dollars, and other wrongs, &c.

The second count charged that on the same day and year, and at the same county, the defendants, with force and arms, set fire to, burned down, and destroyed other, the property of the plaintiff, of the value of 1000 dollars, and other wrongs, &c.

At the term to which the writ was returnable,—it having been returned as executed upon the defendants Reuben, Jacob, jr., and Jacob, sen., and Lucy his wife, the defendants in this writ of error,—the Court granted a rule requiring the defendants to plead by 9 o'clock of the next day. This rule was granted and entered of record the 3rd of October, 1832. Accordingly, on the next day, the 4th of October, the defendants, Reuben, Jacob, jr., and Jacob, sen., filed their plea of not guilty, upon which plea issue was joined the same day.

At the April term, 1833, of the Circuit Court, to which term the cause had been continued on motion of the plaintiff, a judgment by default was taken against Lucy Clark and Jacob Clark, sen., her husband, for their default in not pleading, or otherwise answering on behalf of Lucy, to the plaintiffs' action, and a jury was called and sworn to try the issue joined, and to enquire of damages against Jacob Clark, sen., and Lucy his wife. The jury returned a verdict of not guilty as to the issue, and assessed the

damages against Jacob Clark, sen., and Lucy his wife, to three hundred and sixty dollars.

On the trial before the jury, it appeared that the burning of the property charged, took place in *Hamilton county*, and the Court on motion of the defendants, excluded the evidence from the jury, as to all the defendants who were on trial. To this decision the plaintiff excepted.

On the next day, the 4th of April, and before judgment was entered on the assessment of damages, against the defendants in default, Jacob Clark, sen., one of those defendants, made and filed his affidavit, setting forth in substance, that he had understood from the sheriff, when at his house to serve process on himself, that his wife Lucy was not included in the suit; that he, the affiant, did not then, or at any time, know that his wife was a party to the suit; that no rule or notice was ever served on him of any description by which he supposed his wife was a party to the suit; nor did he believe his wife was ever summoned by the sheriff, or knew in any manner that she was a party to the suit, or required to plead or attend to the trial. The affidavit further stated that the affiant was informed by counsel since the trial of the suit, and believed, that his wife had a good and meritorious defense, and that she would be able to show on a trial of the merits of the case, that she was in no wise guilty of the trespass complained of. That he was expressly informed and believed, that his information came from the plaintiff, that the suit had been compromised on the part of the other defendants, and that consequently he was released from all liability in the action. That at the last term of the Franklin Circuit Court, the plaintiff sued the affiant and others, not including the wife of the affiant, and he, the affiant, expressly understood that it was upon this last suit that he was bound to answer, and that Harmison had abandoned the first.

Upon this affidavit of Jacob Clark, sen., he, and his wife, Lucy, moved the Court to set aside the judgment of default rendered, and the proceedings had.

The plaintiff resisted the motion, and on its hearing, offered to read to the Court the affidavits of Warrenton L. Duncan and William Dye, the first of which asserted the service of summons on Lucy Clark, as returned by the affiant, and that the return was literally and in every respect, true. That he never gave Lucy Clark, nor her husband, to understand that the former was not sued, or that the suit was compromised. That, furthermore, both of these defendants had acknowledged to the affiant, that they were summoned, and that they knew it. The affidavit of Foster and Dye sets forth that they, the affiants, were present on Friday morning, the 5th of April, (the day after the motion and affidavit were made and filed,) and heard Jacob Clark, sen., and his wife,

admit that the summons in this case had been served on the latter by the sheriff of Franklin county, previous to the October term, 1832, but that knowing that he had not served a certain capias, issued during that term, at the suit of Harmison, against the same parties, they, Clark and his wife, meant that he had not served that capias.

These affidavits the Court refused to hear, and upon the affidavit of Jacob Clark, sen., set aside the default and verdict, and granted a new trial as to all of the defendants, as well those who had pleaded, as those against whom the default had been taken.

To both of these decisions the plaintiff's counsel excepted.

The cause was then continued until the next succeeding term of the Circuit Court, at which term, by leave of the Court previously given, a new count, by way of amendment to the declaration, was filed, charging a trespass upon personal property only. Pleas were put in by all of the defendants in Court, including Lucy Clark, and Jacob Clark, sen., and a verdict was rendered for the defendants. Upon which verdict the Court gave judgment for costs against Harmison.

To reverse this judgment, and to render final the judgment before taken against Jacob Clark, sen., and his wife, this writ of error was prosecuted. The cause was tried at October term, 1833, before the Hon. Thomas C. Browne and a jury.

A. F. Grant, for the plaintiff in error, contended that the reason given in the books why an action of *trespass quare clausum fregit* is considered a local action in England, does not exist in this country. The only substantial distinction between local and transitory actions being, as laid down by Lord Mansfield, that, "Where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if the venue be laid in a wrong place, the action is local;" while here the process of our Courts, final process, as well as all other, runs throughout the State, may issue from one county, and be directed to, and executed by the sheriff of another. If the law ceases with the reason upon which it is founded, then, the common law governing the laying of the venue, in cases of this kind; cannot be the law in this State. Fabrigus *v.* Mostyn, Cowp. 176–7, cited in Tidd's Practice, 370.

The principal matters stated in the affidavit of Clark, are stated by him on the information of others, and not of his own knowledge. They are matters, however, for the most part, within the personal knowledge of his wife, if they existed; and she not having sworn to them, although with her husband party to the application; and some of the facts stated being in direct contradiction to the return of the sheriff, the reading of the counter affidavits offered by the plaintiff, tended to the eliciting of truth.

and was for that reason proper, on a motion addressed to the discretion of the Court.

Counter affidavits, upon applications to hold to bail, &c., where a discretion is to be exercised, are admitted in the Court of Common Pleas in England, and in the American Courts. 1 Sellon's Prac. 113 ; Johns. Cases, 105, cited in Am. Dig. 105.

The default was taken against Clark and his wife, for the want of an appearance and plea on behalf of the latter. The application to set aside the default was made by both of them, and should have been predicated upon the joint or separate affidavits of both ; and many of the facts stated in the affidavit that was made, being facts that in their nature were within the wife's knowledge, and she being a party in the application, her affidavit, as to these facts particularly, was necessary. "An affidavit, by a third person, of facts in the knowledge of a party, on which the application is founded, cannot be read, as it ought to be by the party himself." 3 Caines 125, cited in 1 Am. Dig. 16.

The award of a new trial as to all, upon the application of some, without the assent of the others, is error : Such in this case was the order, and to that effect was the application of the defendants. 1 Washington 322 : 2 Strange 813 : 2 Blac. Rs. 1030 ; 12 Mod. 275 ; 3 Salk. 362.

W. B. Scates, for the defendants in error, cited 1 Tidd's Pract. 369, 404, 430, 433, 434–5, 506–8, 819. "Where three are sued, and two suffer judgment of default, and the third pleads to issue, and it is found for him, the two may bring a writ of error." 2 Tidd's Pract. 1054 ; Gould's Plead. 116 ; Bac. Abr. tit. *Local Actions A*, *a* : Cowp. 180 : 4 Term R. 503 : 6 East 598–9.

Wilson, Chief Justice, delivered the opinion of the Court :

In this cause two trials were had in the Court below. Upon the first trial, judgment was rendered in favor of two of the defendants, and judgment by default was taken against Jacob Clark, sen. and Lucy his wife, two other defendants. At the same term, the Court, upon the application of Jacob Clark, sen., set aside the default against him and his wife, and granted a new trial as to all of the defendants.

During the progress of the first trial, several exceptions were taken by the plaintiff to the opinion of the Court, but these exceptions are not now available. To have enabled him to avail himself of them, he should have renewed them on the last trial (if the same ground of exception again occurred,) as that was a trial *de novo*, and the judgment rendered on that trial is the only final judgment in the case.

Upon the second trial, a verdict and judgment were rendered in favor of all the defendants.

From this statement of the case, the only assignment of error that can be noticed by the Court, is that which questions the correctness of the order of the Court below, setting aside the default of two of the defendants, and granting a new trial, as to all of them. It has been repeatedly decided, that an application to set aside a judgment by default, or to grant a new trial, is addressed to the discretion of the Court, and that the decision of the Court upon such application, cannot therefore be assigned for error.(1) [a] It is however contended that this case is not within this general rule, because a new trial was ordered as to two of the defendants who were acquitted, and who did not join in the application made by the others for that purpose. This position might well be assumed by those defendants who were acquitted on the first trial, had they afterwards been convicted; because the effect of the order was to impose upon them the costs of another trial, and to subject them to another chance of conviction. But the same reason that would, under this state of the case, authorize them to assign this decision of the Court for error, precludes the plaintiff from doing so. The decision was to his advantage, by multiplying his chances of success. He therefore has no reason to complain, and cannot assign that for error which was for his benefit. The judgment must be affirmed with costs.

Judgment affirmed.

(1) See note to last case.

(a) Allen *vs.* City of Monmouth 37 Ill. R. 380; Mitchell *vs.* Chicago 40 Ill. R. 174.

ABRAHAM IRVIN and ELIZABETH IRVIN, his wife, plaintiffs in error *v.* GEORGE WRIGHT, defendant in error.

Error to Gallatin.

A judgment recovered after action brought, and after plea pleaded, cannot be set-off against the plaintiff's demand.
The construction of the English statute of set-off, and of § 17 of our practice act, should be the same in relation to the time at which the set-off should exist.

THIS action was tried at the March term, 1834, of the Gallatin Circuit Court, before the Hon. Thomas C. Browne and a jury. A verdict was rendered for the defendant in error, who was the plaintiff in the Court below, for $55.25. Upon this verdict judgment was entered.

H. EDDY, A. F. GRANT, and S. BREESE, for the plaintiffs in error.

W. J. GATEWOOD, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* brought by Wright to recover compensation for work and labor done and performed for Mrs. Irvin while sole.

Among other pleas which it is unnecessary to notice, the defendants below pleaded, that since the commencement of the suit in the Court below, they had recovered a judgment against Wright, which they offered to set off against the damages sustained by the plaintiff in this suit. To this plea Wright demurred, and the Circuit Court sustained the demurrer.

Did the Court err in this judgment? By the 17th section (1) of the "*Act concerning Practice in Courts of Law*," it is provided that "The defendant in any action, brought upon any contract or agreement, either express or implied, having *claims or demands* against the plaintiff, may plead the same," &c. The only question for our consideration under this act, is, at what time must the claims or demands exist, so as to justify their being set off against the plaintiff's demand? It was contended in the argument, by the counsel for Irvin, that our statute was more comprehensive than the English statute of set-off, and therefore a debt or demand due or accruing after suit brought, might be set off. The Court, however, upon an examination of the English statute of set-off, are of opinion that although the phrase in our statute, "claims or demands," would admit of a construction that would embrace more modes of indebtedness than the phrase "mutual debts," used in the English statute, yet in respect to the time at which the "claims or demands," under our statute, and the "mutual debts" under the English statute, should exist so as to be the subject of set-off, the same construction as to both statutes ought to prevail.

In the case of Evans v. Prosser,(2) the Court of King's Bench held that a judgment recovered after the action was brought, and before plea pleaded, could not be pleaded as a set-off. This decision we think in point, and we do not perceive that it violates any principle of justice, or the intention of the legislature. Should a different construction prevail, gross injustice might frequently be practised. The plaintiff, when he commences his suit, has a good cause of action, and to which the defendant has no defence; yet if the rule should be established that "claims or demands" might be pleaded that originated or became due after suit is brought, it will put it in the power of the defendant, by purchasing a note against the plaintiff, to defeat his action, and consequently charge him with the costs. This cannot be reasonable, nor can it be supposed that the legislature intended to enable the defendant by an act of his own, to defeat the plaintiff's right of recovery in a case so situated. The Court are of

(1) R. L. 491; Gale's Stat. 592. (2) 3 Term R. 186.

opinion that the demurrer of the plaintiff was properly sustained. The judgment of the Court below is affirmed with costs.

Judgment affirmed.

Note. See Edwards *et. al. v.* Todd, *Post.* 462

WILLIAM TINDALL, appellant *v.* DANIEL MEEKER appellee.

Appeal from Madison.

Appeals from the judgments of justices of the peace, must be tried in the Circuit Court *de novo.*

Where a judgment is rendered by a justice of the peace upon a note bearing interest, and an appeal is taken to the Circuit Court, in computing the amount due on the note, interest should be calculated upon on *the note* to the time of rendition of the judgment in the Circuit Court, and not on the *judgment.*

On appeal from a judgment of a justice of the peace, the Circuit Court should give judgment for the amount that may be due, although that amount may exceed the jurisdiction of a justice; provided the justice had jurisdiction at the time of the commencement of the suit. The rule is, if an inferior court has jurisdiction *ab origine*, no subsequent fact arising in the case, can defeat it.(a)

Interest may be calculated at any rate that the parties may agree upon.

THIS cause was tried in the Circuit Court of Madison County, at the May term, 1834, before the Hon. Theophilus W. Smith.

J. SEMPLE, for the appellant.

J. B. THOMAS, Jr., for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

Meeker sued Tindall before a justice of the peace on two promissory notes, one bearing interest at the rate of twelve per centum per annum, and the other at the rate of twenty per centum per annum. On the trial before the justice, Meeker recovered a judgment for $92,25, being the amount of the principal and interest of the notes, at the time of trial, calculating the interest at the rates specified in the notes. To reverse this judgment an appeal was taken to the Madison Circuit Court, where at the May term, 1834 (after a delay of sixteen months from the rendition of the judgment of the justice of the peace) a trial was had, and the judgment of the justice of the peace affirmed: and the Court in addition allowed $7,75 as interest, making the judgment in the Circuit Court amount to $100.

The Court, as appears from the bill of exceptions, in calculating interest, allowed interest on the notes from their respective dates, and according to the respective rates mentioned in said notes, up to the time of rendering judgment in the Circuit Court. The interest, at the rates specified in the notes, amounted with

(a) *Post* 577.

the principal to more than $100. The excess over that sum, was remitted by the plaintiff below. An appeal has been taken from the judgment to this Court, and the appellant assigns for error, 1st, That the Circuit Court allowed interest on a judgment of a justice of the peace, at a greater rate than six per cent. 2d. That if interest at the rate agreed on in the notes, was allowable, then the amount of principal and interest was over $100, and the Court could not give judgment.

In support of the first assignment of error, the act entitled "*An act regulating the interest of money*,"(1) is relied on. This act provides "that creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument in writing, or any judgment recovered before any court or magistrate, authorized to enter up the same within this State, from the day of signing such judgment until the effects be sold, or satisfaction of such judgment be made," &c.:

"*Provided always*, That nothing in this act contained shall be so construed as to limit the rate of interest, for the payment of which an express contract hath been made." To arrive at a correct understanding of the question how far this statute applies to the case under consideration, it is necessary first to ascertain the duty of the Circuit Court, in the trial of appeals from the decisions of justices of the peace? By the 34th(2) section of the "*Act concerning Justices of the Peace and Constables*," The Court shall hear and determine appeals in a summary way, without pleading in writing, according to the justice of the case." And be § 35 of the same act, "The Court shall at any time admit such amendment of the papers and proceedings, as may be necessary to a fair trial of the case upon its merits." The construction put upon these sections, has uniformly been, that causes brought up by appeal from justices' courts, shall be tried *de novo:* and the judgment below furnishes no evidence to sustain the correctness of the decision of the justice. It consequently follows, that when the cause is tried in the Circuit Court, its decision not being controlled by the decision below, the judgment must be for whatever sum is proved to be due on the trial in the Circuit Court. The Court therefore decided correctly, that the plaintiff below was entitled to the amount of the notes, together with interest as agreed in the notes, to be calculated from their respective dates, at the expressed rates of interest, up to the time of rendering judgment in the Circuit Court. Had the defendant acquiesced in the judgment before the justice, then the plaintiff could only have collected six per cent. interest on the judgment, whether he proceeded by execution, or by action of debt on the judgment before any other court. "When a judgment is ob-

(1) R. L. 350: Gale's Stat. 344. (2) R. L. 395: Gale's Stat. 410.

tained upon a contract, that contract ceases to exist, and is merged in the judgment, and the judgment is operated upon and controlled, not by the contract, but by the statute."(1) But when an appeal is taken from a justice's decision, the judgment becomes of no effect, as it is incumbent on the plaintiff to produce his evidence anew in the Circuit Court. It comports with reason and justice, that the plaintiff should recover all he proves to be due at the time of trial; and if part of the demand grows out of an express contract to pay more than six per cent. interest, he has by the terms of the contract a right to recover the interest until the note is paid, or until, by a judgment that is conclusive on both of the parties, it ceases to be a contract *inter partes*, and is merged in a contract by operation of law. The second assignment is equally untenable. When the action was commenced, and the judgment rendered by the justice, he had unquestionable jurisdiction of the cause. If an inferior court entertains jurisdiction of a case, and gives judgment, where by law such inferior court has no jurisdiction, the whole proceedings are *coram non judice* and void; and all acting under such void judgment would be trespassers. Now, can it for a moment be allowed, if no appeal had been taken, that the justice and constable would have been trespassers, if an execution had been issued on the judgment, and the defendant's goods taken and sold? To state the case is sufficient to show the unreasonableness of the proposition that the defendant by taking an appeal, and by subsequent delay in the Circuit Court, until the interest had accumulated so as to make the plaintiff's demand exceed $100, such subsequent accumulation should relate back and oust the justice of the jurisdiction of a cause of which when adjudicated he had legal cognizance. The rule in such cases is, if an inferior court has jurisdiction *ab origine*, no subsequent fact arising in the case, can defeat it, when it was lawful in the inception. It has not been made a question whether the Circuit Court could, if the plaintiff had not remitted it, have given judgment for more than $100, yet had the Court done so, upon the principle here stated, that the Circuit Court ought to render judgment for such amount as appeared to be due, it would probably not have been erroneous."

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. The act of February 28, 1833, and which took effect April 1, 1833, limits the rate of interest which parties may agree upon to 12 per cent. per annum. R. L. 349; Gale's Stat. 333.

(1) Breese 52.

(a) *Post*, 193; Raymond *vs.* Strobel, 24 Ill. R. 113. Rives *vs.* Kumler, 27 Ill. R. 233.

PHINEAS C. HALL and SAMUEL B. HALL, plaintiffs in error *v.* AUGUSTINE BYRNE & Co., defendants in error.

Error to Jackson.

A mortgage of lands is not a note, bond, bill, or other instrument in writing within the meaning of the act in relation to promissory notes; and a want of consideration, or a failure of consideration cannot be pleaded to a *scire facias* to foreclose a mortgage.(*a*) Statutes which treat of things or persons of an inferior rank, cannot, by any *general words* be extended to those of a superior.

THIS was a *scire facias*, brought to foreclose a mortgage. The consideration expressed in the mortgage is one dollar in hand paid by the mortgagee; and in the defeasance reciting that James Hall, Jr. is indebted to the mortgagee by note due the 1st of May, 1827, in the sum of $997,74.

The defendants below pleaded three pleas: 1. A want of consideration; 2. A failure of consideration; and 3. A part failure of consideration.

To each of these pleas the plaintiffs below filed a general demurrer, and the Court sustained the demurrer, and gave judgment for the plaintiffs below.

The cause was decided at the April term, 1834, of the Jackson Circuit Court, by the Hon. Thomas C. Browne.

W. J. GATEWOOD and W. B. SCATES, for the plaintiffs in error.

If an action at law be commenced upon any note, bond, bill, or *other instrument in writing* for the payment of *money or property*, or the performance of covenants or conditions by the obligee or payee thereof, and there was no consideration, or it has in the whole or in part failed; it may be pleaded, and judgment shall be given for the defendant according to the fact. R. L. 482, § 5.(1)

It is laid down that at common law, six things should concur to make a good and valid contract; the fourth of which is, that there be a good and sufficient consideration or *quid pro quo*: this had relation to parol contracts or agreements. Comyn on Cont. 2, 7, 8, 9, 13; Chit. on Cont. 2–16, and authorities there cited; 2 Blac. Com. 442–445, at notes 8. 9, 10; 3 Bos. & Pul. 294, note; Carson *v.* Clark, decided Dec. term, 1823.(2)

In Pillans *v.* Van Mierop, it was held that there could not be a *nudum pactum* in writing. Comyn on Cont. 7; 3 Burr. 1671.

This doctrine was overruled in the case of Mary Hughes' Exrs. *v.* Isabella Hughes' Admrx., 7 Term R. 350 *n. a.*; 7 Bro. Parl. Cas. 551, S. C., where it was held that in all contracts, whether

(*a*) Woodbury *vs.* Marlowe, 1 Hill. R. 213, and notes; Mc Faddon *vs.* Fowler, 2 Hill. R. 509.

(1) Gale's Stat. 526. (2) Ante 113.

they be in writing or not, if they be not *specialities*, a *consideration must be proved*, Comyn on Cont. 8, and note 4, 9, and note 5: 2 Kent Com. 463—468.

But our statute has placed *specialities* on the same footing with *simple* contracts at common law, if a plea of a want or failure, or part failure of consideration, be pleaded. R. L. 483, § 5.

A *scire facias* (except in some few cases) is a new action. 3 Saund. 72, note 4. It commands the Sheriff that by good and lawful men he make known, &c.; and the sheriff's return is, that by good and lawful men, naming them, he made known, &c. Id. 617, 70.

It has been decided not to be amendable. 2 Tidd. Pr. 1037; and the *scire facias* by our statute is constituted in the place of a declaration. R. L. 486, § 43.(1) Consequently, it must possess all the requisites of form and substance of a good declaration. Before the statute, any defect in these, or the sheriff's return, must have been objected to by motion to *quash*. 2 Tidd. Pr. 1037: but since the statute, it is in the nature of a declaration, and not a summons: the objection is not in abatement by motion to *quash*, but by plea or demurrer. The demurrer opens the whole of the pleadings, and although the pleas may be defective, yet the Court may look into the *scire facias*, and if it be defective, give judgment against the plaintiffs. 1 Chit. Pl. 647.

A. F. Grant and H. Eddy, for the defendants in error.

Lockwood, Justice, delivered the opinion of the Court:

This was a *scire facias* brought on a mortgage of land, to sell the premises under the 18th section of an act entitled, "*An act concerning judgments and executions.*" (2) To the *scire facias* the defendants below pleaded three pleas, to wit: 1st. That there was no consideration for executing the mortgage; 2d. A failure of consideration; 3d. A part failure of consideration. To these pleas the plaintiffs below demurred, and the Circuit Court sustained the demurrer, and gave judgment for the amount due on the mortgage, and that the lands mentioned therein be sold to satisfy the same. To reverse this judgment a writ of error has been brought to this Court, and the only error assigned is, that the Circuit Court erred in sustaining the demurrer to these pleas. To support this assignment, the counsel for the plaintiffs in error rely on the 5th section of the "*Act relative to promissory notes, bonds, due bills, and other instruments in writing* (3) *and making them assignable.*" This section provides that "In any action commenced or to be commenced in any court of law in this State, upon any note, bond, bill, or other instrument in writing, for the payment of money or property, or the perform-

(1) Gale's Stat. 529.
(2) R. L. 376; Gale's Stat. 321
(3) R. L. 483; Gale's Stat. 526.

ance of covenants or conditions, by obligee or payee thereof, if such note, bond, bill, or instrument in writing was made or entered into without a good or valuable consideration; or if the consideration upon which such note, bond, bill, or instrument in writing, was made or entered into, has wholly or in part failed, it shall be lawful for the defendant or defendants against whom such action shall be commenced by such obligee or payee, to plead such want of consideration, or that the consideration has wholly or in part failed."

Under the pleadings, the question presented for the considera- of this Court, is whether a mortgage, executed and recorded according to the statute, is a "note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions by the obligee or payee thereof," and liable to be defeated by either of the pleas above mentioned. To arrive at a satisfactory answer, it is necessary to enquire into the nature and effect of a mortgage. "A mortgage is a conveyance of lands, by a debtor to his creditor, as a pledge or security for the repayment of money due; with a proviso that such conveyance shall be void on payment of the money and interest, on a certain day; and in the event the money be not paid at the time appointed, the conveyance becomes absolute at law, and the mortgagor has only an *equity of redemption*; that is, a right in equity, on payment of principal, interest, and costs, within a reasonable time, to call for a re-conveyance of the lands."(1)

From this definition, a mortgage of lands (the execution of which is attended with many legal solemnities, and must be acknowledged and recorded, as are all other deeds affecting real estate) cannot be such an instrument in writing as is contemplated by the 5th section of the act aforesaid. A mortgage is certainly not made negotiable by the act, nor is it an instrument for the direct performance of covenants or conditions by the obligee or payee, although it is subject to be defeated by the payment of money. Mortgages were in common use when this statute was passed, and had the Legislature intended to have them defeated by such pleas as were interposed in this case, there can be no doubt that they would have been enumerated. It is also evident that mortgages were not intended to be embraced within the act, because the legislature use the words "obligee or payee," when designating the plaintiff to whose action these pleas may be pleaded, instead of the term "mortgagee." The terms "obligee or payee" have a technical and definite meaning in the statute under consideration, and apply only to notes, bonds and bills, whether such notes, bonds, or bills are given for the payment of

(1) Cruise's Dig. 89.

money or property, or the performance of covenants or conditions, and not to mortgages.

It is also a well settled rule of the common law, that statutes which treat of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior.(1) Mortgages are clearly instruments of a higher dignity than bonds, promissory notes, or bills, because greater solemnity is required in their execution. They are required to be recorded, and the same remedy given as in case of judgments. The Court therefore conclude, as well from the general scope and object of the act relative to "promissory notes, bonds, due bills, and other instruments in writing and making them assignable," as from the consideration that the proceeding authorized in this case is by *scire facias*, and founded on a record, that a mortgage is not embraced in the 5th section of the act above mentioned, and consequently the pleas were correctly overruled by the Court below.

Judgment affirmed with costs.

Judgment affirmed.

(1) 1 Blac. Com. 88; Breese 294.

JARROT GARNER and GEORGE AYDOLLETT, plaintiffs in error v. JOHN CRENSHAW, defendant in error.

Error to Gallatin.

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.

JUDGMENT was rendered in this cause by the Hon. Thomas C. Browne, at the March term, 1834, of the Gallatin Circuit Court.

A. F. GRANT, for the plaintiffs in error.

H. EDDY, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *trespass de bonis asportatis*. The defendants appeared and pleaded and subsequently withdrew their plea, letting judgment pass by default against them. An order for the execution of a writ of inquiry of damages was entered; but before its execution, Garner, one of the defendants, moved to set aside the default, and asked leave to be permitted to plead. The Circuit Court refused on the affidavit of Garner, (which disclosed the grounds of his application,) to set aside the

default, and order for the execution of the writ of inquiry, to which refusal the defendants excepted. The bill of exceptions contains the reason of the Court for the refusal, which is that one term of the Court had intervened between the term at which the default was taken, and that at which the motion was made. It is now urged by the counsel for the plaintiffs in error, that the reason given is an insufficient one, and that the default ought to have been set aside, and the defendants let in to plead. If the grounds of the application to the Circuit Court were examined, they would be found to present no reasonable cause for vacating a default, virtually acceded to by the defendants themselves, by the withdrawal of their plea; nor would the grounds disclosed in the affidavit of one of them, furnish any legal excuse for not renewing their defence in time, if they had so desired or intended, as it appears that one full term had elapsed before the application to set aside the default.

Apart, however, from the merits of the application to the Circuit Court, it will be perceived that an application to set aside a default, is addressed to the sound legal discretion of the Court, and that no writ of error will lie to correct the erroneous exercise of this power. The entering of the default was an interlocutory order, and its vacation depended on the exercise of this discretionary power under the rules and practice of the Circuit Court, and as should best, under those rules, subserve the purposes of justice. We are not only satisfied that this power was discreetly exercised in the present case, and conformably to its justice, but that the refusal to set aside the default, cannot be assigned for error.

The judgment of the Circuit Court is affirmed with costs,

Judgment affirmed.

See note to the case of Wickersham *v.* The People. *Ante* 123.

Piggott *v.* Ramey *et al.*

LEVI PIGGOTT, surviving executor of the estate of George Ramey, deceased, plaintiff in error *v.* NANCY RAMEY, widow and relict of George Ramey, deceased, FOSTER RAMEY, MICHAEL PALMER and ELIZABETH his wife, POLLY RAMEY, JOHN SMITH and ELIZA his wife—WILLIAM RAMEY, CATHARINE RAMEY, THADEUS W. RAMEY, minors, who sue by their next friend Nancy Ramey, heirs at law of George Ramey, deceased, defendants in error.

Error to Monroe.

Where the legislature directs an inferior court as to the mode of enforcing its orders or decrees, such court possesses no discretion, but must proceed conformably to the mode prescribed.

A Court of Probate has no power to render a judgment in favor of heirs or devisees, against an executor or administrator for failing or refusing to pay over to such heirs or devisees, their distributive portions of the estate of the deceased.

If an executor or administrator fail or refuse to comply with the order of the Court of Probate, requiring him to make such payment, the remedy is by attachment for contempt of Court.

A. COWLES and N. W. EDWARDS, for the plaintiff in error, relied upon the following points and authorities:

1. No action lies for a legacy against an executor without his express assent. Cowper 284; 7 Johns. 103–4; 10 Johns. 31; 1 Chit. Plead. 89, 95, and cases cited in note C.; Toller 365, 240; 1 Chit. Plead. 101–2.

2. Executors and administrators not liable at law until a *devastavit* is legally established. Breese 154; Toller 342, 363–8.

3. Upon a declaration against an executor or administrator, the judgment can only be first against the goods and chattels in his hands to be administered. 2 Saunders 117, d, note; Tidd's Appendix 213.

4. From the uncertain character in which the plaintiffs below sue, no judgment can properly be rendered. 9 Saunders 117, f, note 1.

5. The interest which these plaintiffs took under the will, was a several, and not a joint interest. 1 Saunders 154, note.(1)

6. No judgment could be rendered against defendants without showing a previous demand for payment. 1 Mass. 428; § 121, Act relative to Wills and Testaments, R. L. 650.

S. BREESE and A. W. SNYDER, for the defendants in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *debt* brought by the heirs or devisees of George Ramey, deceased, against Levi Piggott, as surviving

executor of said Ramey. The declaration states, "That the plaintiffs, as heirs of Ramey, deceased, heretofore, to wit, on the 4th day of January, 1830, at a Court of Probate, held in the town of Waterloo, Monroe county, by the Hon. James B. Moor, Judge of Probate for said county, by the consideration and judgment or decree of said Court, recovered against the said Levi Piggott, surviving executor of the estate of George Ramey, deceased, the sum of $389,29, which was then and there adjudged to the plaintiffs before mentioned, they being the persons entitled to the same under the last will and testament of the said George Ramey, deceased," &c. The defendant below made default, and judgment was given for the plaintiffs against the defendant personally, for the above mentioned debt and costs of suit. The cause was brought into this Court by writ of error. A number of errors have been assigned. It will, however, be unnecessary to examine any other point in the case, except whether a Court of Probate had any power to render a judgment in favor of heirs or devisees against an executor for distributive shares or legacies, under the "*Act relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates*," approved January 13d, 1829. This power was, on the argument of the case, supposed to be conferred on the Court of Probate, by the 121st and 122d sections of the act. The 121st section directs that "If any executor or administrator shall fail or refuse to pay over any moneys or dividends to any person entitled thereto, in pursuance of the order of the Court of Probate, lawfully made, within thirty days after demand made for such moneys or dividend, the Court of Probate, upon application made, shall attach such delinquent executor or administrator, and may cause him to be imprisoned until he shall comply with the order aforesaid, or until such delinquent is discharged by due course of law:" and this section further authorizes a suit to be brought on the bond of such executor or administrator, upon his neglect or refusal to comply with such order. The 122d section provides, that "Whenever it shall appear that there are sufficient assets to satisfy all demands against the estate, the Court of Probate shall order the payment of all legacies mentioned in the will of the testator, the specific legacies being first satisfied."(1)

The Court are clearly of opinion that in neither of these sections is any authority given to the Court of Probate to render a judgment.

The word *order*, used in both sections, does not *ex vi termini* mean a judgment. That the legislature did not intend to confer the power to give judgment, is evident from the consideration that in the 121st section, provision is made to proceed against the executor or adminstrator who neglects or refuses to comply with

(1) R. L. 651; Gale's Stat. 716.

the order after demand being made, by attaching and imprisoning him for contempt; and in neither section is there authority to issue an execution.

Had the legislature intended to have authorized the Court of Probate to render judgment against the executor or administrator, under these sections, the Court would unquestionably have been required to collect such judgment by the usual process of execution. The legislature, however, has only given the remedy for the refusal to comply with an order of the Court of Probate, as the common law gives to courts of record in similar cases; to wit: an attachment for contempt. When the legislature directs an inferior court as to the mode of enforcing its orders or decrees, such Court possesses no discretion, but must proceed conformably to the mode prescribed. The court are further confirmed in this view of the subject by the 124th section. This section provides, that "Executors or administrators, shall not be compelled to pay legatees or distributees, until bond and security be given by said legatees or distributees, to refund their due portion of any debt which may afterwads appear against the estate, and the costs attending the recovery thereof; and such bond shall be made payable to such executor or administrator, and shall be for his indemnity, and filed in the Court of Probate".[b] This provision is entirely inconsistent with the idea that the Court of Probate has power to give a judgment which is a final disposition of the matter in controversy, leaving no act *in pais* to be done to entitle the successful party to an execution which will put him in possession of the fruits of his recovery. But if we consider the *order* mentioned in the 121st and 122d sections, as liable only to be enforced by attachment for contempt, then before the Court of Probate could issue such attachment, evidence would have to be furnished that the executors refused to pay the dividend, and that the devisees or distributees had executed the bond with security, required by the 124th section. In this mode, the proceeding before the Probate Court would comply with the requisitons of the statute, and conform to analogous proceedings in other Courts, and the symmetry of legal proceedings would be preserved.[a]

The judgment is reversed with costs.

Judgment reversed.

(*b*) Rowan *vs.* Kirkpatrick 14 Ill. R. 11: People *vs.* Admire 39 Ill. R. 252. 1 Story's Eq. J. Sec. 540.

(*a*) Palston *vs.* Wood 15 Ill. R. 159: Stose *vs.* People 25 Ill. R. 600.

JACOB CRISMAN and MICHAEL CRISMAN, appellants, *v.* SAMUEL T. MATTHEWS, appellee.

Appeal from Morgan.

In a suit by a sheriff upon a forthcoming bond taken by him for property levied on by an attachment, it is unnecessary for the plaintiff to show that the attachment was actually levied upon the property: the judgment of the court directing the property attached to be sold, is conclusive as to that point.(*a*)

A defendant in a forthcoming bond is estopped from denying that an attachment had issued, and that the property had been seized and taken by the sheriff: the recitals in the condition of the bond, admit these facts.

THIS case was tried at the October term, 1834, of the Morgan Circuit Court, before the Hon. Samuel D. Lockwood, and a judgment rendered for the appellee for $126,83.

WM. THOMAS, for the appellants.

M. MCCONNELL, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

This is an action of *debt* instituted in the Court below, by the appellee against Peter D. Mordecai and the appellants, upon a bond executed by Mordecai and the appellants, the latter as sureties, to the appellee as sheriff of the county of Morgan The declaration states, that on the 26th day of April, 1832, a certain writ or attachment issued from the Circuit Court of Morgan county, at the suit of Elisha Kellogg, against the said Peter D. Mordecai, for two hundred and fifty dollars, directed and delivered to the said Matthews as sheriff to execute and return; that by virtue of said writ, the sheriff attached one horse and other property of the said Mordecai, and took the same into possession; that Mordecai being desirous of retaining possession of the property, executed a bond, with the Crismans as sureties in the penalty of $500, conditioned that if the said property should be forthcoming to answer such judgment as the Court might render against the said Mordecai in favor of Kellogg, then the obligation to be void. The breach alleged is that Kellogg obtained a judgment on the 22d of June, 1833, for two hundred and fifty dollars, on which judgment a special execution issued on the 12th day of July, 1833, directed to the sheriff of Morgan county, requiring him to sell the property attached as aforesaid, and on the 23d of September, 1833, the sheriff returned the execution endorsed that the property could not be found, whereby an action accrued to the plaintiff to have and demand the debt aforesaid

At the May term, 1834, of the Circuit Court, the defendants, Jacob and Michael Crisman, appeared and pleaded to the action

(*a*) Smith *vs.* Whitaker 11 Ill. R. 417; Gray *vs.* McLean 17 Ill. R. 404; Drake on Attach. Sec. 330, 339, 344, 3d Ed., Brush *vs.* Segnin 24 Ill. R. 256.

in substance, that Matthews, the sheriff, represented that he had levied an attachment on the personal property at the suit of Elisha Kellogg, and required Mordecai to execute the bond declared on for the delivery of the property: Whereas in truth and in fact, the said sheriff had not levied the attachment on the said property or any part thereof, nor did he make any return on the attachment showing that he had levied the same. To this plea there was a demurrer, and the Court decided the plea insufficient. The defendants then had leave to withdraw the plea and plead *de novo;* and at the same term of the Court filed another plea, alleging the same facts but differing from the first in the conclusion. To this plea there was also a demurrer, which the Court sustained, and gave leave to file an additional plea, and the cause was continued. At the October term, 1834, the defendants filed four pleas. The first after craving *oyer* of the bond, alleges, that the Circuit Court of Morgan county never did make any order or render any judgment, requiring any disposition of the property specified in the bond, or requiring a delivery of the property to the plaintiff, or a sale of the same.

The second plea alleges that the plaintiff represented to the defendants, that by virtue of an attachment issued from the Circuit Court of Morgan county, at the suit of Elisha Kellogg against Peter D. Mordecai, he had levied on forty acres of land, situated in the county of Morgan, and the personal property specified in the condition of the bond declared on, and the defendants relying on the representations so made as aforesaid, executed the said bond, as sureties for the said Mordecai: Whereas the defendants aver that the plaintiff never had levied the said attachment on the land aforesaid, or on the personal property aforesaid, by reason whereof, the said Circuit Court never did make any order or render any judgment, requiring a sale of said personal property, to satisfy the judgment obtained by Kellogg against Mordecai, nor could the plaintiff, by force of the proceedings had in the said Circuit Court, lawfully claim or seize the said personal property.

The third plea alleges that the plaintiff returned the attachment referred to, and recited in the bond without certifying or endorsing thereon that he had levied the same on the personal property mentioned in the condition of the bond, or any part thereof, by reason whereof the property was taken and conveyed away out of the jurisdiction of the Court, by the said Peter Mordecai, and the Court could not by reason of the default of the plaintiff, render any judgment in said suit, and subject the property to the payment thereof.

The fourth plea alleges that the attachment referred to and recited in the condition of the bond, was sued out by Elisha Kellogg against Mordecai, on the complaint of said Kellogg,

alleging that said Mordecai was about to depart from the State with the intention of having his effects removed ; that the said Mordecai never was served with process or summoned or notified to answer the complaint of said Kellogg in said suit, and the plaintiff returned the attachment to the said Court without certifying or endorsing thereon that he had levied the same on any part of the said real or personal estate of said Mordecai; whereupon they say that the said judgment in favor of Kellogg against Mordecai, is null and void, and of no force or effect.

To the first plea filed in October, 1834, the plaintiff replied that the Circuit Court of Morgan county had rendered judgment, and required the property specified in the bond, to be sold to satisfy the same, concluding with a verification, &c. This replication was joined by defendants. The plaintiff demurred to the other three pleas, and the demurrer being joined, the Court decided the pleas insufficient. A trial was then had on the issue taken upon the first plea, and the Court decided on the trial of that issue, that the judgment in favor of Kellogg against Mordecai, was sufficient evidence to prove the issue, and that the plaintiff was not bound to produce the attachment and show by the return thereon, that the property had been attached, and gave judgment for the value of the property. The defendants excepted to the opinion of the Court in deciding that the judgment was sufficient evidence to prove the issue, and have brought the case to this Court by appeal. The errors assigned are,

1. The Court erred in sustaining the demurrer to the plea filed May, 1834.

2. The Court erred in sustaining the demurrers to the pleas filed October, 1834.

3. The Court erred in deciding that the judgment in favor of Kellogg against Mordecai was sufficient evidence to prove the issue tried by the Court, and that it was not necessary for the plaintiff to produce the attachment and show by the return thereon, that the property mentioned in the condition of the bond had been attached.

Two questions are raised for the consideration of the Court upon the foregoing statement of the case, and the errors assigned.

1. Were the demurrers to the 2nd, 3d and 4th pleas of the defendant properly sustained? I pass by the question presented as to the first two pleas and the demurrers thereto, because the defendants having withdrawn the pleas after the judgment on the demurrers, cannot now assign that for error, though if the pleas were considered, they would not, in my judgment, alter the present result.

2. Was the evidence under the issue found sufficient to justify

the finding of the Court, and the rendition of the judgment thereon?

On the first point it will be perceived that the 2nd, 3d and 4th pleas aver a state of facts not merely controverting the condition set forth in the bond, but denying the power of the Circuit Court to render a judgment in the attachment cause against the original debtor. They also partake in some particulars of a plea of *nul tiel record*, and are analogous in their form and matter. From a consideration of them they will be seen, first, to attempt to put in issue the existence of matters distinctly admitted in the bond; then to seek to controvert the jurisdiction of the Court which rendered judgment in the action of attachment, and finally to deny because of certain alleged informalities, as to the levy and return of the sheriff, that the Court did render such judgment as is alleged in the plaintiff's declaration.

This statement of their principal ingredients and qualities, shows, without further observation, that pleas containing each within themselves such matters incongruously joined, could not be good.

On the second point, I am clearly of opinion that the defendant was estopped from denying the admissions made in the condition of the bond, or of controverting their existence. The bond recities the issuing of the attachment and its coming into the hands of the sheriff; that it was duly levied on the property of Mordecai, and covenants to restore it to answer such judgment as the Circuit Court might render against Mordecai.

Can it be, after the admission of the defendants of these facts, verified by the most solemn legal forms known to the law, that they shall be permitted to deny them, and seek to avoid their force and effect by a resort to some informal or insufficient acts of the sheriff, in the manner of the levy or the return of the process? The existence of the judgment, however, was alone by the pleadings put in issue, and its production was sufficient evidence to sustain that issue. To have required more, would have been to require more than the parties had called on the Court to investigate; and not only so, but what had been already solemnly admitted by the defendants when they became a party to the bond. The production of the original attachment, with the return of the officer thereon, was wholly unnecessary, because the judgment was in itself conclusive.

The Supreme Court of New York have adopted this rule in a case clearly analogous. A sheriff who had taken a bond with sureties for the limits of the jail granted to a prisoner in execution, was sued for an escape, and judgment recovered against him. He gave notice to the sureties of the suit, which was regularly defended by the sheriff, aided by the sureties. The sheriff afterwards brought an action on the bond for his indemnity, and

it was held that the recovery in the former suit was conclusive evidence in the suit on the bond; and that the defendants could not on the trial of the suit against them on the bond, controvert the fact of the escape.(1)

The judgment is affirmed with costs.

Judgment affirmed.

(1) Kip *v.* Brigham *et al.* 6 Johns. 158.

JAMES MCKINNEY, apellant *v.* ISAAC FINCH, appellee.

Appeal from Morgan.

Where a suit is brought before a justice of the peace, which terminates in a final judgment on the merits, there both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case.(*a*)

Where two distinct suits are brought before the same justice, on the same day, upon two demands which might be consolidated into one suit, and which when thus consolidated, would not exceed $100, and one suit is dismissed, and judgment is rendered in the other, the proceedings are regular.

The dismissal of a suit by a justice of the peace, is in effect a non-suit, and does not bar a subsequent suit for the same demand, or for a different cause of action.

THIS cause was tried at the May term, 1834, of the Morgan Circuit Court, before the Hon. Samuel D. Lockwood, and a judgment rendered for the appellee for $34,17, and costs. From this judgment the defendant below appealed to this Court.

J. LAMBORN, for the appellant.

WM. THOMAS, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

Finch sued McKinney before a justice of the peace, on a sealed note, and recovered judgment. The suit was taken into the Circuit Court of Morgan county by appeal. On the trial in the Circuit Court, Finch gave the note in evidence. McKinney then proved that on the same day of the trial of the cause before the justice, there was a previous suit in favor of Finch against McKinney, which was founded also on a promissory note, not under seal, made payable to the plaintiff, and signed James McKinney, by his agent John A. McKinney. This suit the justice dismissed, because the agency of John A. McKinney was not sufficiently established. Both suits were tried before the same justice, and both notes did not amount to sum of $100. The defendant then pleaded and relied upon the 16th section(2) of the "*Act concerninig Justice of the Peace and Constables*," as a bar to the action; but the Circuit Court overruled the defence, and gave judgment for the sealed note above mentioned. The Court also decided that the plaintiff had a right to recover on one note, and

(*a*) Buckner *vs.* Thompson 11 Ill. R. 564; Casselberry *vs.* Forquer 27 Ill. R. 170; Lucas *vs.* Lecompte 42 Ill. R. 304.

(2) R. L. 591; Gale's Stat. 406

no right to recover on the other note. The 16th section above referred to provides that "In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other, which are of such a nature as to be consolidated, and which do not exceed $100 when consolidated into one action or defence; and on refusing or neglecting to do the same, shall be forever debarred from the privilege of suing for any such debt or demand." Did the Circuit Court err in overruling the defence set up under this section of the act regulating trials before justices of the peace? Did the legislature mean that the bare commencement of a suit, in which the plaintiff and defendant did not consolidate all their demands, should, whether the cause was tried or not, bar all debts, or demands not consolidated? The objects the legislature doubtless had in view, were to prevent the multiplicity of suits, where the matters in dispute were small, and to avoid the unnecessary accumulation of costs. These objects are effected, by deciding that where a suit is commenced before a justice, in which all the demands of the parties may be investigated consistently with the rules of law, and such suit terminates in a judgment binding upon the parties, if the parties do not bring forward all the demands which might have been consolidated into one action or defense, then such demands, thus neglected to be exhibited, shall not be foundation of a future action. To give a construction to this section, that the commencement of a suit without a trial and judgment, should bar the claims of both parties, would be productive of the greatest injustice. To illustrate this position, we will suppose the following case: A plaintiff commences an action before a justice, and on the trial discovers that his testimony is insufficient to support his action, and he submits to a non-suit. This he clearly may do, and then bring a new suit for the same cause of action, and upon sufficient proof recover his demand. Can it with propriety be insisted if the judgment of non-suit in the supposed case does not bar the demand sued on, that it can have the effect to sue a demand not exhibited before the magistrate,—and even bar a demand of the defendant, that he has had no opportunity to litigate? These would be the absurd consequences of deciding that the parties must bring forward all their demands upon pain of forfeiting them if a suit be commenced, whether that suit result in a final judgment or not. Such consequences were never intended, and consequently we are bound to give this statute such a construction as will effect the objects contemplated by the legislature. These objects are accomplished by construing the statute to mean, that where a suit is brought before a justice, which terminates in a final judgment on the merits, there both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case. The

dismissal of the case first tried by the justice, was in effect a non-suit, and did not bar the bringing of a new suit for the same cause of action, and consequently could be no bar to bringing another suit for a different cause of action.(1)

The judgment is therefore affirmed with costs.

Judgment affirmed.

(1) Carson *vs.* Clark, *Ante* 113.

JOHN DEDMAN, appellant *v.* LEVI WILLIAMS, appellee.

Appeal from Hancock.

One man cannot, by his own voluntary act, make himself the creditor of another.
One co-partner or co-purchaser, can in no case recover in an action for money paid, against his co-partner or co-purchaser, until the money has actually been paid; nor then until the time for payment has arrived.
The giving of a note is no payment.

THIS cause was tried at the August term, 1834, of the Hancock Circuit Court, before the Hon. Richard M. Young.

A. WILLIAMS, for the appellant.

T. FORD and J. W. WHITNEY, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action brought before a justice of the peace, by Williams against Dedman, for money paid by Williams for the use of Dedman. On the trial before the justice, a judgment was rendered in favor of Williams for $72,37 1-2. The cause was brought by appeal into the Circuit Court of Hancock county, where it was tried before a jury, and judgment for $76,38 recovered. On the trial in the Circuit Court, the plaintiff below proved in substance, that one Whitney and others purchased a number of cattle at an administrator's sale, for which they gave their notes to the administrator. That afterwards the plaintiff and defendant, with another person, purchased half of said lot of cattle of Whitney and others, paying them $30 for their bargain, and agreed to give their note in lieu of said Whitney's note to said administrator, he agreeing to accept plaintiff's and defendant's note with security, for one half of the amount of Whitney's note, which had been given for the original purchase money. That after the purchase made by plaintiff and defendant, and the agreement of the administrator to take plaintiff's and defendant's note for half of the purchase money as aforesaid plaintiff and defendant took possession of the half of said lot of cattle, as their joint property. It was also proved that plaintiff and defendant

were to execute their note to said administrator, at some convenient time. That shortly after these contracts, Dedman started with the cattle to Galena, to sell them on the joint account of plaintiff and defendant; that during the absence of Dedman, Williams gave his note with security to said administrator, for the price of said cattle, so purchased of the said Whitney. And the said Whitney upon the surrender of the original note, executed his note to said administrator for the other half of the original purchase money for the cattle bought at said administrator's sale. That when Dedman returned from Galena, he divided with Williams the proceeds of the sale of the cattle. The administrator testified that he held and considered Dedman liable to him on the promise to give his note, and that he had not released him. On this state of the case, Williams brought his suit against Dedman, to recover one half of the amount for which plaintiff and defendant had agreed to give their joint note with security to said administrator. Some irrelevent testimony was also produced, which it is not necessary to notice. After the plaintiff, Williams, had concluded the testimony as above detailed, Dedman's counsel moved the Court to instruct the jury to find for the defendant, as in case of a non-suit, which motion, after argument, was overruled by the Court. After this motion was overruled, testimony was introduced by defendant, and other instructions were asked; but from the view taken of the cases it will be unnecessary to notice any other point except the question whether the Court ought to have instructed the jury that the plaintiff was not entitled to recover upon the evidence that he had adduced?

What was the character of the contract between the plaintiff and defendant? They purchased of Whitney a lot of cattle, and paid him $30 down, and for the remainder of the purchase money, agreed to give their joint note to an administrator, at whose sale Whitney had purchased the same cattle. When the note was to be made payable, does not appear from the testimony. It is, however, a fair presumption that some time was to intervene before it became due. Can then, one of two joint purchasers of property, on a credit, before the time of credit has expired, by giving his individual note for the purchase money, immediately sue his co-purchaser for his proportion of the joint debt? We think not. The rule of law is well settled, that one man cannot make himself, by his own voluntary act, the creditor of another. The relation that existed between Williams and Dedman, by the purchase of the cattle, was that of joint owners or partners, not that of debtor and creditor to each other. Both were bound, when the time of payment arrived, to make payment either to Whitney or to the administrator; and neither could, by any act of his own, coerce payment from the other until the time of pay-

ment for the cattle had arrived. Nor would it vary the result of the case, if the time of payment for the cattle had elapsed when this suit was brought. The giving the note by Williams for the property purchased for the joint use of himself and Dedman, was no payment so far as Dedman was concerned. Dedman was certainly bound to pay his moiety for these cattle, either to Whitney or the administrator of whom Whitney purchased. If his promise to give his note to the administrator, should be void under the statute of frauds, upon which point it is unnecessary to give an opinion, he would still be bound to pay Whitney, of whom he and Williams made the purchase. As we, however, consider the law well settled, that one co-partner or co-purchaser can in no case recover in an action for money paid, against his co-partner or co-purchaser, until the money has actually been paid, nor then until the time of payment has arrived, we are of opinion that the instruction ought to have been given.[a] Had the instruction been given, the plaintiff would doubtless have submitted to a non-suit. This Court, therefore, reverse the judgment below, and render such judgment as ought to have been rendered, to wit, a judgment as in case of non-suit with costs.

Judgment reversed, and judgment of non-suit rendered.

(a) But see McConnell *vs.* Stettinius, 2 Gil. R. 713; Ralston *vs.* Wood, 15 Ill. R. 171, and notes.

JOHN GALLIPOT, *ex dem.* JOHN BRUNER, plaintiff in error *v.* JONATHAN D. MANLOVE and MOSES MANLOVE, defendants in error.

Error to Schuyler.

Where two patents have issued for the same lands to different persons, at different times, the elder patent is the highest evidence of title, and, so long as it remains in force, is conclusive against a junior patent.

A patent cannot be impeached by parol, in an action of ejectment.

The certificate of the Register of a Land Office, of the purchase of a portion of the public lands of the U. S., is, under the statute of this State, of as high a character in point of evidence as a patent, in an action of ejectment; and is to be governed by the same rules of interpretation. The elder certificate is conclusive against a subsequent one.

THIS was an action of *ejectment* tried at the October term, 1834, of the Schuyler Circuit Court, before the Hon. Richard M. Young.

The cause was submitted to a jury, and the jurors not being able to agree upon their verdict, were discharged, by consent of parties, and the following agreement entered on the records of the Court:

"In this case, the jury having been out and returned to the

Court, and reported that they could not agree upon a verdict, thereupon the parties agree that the jury be discharged, and that a judgment may be entered against the plaintiff in the same manner, and be placed in the same situation, as to both parties, that the case would have been, if the jury had found a verdict against the plaintiff, and the said judgment had been rendered thereon. And the cause is to stand in all respects as though a trial had been had, and a verdict given against the plaintiff; and this agreement shall be entered upon the records of this Court, and made a part thereof.

JOHN GALLIPOT,
By B. McCONNELL, his Attorney,
WALKER & MINSHALL,
Atorneys for defendants,

Upon the trial in the Court below, the following bill of exceptions was taken:

"The plaintiff in this cause, proved the possession by the defendants, and produced the following certificate of the Register of the Land Office, and proved the handwriting of the Register, and offered the same in evidence to the jury, which was objected to by the defendants, which objection was overruled by the Court, and the certificate read as evidence by the plaintiff, to which opinion of the Court, the defendants by their counsel except: the said certificate is in the words and figures following, to wit,—

'LAND OFFICE, SPRINGFIELD, ILLINOIS,
November the 3d, 1834.

I, William L. May, Register of the Land Office at Springfield, Illinois, certify that on the third day of August, eighteen hundred and thirty, John Bruner purchased of the United States, at this office, the North West quarter of Section thirty of Township two North, of Range one West of the fourth principal meridian, as appears from the records on file in this office.

WILLIAM L. MAY, Reg'r.'

The defendants then offered in evidence the certificate of the Register of the same Land Office, which was objected to by the plaintiff, which objection was overruled by the Court, and the said certificate permitted to be read as evidence. The said defendants then offered in evidence a duplicate receipt from the Receiver of said Land Office for said land, dated the 29th day of January, 1831, which was objected to by the plaintiff, which objection was overruled by the Court, and said duplicate receipt was read as evidence. Said duplicate receipt from the Receiver, and said certificate of the Register, is in the words and figures following:

'RECEIVERS' OFFICE, SPRINGFIELD,
No. 4654. January the 29th, 1831.

Received from Jonathan D. and Moses Manlove, Schuyler county, Ill., the sum of one hundred and ninety-seven 60-100 dollars, being in full for N. W. qr. of Section No 30, Township No. 2 North, Range No. 1 W. 4th pl. Mer'd. containing 158 08-100 acres, at the rate of $1.25 pr. acre.

Pre-emption Act, 1830. JOHN TAYLOR, Receiver.'

$197 60-100.

'LAND OFFICE, SPRINGFIELD, ILLINOIS,
September 19th, 1834.

I, William L. May, Register of the Land Office at Springfield, Illinois, do hereby certify that Jonathan D. Manlove and Moses Manlove, of Schuyler County, Illinois, did on the 29th day of January, one thousand eight hundred and thirty one, purchase of the United States, at the Land Office aforesaid, by virtue of the provisions of an act of Congress approved on the 29th of May, 1830, entitled "*An act to grant pre-emption rights to the settlers on the public lands*," the North West quarter of Section number thirty, in Township number two North of the base line, in Range number one West of the fourth principal meridian, containing one hundred and fifty eight acres and eight hundredths of an acre; all of which facts appear of record in the books on file in this office.

Given under my hand the day and date above written.

WILLIAM L. MAY, Register of the
Land Office at Springfield, Illin's.'

The defendants then offered to prove that the defendants were in possession of the land in question, and cultivated the same several years before the purchase of said land, either by Bruner or the defendants, which was objected to by the plaintiff, which objection was overruled by the Court, and the witness produced and sworn, who testified that said defendants had been in possession and cultivated said land for seven or eight years, except a part of the time they had been a trip to the Mines out of Schuyler county, but what time they were at the Mines, witness did not recollect.

To the opinion of the Court in admitting said evidence, the plaintiff excepts. The testimony being closed, and the argument of the counsel heard, the plaintiff moved the court to instruct the jury as follows, to wit,—

1st. That the certificate of the Register of the land Office, showing a sale of the land to John Bruner, in August, 1830, was evidence of title in the plaintiff, until a better, legal and paramount title be exhibited.

2. That the certificate of the Register and duplicate of the

Receiver of the Land Office at Springfield, showing a sale of the same land in question to the defendants, by the United States, after said sale of said land to Bruner, is not a better, legal and paramount title for said land to defendants.

3d. That the first sale and conveyance of a tract of land by the United States, must prevail in a court of law, against any subsequent sale and conveyance of the same land to a third person.

Whereupon the Court gave the instructions numbers one and three, as prayed for, and refused to give instruction number two, to which opinion of the Court, in refusing to give said last mentioned instruction, the plaintiff excepts. The defendants then moved the Court to give the jury the following instructions, to wit,—

1st. To entitle the plaintiff to recover, he must prove that he had such a title to the land before he instituted his suit, as by law is deemed, in the action of ejectment, a legal title, and paramount to defendants' title.

5th. That if the jury finds for the defendants, and the plaintiff Bruner gets a patent for the land in dispute, he may bring another action against the defendants, and the present action is no bar to such further suit, (the 1st, 2d, 4th and 6th instructions asked by defendants were refused,) which instructions were objected to by the plaintiff, which objections were overruled by the Court, and the instructions given to the jury. To which opinion of the Court the plaintiff excepts; all of which several exceptions, and this bill of exceptions, the plaintiff now prays may be signed and sealed by the judge and made a part of the records in this case.

Let the same be so.

Done in open Court, November term of the Schuyler Circuit Court, A. D. 1834.

RICHARD M. YOUNG, [L.S.]
Circuit Judge, &c. &c.

The cause was brought to this Court by a writ of error.

The errors assigned, are,—

1. The Court erred in permitting to be read to the jury as evidence, the certificate of the Register of the Land Office at Springfield, Illinois, showing a sale of the land in question in January, 1831, to said Manloves.

2. The Court erred in permitting the defendants to prove that they were in possession of, and cultivated said land prior to the sale of the said land by the United States to the John Bruner, as shown by the certificate of the Register of the Land Office at Springfield, Illinois.

3. The Court erred in refusing to give the second instruction

as prayed for by the plaintiff, and in refusing to give the instruction as asked by the plaintiff.

4. The Court erred in giving the instructions prayed for by the defendants.

The defendants refused to join in error, and the cause was heard *ex parte*.

Murray McConnell, for the plaintiff in error, cited R. L. 280; (1) Jackson *v.* Lawton, 10 Johns. 23; Jackson *v.* Hart 12 Johns. 81: 2 Harris and McHenry's 141–4; 3 Story's Laws 1976.

Smith, Justice, delivered the opinion of the Court:

This was an action of ejectment brought to recover possession of the North West quarter of Section 30, Town 2 North, of Range 1 West of the 4th principal meridian, lying in the county of Schuyler. A verdict was rendered for the defendant. On the trial, the plaintiff offered in evidence, a certificate of the Register of the United States' Land Office at Springfield, in this State, dated November 3d, 1834, by which it was declared, that on the 3d day of August, 1830, John Bruner purchased of the United States, at the said office, the land in question, as appeared from the records on file in said office, which was objected to, but admitted by the Court, the hand writing of the Register being proved. The plaintiff also proved the possession of the land by the defendants. The defendants then offered in evidence, which was objected to by the plaintiff, a duplicate receipt of the Receiver of public moneys at Springfield, dated 29th of January, 1831, which expressed to have received of the defendants the sum of $197,60, being in full for the same land; also a certificate of the Register of the said Land Office, dated 19th of September, 1834, which declared, that on the 29th of January, 1831, the defendants purchased of the United States, at the said Land Office, by virtue of the provisions of an act of Congress, approved on the 29th of May, 1830, entitled "*An act to grant pre-emption rights to settlers on the public lands*," the same tract of land which appeared of record in said office. The Circuit Court admitted, notwithstanding the objection of the plaintiff, the last two certificates to be read in evidence. The defendants were also permitted to prove, notwithstanding the objection of the plaintiff, that the defendants were in possession of the land in question, and cultivated the same several years before the purchase of the land, either by Bruner or the defendants, except a portion of time when they had been out of the county, at the Mines—but how long a time the witness could not state. Several sets of instructions were prayed for and either given or refused. But it is not deemed essential to refer to more than

(1) Gale's Stat. 287.

one asked for the plaintiff's counsel, and refused to be given by the Court, viz: the 2d, "That the certificate of the Register and duplicate of the Receiver of the Land Office at Springfield, showing a sale of the same land in question to the defendants by the United States, after said sale of said land to Bruner, is not a better, legal and paramount title for said land to defendants."

On this state of the case, three questions seem naturally to arise out of the evidence, on the second instruction prayed for:

1st. What is the rule in reference to the conveyance by the government of the United States of its land, where there are two sales and conveyances of the same land to different persons, and at different periods of time?

2d. What is the character and effect, and what the extent of the rights of the parties, derived from the certificates of the United States' Land Officers, by the laws of this State?

3d. Was the refusal of the Court to give the instruction prayed for by the plaintiff's counsel, an error?

On the first point, we presume that a patent for land, or any mode of sale adopted by the government for the disposition of the public domain, must be subject to the same rules of interpretation as ordinary cases. It will not, we apprehend, be for a moment contended to be otherwise. What then is the rule where two patents have issued for the same lands, to different persons, at different times? The elder patent is the highest evidence of title, and as long as it remains in force, it is conclusive against a junior patent. The second patent is inoperative and void, if the land passed by the first patent.

It is the almost universal rule of our courts, to look to the elder patent in all questions of title, and to give it effect. It is not for the Court to look to any equitable claim on the general government which a third party might have in respect to lands conveyed to another person prior to the issuing the patent.(1)[a]

The elder patent must be impeached and vacated, before any title can be set up under the younger one, and it cannot be impeached by parol proof in such an action as the present. Letters patent are matter of record; they can alone be avoided in chancery by a writ of *scire facias* sued out on the part of the government or by some one prosecuting in its name, or by a bill in chancery. The settled English practice is so, and we have no law or practice prescribing a different course. By an examination it will be found, that the authorities, both English and American, speak of the case of two successive patents for the same thing, and that the second patent is void, though some differ as to which shall pursue the remedy to vacate either. The better

(1) Jackson *ex dem.* Mancius *v.* Lawton, 10 Johns. 23; Jackson *v.* ————, 4 Johns. 163; Jackson *v* Hart, 12 Johns. 77, 81.

(*a*) Jamison *vs.* Doe &c., 3 Scam. R. 113; Rogers *vs.* Brent, 5 Gil. R. 573, and notes; Field *vs.* Seabury 19 How. U. S. R. 323 to 334; Browne *vs.* Pierce, 7 Wal. U. S. R. 205.

construction, however, and one more consonant to the nature of the case, seems to be, that the *scire facias* should be prosecuted by the second grantee, to avoid the first, it being a matter of record, or that he pursue his remedy by bill in chancery.(1)

In Virginia, by a law of that State, a patent may be declared void from defects appearing on its face, without the necessity of resorting to a *scire facias* to appeal it.(2) Considering then that the rule of law is as stated, in reference to two patents issued at different times, to different persons, for the same thing, we are necessarily led to the consideration of the second point, in which is to be examined the character and effect of the certificates of the Register and Receiver, and the rights of the respective parties under them.

By the 4th section of the act declaring what shall be evidence in certain cases, approved 10th January, 1827,(3) it is declared that "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 as 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, to recover 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 exhibited for the same." From this section of that act, it is manifest that the Register's certificate is raised to as high a character in point of evidence, in the present form of action, as a patent possibly could be. Its effect is to be the same, and the rights derived from it for the purpose of recovering or maintaining possession of lands described in it, are co-extensive with the most formal, regularly issued patent.

These certificates not only vest the title acquired by purchase from the government in the purchaser, for the purposes named, but make that title transmissible to the heir or to the assignee. For any purpose, then, so far as regards the character of these certificates as evidence in an action of ejectment, they must be considered of as high dignity as patents, and partaking of all their legal attributes. Having settled their character and effect, the rights of the parties under them must be governed by the same rules of interpretation as in the case of patents. No reason can exist for an exception. There is, however, a point of some importance in the case, which seems not to have been adverted to by counsel in the Court below or here. The certificate of the Register given to Bruner, shows the fact that the land was pur-

(1) King v. Avery, 2 Term R. 515; Daniel's case, Dyer 133.
(2) Alexander v. Greenup, 1 Munf. 134; R. C. of Virginia, of 1819, vol. i. 466.
(3) R. L. 280; Gale's Stat. 287.

chased after the passage of the pre-emption law. But whether the defendants established their right to the pre-emption at the Land Office, before or after the purchase by Bruner, does not appear in the case. We might presume it was subsequent thereto, and at the time of the payment of the purchase money; but the Register's certificate is given on the 19th September, 1834, and recites that the purchase was made in pursuance of the act of the 29th May, 1830. But the Receiver's certificate negatives the idea of its being a pre-emption purchase by defendants, for there is no recital in the Receiver's certificate that it was so purchased.

Whether in pursuance of the act of Congress of the 29th May, 1830, the defendants acquired a previous right of purchase of the land in question, we have no means of determining, except so far as the certificate of the Register of the Land Office may lead to such conclusion. But on the other hand, the certificate of the first purchase in August, 1830, by Bruner, is equally as conclusive that the government would not have sold land to which the defendants had a pre-emption right of purchase. The certificate, however, being placed on the same ground as an actual patent for the purpose of evidence in this action, we are bound to consider the first as conclusive until vacated.(1) Whether the same solemnities and forms of proceeding are to be observed to vacate it as in the case of a patent, is a question we are not now called on to determine. That it could not be contradicted by parol, is, however, certain. It would require, we should suppose, some legal proceedings to be had before it could be vacated. Whether there might be sufficient cause to do that, is also a matter not before the Court for its decision. We can know nothing of the merits of such a matter at this time.

The third point is easily settled. The principles here laid down as to the character and effect of the first certificate, and the rights of the party under it, determine the refusal of the Circuit Court to have been erroneous in refusing the instruction asked. The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to the Circuit Court to award a *venire de novo*, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

(1) See note to the case of Jackson *ex dem* McConnell *v.* Wilcox. *Post*. 280.

WILLIAM L. BERRY, plaintiff in error *v.* JOHN P. WILKINSON and ELIHU WOLCOTT, defendants in error.

Error to Morgan.

Reasonable notice must be given to the adverse party, of a motion for a change of venue. The length of time necessary to constitute reasonable notice, will in some degree depend upon the peculiar circumstances of each particular case, and must necessarily be left to the legal discretion of the judge or court to which the application is made.

THIS writ of error was brought to reverse a decision of the Hon. Samuel D. Lockwood, made at the October term, 1834, of the Morgan Circuit Court.

M. MCCONNELL, for the plaintiff in error.

WM. THOMAS, for the defendants in error.

WILSON, Chief Justice, delivered the opinion of the Court:

On the third day of the last October term of the Morgan Circuit Court, the plaintiff in error gave notice to the plaintiffs below, the defendants in error, that he would apply to the Court for a change of venue in this cause, and several days afterwards he made the application, founded upon an affidavit setting forth that the plaintiffs had an undue influence over the minds of the inhabitants of Morgan county, and that the inhabitants of said county were prejudiced against him, so that he did not expect a fair trial in that county. The Court overruled the application for a change of venue. To which opinion the plaintiff in error excepts, and assigns the refusal of the Court to grant his motion, as the ground for the reversal of this case.

The statute that authorizes a change of venue for causes therein enumerated, requires that *reasonable* notice of an application to the judge or court for such purpose, shall be given to the adverse party, or his attorney. The length of time necessary to constitute reasonable notice, will in some degree depend upon the peculiar circumstances of each particular case, and must necessarily be left to the legal discretion of the judge or court to which the application is made. In this case, the Court in the exercise of that discretion, decided the notice to be insufficient; and we are not satisfied that the decision is not warranted by the circumstances of the case. For aught that appears in the petition, the existence of the prejudice of which the defendant below complains, may have been known to him for months before the term. If such was the fact, and it may be inferred from the contrary not being averred, the Court might very properly say that notice during the term of the Court, after the plaintiffs had incurred the

expense of a preparation for trial, was not such reasonable notice as the statute contemplated.(1)[a]

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

(1) See note to the case of Clark *v.* The People. *Ante* 117.

(*a*) Barrows *vs.* People, 11 Ill. R. 122; Hunt *vs.* Giles, 21 Ill. R. 639; Moss *vs.* Johnson, 22 Ill. R. 636; Kelly *vs.* Downs, 29 Ill. R. 74.

Samuel Swafford, appellant *v.* George Dovenor, appellee.

Appeal from Franklin.

A bill of exceptions cannot 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 misdirecting a jury on a point of law.

The matter or decision excepted to, must have arisen during the progress of the cause, and before final judgment.

A bill of exceptions will not lie to the final judgment of a court, where the whole case is submitted to the court for decision, and a jury dispensed with.

This cause was tried before the Hon. Thomas C. Browne, at the April term, 1834, of the Franklin Circuit Court.

Walter B. Scates, for the appellant.

Baker, for the appellee.

Smith, Justice, delivered the opinion of the Court:

This was an action of *debt* upon a note, instituted before a justice of the peace, in which the appellee recovered judgment for $22,50. By appeal it was taken into the Circuit Court, and there tried by the Court without the intervention of a jury, and the judgment of the justice of the peace affirmed. The cause is brought by appeal to this Court. A bill of exceptions was taken to the judgment of the Circuit Court, on the evidence adduced before that Court, and this Court is now called on to say, whether on that evidence, the Circuit Court ought to have given judgment for the plaintiff in the Court below.

It is conceived that an important question of practice is now presented, involving the refusal or sanction of the Court to the mode and time of taking the bill of exceptions in the cause, as also the character and matter therein contained, and by which the future practice in relation to appeals from the decisions of justices of the peace, retried in the Circuit Court, is to be settled. Whatever may have been the practice heretofore, in reference to cases of this character, by presumed assent of the parties, because the point has not been heretofore raised, it furnishes no reason or argument if it be intrinsically wrong and improper in itself, for its further continuance. The cases heretofore decided in this

Court, referred to in support of the practice, and which it is supposed sanction the form of the proceedings, are very far, it is conceived, from so doing. The strongest and most relied on, is the case of Johnson *v.* Achles, decided in June term, 1825. (1) By an examination of that case, it will be perceived, that the only point there decided, was, that a bill of exceptions might be signed at the term to which the case had been continued, after the hearing and trial, and when judgment was given. As no judgment was given at the term at which the cause was tried, the Court there say, that the party had no knowledge whether a bill of exceptions would be required to be signed, and that they had no opportunity of taking it sooner. It is also said, that the trial of appeals is an anomaly in the law, and the rule of taking bill of exceptions in ordinary trials by jury, cannot apply. It could never have been the intention of the Court in that case, to say, that matter to which a bill of exceptions could not lie, according to the well settled principles of law, might be excepted to because the trial of appeals was an anomaly. It must have been its intention to confine it to the time and manner of taking the bill of exceptions, and not to the matter contained in the bill. The question was not then presented, as it now is, whether a bill of exceptions will lie to the judgment of the Court on the evidence. There is nothing in the case decided, which touches on the present point, and we cannot perceive that the present question can touch that case, or the decision now made in any way conflict therewith. What then is the case now presented, and by what principles and rules should it be governed? To understand those principles and rules, we must inquire in what cases a bill of exceptions lies. "A bill of exceptions cannot 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. This is the rule laid down by the Court in the case of Clemson *v.* Kruper.(2) In the case before us, there was no exception for receiving improper testimony, or rejecting proper testimony, and as there was no jury, of course there could be no misdirection of them. The party did not demur to the evidence, and ask the judgment of the Court, whether in law it was sufficient to authorize a recovery; nor can it be assimilated to such a proceeding, because the exception is taken after the final judgment of the Court. The exception goes to the judgment of the Court on the evidence in the cause, and is taken after its final judgment. Can it be that an exception will lie in such a case? The rule is universal, that an exception will only lie in the cases named, and that the matter or decision excepted to, must have arisen during the progress of the cause, and before final judgment. As well

(1) Breese 59 (2) Breese 162

might a motion be sustained to arrest a judgment after its final rendition. Although it is true that the Court act in the *quasi* character of a jury, yet as its whole decision on the facts, and the judgment of the law arising on those facts, is given at one and the same time, it seems wholly irregular to admit that because it is so, a bill of exceptions ought to lie.(1) The argument of inconvenience, which it is said will arise from an adherence to the rules regulating the taking of bills of exceptions in such cases, is not really founded in justice, because the party has only to require a jury trial and all difficulty vanishes. If by his own act and consent, he chooses to submit the decision on the facts and the law to the Court, it is an inconvenience of his own selection. During the trial he has a right to object to the admission of improper evidence, and to insist on the admission of proper evidence, or of moving for a non-suit for want of evidence, and if the Court err in such case, he may except to the opinion of the Court, and have the error corrected, if there be one. It is of infinite importance that innovations on the rules of proceedings should not be sanctioned, and that those which are found after long use and practice, to be best adapted to the correct determination of causes, should be adhered to. For these causes we are of opinion that the judge might have refused properly to have signed the bill; but because he has not done so, it does not necessarily make the matter excepted to proper, nor legalize the manner of doing it.

Suppose, however, the Court should consider the bill of exceptions regularly taken, and should also be of opinion that the judgment of the Court should be reversed; then it would have also to order a new trial, and make thereby this mode of proceeding virtually an exception for not granting a new trial.

On the evidence contained in the bill of exceptions, there can be no doubt that the judgment of the Court was warranted. On the question of the inadmissibility of bills of exceptions in cases like the present, as well as on the merits of the case, the judgment must be affirmed with costs.

Judgment affirmed.

(1) Since the decision of this case, an act has been passed giving the right to except to the final judgment of the Circuit Courts in cases where parties agree that both matters of law and fact may be tried by the Court. Act of July 21, 1837: Gale's Stat. 540.(*a*)

(*a*) Metcalf *vs.* Fouts. 27 Ill. R. 110.

ROBERT SANDS, appellant *v.* THOMAS DELAP, appellee.

Appeal from Schuyler.

A justice of the peace has no jurisdiction of a demand exceeding one hundred dollars but reduced below that sum by unfair or feigned credits.
Nor has a justice of the peace under the statute of 1827, jurisdiction in any case where he would necessarily have to investigate an account exceeding one hundred dollars.

THIS cause was tried at the June term, 1834, of the Schuyler Circuit Court, before the Hon. Richard M. Young, and a judgment was rendered for the appellee for $80.19, from which an appeal was taken to this Court.

S. BREESE, for the appellant.

T. FORD, for the appellee.

SMITH, Justice, delivered the opinion of the Court:(1)

Delap brought a suit before a justice of the peace, on an account comprising various items of labor performed on the lands of Sands, which Delap had occupied without the consent of Sands. The labor had been rendered without the request of Sands, and when he resided in another State. Delap on his account made a credit of $50, in the words of the account "by way of rent on said improved land." On the trial before the justice of the peace, Sands moved to dismiss the suit, because the justice had not jurisdiction thereof, the account being over $100, and not reduced by fair credits. A motion to nonsuit the plaintiff in the Circuit Court, was also made, but overruled. It is unnecessary to consider any other point raised in the cause, than the one of jurisdiction.

The case comes directly within the principles and reasons of the decisions in the cases of Clark *v.* Cornelius,(2) Ellis *v.* Snyder,(3) and Blue *v.* Wier and Vanlandingham.(4) This Court decided in the last case, in accordance with the decision in other enumerated cases, that the statute of 1827, giving jurisdiction to the justices of the peace in civil cases, did not authorize a justice to entertain jurisdiction where the account was open and unsettled, and the whole amount of the account of either party exceeded $100.(5) This is precisely the case here;—the appellee claims $130,19, and gives a credit of $50, for rent supposed due

(1) WILSON, Chief Justice, did not sit in this cause.
(2) Breese 21. (3) Breese 263. (4) Breese 293. (5) See the case of Hugunin *v.* Nicholson, decided December term, 1839, *Post*. 575, where it is held that under the act of March 2, 1833, a justice of the peace has jurisdiction in cases where the original indebtedness exceeds one hundred dollars but has been reduced below that sum by fair credits. See also note to Simpson *v.* Rawlins. *Ante* 29.

for lands, which from the case, it must be evident, he had never occupied with assent of the appellant.

The relation of landlord and tenant no where appears by the evidence in the cause, but the fair inference is that he was an intruder on the lands. But the credits as in the case last referred to, were made by the party himself, when in truth he paid nothing to Sands, for the purpose of merely gaining, as he supposed, a jurisdiction for the magistrate. It is evident it was not a *bona fide* credit. There could have been no ascertaining of a balance between the parties as contemplated by the statute. To ascertain this balance, the justice had necessarily to investigate an account much exceeding $100, and consequently therein greatly exceed his jurisdiction by assuming it.

The judgment of the Court below is reversed for want of jurisdiction.

Judgment reversed.

John White and David Barnes, appellants *v.* Wm. Wiseman, appellee.

Appeal from Hamilton.

A bill of exceptions will not lie to the final judgment of the Circuit Court in a case where the cause is tried without a jury.

W. B. Scates, for the appellant.

W. J. Gatewood, for the appellee.

Smith, Justice, delivered the opinion of the Court:

This is the case of an appeal from a justice of the peace to the Circuit Court, and from the Circuit Court of Hamilton county to this Court. The cause was tried in the Circuit Court without a jury. The appellants, who were defendants in the Circuit Court, took an exception to the judgment of the Circuit Court on the evidence in the cause, on the day after the rendition of the final judgment. It will be perceived that this cause comes directly within the principles of the decision in the case of Swafford *v.* Dovenor, decided at this term, that no bill of exceptions lies to the judgment of the Circuit Court.(1)

The judgment is necessarily affirmed with costs.

Judgment affirmed.

(1) See note to the case of Swafford *v.* Dovenor. *Ante* 165. and notes.

JOHN HUTSON, appellant *v.* JOHN OVERTURF, appellee.

Appeal from Franklin.

A promise made by a vendee of public lands, after the purchase of the same of the United States to pay for improvements made upon the same previous to the purchase, is without consideration and void.

The statute of 1831, in relation to the sale of improvements upon public lands, has no application to a promise made by a purchaser of a portion of such lands after such purchase, to pay for improvements made upon the same while it belonged to the United States. It applies only to contracts respecting the sale of improvements which at the time the contract is entered into, are on the land owned by the government.

THIS cause was tried at the April term, 1834, of the Franklin Circuit Court, before the Hon. Thomas C. Browne. A judgment was rendered for the appellee for $40 and costs, from which an appeal was taken to this Court.

W. B. SCATES, for the appellant, cited Comyn on Cont. 2, 7, 8–13, 14–17, 18, 19 and note, 24, 59; Chitty on Cont, 2–16 and authorities there cited, 215–232. 2 Blac. Com. 442–445 and notes 8, 9, 10; 3 Bos. and Pul. 249 note, and 419 note; Carson v. Clark, Ante 113; Noy's Maxims 24; 2 Kent's Com. 463–468; R. L. 483, § 5; U. S. Land Laws No. 133, p 551—No. 216, p. 677—No. 305, p. 716; 4th Art. of Ordinance admitting Illinois into the Union; Carth. 252; 1 Taunt. 136; 5 Barn. and Ald. 335; *Exparte* Dyster, 2 Rose Bkft. Cas. 351; 1 H. Black 65.

D. J. BAKER, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This was an appeal from the judgment of a justice of the peace to the Circuit Court. In that Court the judgment was affirmed in favor of the plaintiff below, Overturf. From this decision Hutson appealed to this Court. From the bill of exceptions taken in the case, it appears Houston purchased from the United States, in May, 1833, eighty acres of land upon which Overturf had made an improvement before the sale by the United States to Hutson; that in September following, Hutson told Overturf he would give him forty dollars for the improvement he had made upon the land. Respecting this part of the case, the evidence is inconclusive and contradictory; but it is clear that the only consideration for whatever promise Hutson made, was the improvement upon the land of which he at the time was owner. This case comes clearly within the principle of the case of Carson v. Clark, decided by this Court at the last term.(1) In that case the Court decided that a promise made by a vendee, after

(1) *Ante* 113.

the purchase of land from the government, to pay for improvements made upon the land previous to the purchase, was a promise without consideration, and therefore void. It is contended, however, that the statute relative to contracts for the sale of improvements on public land approved Feb. 15th, 1831,(1) has changed the principle of the common law, and made valid that class of contracts respecting improvements on public land, which before its passage were void for want of a sufficient consideration. It is not necessary in this case, to inquire whether that statute has changed the principles of the common law upon this subject, or if it has, to what extent. This case is not within its provisions. The statute declares all contracts and undertakings entered into in good faith for the sale or payment of improvements made on land owned by the government of the United States, to be valid and binding. This provision applies only to contracts respecting the sale of improvements which at the time the contract is entered into, are on the land owned by the government. The contract in this case, as the bill of exceptions shows, was not for an improvement thus situated. The land upon which it was made, did not at the time of the contract, belong to the government, but on the contrary was owned by Hutson, who had previously purchased it of the United States. His promise, then, to Overturf, to pay for that of which he was already the owner, was void at common law, for want of consideration, and is not made obligatory by the statute relied upon.[a]

The judgment of the Circuit Court is therefore reversed, and judgment rendered for Hutson, the appellant, for costs.

Judgment reversed.

(1) R. L. 420; Gale's Stat. 431.

(a) *Post*, 396; But see L. 1845 p. 617 sec. 2. Taylor *vs* Davis, 11 Ill. R. 12.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

JUNE TERM, 1835, AT VANDALIA.

Note. At this term Justices LOCKWOOD and BROWNE were not present.

DANIEL BLEVINGS, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Jefferson.

Where the defendant pleaded guilty to an indictment for burglary, and the Court sentenced him to be imprisoned in the penitentiary for eighteen months: *Held*, that the proceedings were regular.

The words in "all cases" in § 158 of the Criminal Code, apply only to all cases tried by a jury.

Where a prisoner pleads guilty on an indictment for burglary, the Court should fix the time for which he is to be confined in the penitentiary.

W. B. SCATES, for plaintiff in error.

J. B. THOMAS, Jr., Attorney General, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

This was an indictment for *burglary* found at the September term of the Jefferson Circuit Court, 1834.

At the March term, 1835, the plaintiff in error was arraigned on the indictment, and thereupon plead guilty. The Court sentenced him to imprisonment in the penitentiary for the space of one year and six calendar months, sixteen months to hard labor, and the last two months to solitary confinement. To this judgment the plaintiff excepted.

The only question submitted to the Court for its determination by the errors assigned, is, whether, in the present case, the prisoner having pleaded guilty, the Court, upon the recording of such plea of confession of guilt, shall pronounce the judgment of the law, and sentence the party to imprisonment in the penitentiary, or whether our Criminal Code has omitted to provide for the punishment of offenders in such cases, and left the Court entirely powerless, because the conviction of the party is rendered on his confession, and not on the verdict of a jury, who may have found his guilt.

It is admitted that at common law, in all criminal cases, juries were empanelled to find the facts only, except perhaps in some cases of special jurisdiction; that they never were invested with the power of determining the character or extent of the punishment to be awarded for the perpetration of the crime. But in considering the present question, we are to be governed entirely by the provisions and enactments of our code of criminal jurisprudence; and if it shall satisfactorily appear from it, that although in cases where the guilt of the party in a criminal trial has been ascertained and pronounced by the verdict of a jury; that jury are, where the punishment shall be by confinement in the penitentiary, to determine in their verdict for what term the offender shall be confined; that the Court have, in all cases where the party indicted shall plead guilty, the express power conferred on it to proceed to render judgment and execution therein, as if the party had been found guilty by a jury; then it will not be contended that the sentence and execution thereon have been erroneous. Now, although it is certain that in the 158th section(1) of the Criminal Code it is expressly provided that in all cases where the punishment shall be by confinement in the penitentiary, "the jury shall say in their verdict for what term the offender shall be confined," still it is as clearly provided in the 173d section(2) of the same act, that in all cases where the party indicted shall plead guilty, such plea shall be received and recorded, and the Court shall proceed to render judgment and execution thereon, as if he or they had been found guilty by a jury. These two sections taken in connection with each other, do not stand in such a position of conflict as to destroy the power given to pronounce the judgment on the confession of guilt, and award the punishment provided by law. The words "in all cases," in the 158th section, must be intended to apply to all cases tried by a jury, for, if any other construction were given, it would lead to the absurd consequence of admitting that on a confession of guilt no punishment could be awarded, notwithstanding the express provision giving the power under the 173d section. The intention of the legislature is apparent; and

(1) R. L. 208; Gale's Stat. 229. (2) R. L. 212; Gale's Stat. 232.

even by a strict construction, the two sections may be fairly reconciled. There can be no doubt that the judgment was proper and warranted by law. The mode in which this case is before the Court, is not objected to by the counsel for the People, and the Court do not mean to say that it is regular, but they suggest whether the party ought not to have moved in arrest of judgment in the Court below.—This remark is made to preclude the idea of sanctioning the mode now adopted. Let the writ of error be dismissed.

Judgment affirmed.

THOMAS R. WILSON, plaintiff in error *v.* JOHN S. GREATHOUSE, defendant in error.

Error to Marion.

The return of a constable or other officer, should state the time when service of process was made.
The following return upon a summons, "Executed on the within defendant by his reading the within. Joseph Flinn, Const. M. C.," is insufficient and void.
Parol proof cannot be received to show when process was served, when the officer who made the service is dead.

THIS cause was tried at the March term, 1835, of the Madison Circuit Court, before the Hon. Thomas Ford.

SETH T. SAWYER, for the plaintiff in error.

WM. H. BROWN, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action prosecuted originally before a justice of the peace, and removed by appeal into the Circuit Court.

The defendant in error moved in the Circuit Court to reverse the judgment of the justice of the peace, which had been entered against the defendant, he not having appeared before the justice, on the return day of the process of summons, because of the insufficient return of the constable as to the service of the summons, which return as endorsed on the process was, "Executed on the within defendant by his reading the within, Joseph Flinn, Const. M. C." At the same time the plaintiff in error moved the Circuit Court for leave to show, by parol, that the constable who served the process was dead, and the service of the process was within the time required by law; and also that the defendant had admitted the service to have been in time. The Circuit Court refused the leave asked by the defendant, and reversed the judgment of the justice of the peace. To reverse the decision of

the Circuit Court on this state of the case, this writ of error is prosecuted.

To determine the correctness of the judgment of the Circuit Court, it is necessary to recur to the act creating the jurisdiction of justices of the peace, and prescribing the mode of emanation, and defining the time within which the service of process of summons shall be made. The 3d section(1) of that act declares that the summons shall be served at least three days before the time of trial mentioned therein, by reading the same to the defendant. It is apparent in the present case, that it would be utterly impossible, from the face of the return, to determine whether the process had been served within the time prescribed by the law or not, because no day or date is given by the return of the officer. The return is not even dated, and by which it might, if made three days before the return day of the process, have been perhaps inferred, that the service had been made in time. For aught that can be presumed, it might have been made on the return day of the process. The return should have shown distinctly the time of service, so that the justice could have determined whether the service was regular, and within the time prescribed by law. It is proper that ministerial officers, like sheriffs, constables, and others charged with service of process, should state clearly the time and manner of serving such process, and no plea of inconvenience resulting to others from their neglect should dispense with its performance. It is essential to the exercise of all jurisdiction rendering judgments or decrees affecting the persons or property of individuals, where the proceeding is by summons directed to the defendants, that they should have indisputable evidence before them, that the party to be affected by their judgments or decrees, is regularly before them, otherwise their proceedings are *coram non judice;* consequently irregular and void. This appearance must be either actual or constructive. Now, where there is no evidence that the process by which the party is to be called before the Court, has been duly served, according to the law prescribing the time and manner of such service, can it be contended that a judgment may be rendered against such party by default, and execution issue against him?

The plaintiff, in a case where the defendant does not appear, proceeds at his peril; he is bound to see that all antecedent proceedings are regular, and if they are not, he necessarily consents to meet the consequences of such irregularities. It is manifest in the present case, that there was no evidence of the time of the service of the process of summons on the defendant, and as he did not appear before the justice, he has waived nothing on the score of irregularity.

(1) R. L. 387; Gale's Stat. 403.

The cross motion for leave to show, by parol, the time of service, was properly refused. Such a course could never be justified on principle, nor is there, it is believed, a single precedent to warrant such a course. The return of the officer could have been amended only by himself; if his death intervened to prevent it, still that is no cause for a departure from the rule. It is a false supposition to say that the act of God would work an injury to the present plaintiff, if parol evidence be refused, because it was the plaintiff's own negligence in not taking care, in the first instance, before the justice, to have had the return of the constable amended at the trial. His omission to do so, cannot now be a reason for adopting a rule that would lead to the most interminable perplexities and mischievous consequences. But suppose the evidence received, still no officer, it is admitted, is in being to make the amendment. By whom, then, could it be done? This it is supposed, sufficiently illustrates the entire irregularity and inutility of the cross motion.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

ELI B. CLEMSON and CHARLES W. HUNTER, plaintiffs in error *v.* MOSES HAMM, defendant in error.

Error to Madison.

The return of a sheriff should state the time when the process was executed.
The return of a sheriff upon a summons, in these words, "Executed on Hunter—Clemson not found. N. Buckmaster, Sheriff, M. C.," is insufficient.

J. B. THOMAS and D. PRICKETT, for the plaintiffs in error.

J. SEMPLE, for the defendant in error.

WILSON, Chief Justice delivered the opinion of the Court:

In this case the judgment below was against the defendants, Eli B. Clemson and Charles W. Hunter, by default. The error assigned for the reversal of this judgment, is, the want of sufficient notice to the defendants below. The return of the sheriff on the summons, is in these words: "Executed on Hunter—Clemson not found. N. Buckmaster, Sheriff, M. C."

The statute requires the sheriff to serve all process of summons or capias, when it shall be practicable, ten days before the return day thereof, and to make return of such process to the clerk who issued the same, by or on the return day, with an endorsement of his service, the time of serving it, and the amount of his fees. The sheriff's return, in this case, is certainly not in accordance

with the requisitions of the statute. The time when the summons was served, he has omitted to state. This is a material fact, for if it was not served ten days before the commencement of the term, the defendant could not be compelled to plead before the next succeeding term. The Court could not know from the endorsement of the summons whether one or twenty days had intervened between the service and the return thereof; it erred, therefore, in rendering judgment by default against Hunter. The case of Wilson *v.* Greathouse, decided at the present term, is in principle analogous to this case.[a]

The cause is reversed with costs.

Judgment reversed.

(a) *Ante* 174; Ball *vs.* Shattuck, 16 Ill. R. 299

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1835, AT VANDALIA.

WILLIAM G. BLAIR, appellant *v.* CALEB WORLEY, appellee.

Appeal from Vermilion.

A purchaser of land from the government of the United States or of this State, acquires the right to all the improvements made upon it anterior to his purchase. The act of February 23d, 1819, giving the right to remove fences made by mistake upon the lands of other persons, applies only to natural persons; it has no relation to a case where a fence is erected by mistake upon the lands of the United States or of this State.

In the enactments of legislative bodies, where persons are spoken of, no other than natural persons will be 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 to carry into effect the objects contemplated in their grant or charter.

THIS cause was tried at the October term, 1835, of the Vermilion Circuit Court, before the Hon. Alexander F. Grant and a jury. A verdict was found for the plaintiff below, the appellee, for $25, and judgment was rendered upon this verdict. The defendant appealed to this Court.

S. MCROBERTS, for the appellant.

J. PEARSON, for the appellee.

SMITH, Justice, delivered the opinion of the Court:(1)

This was an action of *trespass*, the declaration contains two counts, one for the assaulting and beating the plaintiff, and the other for entering his close, and carrying away a quantity of the

(1)WILSON, Chief Justice, did not sit in this cause.

rails on said close. The defendant pleaded not guilty, and gave notice of special matter in justification. By the bill of exceptions taken on the trial of the cause, it appears that the plaintiff in the Court below, erected a fence upon the S. E. qr. of the N. E. qr. of section 16, in T. 20, N. of Range 11 West, in the fall of 1834, and while the land was public land. That, on the third day of March, 1835, Blair, the defendant in the Court below, duly purchased from the school commissioner, at private sale, the same lands, and, that he afterwards took and removed the fence and rails erected on the land, after he made such purchase, which were still there. Upon this proof the defendant's counsel prayed the Court to instruct the jury, that Blair, by virtue of the purchase of the land, became the owner of the fence and rails, and that so far as regards the taking of said fence and rails, they must find the defendant justified; and accordingly find a verdict for him. The Court below refused the instruction asked, and instructed the jury, that if they believed that the plaintiff had erected the fence on the tract *described*, through *mistake*, believing it to be on the *adjoining tract* of which he was proprietor, the act of the legislature entitled "*An act to enable persons to remove fences made by mistake on the lands of other persons*,"(1) approved February 23, 1819, gave the plaintiff, Worley, the right to said rails, and to remove the same, in the manner prescribed in said act. The defendant excepted to these instructions, and he now assigns in this Court for error, the refusal of the Court below to give the instructions prayed for, and the instructions as given.

In determining the tenableness of the positions assumed by the counsel for the plaintiff in error, in the causes of error assigned, it will perhaps be only necessary to recur to the decision made in this Court at its December term, 1833, in the case of Carson *v.* Clark,(2) and in which the doctrine is recognized, that the purchaser of land from the government of the United States, acquires the right to all the improvements made upon it anterior to his purchase.[a] Under that decision, it is manifest that the instructions prayed for by defendant's counsel in the Court below, ought to have been given; unless indeed the act referred to, in the instructions given, changed the rights of the parties. After an attentive examination of that act, it is not perceived that the makers of it could have had in contemplation to establish a rule of action in relation to the erection of fences by mistake between any other than natural persons; certainly not between governments and individuals. It is not possible to suppose, that they contemplated that the government of the United States or of this State, would become the cultivators of the soil, and erect fences

(1) R. L. 419; Gale's Stat. 433.
(a) Cook *vs.* Foster, 2 Gil. R. 652.
(2) *Ante* 113.

over our vast prairies, and enter into all the various pursuits of agriculture.

Yet it seems to me this must be the necessary inference, if the construction contended for by the appellant's counsel, and given in the instructions of the Circuit Court, be sanctioned. It is too manifest to doubt, as well from the preamble of the act, as from its context, that it merely contemplated a remedial action between individuals, and intended to change the rights of parties as they stood at common law. This is both its letter and spirit, and is most clearly evinced by the forms of proceeding to be observed by the parties in seeking the remedies given under the law. Let it be asked whether any law of this State could be constitutionally enacted, which should provide for the occupancy of any portion of the lands of the United States, and that individuals should place fences thereon, and that a purchaser from the government of the United States, should not disturb the same for one year thereafter? Surely not, and yet this would, in effect, be the operation of the second section of this act, if the instructions of the Circuit Court in this case were correct.

Independent of this view of the case, the doctrine laid down in the case of Betts *v.* Menard,(1) decided in this Court in December term, 1831, is directly applicable. It is there said "that in the enactments of legislative bodies, where persons are spoken of, no other than natural persons will be 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, to carry into effect the objects contemplated in their grant or charter."

The legislature could never have intended that the operations of the act referred to, should apply to artificial persons, at least of a political cast. Whether that artificial body be this State or the United States, can make no difference. The land purchased of the school commissioner, was held by the State in trust for the inhabitants of the township in which it lay, and was, in contradistinction to private lands, as much public lands, as if owned by the government of the United States.

As the instructions prayed for, ought to have been given, and those actually given were erroneous, the judgment of the Circuit Court is reversed with costs.

Judgment reversed.

(1) Breese's App. 10.

Thomas Webb, appellant *v.* George W. Sturtevant appellee.

Appeal from Cook.

In actions of *trespass quare clausum fregit*, the law is well settled, that possession of the close is sufficient to sustain the action against any person who shall enter upon that possession, except the owner.(*a*)

The possession, where that alone is relied on, must be an actual and not a constructive possession.

The mere entry upon a tract of land without any color of title, and enclosing a small part of it, does not, of itself, constitute an actual possession of any more land than is enclosed.(*b*)

This cause was tried at the May term, 1835, of the Cook Circuit Court, before the Hon. Sidney Breese and a jury. A verdict was rendered for the plaintiff below for $56. Judgment was rendered on this verdict, and an appeal taken to this Court.

The bill of exceptions is as follows:

Be it remembered that on the trial of this cause, at the May term of the Cook Circuit Court, the defendant, by his counsel, moved the Court to instruct the jury as follows:

1. That if the jury shall believe from the evidence, that the land on which the supposed trespasses were committed, at the time was the land of the United States or of the State of Illinois, and that the United States and this State were in possession of said lands at the time of the plaintiff's entry thereon, that such entry of the plaintiff, did not dispossess the United States or this State, only so far as the plaintiff's actual close, and no further. and in such case the law is for the defendant.

2. That if the jury shall believe from the evidence, that the plaintiff, at the time of the committing of the supposed trespasses. was not in the *actual* and *exclusive* possession of the land on which the supposed trespasses were commited by the defendant. then the law is with the defendant.

3. That if the jury shall believe from the evidence, that the land on which the supposed trespasses were committed, and at the time, in the possession of the United States or of this State, or any person other than the plaintiff, then they ought to find for the defendant.

4. That if the jury shall be satisfied from the evidence, that the plaintiff had no property or interest in the timber and soil, or either, on which the supposed trespasses were committed, at the time, then the plaintiff cannot recover of the defendant.

5. That if the jury shall be of opinion from the evidence, that at the time of the committing of the supposed trespasses, the

(*a*) Reeder *vs.* Purdy 41 Ill. R. 279.

(*b*) Brooks *vs.* Pruyn 18 Ill. R. 539, and notes; Truesdale *vs.* Ford 37 Ill. R. 210; Ewing *vs.* Burnet 11 Peters U. S. R. 41.

plaintiff was but a mere squatter upon the land, without any title thereto, either in law or equity, and that said land was the propery of the United States or of this State, and also that the supposed trespasses were not committed within the plaintiff's actual enclosure, then the law is for the defendant.

6. If the jury shall believe from the evidence, that the land was, at the time of the committing of the supposed trespasses, the uninclosed land of the United States and of this State, and in possession of the United States, and not in the actual possession of the plaintiff, then the law is for the defendant.

7. That if the jury shall be of opinion from the evidence, that the plaintiff entered on the land, claiming it as the property of the United States, and not claiming or setting up title to the land adversely from that of the United States, and the supposed trespasses were not committed within the actual improvement of the plaintiff, then the law is with the defendant.

8. That if the jury shall believe from the evidence, that the plaintiff is entitled to recover at all, they are to confine their enquiry to the injury done to the actual possession of the plaintiff, and not to the value of the timber or trees carried away.

The fifth and seventh instructions the Court refused to give, but gave the others, the eighth with this qualification, that the jury must confine their enquiry to the injury done to the actual possession, and that the value of the timber was a criterion by which to estimate that injury, and instructed the jury that "where the claim, settlement, and actual possession concur and are made *bona fide*, and continued to the extent of 160 acres or other lower legal subdivision of the public lands, the action of trespass can be maintained against any one, other than the real owner, who shall unlawfully enter upon such subdivision, doing damage thereon by cutting down timber, against the will of the actual occupant, and disturbing him in his possession; and that the right to such action is not confined to an injury to the actual inclosure." To which said several opinions of the Court in refusing to give said fifth and seventh instructions, and the eighth instruction as qualified, and in giving the said last mentioned instruction, the said defendant by his counsel excepts, and prays the Court to sign and seal this his bills of exceptions, and make the same a part of the record, which is done.

SYDNEY BREESE, [L. S.]

All of the opinions of the Court which are excepted to, are assigned for error.

B. S. MORRIS and JAMES GRANT, for the appellant.

G. SPRING and E. PECK, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

Webb v. Sturtevant.

This was an action of *trespass quare clausum fregit*, brought in the Cook Circuit Court, by Sturtevant against Webb, for breaking and entering the close of Sturtevant, and felling and carrying away the timber growing thereon. To the declaration filed in the cause, the defendant below pleaded not guilty. On the trial in the Circuit Court, the defendant below asked the Court, among other things, to instruct the jury, as follows, to wit, "That if the jury shall be of opinion from the evidence, that at the time of the committing of the supposed trespasses, the plaintiff was a mere squatter on the land, without any title thereto, either in law or equity, and that said land was the property of the United States or of this State, and also that the supposed trespasses were not committed within the plaintiff's actual enclosure, then the law is for the defendant," which instruction the Circuit Court refused to give. This refusal is assigned for error, and the question presented is, whether the instruction ought to have been given. In actions of trespass *quare clausum fregit*, the law is well settled, that possession of the close is sufficient to sustain the action against any person who shall enter upon that possession, except the owner. The possession, where that alone is relied on, must, however, be an actual and not a constructive possession. The mere entry upon a tract of land without any color of title, and enclosing a small part of it, does not, of itself, constitute an actual possession of any more land than is enclosed. A contrary doctrine would lead to great uncertainty.[a] It could with as much propriety be contended, that the actual possession of a part of a tract of land drew to it the possession of a whole section containing 640 acres, as that such actual possession drew after it the possession of 160 acres, or any other legal subdivision of a lot. This would be manifestly unreasonable. The reason that the law protects the mere possession of land, where the possessor is a squatter, is to preserve the public peace; and such protection is not intended as an encouragement to squatters, and ought not, therefore, to be extended any further than is necessary to attain the desired object.[a]

From this view of the law, and the reason upon which it is founded, the Court below ought to have given the instructions asked for by the defendant below. For this error, without enquiring into the other errors that have been assigned, the judgment must be reversed with costs.

Judgment reversed.

Note. See Lovett *et al.* v. Noble, *Pos.*

Since the decision of this case the following acts have been passed by the General Assembly:

AN ACT to define the extent of possession in cases of settlement on the public lands. SEC. 1. *Be it enacted by the people of the State of Illinois, represented in the General*

(a) See Gleason *vs.* Hitchcock, 2 Scam. R. 448.

Assembly. That hereafter in all actions of trespass *quare clausum fregit*, trespass, and ejectment, and forcible entry and detainer, as well as forcible detainer only, where any person or persons may be settled on any of the public lands in this State, when the same have not been sold by the general government, his or their possession shall, in the absence of paper title, be considered on the trial as extending to the number of acres embraced by the claim of such person or persons, according to the custom of the neighborhood in which such lands may be situated: *Provided*, That such claim shall not exceed in the whole three hundred and twenty acres: *Provided further*, That where the lands have been surveyed, such claim shall not exceed one hundred and sixty acres, and be ascertained by land marks so plainly made that the same may be designated from the other lands contiguous thereto in the same neighborhood of country: *And provided further* That such claim shall not be plead or set up in bar of any action, at any time commenced or to be commenced, by a bona fide purchaser or purchasers of such lands from the United States, or persons entitled to a right of pre-emption on the same, under any act of Congress now in force, or hereafter to be in force.

This act to take effect from its passage.

Approved 27th February, 1837.

Acts of 1836-7. 154; Gale's Stat. 436.

AN ACT supplemental to the act entitled "An act to define the extent of possession in cases of settlement on the public lands," approved February 27, 1837.

Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the said act to which this is supplemental shall be construed to mean, and to give to the claimant, the legal possession (for the purposes mentioned in said act) of three hundred and twenty acres (if the custom of the neighborhood extends to that number) of unsurveyed lands, or one hundred and sixty acres of surveyed lands, whether the same be in one or more separate parcels, and that the claimant shall reside on or near the same; and that the claim of unsurveyed lands be so plainly marked that it can be designated from the adjacent lands.

Approved February 16, 1839.

Acts of 1838—9, 124.

Anthony B. Turney, plaintiff in error *v.* William Goodman, defendant in error.

Error to Wayne.

The certificate of a land officer, is evidence.

The parol testimony of a county surveyor, in relation to the location of a tract of land, is good evidence.

This cause was tried at the March term, 1835, of the Wayne Circuit Court, before the Hon. Justin Harlan.

From the record, all that can be discovered, is that the cause was appealed from a justice of the peace to the Circuit Court, and in that Court a judgment was rendered for the defendant for $8,27 and costs. What the suit was about, no where appears; but that it was a suit, is pretty evident from the fact that

a judge, clerk, and lawyers figure in the record, and a bill of costs is tacked on to the end of it.

J. Pearson, for the plaintiff in error.

O. B. Ficklin, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This was an appeal from the judgment of a justice of the peace. There is consequently no declaration from which the Court can learn the nature of the plaintiff's claim, or cause of action; and the bill of exceptions taken in the case, is too imperfect to supply the information. All that is shown by it, is, that Turner purchased of Goodman an improvement on Congress land, that the price was paid, and the improvement delivered, according to contract; that the defendant was permitted to give in evidence the certificate of purchase from the Land Office, of a tract of land purchased by his son, and the county surveyor was permitted to prove by parol, that the improvement was on the land described in that certificate.

These are all the facts disclosed by the record. It is therefore manifest that they do not make out such a case as to enable this Court to adjudicate upon the final decision of the Court below. As to the opinion of the Court in admitting the Register's certificate to be read in evidence, which was objected to, there is no error. The official certificate of a land officer is made evidence by the express terms of the statute,(1) and the parol testimony of the surveyor, was also properly admitted. It was not only the highest, but it was the only kind of evidence which could be adduced in support of the fact which it was offered to establish. As the only point, then, which is presented by the record, relates to the admission of testimony, and that being decided correctly by the Court below, the judgment of that Court will be affirmed with costs.

Judgment affirmed.

(1) R. L. 280; Cale's Stat. 287.

Joseph Lovett and Hiram Ingersoll, appellants *v.* Mark Noble, Sen., appellee.

Appeal from Cook.

A settler upon the public lands of the United States, cannot maintain an action of trespass against a person who may enter and cut down the timber, upon a portion of the legal subdivision of land upon which he is settled, but which is not actually enclosed or occupied by such settler.

This case was tried at the May term, 1835, of the Cook Circuit Court, before the Hon. Sidney Breese and a jury. A verdict was rendered for the appellee for $195. Judgment was rendered on this verdict, and an appeal taken to this Court.

J. D. Caton and S. A. Douglass, for the appellants.

The plaintiff, in an action of trespass *quare clausum fregit*, must show himself to be in the actual possession of the *locus in quo* at the time the trespasses complained of were committed. 1 Chit. Plead. 175–8; 1 Johns. 511; 12 Johns. 183; 2 Saunders' Plead. and Ev. 866, and cases there cited; 2 Wheat. Selwyn's N. P. 482, n. 1; 1 Term R. 430; 2 Phil. Ev. 132; Esp. N. P. 347, or 266 in Part 2d; 1 Wendell 466; 2 Ohio 105.

It is the exclusive province of the jury to judge of evidence, and to determine facts.

E. Peck and G. Spring, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *trespass quare clausum fregit*, commenced by Noble against Lovett and Ingersoll, in the Cook Circuit Court. The defendants below pleaded not guilty, and on the trial of the cause, moved the Court to instruct the jury, "That the plaintiff must show himself to have been in the actual and exclusive possession of the land at the time of the trespasses complained of: and that it was not sufficient for the plaintiff to show that he was residing upon and cultivating another part of the same legal subdivision, unless he also proved that the alleged trespasses were committed upon the part of the lot enclosed or under cultivation by him." This instruction the Court refused to give, but instructed the jury, that "The peaceable occupation and possession by building, or cultivating and residing on any portion of the legal subdivision of the public lands, not exceeding 160 acres, will entitle such possessor to an action against the unauthorized entry of any individual who may enter and cut down the timber, or interfere with the possession of such legal subdivision."

This instruction was clearly erroneous according to the decision of the case of Webb *v.* Sturtevant.(1) decided at the present term.

The judgment must therefore be reversed with costs.

Judgment reversed.

(1) Ante 181.

William G. Pinckard, David Pembroke, B. F. Long, Nathan C. D. Taylor, and Henry Long, plaintiffs in error *v.* The People of the State of Illinois.

Error to Madison.

It is error to enter up final judgment upon a recognisance upon the recognisors failing to appear agreeably to the terms of their recognisance. Before final judgment can be entered, a *scire facias* must issue against them to show cause why judgment and execution should not be had, or an action must be instituted on the bond to recover the penalty.(*a*)

Judgment was rendered in this cause at the November special term of the Madison Circuit Court, 1834, by the Hon. Theophilus W. Smith, for $100 and costs. To reverse this judgment a writ of error was prosecuted to this Court.

J. M. Krum. for the plaintiffs in error.

Smith, Justice, delivered the opinion of the Court:(1)

The record in this case shows a judgment on a bond or recognisance of the defendants to appear and testify on behalf of the People, at a Circuit Court to be holden at Edwardsville on the 4th Monday of October, 1835. The defendants, on being called, did not appear, and their default was entered, and a final judgment rendered for the penalty of the recognisance and costs.

The error assigned is that this final judgment was irregular. This we cannot doubt.

Instead of a final judgment, a *scire facias* should have been sued against the defendants, to show cause why judgment and execution should not be had, or an action instituted on the bond to recover the penalty. The final judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

(*a*) People *vs.* Witt, 19 Ill. R. 171.

(1) Wilson, Chief Justice, did not sit in this cause.

John C. Slocumb, plaintiff in error *v.* Lewis Kuykendall, defendant in error.

Error to Gallatin.

In an action for slander, it is sufficient to prove the substance of the words charged. But proof of equivalent words is not sufficient.

This was an action on the *case for slander*, brought by the plaintiff in error against the defendant in error in the Court

below. The cause was tried at the April term, 1835, of the Gallatin Circuit Court, before the Hon. Alexander F. Grant.

On the trial the following bill of exceptions was taken:

"Be it remembered that on the trial of this cause, the plaintiff proved by Isaac Hogan, that defendant said the miller must have taken my wheat; that from the quantity of wheat I took to mill, and the quantity of flour received, he must have taken my wheat. It was no other man than John C. Slocumb. This was in August, or September, 1833. That he, witness, heard defendant say that he had heard Slocumb had taken too much toll from others, and that charges had been made against Slocumb to Mr. Graves, the owner of the mill; that he saw Slocumb go to the hopper, and take out two half bushels of wheat, and put it away, and put one of them in a dark corner; that what he knew, he knew, and what he saw, he saw; that he, defendant, asked Slocumb what he was doing. Slocumb said he was taking toll. This was in January last. That Slocumb, when taking the wheat, looked over his shoulder, as if to see if anybody saw him: and defendant was talking about his wheat being lost at the mill where Slocumb had taken this wheat. Defendant had taken thirty-two bushels of wheat to the mill on this occasion. John Jordan, plaintiff's witness, proved that in conversation with defendant last winter, Esq. Slocumb's name was mentioned. Defendant asked if it was John Slocumb who had attended the mill at New Haven. Witness replied it was, but that he wrote his name John C. Slocumb; defendant then said, 'Well he is the man who took my wheat, there was too much toll taken, from the quantity of wheat I took to mill and the flour I got. I saw him take two half bushels out of the hopper, and put it away. I asked him what he was doing. He said he was taking toll. This was in the night.' Defendant said, 'I would not swear he, Slocumb, stole my wheat, but if I had to swear, I would swear I believe he stole my wheat.' Whereupon the defendant, by his attorney, moved the Court to instruct the jury to find in the way of a nonsuit; which motion the Court sustained, and instructed the jury that the evidence did not support either count of the plaintiff's declaration, and for them to find accordingly in the way of a nonsuit. To which opinion of the Court, the plaintiff, by his counsel excepts, and it is allowed, &c.

ALEX. F. GRANT. [L.S.]

A. P. FIELD and H. EDDY, for the plaintiff in error.

JESSE J. ROBINSON and W. J. GATEWOOD, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *slander* for words imputing theft.

The declaration contained three counts: 1st. for the words: "The miller stole my wheat, and he was no other man than John C. Slocumb." 2d. "He stole my wheat." And 3d. "John C. Slocumb is a thief; he stole my wheat."

The defendant pleaded not guilty, and not guilty within one year. On the trial, after the plaintiff's evidence had been heard, the defendant moved the Court to instruct the jury to find as in case of a nonsuit.

The Court instructed the jury accordingly, and also that the evidence did not support either count of the plaintiff's declaration. To these instructions the plaintiff excepted. The jury found for the defendant,

The only error assigned is the instructions of the Circuit Court, and we are now to enquire whether or not they were correct. It will not be doubted, that the rule which heretofore required the plaintiff to prove the words to have been spoken precisely as laid, has been relaxed, and that it will now be sufficient to prove the substance of them as charged; while, however, this rule is admitted to its fullest extent, we still understand that the proof of equivalent words will not be proving the substance of those charged to have been spoken. To prove words of similar import will not surely be proving the substance of those laid, but the proving of other and different words. In the case of Maitland *v.* Goldney (1) the Court say "Though the plaintiff need not prove all the words laid, yet he must prove so much of them, as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander." The case of Olmstead *v.* Miller (2) supports the same doctrine.[a]

This rule should be adhered to. Further relaxation would be attended in my opinion, with infinite mischief. The allegation and the proof should correspond, yet if a party be charged with the speaking of one set of words, and the proof show another set of an equivalent character, and that be admitted to be sufficient to sustain the cause of action, how is the party to be prepared to defend himself? If this latitude be indulged in, and proof of equivalent words be sufficient, how will the defendant be able to know what he must come prepared to meet? One set of words is charged, another is proved, and the party surprised and held answerable for what he might have rebutted or explained by testimony, had he had reason to suppose such proof would have been offered. The introduction of such a course seems to me subversive of the first principles of the rules of evidence, and ought not to prevail. Besides, the uncertainty of the memory of witnesses, and their understanding of the import of words, and the sense in which they may have understood them to have been used, would render a party accountable for their misapprehension,

(1) 2 East 438. (2) 1 Wendell 510.

(a) Patterson *vs.* Edwards, 2 Gil. R. 720; Sandford *vs.* Gladdis 15 Ill. R. 229 and notes.

very frequently, if they could be allowed to testify to the import of his expressions.

It is the province of the Court and jury to construe his words, and not that of the witnesses. Apply this reasoning to the case before us, and it will be readily perceived that the proof does not sustain either of the counts of the declaration. From the bill of exceptions, such of the testimony as did not fall within the plea of the statute of limitations, is stated by one witness to refer to a conversation had with the defendant in January, 1833, and is narrated by the witness in these words: "That he heard defendant say, that he had heard Slocumb had taken too much toll from others, and that charges had been made against Slocumb to Mr. Graves, the owner of the mill; that he saw Slocumb go to the hopper, and take two half bushels of wheat, and put it away, and put one of them in a dark corner; that what he knew, he knew, and what he saw, he saw; that the defendant asked Slocumb what he was doing. Slocumb said he was taking toll; that Slocumb, when taking the wheat, looked over his shoulder, as if to see if any body saw him; and defendant was talking about his wheat being lost at the mill where Slocumb had taken his wheat. Defendant had taken thirty-two bushels of wheat to the mill on this occasion."

The other witness refers to a conversation with defendant at another time, and says that Slocumb's name was mentioned. Defendant asked if it was John Slocumb who had attended the mill at New Haven. Witness replied that it was, but that he wrote his name John C. Slocumb. Defendant then said, well he is the man who took my wheat; there was too much toll taken, from the quantity of wheat I took to mill, and the flour I got. I saw him take two half bushels out of the hopper, and put it away. I asked him what he was doing. He said he was taking toll. This was in the night. Defendant said I would not swear, he Slocumb, stole my wheat, but if I had to swear, I would swear I believe he stole my wheat.

It will be remarked, that the conversation detailed by the two witnesses, happened at different periods, and were entirely disconnected. It is not the enquiry now, whether or not this language might not be actionable, if laid as proved, with the necessary averments, though it might perhaps involve a question of doubt whether the defendant intended to charge the plaintiff with a felonious intention in taking the wheat; and whether the taking of too much toll, unless accompanied by indisputable evidence of such intent, could constitute a larceny; but whether the language proved to have been used, taken separately and disconnectedly, as stated by each witness, sustains either count of the declaration, I cannot concieve that either, taken separately, supports either of the counts in the declaration. The proof can

be viewed in no other light than as establishing the speaking of equivalent words, and by no means as supporting the proof of the substance of the words as laid. I am therefore of the opinion that the instrucions of the Court were correctly given, and that the judgment of the Circuit Court ought to be affirmed with costs.

Judgment affirmed.

JOHN DROULLARD plaintiff in error, *v.* THOMAS BAXTER. DRURY L. WALLS, JOHN CAIN. SAMUEL ALEXANDER. THOMAS W. BUCKNER, E. L. R. WHEELOCK, MARTIN LADMER, JOHN T. GILMER, SARAH L. WILLIAMS, JOHN RIDDLE. JOHN WOOD, and ROBERT MCQUEEN, defendants in error.

Error to Adams.

A complainant has an unquestionable right to amend his bill in equity before answer filed, and in many cases, after, and before replication filed.(a)

The proceedings in this case in the Court below, were had before the Hon. Richard M. Young, at a special term of the Adams Circuit Court, in November, 1834.

A. WILLIAMS and J. W. WHITNEY, for the plaintiff in error.

O. H. BROWNING and C. WALKER, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court :(1)

The complainant filed his *bill in equity* to set aside and annul certain conveyances of land alleged to have been obtained through fraudulent representations and combinations of the defendants. On the return of the process of summons, a portion of the defendants being served with process, their appearance was entered, and a motion was made by their counsel to dismiss the bill for want of equity. From the order of dismissal, it also appears that a cross motion was interposed by complainant for leave to amend his bill. The Circuit Court refused the leave asked to amend, and dismissed complainant's bill; and this, among other grounds, is assigned for error.

Without meaning to affirm the doctrine laid down in the case of Edwards *v.* Beard(2) decided under the former organization of this Court, that a bill in equity may be properly dismissed on motion, and that the party is not bound to demur to the bill, in

(a) Jefferson *vs.* Ferguson, 13 Ill. R. 35 and notes.

(1) WILSON, Chief Justice, did not sit in this cause. (2) Breese 41.

order to avail himself of a dismissal; it will be sufficient to consider the single point whether the Circuit Court did not err in refusing the leave asked to amend the bill.

We understand the rule to be, in pleadings in equity, that Courts give greater latitude and indulgence to the parties than in courts of law—and that a complainant has a right, considered unquestionable, to amend his bill before answer filed, and in many cases after, and before replication filed. When such amendment is made, the Court will judge of its relevancy, and if it be impertinent or entirely foreign to the cause, it will be ordered to be stricken out. We consider the amendment not a matter of discretion in the Court to allow or refuse, and therefore it is good ground of error, that such refusal was ordered in the present case.

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

SAMUEL SEWARD, for the use of GEORGE W. CHAPMAN, plaintiff in error *v.* ABIJAH WILSON, defendant in error.

Error to Adams.

A non-resident plaintiff cannot institute a suit before a justice of the peace, until he has given a bond for costs, although he sue for the use of a resident. The statute in relation to costs in the Circuit Court, in like cases, is different.

THIS cause was decided in the court below, at the April term, 1835, by the Hon. Richard M. Young.

A. WILLIAMS, for the plaintiff in error.

O. H. BROWNING, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action instituted originally before a justice of the peace. From the bill of exceptions it appears that the plaintiff was at the time of the commencement of the suit a non-resident, but that the person for whose use it was instituted, was a resident. It also appears that a motion was made before the justice to dismiss the cause, for the reason of the non-residence of the plaintiff. The Circuit Court, on the cause being brought to that Court, dismissed the cause because of the non-residence of the plaintiff at the time of its commencement before the justice, and entered a judgment for defendant for the costs. To reverse this judgment, this writ of error is prosecuted, and the only question made here,

is whether the Circuit Court decided erroneously in dismissing the cause.

Strictly the order dismissing the cause is not conformable to the judgment which should have been entered on the facts as they appear; and it is presumed to be a clerical error in using the word "dismiss," when it should have directed the judgment of the justice to have been reversed. The effect may be the same, however, as no *procedendo* was awarded, and the defendant recovered his costs in both Courts. The judgment of the Circuit Court is substantially correct.

Nothing is more certain from the act regulating the proceedings before justices of the peace in civil actions, than that a non-resident plaintiff shall not institute a suit until he shall have given a bond for costs. It is a disability imposed on him, and as effectually precludes his right to sue until the bond be given, as in the case of an alien enemy. The statute in relation to costs in like cases in the Circuit Court, is different, because it speaks of persons for whose use suits may be instituted, but even there it may be justly doubted whether, under that act, the person for whose use the suit is instituted, filing a bond would be a compliance with that act. It only declares that he shall be liable for costs, but neither by that law, nor the practice of the Court, could a judgment be rendered in the action against him, for the costs in favor of the defendant. If he prevailed he is driven to a separate action.[a]

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(*a*) Robertson *vs* County, Com. 5 Gil. R. 565 and notes.

Note. In the case of Harmon, for the use of Caton *v.* Harmon, decided at Dec. term, 1839,(1) it was held that a security for costs is not necessary where a suit is brought in the Circuit Court by a non-resident for the use of a resident. See also, Acts of 1828–9, 271.

(1) *Post.* 531.

Hiram Pearsons, appellant *v.* Nelson Lee, appellee.

Appeal from Cook.

The copy of an agreement or instrument in writing, attached to a declaration or filed with it, forms no part of the declaration.

A variance between the agreement declared on, and the declaration, should be taken advantage of on the trial by a demurrer to evidence, or a motion for a nonsuit.

An agreement to attend a public land sale of the United States, and purchase a tract of land, is not fraudulent or against the laws of the U. S.

A declaration averring that L., for the consideration of $200 to be paid by P., engaged to attend the sale of the public lands at C., at a certain day named, and bid off a quarter section of land provided it could be purchased for eight dollars an acre,—and averring that P., was ready on his part to pay the $200, and that although the land sold for less than eight dollars per acre, L., did not purchase the same &c., is good on general demurrer.

Pearsons *v.* Lee.

This was an action of *assumpsit* commenced in the Cook Circuit Court, by the appellant against the appellee, upon an agreement in writing signed by the appellee only.

The cause was decided at the October term, 1835, by the Hon. Stephen T. Logan, and a judgment for costs rendered for the appellee.

A. Cowles and G. Spring, for the appellant.

E. Peck, for the appellee, contended,

1. That the declaration shows no sufficient consideration.

2. That the declaration disclosed a contract all on one side, in contravention of the common law; and of the laws of the United States, regulating the sale of public lands.

3. That the agreement is against good policy, and *contra bonos mores*.

Smith, Justice, delivered the opinion of the Court:

This was an action of *trespass on the case on premises*.

The declaration is on a special agreement in writing not under seal, and is described to have been entered into between the plaintiff and defendant for the purchase, sale, and conveyance of a certain quarter section of land; and it also avers that the defendant, for the consideration of two hundred dollars, to be paid by the plaintiff, engaged to attend the sale of public lands at the town of Chicago, at a certain day named, and bid off the said quarter section: provided it could be purchased for a sum not exceeding eight dollars per acre, and to request the Register of the Land Office at said place to grant a certificate to said plaintiff in his name, on the payment of the purchase money by the plaintiff to the Register; or if, on such payment, the certificate was issued to defendant, then he engaged to execute a good and sufficient warranty deed for said land. The breach assigned is that although the plaintiff was ready on his part to pay the two hundred dollars, and although the land sold for less than eight dollars per acre at such sale, yet the defendant did not and would not purchase said land, nor had he requested the Register to make the certificate to said plaintiff; nor would he execute a good and sufficient warranty deed for the same land, or of any part thereof to the plaintiff, according to the tenor and effect of said agreement, although often requested, &c. To this declaration a general demurrer was interposed, and the Circuit Court adjudged the declaration bad. To the declaration is annexed a copy of the agreement, and if the Court were permitted to look to that copy which it cannot see with legal eyes, because it has

been constantly decided by this Court to form no part of the declaration, it might perceive that the agreement is signed by the defendant only, and is not binding on the plaintiff, and therefore void for want of mutuality; but on that point it can give no opinion, because it is not before the Court. If the defendant had wished to have presented that question, he should have taken issue, and taken advantage of it either by a demurrer to the evidence, or moved for a nonsuit on the trial for a variance between the count and the instrument declared on.[a] This not having been done, the only question to be determined, is, whether the declaration is substantially good. No objection that can be perceived, exists to the declaration which would be available on a general demurrer, and for aught that appears, it is sufficient. Nor are we prepared to say that the contract, as stated in the count, is either *contra bonos mores*, or against any public law.

The contract, as laid, proposes, so far as is disclosed to the Court, no more than the employment of an agent to purchase a piece of public land at the public sale, at a price stipulated, not only above the minimum price, but greatly so, at which the public lands may be sold, for a stipulated compensation, and to vest the title in the plaintiff. Here, then, is surely no combination to lessen the price, nor an arrangement not to bid against one another. The agreement presupposes a competition, because the agent is confined to not giving more than $8 per acre. How then can this be said to be in violation of the statutes of the United States, prohibiting combinations to lessen the price of public lands? In what way can it operate to the injury of the public morals? Surely a person may legally depute another to bid for him, for the public lands, for any or no compensation, without violating any public law or contravening, in the least, principles of public policy, or without injury to the public morals. It seems to be as free from such an imputation, as can possibly be imagined; and without extraneous evidence, to show that such was the intention and real object of the parties, can fraudulent motives be imputed without proof, and in the entire absence of any supposed reasonable motive?

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings. The appellant recovers costs.

Judgment reversed.

(a) Tefft *vs.* Ashbaugh 13 Ill. R. 602 and note.

JOHN ARNOLD, plaintiff in error v. JACOB JOHNSON, assignee of EZRA BAKER, Jr., defendant in error.

Error to Wabash.

An assignor of a note is not the adverse party contemplated by the statute permitting a party to prove his demand by the adverse, &c., in a trial before a justice of the peace.
In relation to the law of appropriating payments, where the debtor pays generally, the rule is well settled, that the creditor may apply the payment to whatever debt he sees proper, unless there are circumstances that would render the exercise of such discretion on the part of the creditor, unreasonable, and enable him to work injustice to his debtor.(a)
It is a well settled rule of law, that where one party relies on the admission of the other party, the whole of the admission must be taken together.

THIS cause was tried at the March term, 1835, of the Wabash Circuit Court, before the Hon. Justice Harlan, and a judgment rendered for the defendant in error for $28,45, in affirmance of the decision of the justice of the peace.

J. PEARSON, for the plaintiff in error.

O. B. FICKLIN, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:(1)

This was an action commenced before a justice of the peace by Johnson, assignee of Baker, against Arnold, and appealed into the Circuit Court of Wabash county. On the trial of the cause in the Circuit Court, the following bill of exceptions was taken, to wit, "Be it remembered that at the March term, 1835, the above cause came on to be tried by the Court. Plaintiff declared in the Court below on the following note: 'Ten days after date, for value received, I promise to pay E. Baker, Jr., or bearer, forty-nine dollars and forty-seven cents without defalcation or discount. March 6, 1830.

JOHN ARNOLD.' "

Upon which note the following endorsements appear: "July 31, 1830. Recd. on the within sixteen dollars and forty-six cents —Feby. 19th, cr. by cash $9,12 on this note." The assignment is in these words: "For value received I transfer the within note unto Jacob Johnson. Nov. 24, 1834. Ezra Baker, Jr." After the introduction of the note, the defendant stated he had no witness or legal evidence to establish his account of payment of money to Ezra Baker, Jr., more than sufficient, together with the endorsements on the note, to have paid the note, except he should call on the said Ezra Baker, Jr., and wished therefore, under the statute, to prove his own account by his own testimony,

(a) Bayley vs. Wynkoop, 5 Gil. R. 452; Jackson vs. Bailey 12 Ill. R. 159.
(1) WILSON, Chief Justice, did not sit in this cause.

or by the adverse party, to which evidence the plaintiff, by his counsel, objected, and such objection was sustained by the Court, and the defendant's (Arnold) testimony to prove his account of payment, was excluded by the Court. The defendant next offered in evidence an account current rendered by Ezra Baker, Jr. against the said defendant, since giving the said note, and also the credits of money paid by defendant to the said Baker, since the giving of the said note, which account showed payments exceeding the whole amount of said note, and for which the said Baker before the transfer of the note, had given the said Arnold credit, on the book account, instead of applying the credit on the note. This evidence was admitted by the Court, but decided that unless the said Arnold had directed the specific application of the money to the note, the said Baker had a right to apply the payments to the book account.

The errors relied on, are, that the Court erred in not permitting Arnold to be a witness to prove his set-off against Baker, and in deciding that unless Arnold had directed the specific application of the money to the note, that Baker had a right to apply the payments to the book account.

By the 5th section(1) of an act to amend "*An act concerning Justices of the Peace and Constables*," approved February 13, 1827, it is enacted, that "In all trials before justices of the peace, when either party may not have a witness or other legal testimony, to establish his or her demand, discount, or set-off, the party claiming such demand, discount or set-off, may be permitted to prove the same by the testimony of the adverse party," &c. Is the assignor of the note the adverse party contemplated by this act? This question is readily answered by the fact that he is not a party to the suit. The suit can be carried on without the use of his name, and against his consent. He cannot therefore be considered in any sense the "adverse party" in the suit, and consequently the Court decided correctly in refusing to permit the defendant below to be sworn under the act above recited.

In relation to the law of appropriating payments, where the debtor pays generally, the rule is well settled, that the creditor may apply the payment to whatever debt he sees proper, unless there are circumstances that would render the exercise of such discretion on the part of the creditor unreasonable, and enable him to work injustice to his debtor. In this case, no circumstances exist that ought to take this power out of the creditor's hands.

The only evidence that any payment had been made to Baker, except what was credited on the note, was his admissions, in an account current, which account shows that the payments had

(1) R. L. 409; Gale's Stat. 420.

been applied towards the discharge of the amount in the ordinary course of dealing. The fair inference in such a case is, that the application of the payments was in accordance with the views of both parties. It is also a well settled rule of law, that where a party relies on the admissions of the other party, the whole of the admissions must be taken together.[a] The defendant below produced no evidence of payment whatever, except what is furnished by Baker's account current, and that shows that the payments were made to settle the items of indebtedness charged against the defendant below. It, therefore, taken together amounts to nothing in proof of a payment on the note, as it does not appear from the bill of exceptions, that there was a balance due to the defendant below on the account current.

The Court therefore affirm the judgment below with costs.

Judgment affirmed.

(a) Young *vs.* Bennett, 4 Scam. R. 43.

JOHN MITCHELTREE, appellant, *v.* MATTHEW SPARKS, appellee.

Appeal from Schuyler.

Where a judgment is rendered by a justice of the peace against two defendants, and one of them only appeals to the Circuit Court, the cause should be docketed against the appellant only.(a)

Where an appeal is taken from a justice of the peace to the Circuit Court, if the justice had jurisdiction of the suit when it was commenced before him, the Circuit Court may render judgment for a sum exceeding $100, if such excess is for interest that has accrued subsequent to the rendition of the judgment by the justice of the peace.(b)

THIS cause was tried at the November term, 1835, of the Schuyler Circuit Court, before the Hon. Richard M. Young.

M. MCCONNELL, for the appellant.

G. W. P. MAXWELL, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court: (1)

The following are the facts in this case: Sparks commenced an action before a justice of the peace against Mitcheltree and Teal, and the justice gave judgment against both defendants. Mitcheltree took an appeal to the Circuit Court, where the appeal was dismissed because both defendants had not joined in the appeal. From this decision of the Circuit Court, Mitcheltree appealed to this Court, and the judgment of the Circuit Court was reversed by default, and the cause remanded to the Circuit Court of Schuyler county, with directions to that Court to "reinstate

(a) But see Stewart *vs.* Peters, 33 Ill. R. 384.

(b) Bates *vs.* Buckley, 2 Gil. R. 389; Rives *vs.* Kumler 27 Ill. R. 293; *Ante* 139.

(1) WILSON, Chief Justice, did not sit in this cause.

said cause in said Court, and proceed therein upon the merits of the final judgment."

The Circuit Court of Schuyler county upon receiving a copy of the order of this Court, ordered the cause to be reinstated on the docket of said Circuit Court, in the name of Sparks *v.* Mitcheltree. On the trial of this cause in the Court below, judgment was rendered in favor of the plaintiff against the defendant, for $50 debt, and $50,37 1-2 damage, besides costs. From this judgment an appeal has been brought into this Court, and the following errors relied on for a reversal, to wit: 1. The judgment is void for want of certainty as to which of the defendants judgment was against, and the judgment is rendered for more than was justifiable. 2. The Court erred in rendering a judgment against one of the defendants in the cause, and not against both.

It will be perceived by the facts of the case, that the question whether an appeal can be taken by one of two defendants, against whom a justice has rendered judgment, is not now before this Court. Nor did the former reversal by default of the decision of the Circuit Court, decide this point any farther than concerned this case when it again reached the Circuit Court. When the order of reversal was presented to the Court below for its action, the question naturally presented itself to that Court, How shall the cause be docketed? Shall it be docketed against Mitcheltree and Teal, or shall it be docketed against Mitcheltree, who alone had taken the appeal to the Circuit Court, and who had also appealed to this Court? The Circuit Court ordered, and we think correctly, that the cause should be docketed against Mitcheltree only. Teal being satisfied with the decision of the magistrate, it would be unreasonable to compel him to litigate further, contrary to his will, and perhaps thereby subject himself to heavy loss. The cause then was correctly docketed in the Circuit Court, against Mitcheltree. And from the form of the entry of the judgment that the "plaintiff recover of the defendant," it is sufficiently certain that the judgment was only against Mitcheltree.

The other point in the case is, did the Circuit Court give judgment for more than was due on the note filed in the case? The note was for $50 with twenty-five per cent. per annum interest. The Circuit Court allowed interest from the date of the note till the rendition of the judgment in the Circuit Court. This was correct.(1) The Court in that case intimate that the Circuit Court (its jurisdiction being unlimited) may enter judgment for more than $100, where the justice had jurisdiction of the suit when it was commenced before him, and the excess is for interest that has accrued subsequent to the rendition of the judgment

(1) Tindall *v.* Meeker. *Ante* 137.

before the justice, and we see no reason to dissent from that opinion.

The judgment, therefore, must be affirmed with costs.

Judgment affirmed.

ALEXANDER BROTHER and THOMAS T. JANUARY, plaintiff in error *v.* EPHRAIM CANNON, defendant in error.

Error to Pike.

In an action against a constable for an escape upon a *ca. sa.*, or for neglecting to execute a *ca. sa.*, proof that the *ca. sa.* was issued, upon the oath of an agent of the plaintiffs, is not admissible.

In an action against an officer for an escape on process sued out, and placed in the officer's hands to execute, or in an action for a false return, or for a refusal to execute such process, it is no justification for suffering an escape, or for making a false return, or for a refusal to execute such process, that the forms of law in suing out such process have not all been observed. If the process be regular on its face, and it be not absolutely void, having been issued without the authority of law, the officer can never be made a trespasser, although it may have been erroneously issued; and he is bound to execute the process, although it may have been erroneously sued out.(*a*)

If the magistrate had jurisdiction of the subject matter, the officer was not bound to enquire further into the accuracy of his proceedings, but should have proceeded to obey the mandate of the warrant.

THIS cause was tried at the April term, 1835, of the Pike Circuit Court, before the Hon. Richard M. Young. After the decisions of the Circuit Court in relation to the admissibility of the evidence offered, the plaintiff being unable to proceed further, suffered a nonsuit, subject to the reversal and opinion of the Supreme Court.

WM. THOMAS and CYRUS WALKER, for the plaintiffs in error, cited 5 Johns. 89; 13 Johns. 529; 15 Johns. 378; 8 Cowen 194; 6 Monroe 622; 1 J. J. Marshal 56; 2 Saund. 101 Y note 2.

O. H. BROWNING, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:(1)

This was an action on the *case*. The declaration contains a count for an escape, the defendant being a constable, and having arrested a defendant on a warrant issued by a justice of the peace, at the suit of the plaintiff, and permitted him to go at large: another for a false return as such officer; and a third for not arresting defendant on the warrant. Plea not guilty.

On the trial the plaintiffs introduced the warrant issued by the justice of the peace, with the return endorsed thereon; after

(*a*) But see Barnes *vs.* Barber, 1 Gil. R. 401; Tefft *vs.* Ashbaugh 13 Ill. R. 603. *Post*. 237.

(1) WILSON, Chief Justice, did not sit in this cause.

which the Circuit Court permitted the justice to state, that the oath upon which the warrant had been obtained and issued, was made by the agents of, and not by the plaintiffs, in the action before the justice, though the plaintiffs objected to the introduction of this evidence. The Circuit Court then on motion of the defendant, excluded the warrant and return from the jury. To the decision of the Court in thus admitting the testimony of the justice in relation to the oath of the agents of the plaintiffs, and the exclusion of the warrant and return from the jury, the plaintiffs excepted, and the only question now made in this Court. is whether the Circuit Court decided erroneously in admitting such testimony. and in excluding the warrant given in evidence to the jury.

It cannot be doubted that the Circuit Court erred on both points. It should have permitted the warrant and return to have gone to the jury, not merely because they had been properly read in evidence, but because it was legal and relevant testimony to establish the point at issue. In an action against an officer for an escape on process sued out, and placed in the officer's hands to execute, or in an action for a false return, or for a refusal to execute such process, it is no justification for suffering an escape, or for making a false return, or for a refusal to execute such process, that the forms of law in suing out such process, have not all been observed. If the process be regular on its face, and it be not absolutely void, having been issued without the authority of law, the officer can never be made a trespasser, although it may have been erroneously issued; and he is bound to execute the process, although it may have been erroneously sued out. If the magistrate had jurisdiction of the subject matter, the officer was not bound to enquire further into the accuracy of his proceedings, but should have proceeded to obey the mandate of the warrant. In a case in England,(1) Kenyon, Chief Justice, says: "It is incomprehensible to say that a person shall be considered a trespasser who acts under the process of the Court." By the return to the warrant, the officer appears to have so acted, and the plaintiffs had a perfect legal right to enquire into the truth of such return. The warrant was not absolutely void, although the oath was made by the agents of the plaintiffs, but merely voidable, even if it be determined that the oath required by the statute could not be made by an agent.[a] The testimony of the justice was wholly irrelevant, and ought not to have been received; and it was most clearly erroneous for the Circuit Court to exclude the warrant.

In the case of Lattin *v.* Smith,(2) decided in this Court at the December term, 1830, these principles are distinctly laid down: and they are supported by reference to numerous decisions made

(1) Beck *v.* Broad, 2 Term R. 185.
(2) Breese 284.
(a) See Wilson *vs.* Nettleton 12 Ill. R. 62.

in both the American and English courts, and by one in particular, in which the judge of the Circuit Court of the United States says, "That where process is deliverved to an officer, he is bound to act in conformity to the commands of the writ, and if he proceeds to execute it, he is bound to complete the execution."(1)

The judgment of the Circuit Court is reversed with costs, and the cause is remanded with directions to the Circuit Court of Pike county to issue a *venire de novo*.

Judgment reversed.

(1) Meecher *et. al. v.* Wilson. 1 Gallison 519.

The People of the State of Illinois, *ex relatione* Henry Harris *v.* Edmund D. Taylor.

Application for a writ of Habeas Corpus.

The Supreme Court has no original jurisdiction to authorize the allowance of writs of *Habeas Corpus*. It has no authority except as an appellate Court, in the review of legal proceedings, to allow writs of *Habeas Corpus*. But a party can apply for such writ to one of the judges of the Supreme Court, or to one of the judges of the Circuit Courts, and obtain the writ.(*a*)

A. Cowles, for the People.

A. P. Field, for the defendant.

Smith, Justice, delivered the opinion of the Court:

The allowance of a writ of *Habeas Corpus* in this case is refused. The Court has no original jurisdiction to authorize the allowance of such writs, unless it be in the exercise of their appellate powers. In the present instance, the party who it is said is restrained of her liberty, does not appear to be held under, or by virtue of any process or other legal authority, or the color of any, but is alleged to be holden without pretence of right, and by mere arbitrary force. It cannot be doubted that the Court have no jurisdiction in the case.

In the case of Bollman and Swartwout, (2) the Supreme Court of the United States, whose organization under the constitution of the United States, is similar to ours, as an appellate Court, decided that it had no authority, except as an appellate Court in the review of legal proceedings, to entertain jurisdiction and allow writs of *Habeas Corpus*. The party can apply to a judge of this Court or to one of the judges of the Circuit Courts, and obtain the writ.

Motion disallowed.

(*a*) See *In re* McIntyre 5 Gil. R. 424 and note.
(2) 4 Cranch 75; 2 Peters' Cond. R. 23.

PHILIP C. LATHAM, plaintiff in error *v.* EPHRAM DARLING, impleaded, &c., defendant in error.

Error to Sangamon.

The words "*with three dollars per month interest after due till paid*," mean three dollars per month, or thirty-six dollars per annum, and not that interest should be calculated at the rate of thirty-six *per centum* per annum. The interest for one year on a note for thirty dollars and seventy-five cents, "with three dollars per month interest," is thirty-six dollars.(*a*)

This was a suit instituted by the plaintiff in error in the Sangamon Circuit Court, upon the following note:

"30,75.

Four days after date, we or either of us, promise to pay P. C. Latham thirty dollars and seventy-five cents, with three dollars per month interest after due until paid, for value received. Sept. 18th, 1832.

his
JAS. ✕ GARDNER,
mark
EPHM. DARLING."

The cause was tried at the October term, 1835, before the Hon. Thomas Ford, and a judgment rendered for the plaintiff in error, for $63,96 and costs. The Court below decided that the note drew interest at the rate of three dollars per month for $100. The plaintiff excepted to the opinion of the Court.

J. T. STUART and J. B. THOMAS, for the plaintiff in error.

C. WALKER, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *trespass on the case on promises*. The only point made and submitted to the Court for its decision, is on the import of the words used in the note on which the action is founded, in relation to the interest which the makers should pay on the amount of the note. These words are, "with three dollars per month interest after due until paid." It is conceived that there is no ambiguity in this language, and that the words declare the rate of interest shall be three dollars for each and every month that the note shall remain unpaid, after it shall have become due.

This would be clearly thirty-six dollars *per annum* for the non-payment of the amount promised to be paid by the note, and not three *per centum per month*, or at the rate of three dollars per month for the use of one hundred dollars for that time. The

(*a*) Phinney *vs.* Baldwin, 16 Ill. R. 108.

rate of interest is doubtless enormous, but that can be no reason whatever for changing terms and legal effect of a contract which the parties have entered into.

The construction put on the contract in the Circuit Court, as to the rate of interest, was evidently erroneous, and could not, it is conceived, comport with the meaning and obvious import of the language used.

The clerk of this Court is directed to modify the judgment of the Circuit Court, by entering judgment for the amount of the note, with the interest due thereon, from the day the note become due and payable, computing such interest at and after the rate of three dollars per month for each month, and at the same rate for a fraction of a month, until the day of the rendition of the judgment in the Circuit Court with costs,

Judgment modified.

Jacob White, plaintiff in error *v.* George W. Hight, defendant in error.

Error to Adams.

Non-residents are exempted from the operation of the statute of limitations.
The limitations of sixteen years in the statute of limitations, only applies to actions of debt and covenant, and to actions on awards.

This cause was tried at the November term, 1835, of the Adams Circuit Court, before the Hon. Richard M. Young.

A. Williams, for the plaintiffs in error.

O. H. Browning, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:(1)

This is an action of *assumpsit* commenced by White against Hight in the Adams Circuit Court. The declaration contains two counts. The first count is on a promissory note dated the 26th day of January, 1819, for $403. The second count is on a written agreement dated 1st October, 1824, by which the defendant promised to pay the plaintiff $486,92, being the balance due the plaintiff on a note which he had held against the defendant, but which note had been lost.

The defendant pleaded three pleas, to wit, *non assumpsit*, *non assumpsit* within five years, as both counts, and *non assumpsit* within sixteen years, as to the second count. To the second and third pleas the plaintiff replied, "That at the time when the

(1) Wilson, Chief Justice, did not sit in this cause.

said several causes of action and each of them did accrue to him, he, the said plaintiff, was in parts beyond the limits of this State, to wit, in the State of Ohio; and has ever since remained, and yet is beyond the limits of this State, to wit, in the State of Ohio." To which replication the defendant demurred, and the Circuit Court sustained the demurrer, and gave judgment for the defendant. The only question presented in this case, is, whether the "*Act for the Limitation of Actions, and for avoiding vexatious Law Suits*,"(1) approved February 10th, 1827, extends to non-resident plaintiffs. By the first section of the act, all sections upon the case, which term includes actions of assumpsit, and the other actions therein enumerated, shall be commenced within five years next after the cause of action shall have accrued, and not after. The second, third, fourth, and fifth sections limit the commencement of the several actions mentioned in these sections, to the times therein contained. The 6th section applies to the right of entry into land, and limits the time within which such entry may be made. The 7th section is in these words, to wit, "That every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action accrued, and not after: *Provided*, that in *all the foregoing cases in this act mentioned*, where the person or persons who shall have right of entry, title, or cause of action, is, are, or shall be, at the time of such right of entry, title, or cause of action, under the age of twenty-one years, insane, beyond the limits of this State, or *feme covert*, such person or persons may make such entry, or institute such action, so that the same be done within such time as is *within the different sections of this act* limited, after his or her becoming of full age, sane, *feme sole*, or coming within this State." The language used in the seventh section is too plain and unequivocal to admit of a doubt that the legislature intended to exempt infants, insane persons, *feme coverts*, and non-residents, from the operation of the act, until the removal of their respective disabilities, and the legislature are not without precedents of similar exceptions in other countries. The English statute of limitations contains a similar provision, and several of the States have copied it into their statutes.

The plea that the cause of action mentioned in the first count, did not accrue within sixteen years, is incorrectly pleaded. The limitation of sixteen years only applies to actions of debt and covenant, and to actions upon awards.

The Court therefore are clearly of opinion that the Court below erred in sustaining the demurrer to the plaintiff's replica-

(1) R. L. 441; Gale's Stat. 454.

tion. The judgment is reversed with costs, and the cause remanded to the Adams Circuit Court, with directions to overrule the demurrer, and proceed in the cause consistently with this opinion.

Judgment reversed.

Note. Since the decision of this case, the following act has been passed by the General Assembly: An act to amend an act entitled "An act for the limitation of actions, and for avoiding vexatious law suits." Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the proviso to the seventh section of the act to which this is an amendment, shall not be held to extend to any non-resident, unless such non-resident be under the age of twenty-one years, insane or feme covert, and then and in that case the rights of such persons shall be saved for the time limited by the different sections of said act, after his or her becoming of full age, sane or feme sole. Approved, February 11th, 1837. Acts of 1836—7, 169: Gale's Stat. 456—7. See also Acts of 1835.

Cyrus Felt, plaintiff in error *v.* Wesley Williams defendant in error.

Error to Hancock.

The action of detinue is an unusual action, and the books furnish but few rules of evidence applicable to it. Great certainty and accuracy in the description of the things demanded, are still required in detinue.

A declaration in detinue for "a red cow with a white face," is not supported by proof that "the cow was a yellow or sorrel cow."

This cause was tried at the April term, 1835, of the Hancock Circuit Court, before the Hon. Richard M. Young, and a judgment was rendered for the plaintiff in the Court below, the defendant in error.

C. Walker, for the plaintiff in error.

A. Williams and O. H. Browning, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *detinue* brought in the Hancock Circuit Court by Williams against Felt, to recover *a large red cow with a white face*. On the trial of the cause, the plaintiff introduced a witness to prove property in the cow, who testified that the cow claimed by the plaintiff "was not a red cow, nor was she of such a color which he had ever heard any body call red." The witness further stated that "the cow was a yellow or sorrel cow." This was all the testimony that the plaintiff gave respecting the description of the cow. The defendant below moved the Court to instruct the jury to find a verdict for the defendant, as in case of a nonsuit, because of a discrepancy between the

proof and the declaration, in respect to the color of the cow. This instruction the Court refused to give, and this refusal is assigned for error.[a]

The action of detinue is an unusual action, and the books furnish but few rules of evidence applicable to it. It is however laid down "That great certainty and accuracy in the description of the things demanded, is still required in *detinue*, because the plaintiff may desire to recover the specific things themselves, which only can be done in this action.(1) The same author says that less certainty of description of the goods in dispute, is required in trespass and trover, because in these actions the plaintiff only recovers damages, but in the action of detinue the judgment is to recover the identical thing itself, or the value, if it is not restored. There is no propriety in requiring great certainty and accuracy in the description of goods in this form of action, if the law does not also require that the proof shall correspond with equal certainty to the description of the goods given in the declaration. In this case there is such a manifest variance between the cow described in the declaration, and the one described by the witness, that the Court ought to have rejected the testimony, as not tending to prove the issue between the parties. As all the proof on the subject of the identity of the cow, is given in the bill of exceptions, and that being adjudged by this Court insufficient to support the plaintiff's action, it is unnecessary to remand the cause, this Court having power to give such judgment as the Court below ought to have given.

The judgment, therefore, is reversed with costs, and a judgment as in case of a non-suit rendered.

Judgment reversed.

(a) Tefft *vs.* Ashbaugh, 13 Ill. R. 602; Taylor *vs.* Riddle, 35 Ill. R. 567.
(1) 2 Saund. 746.

JOHN STACKER, SAMUEL STACKER and THOMAS T. WATSON, plaintiffs in error, *v.* TYLER D. HEWITT, defendant in error.

Error to Gallatin.

A note expressing on its face to have been given for value received, imports a sufficient consideration, and leaves it open to be impeached by the defendant.
A note is *prima facie* evidence of a consideration, although it does not express on its face that it is given for value received; and when a want or failure of consideration is relied on, it must be pleaded and proved by the party alleging it.
The case of Poole *v.* Vanlandingham, Breese 22, is overruled.

This cause was tried at the October term 1835, of the Galla-

tin Circuit Court, before the Hon. Justin Harlan, and a judgment rendered for the defendant in the Court below, upon which the plaintiff sued out the writ of error herein.

H. Eddy, for the plaintiff in error, cited the following authorities:

R. L. 490 § 12;(1) 3 Bibb 317; 1 Pirtle's Dig. 146 § 11, 16; do. 148, § 27; do. 154 § 69; 4 Monroe 531: 1 Marsh. 332: 2 J. J. Marsh. 420; 3 J. J. Marsh 167.

Jesse J. Robinson, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:

This was an action of *debt* on a note of hand. The declaration contains the usual count on a sealed instrument. The defendant pleaded that the note was given without any consideration whatever.

The plaintiffs took issue on this plea, and submitted both law and fact to the Court for trial. On the trial, as shown by the bill of exceptions, the plaintiffs offered in evidence the note, which was under seal, and expressed to have been given for value received. To this evidence the defendant demurred *ore tenus*, and the Circuit Court adjudged the proof insufficient, and there being no other evidence offered, gave judgment for the defendant.

By the 12th section of the practice act, it is provided "That no person shall be permitted to deny on the trial, the execution of any instrument in writing, whether sealed or not, upon which action may have been brought, unless the person so denying the same shall verify his plea by affidavit."(2) This provision of the law made the mere production of the note evidence without proof of its execution; and, indeed, without the statute, it was already admitted by the defendant's plea of want of consideration.

It is equally certain that the production of evidence to support the plea of no consideration, being an affirmative plea, developed on the defendant.[a] There being no evidence in support of it, the court evidently erred in rendering judgment for the defendant. The position assumed by counsel, that the plea was the affirmation of the non-existence of a fact not susceptible of proof by the defendant, and that therefore the *onus probandi* to show the actual consideration of the note, ought to devolve on the plaintiffs, is not, we apprehend, by any means correct. The entire absence of a consideration, for the execution of the note, would be a fact as completely within the means of proof by the defendant, as to the plaintiffs, ability to show a consideration therefor. By the rule of the common law, the note being under seal im-

(1) Gale's Stat. 531. (2) R. L. 490; Gale's Stat. 531.
(a) Delahay *vs.* Clement. 2 Scam. R. 577.

ported a valuable consideration, and no enquiry could be had in relation thereto. So a note not under seal, expressing on its face to have been given for value received, imports a sufficient consideration, and leaves it open to be impeached by the defendant.

By the statute of this State relative to promissory notes, bonds, due bills, and other instruments in writing, making them assignable, approved 15th Feb. 1827,(1) it is declared that such notes, bonds, due bills, and other instruments in writing whereby the maker agrees to pay any sum of money or article of personal property, or of money in personal property, shall be taken to be due and payable to the person to whom the same is made. This act of itself, then, would make any instrument, coming within the description named, *prima facie* evidence, although it did not express on its face to have been given for value received, and render the proof by the plaintiff of a consideration unnecessary. But it is considered well settled, and a principle admitting of no doubt, that the defendant by his plea was bound to sustain by proof, the existence of the fact averred in his plea, and upon which the plaintiffs had taken issue. This rule is laid down in a recent case decided in a sister State, Mitchell *v.* Sheldon *et al.* (2) In that case, which is directly analogous to the present, the Court say, the note is *prima facie* evidence of a consideration, and when a want of, or a failure of, consideration is relied on, it must be pleaded and proved.

The judgment of the Circuit Court is reversed, and the clerk of this Court is directed to enter judgment for the plaintiffs in this Court, for the amount of the note with interest thereon, at the rate of six per cent. damages from the 25th day of May, 1834, until the rendition of the judgment in this Court, with costs of suit.

Judgment reversed.

(1) R. L. 482; Gale's Stat. 525. (2) 2 Blackf. 183.

JOHN DOE, *ex dem.* LUTHER WHITNEY, plaintiff in error *v.* JOHN COCHRAN and CYRUS FELT, defendants in error.

Error to Hancock.

In the case of a parol purchase of land, if the vendee enter into possession, and afterwards refuse to affirm the contract, he would be liable to the vendor for the use and occupation of the land, and could not dispute his title by setting up an outstanding title in a third person.

Whitney *v.* Cochran *et al.*

A parol contract for the purchase of land is not absolutely void, but only voidable under the statute of frauds.

This cause was tried at the September term, 1835, of the Hancock Circuit Court, before the Hon. Richard M. Young. Judgment was rendered for the defendants and the plaintiff brought the cause to this Court.

C. Walker and J. W. Whitney, for the plaintiff in error.

A. Williams, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:(1)

This was an action of *ejectment*. On the trial of the cause the planitiff offered in evidence a certificate of the Register of the United States' Land Office at Springfield, showing the purchase of the tract of land in controversy, and also a deed for the same, which, owing to an alleged informality in the certificate of acknowledgment of the proof of the deed, was rejected as evidence in the cause. The plaintiff then offered to prove a tenancy on the part of the defendants under the lessor of the plaintiff, and as an estoppel on the part of the defendants, to dispute the plaintiff's title, and offered to prove that the defendant, Cochran, purchased the land described in the declaration, by parol, from the lessor of the plaintiff, who, in like manner, by parol, had sold the same to the defendant, Felt, and that the defendants had respectively taken possession of the land under said purchases, before the date of the demise in plaintiff's declaration: to which the defendants objected; and the Court sustained the objection, deciding that a parol sale of land was void, and could not create a tenancy; to which opinion the plaintiff by his counsel excepted.

The decision of the Circuit Court, that a parol purchase of land was absolutely void, is evidently founded on a misconception of the statute of frauds. Such a contract is only voidable, under that statute, and not void in itself.[a] The parties to a parol contract for the sale of land, might surely consummate it at any time, and unless one of them chose to interpose the statute, as a legal defence to an action for a refusal to consummate such an agreement, it would evidently be obligatory. The Court ought also to have admitted the parol evidence of the contract, to establish the relation of landlord and tenant, because it cannot, we think, be denied, that in the case of a parol purchase of land, if the vendee enters into possession, and refuses afterwards to affirm the contract, he would be liable to the vender for use and occupation, and could not dispute his title by setting up an outstanding title in a third person.[b]

The judgment of the Circuit Court is reversed, and the cause

(1) Wilson, Chief Justice, was not present on the argument of this cause.
(*a*) *Ante* 60. (*b*) Wells *vs.* Mason, 4 Scam. R. 90; Tilghman *vs.* Little. 13 Ill. R. 241. Dudley *vs.* Morrison, 39 Ill. R. 398 &c.

remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

CHARLES S. MORTON, appellant *v.* JOHN GATELEY, appellee.

Appeal from Coles.

The refusal of the Circuit Court to instruct the jury that there was no evidence of a fact which the testimony tended to prove, cannot be assigned for error.

It may be doubted whether an agreement between two or more individuals, to do a particular piece of labor for which each is to receive his aliquot part of the compensation for the work, constitutes them partners.

THIS cause was tried in the Coles Circuit Court, at the April term, 1835, before the Hon. Justin Harlan and a jury, and a judgment rendered against Morton for $47,50 and costs of suit, from which he appealed to this Court.

J. PEARSON, for the appellant.

O. B. FICKLIN, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

This was an action originally instituted before a justice of the peace, and taken by appeal to the Circuit Court of Coles county. The plaintiff's claim, before the Circuit Court, consisted of various items contained in his account, and the defendant presented an account of various items of set-off; and among others, one for money had and received by the plaintiff, for work and labor rendered jointly by the defendant and plaintiff and a third person, in the construction of a building, the one third part of the compensation for such labor being due and payable to the defendant; but which the plaintiff had received of the person from whom it was payable, without the authority or consent of the defendant, as appears from the evidence in the bill of exceptions. The evidence was objected to by the plaintiff, and the counsel for the plaintiff asked the Court to instruct the jury, that there was no evidence before it, to support the charge. This the Circuit Court refused to do, but left it to the jury to determine, whether these parties were in partnership; and if they were, whether there had been an adjustment of their partnership accounts, and a promise on the part of Morton to pay Gateley, the defendant, the amount received by him.

The refusal of the Court to give the instructions asked, and the giving the instructions as stated, are now assigned for error.

On both points the Circuit Court was correct. It could not properly instruct the jury that there was no evidence to support the charge for money had and received, in direct opposition to the testimony itself. We imagine the instructions prayed for were based on a supposed partnership, existing between the plaintiff, defendant, and the third person, to do the labor jointly; but the evidence showed that each party had received his separate share, except the defendant, whose share had been set apart, and had been obtained on a promise to indemnify the debtor, if the payment was not ratified by the defendant. But it may be doubted whether an agreement between two or more individuals, to do a particular piece of labor, for which each is to receive his aliquot part of the compensation for the work, can constitute them partners.[a] The instructions given by the Circuit Court, went farther than the case required, and were distinctly favorable to the plaintiff, under the view taken by the Court, because it was left to the jury to determine from the evidence, whether there was a partnership proven, and whether or not there had been an adjustment of their partnership transactions; and a promise by the plaintiff to pay the defendant. In every aspect in which this case can be viewed, it cannot be perceived that there was any error in the refusal to give the instructions asked, nor in those which were given.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(a) Blue vs. Leathers, 15 Ill. R. 32 and notes.

WILLIAM MURRY, plaintiff in error *v.* JOSIAH CROCKER, defendant in error.

Error to St. Clair.

A defendant cannot avail himself of the statute against usury, unless the same be pleaded, and an application be made to the Court where the cause is pending, for the benefit of the act.

J. W. WHITNEY, for the plaintiff in error.

A. COWLES, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action instituted originally before a justice of the peace, and taken by appeal to the Circuit Court.

The only question presented by the pleadings in this case, arises on the note, which contained a provision that if the amount was not paid when it became due, then interest was to be paid therefor at the rate of twenty per cent. until paid. The Circuit

Court rendered a judgment on the note with interest at the rate of six per. cent per annum, and to this judgment the defendant objects, alleging the contract was an usurious one. The pleadings do not show that the question of usury was ever raised in the Circuit Court or before the justice. The statute relative to usury provides that if it shall appear to the court before which the action shall be tried, by the pleadings in the case, and on application of the defendant, that a greater rate of interest shall have been reserved or taken, than is reserved by the act, the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the whole interest reserved; and the plaintiff shall have judgment only for the balance.(1)[a]

Now in this case, it neither appears by the pleadings in the case, that the question of usury was raised, nor that an application contemplated by the act, was ever made; consequently, this Court cannot consider the point in any way before the Court for its adjudication. Why the Circuit Court changed the rate of interest, we cannot collect from the record, but as the reduction of the rate of interest was in favor of the plaintiff in error, he cannot surely object to the judgment below for that cause.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(1) R. L. 349; Gale's Stat. 343.
(a) This changed in 1857; L. 1857 p 45; Stockton vs. Munson, 28 Ill. R. 81.

CHARLES S. MORTON, appellant, *v.* GIDEON S. BAILEY, and JULIA BAILEY his wife, administratrix of James J. Jones, deceased, appellees.

Appeal from Coles.

A defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace.

An administrator is not bound upon the exhibition by a creditor of his claim against the estate of the intestate, to set off any debt or demand such estate may have against such creditor; and his failing to do so will not bar such debt or demand.

A defendant by suffering judgment to go by default, is out of Court, and has no right to except to testimony. He is, however, premitted to cross-examine the witnesses, but he cannot introduce testimony, or make a defence to the action. Should improper testimony or wrong instructions be given, the proper course is to apply to the Court to set aside the inquisition, and grant a new inquest.

The remedy given by statute, to collect fees by making out a fee bill and delivering it to an officer, is a cumulative remedy, but it does not take away the common law remedy by suit.

THIS cause was tried at the November special term of the Coles Circuit Court, 1835, before the Hon. Alex. F. Grant, and

a judgment rendered against Morton for $84,55 and costs, from which he appealed to this Court.

J. Pearson, for the appellant.

O. B. Ficklin, for the appellees.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced in the Circuit Court of Coles county, by Bailey and wife, in her right as administratrix of Jones, deceased, against Morton, The declaration contains several counts. The defendant pleaded in bar of the suit, and after Mrs. Bailey was appointed administratrix, he, said Morton, exhibited before the Judge of Probate of Coles county, in pursuance of notice given by said administratrix, his claim against the estate of said Jones, consisting of charges for work and labor done and performed, goods sold, money lent and had and received by said Jones in his life-time,—that the Judge of Probate gave judgment for Morton on the amount or claim thus exhibited; and that plaintiffs below might have set off the demands mentioned in the declaration against the claim thus exhibited by Morton, but the plaintiffs neglected to make such set-off, whereby the plaintiffs are barred, &c.

To this plea the plaintiffs demurred, and the Court sustained the demurrer. The defendant not farther answering, judgment was given by default, and a jury called and sworn to enquire of damages. On the taking of the inquest in the Circuit Court, the defendant excepted to several portions of the testimony offered by the plaintiffs.

Two questions are presented for the consideration of this Court, to wit, 1. Was the administratrix barred by the proceedings before the Judge of Probate? and 2, Can a defendant on the taking of an inquest by default, except to the opinion of the Court in receiving or rejecting testimony?

At common law a defendant could not set off his demand against the plaintiff's debt, and our statute of set-off is permissive, but not compulsory. According, then, to the general law of the land, a party defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace. Is there any provison in the "*Act relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates*," and the several acts amendatory thereof, requiring administrators, upon the exhibition by a creditor of his claim against the estate, to set off any debt or demand such estate may have against such creditor? The Court have looked in vain for any such provision in the acts above enumerated, and are accordingly of opinion that the administratrix was not barred of her action by the proceedings before the Judge of Probate.

On the point whether the defendant on the execution of an inquest, can take a bill of exceptions, the Court are of opinion that the defendant by suffering judgment to go by default, is out of Court, and has no right to except to testimony. The defendant is permitted, however, to cross-examine the witnesses, but cannot introduce testimony, or make a defence to the action. Should improper testimony or wrong instructions be given, the proper course is to apply to the Court to set aside the inquisition, and grant a new inquest.

The counsel for the plaintiff urged, on the argument, that no action lies by an officer for the collection of fees due him as a clerk, justice of the peace, or judge of probate. This position is clearly erroneous. The remedy given by statute, to collect fees by making out a fee bill and delivering it to an officer, is a cumulative remedy, but does not take away the common law remedy by suit.[a]

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

(a) No costs at Common Law, 2 Bac. Abr. 481. Title "Costs."

The People of the State of Illinois, *ex relatione* Charles R. Matheny appellants *v.* Mordecai Mobley, appellee.

Appeal from Sangamon.

The fair interpretation of the provision of the Constitution of this State, that "The Supreme Court, or a majority of the justices thereof, the Circuit Courts, or the justices thereof, shall, respectively, appoint their own clerks," is that the Court, in contradistinction to a personal authority, is the repository of the trust conferred by the Constitution, and that whenever a clerk has been appointed, the trust is thereby executed, and cannot be resumed or again exercised until a vacancy shall occur in one of the several ways provided by law.

The terms, "the justices thereof," are used only to confer an authority to make an appointment in vacation, as well as in term.

The Constitution gives to the Court the authority to appoint its clerk: but when thus appointed, it fixes no limit to the duration of his office.

A clerk of the Circuit holds his office under the constitution *ad libitum*, until the legislature shall think proper to prescribe the tenure of the office. This it is certainly competent for the legislature to do.

A judge of a Circuit Court cannot remove a clerk, except for some of the causes pointed out in the statute.(a)

The office of clerk of the Circuit Court is created by the Constitution, and its duration is left undefined; and, unless its tenure be limited by law, it would be of indefinite duration.

This cause was tried at the July special term, 1834, of the Sangamon Circuit Court before the Hon. Richard M. Young.

The following proceedings were had in the Court below:

On the 11th day of July, 1835, Stephen A. Douglass, Attorney for the People of the State of Illinois, came into Court and filed

(a) But see Ex parte Hennen 13 Peters U. S. R. 230.

the affidavit of Charles R. Matheny, in the words and figures following, to wit:

"State of Illinois, Sangamon County, sct.,

Charles R. Matheny states on oath, that heretofore, and long prior to the fourth day of May, 1835, he was legally and properly appointed clerk of the Circuit Court of Sangamon county, by the Circuit Court thereof, and was duly sworn, entered into the necessary and proper official bonds required by law to be taken, and was legally possessed and exercised the powers of said office, receiving the emoluments and enjoying the immunities and privileges appertaining to said office, from the time of his said appointment and induction therein, until the 4th day of May, 1835; that from and after his said investment of said office, he never abandoned or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said Circuit Court, since his said investment of the office aforesaid, as he is advised, (and believes to be true,) been abolished. He further states, that on the 4th day of May, 1835, a certain Mordecai Mobley, illegally claiming the said office as clerk, under color of a void and illegal appointment as clerk of said Circuit Court, (as he is advised and believes,) made after the 13th of February, 1835, unlawfully usurped, intruded into, and unlawfully held and executed said office of clerk of said Circuit Court, and from and since the 4th day of May, 1835, hath, and still unlawfully held and executed said office of clerk aforesaid. and from and since the 4th day of May, 1835, hath, and still doth unlawfully receive, take, and enjoy the emoluments, rights, and privileges of the office aforesaid, and from and since the 4th day of May, 1835, the said Mobley illegally hath and still doth refuse to allow the said Matheny to hold and execute the said office, or to receive the emoluments or to enjoy the rights, privileges, and emoluments thereof; and that he is desirous that a rule may be made upon the facts stated herein, on motion of the Attorney for the People of the State of Illinois, in the First Judicial Circuit, upon the said Mobley, to show cause why leave should not be given to file an information in behalf of the People of the State of Illinois, in the nature of a *quo warranto*, upon the relation of the said Matheny against said Mobley, for usurping, intruding, and unlawfully holding and executing said office as aforesaid. C. R. Matheny.

Sworn to and subscribed, this 11th day of July, A. D. 1835, before me, Thomas Moffett, Jus. Peace."

And moved the Court for a rule to be made on Mordecai Mobley, to show cause, if any he could, why the said Attorney should not

have leave to file an information in the nature of a *quo warranto*, in this Court, in behalf of said People, on the relation of Charles R. Matheny, against said Mobley, for having illegally usurped, intruded into, and unlawfully executed, and still unlawfully executing and holding the office of clerk of the Sangamon Circuit Court; on consideration whereof, it is ordered that said motion be continued till the second day of the next term of this Court.

And afterwards, to wit, on the 14th day of July, 1835, being the regular time of the Circuit Court for Sangamon county, the following motion came on to be heard, viz:

The People, on the relation of Charles R. Matheny *v.* Mordecai Mobley. } MOTION.

This day, Stephen A. Douglass, Attorney for the People of the State of Illinois, in and for the First Judicial Circuit, and on motion grounded upon an affidavit of Charles R. Matheny, filed on the last day of the last special term of this Court, and now here produced.

It is ordered that a rule be made on Mordecai Mobley, now acting as clerk of this Court, returnable to the fourth day of the present term, to show cause, if any he can, why the said Attorney for the People of the said State, should not have leave from this Court to file an information, in the nature of a *quo warranto*, against the said Mobley, (upon the relation of Charles R. Matheny,) for having usurped, intruded into, and illegally holding and executing the office of clerk of the Circuit Court of Sangamon county, and that a copy of this rule be served upon said Mobley by the sheriff, and returnable to the fourth day of the present term.

And afterwards, to wit, on the 16th day of July, 1835, the said Mobley being in Court, by his attorney, says, That he has no reason to urge why the State's Attorney shall not have leave to file the information as prayed for by him.

Whereupon it is ordered, That the rule heretofore entered in this matter be made absolute, and that leave be given to file the information aforesaid. And the said State's Attorney thereupon exhibited the information which is ordered to be filed, and is in the words and figures following, to wit:

"State of Illinois, Sangamon County, ss.,

In the Circuit Court of said county, July term, 1835, Stephen A. Douglass, State's Attorney of the First Judicial Circuit of the State of Illinois, who prosecutes in behalf of the People of the State of Illinois, on the relation of Charles R. Matheny, of the county of Sangamon aforesaid, comes here into Court and gives the Court to understand and be informed, that on the 14th day

of February, in the year one thousand eight hundred and twenty-seven, the said Charles R. Matheny, relator as aforesaid, was regularly and legally appointed clerk of the Circuit Court for the county of Sangamon aforesaid, by the judge of said Court; that the said Charles R. Matheny took the several oaths required by the statute in such case made and provided, and executed bond with security for the faithful discharge of the duties required of him by law, and thereupon entered into and upon the duties of the said office, and was legally possessed thereof and exercised the powers, received the emoluments, enjoyed the immunities and privileges appertaining to the same, and continued to have, hold, and enjoy the said office, and exercise the powers, perform the duties, and receive the emoluments and immunities thereof, from the time of his said appointment and induction therein until the 4th day of May, 1835; that from and after the said appointment, he never resigned, abandoned, or forfeited the said office, nor has the said Circuit Court of Sangamon county, or the office of clerk of said Court, ever been abolished; nor has he, the said Matheny, ever been removed or displaced from said office by the judgment of any court. And on the said 4th day of May, 1835, at the Circuit aforesaid, one Mordecai Mobley, of said county, well knowing the premises aforesaid, did unlawfully usurp the said office of clerk of the Circuit Court of Sangamon county, and enter into and upon the exercise of all the powers and duties of the office of such clerk, and by such unlawful usurpation did, then and there, become possessed of the said office, and of the emoluments, immunities, and privileges appertaining to the said office, 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 said State's Attorney, on the relation of the said Charles R. Matheny, further gives the Court here to understand and be informed that the said Mordecai Mobley, on the 4th day of May, 1835, at the Circuit aforesaid, did then and there unlawfully hold the office of clerk of the Circuit Court of Sangamon county, and from and since the said 4th day of May, 1835, hath, and still doth unlawfully hold the said office of clerk of the Circuit Court of Sangamon county, and exercise the powers, and receive the emoluments of said office, the said Charles R. Matheny, the relator, being during all the time aforesaid the legal and lawfully appointed clerk of said Court, as stated in the first count in this information, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the said State's Attorney, upon the relation of the said Charles R. Matheny, further gives the Court here to understand and be informed, that on the 10th day of May, 1835, at the Cir-

cuit aforesaid, the said Mordecai Mobley did unlawfully execute the office of clerk of the Circuit Court of Sangamon county; and from and since the said 10th day of May, 1835, hath, and still doth execute the office aforesaid, without any lawful authority, one Charles R. Matheny being on the said 10th day of May, 1835, the clerk of said Court, and still continuing to be and remain such clerk, as stated and alleged in the first count of this information, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the said State's Attorney, upon the relation of the said Charles R. Matheny, further gives the Court here to understand and be informed, that on the 10th day of May, 1835, at the Circuit aforesaid, the said clerk of the Circuit Court of Sangamon county, and by such unlawful intrusion, did, then and there, become possessed of the said office of clerk of the Circuit Court of Sangamon county, and of the emoluments and immunities of said office, and hath hitherto continued to have and to hold, and exercise the powers and duties of such clerk, and to receive the emoluments of said office, the said Charles R. Matheny being at the time of the intrusion aforesaid, and still continuing to be, the clerk of said Court, as stated in the first count of this information, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the State of Illinois.

STEPHEN A. DOUGLASS, State's Attorney.

And afterwards, to wit, on the 18th day of July, 1835, the following cause came on to be heard, viz :

The People, on the relation of Charles R. Matheny *v.* Mordecai Mobley. } ON INFORMATION.

This day came, as well the People aforesaid, by their attorney, as the defendant; and the said defendant filed his plea herein, in the words following :

And the said defendant, by Stone, his counsel, comes and defends the wrong and injury, when and where, &c., and says the People, their information aforesaid to have and maintain, ought not, because, he says, that under the provisions of an act of the General Assembly of the State of Illinois entitled "*An act to provide a uniform mode of holding Circuit Courts*," approved 7th January, 1835, Stephen T. Logan was elected judge of the Circuit Court of Sangamon county, and was regularly commissioned and sworn into office; that according to the laws of the land, the said Stephen T. Logan, as such judge, had full power

and lawful authority to appoint a clerk of the Circuit Court of said county, and having such power and authority, he, the said Logan, on the 25th day of April, 1835, appointed the said defendant clerk of the Circuit Court of Sangamon county, which appointment is in the words following:

Know all men, by these presents, That I, Stephen T. Logan, Judge of the First Judicial Circuit, in the State of Illinois, do, by these presents, constitute and appoint Mordecai Mobley clerk of the Circuit Court for the county of Sangamon, being one of the counties comprised within the said Judicial Circuit. In testimony whereof, I have hereunto set my hand and seal, at Springfield, in the county of Sangamon, this 25th day of April, 1835.

STEPHEN T. LOGAN, [L.S.]

By virtue of which said appointment, he, the said defendant, entered into the office aforesaid, (having taken the oaths and executed the bond as required by law,) as he lawfully might do, that he hath, and doth hold the said office, exercised the powers, performed the duties, and received the emoluments and immunities of the office aforesaid, under and by virtue of the appointment aforesaid, as by the laws of the land he has a right to do, all which he is ready to verify, &c., wherefore, &c.

STONE, Deft.'s Counsel.

To which the attorney for the People filed a demurrer.

And the judge of this Court having stated that he had formed an opinion upon the case, which was unfavorable to the defendant, and that he was therefore unwilling to decide the case, it is agreed between the parties, that judgment be entered against the right of the relator, subject to the right of appeal. Whereupon, by consent of the parties, as aforesaid, it is considered and adjudged by the Court, that the demurrer to the defendant's plea be overruled; and neither the People or the said relator making any other or further answer to the plea aforesaid, it is considered and agreed by the Court that the defendant be, and he is hereby acquitted of the charges alleged against him in the information, and that the said relator take nothing thereby; whereupon, by leave of the Court, the said Charles R. Matheny is permitted to prosecute an appeal from this judgment to the Supreme Court of the State, upon his executing a bond to the defendant, in the penalty of one hundred dollars, with Wharton Ransdall, Edward Mitchell, Francis Philips, Archer G. Herndon, and Janus F. Reed, or either of them, as surety, conditioned that he will well and truly prosecute the appeal; and in case the judgment of this Court is affirmed, that he will pay all costs which may be adjudged against him. The bond to be executed

before the clerk of this Court, within forty days, and which bond was executed and filed on the 10th August, 1835." (a)

STEPHEN A. DOUGLASS, State's Attorney, WILLIAM THOMAS and CYRUS WALKER, for the appellants.

HENRY EDDY, and JESSE B. THOMAS, jr., for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

The pleadings in this case show that Matheny was clerk of the Circuit Court of Sangamon county, on the 3d day of May, 1835; and that in pursuance of an act of the legislature entitled "*An act to establish a uniform mode of holding Circuit Courts*," (1) passed on the 7th of January, 1835, S. T. Logan was elected judge of the Circuit Court of Sangamon county, and in virtue of said office, appointed M. Mobley, the appellee, clerk of the Circuit Court of said county.

It becomes necessary in this case, to enquire what powers in relation to the appointment of clerks, are delegated to Circuit Courts, or the judges thereof, by the Constitution and laws of this State; and, also, by what tenure the clerks of the Circuit Court appointed by virtue of such authority, hold their office.

By the 4th Article and 6th section of the Constitution of this State, it is provided that "The Supreme Court, or a majority of the justices thereof, the Circuit Courts, or the justices thereof, shall, respectively, appoint their own clerks." Is the power of appointment conferred by this provision of the Constitution, a personal trust or authority, which may be exercised by every new incumbent upon entering into the office of judge? or, Is it not a power of appointment confined to the Court, or the judge as the organ or minister of the Court, and if so, has it in the present instance been exercised in such a case, and in such a manner, as is warranted by the Constitution and laws of this State? From a fair interpretation of this provision of the Constitution, it is clear that the Court, in contradistinction to a personal authority, is the repository of the trust conferred by the Constitution; and that whenever a clerk has been appointed, that the trust or authority is thereby executed, and cannot be resumed, or again exercised, until a vacancy shall occur in one of the several ways provided by law. The terms of the Constitution "the justices thereof" are used in connection with the Circuit Court, only to confer an authority to make an appointment in vacation as well as in term time, in order that the administration of justice might not be delayed for the want of so important an officer of the Court as a clerk. In either case the judge acts as the minister of the law. If a different construction should prevail, and the power of appointment should be regarded as personal to the judge, it would

(a) As to practice Jacobs L. Dic. Title Quo Warranto; People vs. R. R. Co. 13 Ill. R. 66 and note.

(1) Acts of 1835, 150; Gale's Stat. 182.

necessarily attach to every judge immediately upon his appointment, and upon the happening of a vacancy in the office of judge, the clerkships in all the counties of his Circuit, would also become vacant; and upon the same principle, when Circuit judges should exchange Circuits, as by law they are authorized to do, the office of clerk would become vacant by such exchange, in all the counties in their respective Circuits, because the judge presiding in the Circuit Court of a county, is for the time being the judge of that Court; and if the clerk is the officer of the judge, and not of the Court or law, he would have to be appointed upon every such exchange, and until the appointment was made, the administration of justice would be suspended. Such a construction of the Constitution, it is believed, is not warranted either by its language or spirit, and would in its consequences be fraught with great inconvenience to the public.

The act of 1835 is relied upon as vesting in the judge elected under it, an authority to appoint the clerks in their respective counties. This is undoubtedly true wherever the offices were vacant; but to sustain the position with respect to the case before the Court, it must be shown that by this act, the present Circuit Courts were created, and that the law which created those in existence at the time of its passage, was repealed, and the Courts thereby abolished. From an examination of that statute, it will be apparent that great caution has been used to avoid such a result. The first section of the act provides for the election of five Circuit judges in addition to the one then in existence, whose duty it should be to preside in the several Circuit Courts now or hereafter authorized and required to be held in the several counties in this State. The third section repeals so much of the law then in force, as required the judges of the Supreme Court to hold Circuit Courts. It will be perceived that the existence of Circuit Courts is expressly recognised by the language of this act, and the requisition to hold as well the Circuit Courts which might hereafter be created, as those then in existence, was intended to apply to, and provide for, the administration of justice in such new counties as might thereafter be created and organized. No part of the act repeals the law of 1829,(1) by which the Circuit Courts then in existence were created. It goes no farther than to assign to the judges elected under it, the duties before that time performed by the judges of the Supreme Court. The Circuit Court remained the same in name, jurisdiction, and character. It is contended by counsel that Matheny's appointment to the office of clerk is invalid, as not having been made by the Circuit Court of Sangamon county, because the judge who at the time of his appointment presided in that Court, was a judge of the Supreme Court. This argument is refuted by a reference to

(1) R. L. 147; Gale's Stat. 158.

that provision in the Constitution which enjoins upon him the performance of the Circuit duties when required by the legislature, and the law of 1829 making the requisition, which gives him the name, and clothes him with the authority, of a Circuit judge. It has also been attempted to assimilate the powers of the judges appointed under the act of 1835, to those of the judges of the Supreme Court under the law of 1827,(1) by which they were required to perform Circuit duties, and under which they reappointed their clerks. The cases, however, are essentially different. The act of 1827 abolished the Circuit Courts then in existence, by repealing the law which created and brought them into being, and with the expiration of that office, the official character and existence of the judge, together with that of the clerk of the Court also expired at the same time;—and when, by the authority of the legislature, Circuit Courts were again called into being, those Courts were authorized by the provision of the Constitution referred to, to appoint their clerks to the newly created offices. The act of 1835, I have attempted to show, did not abolish or change the character of the Circuit Courts; it only substituted for the discharge of the duties of the office, one set of judges in place of another. No inference, then, in favor of the legality of the appointment of Mobley under the law of 1835, can be drawn from the practice of the Courts under the law of 1827. But, on the contrary, if any conclusion is to be drawn from the practice of the Courts, and if such practice is to be regarded as having given a construction to the Constitution, and the powers and duties of the judges in relation to the appointment of clerks, it will settle the question in favor of the relator. By the Constitution, the commissions of the judges appointed prior to the year 1824, expired at that period, and when the judges elected to succeed them, came into office, they were of opinion that inasmuch as the Court remained the same, the office of clerk was not vacated by a change of judges, and consequently no appointment was necessary to continue in office the present incumbent, nor has any such been made.

This view of the subject is strengthened by an enquiry into the tenure by which a clerk of the Circuit Court holds his office. The Constitution gives to the Court the authority to appoint its Clerk, but when thus appointsd it fixes no limit to the duration of the office. The clerk, then, is to be considered as holding his office under the Constitution *ad libitum*, until the legislature shall think proper to prescribe the tenure. This it is certainly competent for it to do, and under a like provision of the Constitution with respect to the Auditor and Attorney General, it has exercised this authority by fixing the term of service of those officers. It has also legislated upon the subject of clerk, and

(1) R. L. of 1827, 119—124.

though it has not defined the tenure of the office specifically, it has done so to some extent, by prescribing the tenure upon which its duration is to depend. Those tenures are the renewal of the bonds at stated periods, his residence at the county seat, and various others. But a vacancy in the office of Judge of the Court, is not one of the causes enumerated, which will vacate the office of clerk, or for which he may, by application to the Court, be removed from office. It is not competent, then, when the Constitution has left the tenure of an office without limit, for the Court to prescribe limits; nor is it their province when the legislature has specified the causes of forfeiture of, or removal from, office, to say that other causes than those enumerated, shall have that effect. The consequence of such a latitude of construction, would be to change the tenure of an office, and make its duration depend not only upon the limits fixed by law, but upon such others as the Court might think it good policy to superadd. From a review of all the points involved in this case, I am of opinion that the order of the Circuit Court of Sangamon county, appointing M. Mobley clerk of that Court, was without authority and erroneous; because the power of appointment is delegated to the Court, and the exercise of that power limited to the filling of offices which may be created, or which may become vacant by any of the various ways known to the law; and because the relator had been legally appointed to the office which he claims, and the appointment had not expired by operation of any law of this State, nor has he been removed for any omission or act in violation of the law prescribing his duties, and defining the tenure of his office.

It is therefore ordered by the Court, that the judgment of the Court below be reversed, and that the relator, Charles R. Matheny, be restored to his office of Clerk of the Circuit Court of Sangamon county.

Browne, Justice, concurring:

The appellants filed an information in the nature of a *Quo Warranto* against the defendant, for usurping, intruding into, and unlawfully holding and exercising the office of clerk of the Sangamon Circuit Court, from and after the 4th day of May, 1835, to the injury of the relator, who, as is alleged, was then and from and after the 14th of February, 1827, had been legally clerk of said Court. To this information, the defendant pleaded specially in bar, that by an act of the legislature of this State, passed 7th January, 1835, entitled "*An act to provide a uniform mode of holding Circuit Courts*," a judge was regularly elected to said Circuit, and that he appointed the aforesaid Mordecai Mobley clerk. To this plea the appellants demurred. By agreement of the parties in the Court below, judg-

ment was rendered in favor of the appellee, subject to appeal, as in other cases. And now the appellant assigns for error the insufficiency of said plea to bar the plaintiff's right of recovery. By the Constitution of this State, Article 4. section 4, it is provided as follows:

"The justices of the Supreme and inferior Courts shall hold their offices during good behavior, until the end of the first session of the General Assembly which shall be begun and held after the first day of January, 1824, at which time their commissions shall expire, and until the expiration of which time the said justices respectively shall hold Circuit Courts in the several counties, in such manner and at such times, and shall have and exercise such jurisdiction as the General Assembly shall prescribe. But ever after the aforesaid period, the justices of the Supreme Court shall be commissioned during good behavior, and the justices thereof shall not hold Circuit Courts unless required by law."

By the 6th Section, "The Supreme Court or a majority of the justices thereof, the Circuit Courts, or a majority of the justices thereof, shall respectively appoint their own clerks."

In January, 1835, the legislature repealed the act requiring the judges of the Supreme Court to hold Circuit Courts, and in the same statute required the judges of the Supreme Court to hold annually two terms of the Supreme Court at the seat of government, and appointed Circuit judges to perform that part of the duty that had been required of the judges of the Supreme Court; such as holding Circuit Courts, &c. The law withdrawing the judges of the Supreme Court from the Circuit Courts, did not destroy those Courts, but only appointed other judges to perform (in that particular only) what had been before performed by the judges of the Supreme Court. By the statute passed 13th February, 1835, (1) it is provided "The several clerks of the Circuit Courts appointed or to be appointed, shall give bond, be qualified," &c., &c.

It is certainly competent for the legislature to impose this on the clerks of the Courts; but I cannot see where the power is given to a judge to remove a clerk when once appointed, where no charge has been preferred against him. By the statute of 1829,(2) it is provided that, "The clerks of the respective Circuit Courts shall issue process," &c., &c,—they "shall keep their office at the county seats, to do and perform all the duties in their Courts which may be enjoined upon them by law," &c. and "if any clerk of a Circuit Court shall neglect or refuse to perform any of the duties enjoined upon him by law, or shall in any manner be guilty of malfeasance in office, upon proper complaint made to the Court or judge, he shall be removed from office:

(1) Acts of 1835, 171—2; Gale's Stat. 183. (2) R. L. 152; Gale's Stat. 172.

Provided, that the said clerk shall nevertheless have the right of appeal to the Supreme Court, under the like conditions as are or may be prescribed by law for other cases." From the state of pleading nothing appears to show that the clerk ever violated any duty that was enjoined on him by law, or that he is guilty of malfeasance in office. I am therefore of the opinion that the judgment of the Circuit Court be reversed, and that the aforesaid Charles R. Matheny be restored to the office of clerk of the Circuit Court of Sangamon county.

SMITH, Justice, concurring:

The importance of the questions discussed and to be decided in this case, necessarily devolves on me the duty of expressing my opinion on the most leading points developed by the application. Entertaining some views not entirely in accordance with the opinion on which the judgment of the Court may be predicated, I propose to state briefly the grounds on which they are founded.

Many and different opinions have been entertained, as to the power of the Circuit Courts, and the judges, to appoint the clerks of those Courts; some supposing it a power which the Court alone could exercise, and others viewing it, also, as a personal power, attaching to the officer, as distinct from the Court.

The 6th section of the 4th article of the Constitution, which gives the power of appointment, is couched in a phraseology very peculiar, and if it be interpreted literally, would seem to admit of no doubt that the power attached, as well to the person of the officer, as to the Court itself. This section is as follows: "The Supreme Court or a majority of the justices thereof, the Circuit Courts, or the justices thereof, shall respectively appoint their own clerks." It is manifest from this language, that in asserting under it the personal right of appointment, no violence would be done to the plain and literal signification of the language used; and I am free to confess that from a casual examination of the section, I have been inclined so to consider it, and I believe I have not been singular in such opinion. The same opinion has been entertained, I am informed, by many highly intelligent legal men, and if I am not greatly misinformed, it has been practised on, and appointments are understood to have been made under such a view of the power, considering it both warranted and proper; but more mature consideration, and the possible injurious consequences which might flow from such an interpretation, have induced me to conclude that the more sound construction is, that it is not a power attaching to the person of the officer, but that the power can alone be exercised by him, as the organ of the Court; and that when the power is once exercised, and the office filled by an appointment, whether in vacation or

in term time, the incumbent cannot be displaced, except in the manner and for the causes provided by law. The office of clerk is created under and by virtue of this section of the Constitution: but it will be remarked, that while thus created, its duration is left undefined, and being so, unless its tenure be defined by law, it would, we should apprehend, be of indefinite duration, whether for life or good behaviour, might also admit of much doubt. That tenure has by the 23d section of the act of 1829,(1) regulating the Supreme and Circuit Courts, and various other acts of the legislature, been in some measure defined, and made to depend on various contingencies, and the performance of certain acts—such as renewing official bonds, keeping his office at the county seat—and has also provided for the manner of removal for acts of malfeasance. This was entirely within legislative competency, and its expediency, as well as necessity, cannot be doubted.

It will not be my purpose to enumerate with particularity the various phases which have taken place in the judicial history of the State, nor of the organization and re-organization of its courts, and the consequences which have, or may be supposed to have followed from the various acts of the legislature in reference thereto. When the Circuit Courts were first created under the Constitution, it is well understood that the judges of the Supreme Court were, as the Constitution provided, assigned by law the duty of holding Circuit Courts. That after the period limited in the Constitution, and when in December, 1824, the re-organization of the judiciary took place, they were withdrawn from that duty, and Circuit judges were created, by and in virtue of the powers contained in the 6th Article of the Constitution of the State, who were, when once created, declared by that Article, to hold their offices during good behaviour, and subject only to removal by impeachment or by address. The repealing of the law which created the Circuit Courts, of which the persons were judges, 1st January and February, 1827, however it may be supposed to have destroyed the Courts previously created in 1824, under that provision of the 1st section of the 6th Article of the Constitution, which declares "The judicial power of the State shall be vested in one Supreme Court and such inferior courts as the General Assembly shall from time to time ordain and establish," could not, in my humble judgment, have in the least affected the tenure of the office of the judge. The shield of the Constitution was placed between him and the act of destruction, and if it failed to afford the protection guaranteed by its broad and comprehensive declaration of his right, it is doubtless because he neglected to seek the shelter it afforded. If it be conceded that all inferior courts called into being under this section of the Constitution, might at all times be again destroyed, and that the

(1) R. L. 152; Gale's Stat. 172.

power again to create, necessarily implies an equal right to destroy, still it seems to me impossible to suppose that the officer, chosen under the Constitution, should be involved in the destruction.

It is not in my judgment necessary to the denial of the right of the judge to remove the relator from the office of clerk of the Circuit Court, that it should rest at all on the effect of the acts of 1827, repealing the act of 1824, under which the judges of the then Circuit Courts were chosen, and the clerks appointed; for while it is admitted that the Court created by the act of 1824, may have been destroyed and the office of clerk with it, still the Constitution preserved the official existence of the judge, and though his duties were taken away and transferred to others, his office still remained. The act then of re-organizing anew the Circuit Courts under the act of 1827, and re-assigning the Supreme Court judges to the duties of holding Circuit Courts, and their appointment of other clerks, or the re-appointment of the old ones, form no ground upon which the removal in the present case can be with propriety based.

The cases seem to me not by any means apposite. The dissimilarity of the provisions in the act of 1827, and the act of 1835, providing for a uniform mode of holding the Circuit Courts in this State, is, I think, most manifestly to be perceived, from a comparison of the language used in them. The act of 1827 professed, in open and undisguised terms, to abrogate the Circuit Courts created by the act of 1824, and the re-organization provided in the same act, referred to those Courts as having heretofore had an existence. The act of 1835 has not the most distant allusion to an abrogation of the Circuit Courts, but provides for the choice of other officers, who are to be assigned to the holding of Courts in existence, and such as should be thereafter required to be held, in the several counties of the State. It is in vain then to refer, in my opinion, to the acts of 1827, or the practice under them, in relation to the appointment of clerks, to sustain the removal of the relator in this case. The clerk could alone have been removed for some one of the causes named in the several laws already referred to, in the manner provided in the 23d section of the act of 1829.(1) It has been urged in the argument, that the 12th section of the act of the 13th Feb. 1835,(2) regulating the times of holding the Supreme and Circuit Courts, authorized the removal. I can see nothing in that section warranting such an inference, much less expressly providing therefor, or recognising the power. It is merely declaratory of the manner in which clerks appointed, or to be appointed, under the act establishing a uniform mode of holding Circuit Courts, should give bond. This was merely a provision in relation to appoint-

(1) R. L. 152; Gale's Stat. 172. (2) Acts of 1835, 171—2; Gale's Stat. 188.

ments of vacancies, and Courts of counties newly organized. If it had intended to have conferred the power of removal, it would have spoken out in language not to be misunderstood.

Considering that the power of appointment under the Constitution is committed to the judges of the Court, as the organs thereof, and is not a mere personal authority to be exercised by every new incumbent, and that the tenure of the office of clerk is limited and defined by law; that the causes for which the clerk shall be removed have been also defined, and the modes of proceeding prescribed; and that the regularity of the proceedings and records of the Courts, and the duties which appertain to the office will be greatly promoted by uniformity and stability of the tenure under which the incumbents hold their offices; I feel constrained from a sense of what I am convinced upon mature reflection upon the points made, is the just and rational interpretation of the Constitution and the laws relative thereto, to concur in the judgment of the Court in favor of the relator.

Judgment reversed.

Note. *See* The People *v.* Field, 2 Scam. 79.

Philip Clark, plaintiff in error *v.* Bayless Lake, defendant in error.

Error to Sangamon.

In an action by C. against L., for erecting a dam across a navigable stream, which obstructed its navigation, and by means of which C.'s boat and boat load of corn were lost, the defendant asked a witness "Whether there was not another mill-dam across said river below the defendant's mill-dam, erected in violation of law, which was higher than the defendant's mill-dam; and whether said lower dam would not have prevented plaintiff from proceeding to the lower markets of Natchez or New Orleans, as it was late in the season, and no other tide might take place in the river during that season, even if the plaintiff could have gone over the defendant's mill-dam:" *Held* that the question was illegal and improper.

The law is well settled, that every person who erects an obstruction across a public highway, is liable for all the injuries that result from it. It is consequently no excuse that another obstruction would have produced the same effect.

The rule relative to receiving or rejecting testimony, is: Does the proposed testimony tend to prove the issue joined between the parties? If the testimony offered does not tend to prove the issue, or is calculated to lead the jury astray, it ought to be rejected.

This cause was tried at the July term, 1835, of the Sangamon Circuit Court, before the Hon. Richard M. Young and a jury, and a verdict and judgment rendered for the defendant.

C. Walker, for the plaintiff in error.

J. T. Stuart and M. McConnell, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

This was an act of *trespass on the case*, brought by Clark against Lake, in the Sangamon Circuit Court. The plaintiff declared against the defendant for erecting a dam across the Sangamon river,—which stream had been declared a public highway by a statute of this State,—whereby the plaintiff had been obstructed in the navigation thereof, while proceeding down the river with a boat load of corn, and thereby lost his said boat and contents. The defendant pleaded not guilty. On the trial of the cause, the plaintiff gave evidence conducing to prove that he descended said river with a boat load of corn, with a sufficient tide of water to descend the river, if it had not been obstructed by artificial obstacles, and intending to go to Natchez or New Orleans. That when the boat arrived within three-fourths of a mile of the defendant's mill-dam, he stopped his boat. That in consequence of the said dam's impeding the navigation of the said river, the boat could not proceed on the trip, and, in consequence of being so stopped, the corn was lost. That the corn was worth twelve-and-a-half cents per bushel where it was stopped on the river, and worth seventy-five cents at the lower markets. After the foregoing evidence was given, the defendant asked a witness, "Whether there was not another mill-dam across said river, below the defendant's mill-dam, erected in violation of said law, which was higher than the defendant's mill-dam: and whether said lower dam would not have prevented plaintiff from proceeding to the lower markets of Natchez or New Orleans, as it was late in the season, and no other tide might take place in the river during that season, even if the plaintiff could have gone over the defendant's mill-dam,"—to which the plaintiff's counsel objected; but the Court overruled the objection, and permitted the question to be asked, and the defendant to prove that fact to the jury by said witness. To which opinion and judgment of the Court, the plaintiff by his counsel excepted.

The only question presented in this case, is, whether the Circuit Court erred in permitting this testimony to be given to the jury.

It appears from the record that the verdict was for the defendant, which probably shows the effect that this testimony was designed to have. This Court cannot conceive what other use could have been made of this testimony unless it was to urge to the jury, that if the plaintiff could have passed the defendant's dam, he would not have been benefitted by it, as he inevitably would have been stopped by the dam lower down the river. This mode

of reasoning, if adopted, was not more unsound in morals than in law. The law is well settled, that every person who erects an obstruction across a public highway, is liable for all the injuries that result from it. It is consequently no excuse that another obstruction would have produced the same effect; for the obvious reason, that the person injured by the first obstruction, has no cause of action against the person who erected the second. In the present case, the second mill-dam had not delayed the plaintiff, and of course he could not have sued the person who erected it. If the plaintiff sought to recover damages for a greater amount than the value of the corn and boat, where the injury occurred, by showing how much profits he had lost by the obstruction occasioned by defendant's mill-dam, it doubtless would have been proper for the defendant to show, in mitigation of damages, that such profits could never have been realized, in consequence of the impossibility of the boat's making the lower markets, occasioned by obstructions in the river below defendant's mill-dam. It is manifest, however, that the evidence was not offered in mitigation of damages, because no such limitation was proposed by the defendant, nor required by the Circuit Court. The true rule relative to receiving or rejecting testimony, is,—Does the proposed testimony tend to prove the issue joined between the parties? If the testimony offered does not tend to prove the issue, or is calculated to lead the jury estray, it ought to be rejected. This Court believing that such may have been the effect of the question asked by the defendant, are of opinion that the Circuit Court erred in not rejecting it.

The judgment is therefore reversed with costs, and the cause remanded, with directions to the Circuit Court of Sangamon county to award a *venire de novo*.

Judgment reversed.

ABRAHAM MARSHALL, appellant *v.* ABRAHAM MAURY, appellee.

Appeal from Schuyler.

A *scire facias* to foreclose a mortgage, is considered both as process and declaration; and the proper course to take advantage of informalities, is by demurrer.

A *scire facias* may be amended.

The objection that a judgment was given without a rule to plead, cannot be assigned for error.

A *scire facias* on a mortgage is a proceeding *in rem*; and the judgment should direct the sale of the mortgaged premises. The direction "that a special execution issue therefor according to the statute in such case made and provided," is not sufficient.

This cause was heard at the June term, 1835, of the Schuyler Circuit Court, before the Hon. Stephen T. Logan, and judgment rendered for the appellee.

C. Walker and G. W. P. Maxwell, for the appellant.

O. H. Browning, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was a *scire facias* brought by Maury against Marshall in the Schuyler Circuit Court, to foreclose a mortgage executed by Marshall to Maury. A motion was made in the Circuit Court by the defendant below, to quash the *scire facias*, for not averring that the note copied into it was the note referred to in the mortgage; and because it did not assign either a breach of the mortgage, or a breach of the note. The Circuit Court overruled the motion, and the defendant not making any farther defence, the Court gave judgment for the plaintiff for the amount due on the mortgage, with directions "that a special execution issue therefor, according to the statute in such case made and provided."

The errors assigned are:

1. That the Circuit Court refused to quash the *scire facias*.
2. Entering judgment without a rule to plead.
3. Rendering judgment for more than the *scire facias* claimed.
4. Rendering judgment generally instead of specially.

A *scire facias* is considered both as process and declaration: and the proper course to take advantage of informalities, is by demurrer.[a] Had the defendant below demurred, the *scire facias* might have been amended.(1) The motion to quash was therefore correctly overruled. The objection that the judgment was given without a rule to plead, cannot be assigned for error. If according to the practice of the Court below, a rule to plead ought to have been entered, the proper course would have been to apply to the Court below to have set aside the judgment for irregularity. The last error assigned is fatal. The statute provides "That the Court may proceed to give judgment, with costs, for such sum as may be due by said mortgage, or appear to be due by the pleadings, or after defence, if any be made, and also that said mortgaged premises be sold to satisfy such judgment." A *scire facias* on a mortgage, is a proceeding *in rem*; and the judgment should have been, as the statute directs, to sell the mortgaged premises.[b] For this error the judgment must be reversed with costs, and the cause remanded with directions to the Circuit Court to give the proper judgment.

Judgment reversed.

(a) McFadden *vs.* Fortier, 20 Ill. R. 509; Osgood *vs.* Stevens, 25 Ill. R. 89.
(1) State Bank of Illinois *v.* Buckmaster, Breese 133; Snyder *v.* The State Bank of Illinois, Breese 122.
(b) Osgood *vs.* Stevens 25 Ill. R. 89.

OLIVER C. VANLANDINGHAM, plaintiff in error *v.* WILLIAM FELLOWS, CORNELIUS FELLOWS, and ABRAHAM HITE, co-partners under the style of W. & C. Fellows & Co., defendants in error.

Error to Gallatin.

The reasons filed by a party, as the foundation for a motion in the Circuit Court, do not thereby become a part of the record. To make them a part of the record, they should be embodied in a bill of exceptions.

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.

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.

The judgment in this cause was rendered at the July term, 1835, of the Gallatin Circuit Court, by the Hon. Alex. F. Grant.

W. J. GATEWOOD and J. J. ROBINSON, for the plaintiff in error.

H. EDDY, for the defendants in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced by W. & C. Fellows and company against Vanlandingham, in the Gallatin Circuit Court, for goods sold, money lent and advanced, and paid, laid out and expended, and also for money had and received, and an *insimul computassent*.

The defendant below made default, whereupon a judgment by default was entered, and writ of inquiry awarded to be executed in vacation.

At the next term of the Gallatin Circuit Court, to wit, on the 17th day of April, 1835, upon the return of the writ of inquiry, final judgment was given for the plaintiffs below. Subsequently in the same term, to wit, on the 18th day of April, the defendant below moved the Court to set aside the inquisition, and filed reasons therefor; but did not accompany them with an affidavit of their truth. The Court overruled the motion.

To reverse this decision, a writ of error has been brought to this Court, and the following errors assigned, to wit: 1. That the writ of inquiry was executed in vacation, and not in term time, and in open Court. 2. That the plaintiff in error had no notice of the time and place of executing the writ of inquiry. 3. That the verdict was contrary to law and evidence. 4. That the Court overruled the motion to quash the writ, set aside the verdict, and arrest the judgment.

In relation to the three last errors assigned, the Court are clearly of opinion, that they cannot be assigned for error. The

reasons filed by a party, as the foundation for a motion, do not thereby become a part of the record. If the facts had been properly before the Circuit Court, and that Court had decided erroneously, the proper course would have been to have taken a bill of exceptions. For any thing that appears from the record, the Circuit Court may have overruled the motion to set aside the inquisition, because no affidavit had been filed showing the truth of the reasons relied on. If the Circuit Court refused the motion upon this ground, it decided correctly. But this Court cannot take any notice of the reasons filed in the Court below, as the ground of the motion to set aside the writ of inquiry, &c., because we consider them as forming no part of the record. The only question for our decision, is that arising from the order of the Circuit Court, that a writ of inquiry issue, to be executed in vacation. Was this irregular? A writ of inquiry at common law, is a mere inquest of office, to inform the conscience of the Court, who if it please, may itself assess the damages, with the assent of the plaintiff, or direct them to be assessed by the sheriff or other proper officer.(1) In the performance of this duty it has been decided that the sheriff acts ministerially, and consequently the writ may be executed by a deputy.(2) But if it appears that important questions of law will arise on the execution of the writ, the Court will order it to be executed in open Court.(3) From this view of the common law, relative to writs of inquiry, it follows that it is not necessary to execute the writ in Court unless expressly so directed by the Court, nor in term time, nor at the Court House. It, like other writs, may be executed at any place within the sheriff's bailiwick. Should any irregularities take place, such as want of notice, improper persons empannelled as jurors, or illegal testimony received, the proper course is to apply, upon affidavit of the facts, to the Circuit Court, to set the inquest aside. If then the order of the Circuit Court to execute the writ in vacation, is no violation of the practice at common law, has the 13th section(4) of the "*Act concerning Practice in Courts of Law*," changed the practice so that a sheriff cannot execute a writ of inquiry of damages? This section provides, that "Whenever judgment shall be given against the defendant or defendants by default, in any action brought on any instrument of writing for the payment of money only, the court may direct the clerk to assess the damages by computing the interest, and report the same to the court, upon which final judgment shall be given; and in all other actions, when judgment shall go by default, the plaintiff may have his damages assessed by the jury in court."

This language can be construed only to mean that the plaintiff

(1) Tidd's Pract. 617. (2) Johns. 63. (3) Tidd's Pract. 623.
(4) R. L. 490; Gale's Stat. 532.

may, if he elect so to do, have his inquest taken in Court. The common law practice is, as we have seen, that the plaintiff by showing good reasons, can have the writ of inquiry executed in Court: but under this statute, he has a right to insist upon its being executed in Court; yet he undoubtedly may waive the right.[a] The order, then, to execute the writ of inquiry in vacation, cannot be assigned for error by the defendant below.

The judgment, must therefore, be affirmed with costs.

Judgment affirmed.

(*a*) Moore *vs.* Purple, 3 Gil. R. 149; Ætna Ins. Co. *vs.* Phelps 27 Ill. R. 71.

JOHN BUSTARD and CHARLES NOOE, plaintiffs in error *v.* WILLIAM MORRISON, administrator of the estate of JOHN EDGAR, deceased, JAMES EDGAR, ISABELLA EDGAR, RACHEL M. MCCRACKEN, ROBERT MCCRACKEN, and NICHOLAS MCCRACKEN, heirs at law of said John Edgar, deceased, LEONARD JONES, JAMES NELSON, and CHARLES GARNER, defendants in error.

Error to Randolph.

It is not the province of a Court of Chancery to carry into effect the judgments of a court of law.

The statute makes judgments of the Circuit Court a lien upon all the lands of the defendant within its jurisdiction. No sale or transfer of these lands after judgment, will exempt them from the operation of an execution at any time within seven years.

If by lapse of time or his own negligence, a party loses his lien, a court of chancery cannot aid him by extending the lien beyond the period limited by law.

A judgment of a Circuit Court creates no lien upon lands beyond the limits of the county in which such judgment is rendered.

THIS cause was decided in the Court below, by the Hon Theophilus W. Smith, at the April term, 1834.

J. SEMPLE, for the plaintiffs in error.

D. J. BAKER, for the defendants in error, contended:

A judgment creditor cannot go into equity to set up or enforce the judgment lien against the real estate of a debtor who dies after judgment, the existence of the lien and the method of enforcing it, being purely legal matters. Miami Ex. Co. Bank *v.* Turpin *et al.*, 3 Ohio 517; Conover's Dig. Index 136.

Bill in equity, &c. cannot be sustained, as complainant has his

remedy at law. Bustard *v.* Dabney *et al.*, 4 Ohio 70; Conover's Dig. Index 137.

Judgment liens are matters purely legal, &c., 6 Ohio 162: Con. Dig. Index 141–2.

WILSON, Chief Justice, delivered the opinion of the Court:

The material facts set out in the complainant's bill, are, that in 1821 they obtained a judgment in the Randolph Circuit Court against J. Edgar, for $829; that in 1823, an execution issued on this judgment, which was replevied with R. Morrison as surety. Other executions afterwards issued, which were returned unsatisfied. The bill further sets out that Edgar died insolvent, but that at the time of the rendition of the judgment, he was the owner of lands in the counties of Randolph, Jackson, and Perry, all of which were sold to persons who are made defendants to the bill of complaint, subject however, to the judgment of the complainants; and concludes with a prayer that the lien may be perpetual, and the land sold to satisfy their judgment.

To this bill the defendants demurred; the Court sustained the demurrer; and the decision of the Court sustaining the demurrer, is the error assigned for the reversal of the judgment below.

It is clear that the complainants have mistaken their remedy, and the effect of their judgment. It is not the province of a court of chancery to carry into effect the judgments of a court of law. The powers of a court of law are amply sufficient to carry into effect its own adjudications. The statute makes judgments of the Circuit Court a lien upon all the lands of the defendant within its jurisdiction. No sale or transfer of those lands after judgment, will exempt them from the operation of an execution at any time within seven years, since the act of 1825.(1)[a] In this case, according to the complainant's own showing, the lands were sold subject to their judgment. The party, then, have mistaken their remedy, in applying to a court of chancery to enforce their judgment, instead of availing themselves of the process of the Court by which it was rendered. If by the lapse of time, and their own laches, they have lost their lien, a court of chancery cannot aid them, by extending the lien beyond the period limited by law;[b] neither can it make the judgment of the Randolph Circuit Court a lien upon the land lying in the counties of Jackson and Perry. The judgment of a Circuit Court creates no lien upon land beyond the limit of its jurisdiction, to wit, the county in which such judgment is rendered.

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

(1) R. L. 371; Gale's Stat. 389.
(a) Durham *vs.* Heaton 28 Ill. R. 274; Kirk *vs.* Vondery 24 Ill. R. 447.
(b) Riggin *vs.* Mulligan, 4 G. I. R. 50.

JEFFREY ROBINSON, appellant *v.* JAMES D. HARLAN, appellee.

Appeal from Wayne.

It cannot be denied that a constable is liable where he has wilfully neglected or refused to execute lawful process issued upon a judgment rendered by a justice of the peace, in a case where he had jurisdiction of the subject matter litigated; but to enforce this liability, it is not only necessary for the declaration to allege generally that the magistrate had jurisdiction, but it should set out specifically the kind of action, and extent of the plaintiff's claim, in order to show to the Court that the justice had jurisdiction.(*a*)

A justice's court is one of limited jurisdiction; the statute is the charter of its authority; and whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void, and the officer obeying its process in such a case, makes himself liable. But if the Court has jurisdiction, the officer is not bound to enquire farther, its process is sufficient authority to him.

THIS cause was tried in the Court below, at the September term, 1835, before the Hon. Alex. F. Grant, and judgment rendered for the defendant. The plaintiff appealed to this Court.

J. PEARSON, for the appellant, cited Cowan's Justice 663, 665; R. L. 351; Breese 284; 2 Tidd's Prac. 1030, 1031, 1061, 1065, 1067, 1036, 1032; Bac. Abr. title *D;* 4 Ohio R. 136 Conover's Dig. 275.

O. B. FICKLIN, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This was an action of *trespass on the case*, brought by Robinson against Harlan, as constable, for neglecting and refusing to execute process issued by a justice of the peace, upon a judgment rendered by the justice in favor of the plaintiff, against John B. Gash. The declaration alleges that the judgment was rendered, and an execution first issued and put into the hands of Harlan, as constable, upon which he returned "no property found;" after which a *capias* was issued and returned by Harlan "not found." It then charges that upon the execution the constable might have made the money, and that with the *capias* he might have taken the body of Gash, but that he refused and neglected to do either, to the damage of the plaintiff $200. To this declaration the defendant interposed a demurrer, which was sustained by the Court.

It cannot be denied that a constable is liable where he has wilfully neglected or refused to execute lawful process issued upon a judgment rendered by a justice in a case where he had jurisdiction of the subject matter litigated; but to enforce this liability, it is not only necessary for the declaration to allege generally that the magistrate had jurisdiction, but it should set

(*a*) *Ante* 201; Schlenker *vs.* Risley, 3 Scam. R. 485; Wells *vs.* Mason, 1 Scam. R. 80. Sandford *vs.* Gaddis, 13 Ill. R. 337; Case *vs.* Hall, 21 Ill. R. 635.

out specifically the kind of action, and extent of the plaintiff's claim, in order to show to the Court that the justice had jurisdiction.

The declaration in this case is essentially defective in this respect; it does not set out the cause of action, or contain even a general allegation of the justice's jurisdiction. The reason of this rule is obvious. By adverting to the organization and powers of a justice's court, it will be perceived that it is one of limited jurisdiction. The statute is the charter of its authority; and whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void, and the officer obeying its process in such a case, makes himself liable. It is therefore incumbent upon a ministerial officer to look to the jurisdiction of the court, but he is bound to look no farther. Its process is a sufficient warrant to him for what it may command, however erroneous the judgment upon which it issued, provided it did not exceed the limits of its jurisdiction as to the subject matter of adjudication.

For anything that appears in the plaintiff's declaration of this case, the action before the justice may have been for slander, or some other matter not cognizable before a justice, and if so, the constable was not bound to execute the execution or *capias*. The defendant's demurrer to the plaintiff's declaration, was therefore properly sustained by the Circuit Court, and the judgment is affirmed with costs.

Judgment affirmed.

Note. See the case of Brother *et. al. v. c.* Cannon, *Ante* 200.

ASAHEL HANNUM, appellant *v.* ELIAS THOMPSON, appellee.

Appeal from Putnam.

A summons not under seal, issued from the Circuit Court, should be quashed on motion in that Court.

H. EDDY, for the appellant.

BROWNE, Justice, delivered the opinion of the Court:

This is an action of *trespass on the case* brought by Elias Thompson against Asahel Hannum, in the Circuit Court of Putnam county. The judgment was rendered in favor of the plaintiff, against the defendant, in the Circuit Court, for one hundred dollars. To reverse the decision, the defendant, Asahel Hannum, has brought the case to this Court by appeal. It is not necessary to notice but one point in the case. It appears from the record

that the clerk of the Circuit Court had omitted to put his seal to the original summons. The defendant by his counsel moved the Court to quash the summons, for want of a seal to it; which motion was overruled by the Court. The Court erred in refusing to quash the summons. By the practice act,(1) it is provided that the first process shall be a summons &c., which summons shall be issued under the seal of the Court, &c.[a] For which error the judgment of the Circuit Court is reversed with costs.

Judgment reversed.

(1) R. L. 487; Gale's Stat. 529.
(a) *Post.* 395; Bybee *vs.* Ashby, 2 Gil. R. 166; Garland *vs.* Britton, 12 Ill. R. 232.

WILLIAM OGLE, plaintiff in error *v.* ANANIAS COFFEY, who sues for the use of JOHN BECK, defendant in error.

Error to Madison.

The return of a sheriff should state the manner in which the process was executed. "Executed Oct. 18th, 1832, as commanded within," is not a sufficient return to a summons.(*a*)

J. B. THOMAS and D. PRICKETT, for the plaintiff in error.

J. SEMPLE, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:(2)

This was an action of *debt* on a judgment rendered in the State of Kentucky. Judgment was rendered by default in the Madison Circuit Court.

The principal error assigned is, the want of personal service of the summons on the defendant. The return of the sheriff is not in compliance with the provision of the law directing the manner of making the service and return by the sheriff. The return of the sheriff is, "Executed Oct. 18th, 1832, as commanded within."

Whether the date specified, is intended for the date of the day of service, or is the day on which the summons is returned, is wholly uncertain. The manner of making the service is still more doubtful. Whether it was by reading the summons to the defendant, or by delivering a copy, is left to conjecture, and it is impossible to say which course was adopted, or whether either was pursued.

The case falls directly within the rule laid down in the cases of Wilson *v.* Greathouse, and Clemson and Hunter *v.* Hamm, decided in June term, 1835.(3)

The judgment is reversed with costs.

Judgment reversed.

(*a*) Ball *vs.* Shattuck, 16 Ill. R. 299; Bancroft *vs.* Speer, 21 Ill. R. 227.
(2) LOCKWOOD and BROWNE, Justices, gave no opinion in this case, not being present at the argument of the cause.
(3) *Ante* 174, 176.

THOMAS BENTLEY, plaintiff in error *v.* JOHN DOE *ex dem.* MIRON K. BROWNSON, defendant in error.

Error to Morgan.

In an action of ejectment, where the judgment of the Circuit Court is for premises not described in the declaration, the judgment will be reversed.

M. MCCONNELL, for the plaintiff in error.

WM. THOMAS, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *ejectment*. The declaration contains a demise of certain premises, described as lots of ground in the town of Naples, by numbers twenty-five in block number nine, and six in block number nine, with their appurtenances.

On the plea of not guilty, the case was submitted to the decision of the Circuit Court, without the intervention of a jury, on the evidence adduced by the parties. By the record it appears that the Court found the defendant guilty of the trespass and ejectment, as to lot number five in block number nine, upon which judgment was entered for the lessor of the plaintiff, for the premises described in the finding. Among a variety of errors assigned under the decision of the Circuit Court, appearing by the bill of exceptions taken in the cause, it is assigned for error, that the finding and judgment is for a lot not described in the declaration of the plaintiff.

The lots in the declaration are described as numbers twenty-five and six. Consequently the finding and judgment are for premises not described, nor in any way the subject of controversy. It is possible that the record may have been in this particular erroneously transcribed, but it cannot be known how this is.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to award a *venire de novo*.

The plaintiff in error recovers his costs.

Judgment reversed.

OLIVER C. VANLANDINGHAM, appellant *v.* THOMAS LOWERY, appellee.

Appeal from Gallatin.

Where a cause has been referred by a rule of Court, it is incumbent on the party objecting to the report of the referees, to show by affidavit that some irregularity has occurred.

In the absence of such proof their proceedings will be deemed to have been regular. It is to be presumed that the requisite forms have been observed, in a case like the present, without a recital.

JUDGMENTS were rendered in two causes between the same parties, at the October term of the Gallatin Circuit Court, the Hon. Justin Harlan presiding, in favor of the defendant, Lowery. The plaintiff appealed to this Court, and assigned the same errors in each case.

H. EDDY, for the appellant.

D. J. BAKER, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

These two actions were instituted in the Circuit Court of Gallatin, and were referred by the mutual agreement of the parties, under the following stipulation: "These two cases are, by consent of parties, referred to a jury of twelve disinterested men, to be summoned by the sheriff or any constable, to meet at some convenient place in Shawneetown, at such time after the Circuit is over, as either party or attorney shall fix, and give the other one week's notice of said jury, to hear evidence, and decide each case separately, and the said jurors, and all witnesses, shall be sworn by some justice of the peace, and the verdict of said jury shall be returned to the Court, and shall form the judgment of this Court." This order was renewed at a subsequent term, not having been acted upon. After which, both cases were tried, and verdicts rendered in each case under said rule.

When the verdicts were presented to the Circuit Court, objections were raised to the entry of judgments on those verdicts; but we can gather from no part af the record, what those objections were. There is nothing in the record showing the least departure from the agreement of the parties as to the manner in which the cases were to be decided.

If the agreement had not been adhered to in any of its essential terms, the party dissatisfied with the proceedings had, should have made the departures appear by affidavit of the facts, and have then moved the Circuit Court to have set aside the proceedings had. The Circuit Court was correct in presuming that the terms of the rule of reference had been observed, as there was nothing in the return of the verdict of the twelve persons selected to try the cause, showing any irregularity. It cannot, I think, be contended, that the present cases were referred under our statute, but that the parties chose to adopt the particular mode agreed on for their own convenience. As they sought this course, there are many reasons why the Circuit Court should not have disturbed the proceedings, unless they had evidence of a direct departure from the terms of the agreement, which resulted

in injustice to the party complaining of the departure. If there was any thing of this kind it was *dehors* the record, and it became the duty of the complaining party to present it to the Court in a tangible shape, so that it could judge of the necessity and propriety of vacating the proceedings had. The voluntary agreement of the parties should be carried out in good faith, and no Court should lend a willing ear to objections of a technical character to annul a proceeding voluntarily had, where no injustice is shown to have arisen, and where none can be fairly presumed. The forms to be observed in summoning jurors, swearing them and the witnesses, and giving notice, are presumed in a case like the present, without a recital, to have been done, and the more so as either party had the means of seeing it done.

It was the interest of both parties to see that the proceedings were regular, and this Court cannot, in the absence of any thing in the record to the contrary, presume differently.

The judgment of the Court is affirmed with costs.

Judgment affirmed.

NANCY REAVIS, plaintiff in error, *v.* ISHAM REAVIS, defendant in error.

Error to Bond.

On a bill filed alleging a desertion for more than two years, and answer confessing the desertion, but justifying it on account of repeated cruelty on the part of the complainant, the jury having found the charge of desertion to be true as alleged in the bill, the Court ordered a decree that the bands of matrimony be dissolved, and that alimony be allowed to the respondent for the support of herself and child, and that the cause be continued to the next term of the Court, for the purpose of enquiring into the amount proper to be allowed. At the next term of the Court, the same evidence was admitted on the hearing of the question in relation to the alimony, which had been admitted on the hearing of the application for divorce, though objected to by respondent; and a decree for one cent alimony, and that each party should pay the costs incured by each, on the application for alimony:—*Held* that said testimony must have been irrelevant to an enquiry on the question of alimony, the only question remaining to be decided, and that it was error to admit the same; and that the allowance of a nominal amount of alimony, was a virtual rescinding of the judgment of the Circuit Court at the previous term. *Ante* 122.

The final judgment of the Court should have decreed a yearly allowance commensurate to the support of the wife and child, in proportion to the husband's ability, and her condition in life

The order that the wife should pay costs, was also erroneous.

THIS was a bill for divorce, filed by Isham Reavis, against his wife, Nancy, setting forth for cause, desertion. There was a verdict for complainant, and thereupon the Court directed the following entry to be made: "Ordered, that the bands of matri-

mony heretofore existing in this cause, between the complainant and the respondent, be dissolved, and that alimony be allowed to the respondent for the maintenance of herself and child, the issue of said marriage, and that the amount so to be allowed be enquired of by evidence to be heard at the next term, until which time the cause is continued."

At the next term of the Court, to wit, at the May term, 1835, the Hon. Thomas Ford presiding, such proceedings were had, that the following bills of exceptions were allowed, to wit, "Isham Reavis *v.* Nancy Reavis, on application for alimony.

The parties appeared, and the respondent introduced proof of the value of complainant's real and personal estate, and the complainant thereupon introduced the evidence of the witnesses which had been heard on the former issue of divorce between the same parties, at the last term, to which the respondent objected, and declined examining the said testimony; but the Court admitted the same, and now here proceeding to hear and determine said issue for alimony, does order, adjudge, and decree that the said Nancy Reavis recover alimony to the amount of one cent, and that each party pay the cost incurred by each."

Nancy Reavis introduced Peter Hubbard to prove the amount of real and personal estate which the said Isham owned, who stated that he had made an estimate of his real and personal estate, and estimated it to amount to two thousand one hundred and forty dollars.

John Hopton agreed with Peter Hubbard in his estimate. No title papers were shown, nor any evidence that Reavis had sold any of his farms.

Complainant offered to prove the same facts by the same witnesses, which had formerly been proved on the trial of the issue for a divorce, to which respondent objected, but the Court overruled the objection and admitted the testimony, to which respondent objected.

James Semple and Alfred Cowles, for the plaintiff in error, made the following points:

1. The Court under the act, title *Divorce*, R. L. 233, 234,(1) were bound to allow reasonable alimony, reference being had to the husband's estate.

2. The 6th section of the statute is imperative.

3. Although there was a verdict for a divorce, yet there is nothing in the statute forbidding or prohibiting allowance of alimony.

A. W. Snyder, and J. W. Whitney, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:

(1) Gale's Stat. 249—51.

Reavis v. Reavis.

This was a proceeding in *equity* under the statute for a divorce, for wilful and continued desertion of the wife of complainant. The defendant answered the bill admitting the desertion, but alleging as a justification therefor, the extreme and repeated cruelty, and the absence of the complainant, and his refusal to protect her from the gross and brutal insults of others in his presence. The facts were enquired into by a jury, and the jury found a verdict in favor of the complainant, sustaining the charge of desertion; upon which the Circuit Court entered up the following decree. "Ordered, that the bands of matrimony heretofore existing in this cause, between the complainant and respondent, be dissolved, and that alimony be allowed to the respondent for her maintenance, and that of her child, the issue of said marriage, and that the amount so to be allowed, be enquired of by evidence to be heard at the next term, until which time the cause is continued."

At the next term the Circuit Court entered up judgment in the cause for one cent alimony, and decreed that defendant should pay her proportion of the costs on the hearing of the application.

The defendant brought the cause to this Court, and now assigns for error.

1st. That the Court erred in allowing nominal alimony, when it was shown that the complainant, at the time, was possessed of large real and personal estate.

2d. That the Court erred in admitting the same testimony which had been heard on the previous issue of divorce, or suit, at a term subsequent to the time when the jury found the issue, against the objections of the defendant.

3d. That the Court decided that respondent should pay costs.

In deciding upon the grounds of error, it will be proper to look to the decree made in the cause, at the term when the bands of matrimony were dissolved. By the order, the Circuit Court doubtless found itself compelled to award the order for the dissolution of the bands of matrimony; the jury found the fact of wilful and continued desertion; but at the same time, it appears that it felt itself equally bound to order that sufficient alimony should be awarded to the respondent for her support, and that of her infant child, the issue of the marriage: but deferred the enquiry therein until the next term, when the amount was to be determined by evidence.

This order was doubtless also made in pursuance of the provisions of the 6th section(1) of the act concerning divorces, approved 31st January, 1827, which declares "That when a divorce shall be decreed, it shall and may be lawful for the Court to make such order touching the alimony and maintenance of the wife,

(1) R. L. 234; Gale's Stat. 251.

the care, custody, and support of the children, or any of them, as from the circumstances of the parties, and the nature of the case, shall be fit, reasonable, and just. And in case the wife is complainant, to order the defendant to give reasonable security for the performance of such order; and may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, as shall appear reasonable and proper."

From the bill of exceptions it appears that the complainant was the owner of considerable real and personal estate, as was proved on the hearing; but it also appears that on this enquiry the Circuit Court permitted the complainant to introduce the same witnesses and prove the same facts which had formerly been proved on the trial of the issue for a divorce, to which the respondent objected and expected to the opinion of the Court in admitting such testimony.

The first enquiry presented on examining the grounds of error assigned, seems naturally to be, what had the Circuit Court decided, on making the order for the dissolution of the bands of matrimony, and decreeing alimony? Must it not have been that although the marriage was dissolved, still under the provisions of the law, the wife was entitled to a fair and reasonable allowance for the support of herself and child; and that as it had not then evidence by which it could judge of the means and ability of the complainant to afford such support, the cause was continued to the next term, for the production of such evidence? It had heard the merits of complainant's prayer, and on the trial had heard the whole grounds of the causes of complaint, and of attempted justification for the abandonment charged and not denied; and with the full knowledge necessarily of the whole grounds occupied by the parties, had come to the determination, that although the complainant was entitled to the relief prayed, yet equally so the wife and child were entitled to a support, which it adjudged the complainant should pay. If this view of the cause thus far, be just, and to it no objection is perceived, then it would seem to follow as a necessary consequence, that the only subject of enquiry, was the condition of the parties in life, and the means and ability of the complainant to pay such allowance as the Court should consider fit, reasonable, and just, and that evidence foreign to such enquiry should be rejected.

It will be perceived that in determining that alimony should be allowed, the Court had necessarily passed on the conduct of the wife, and had by such order necessarily decided that she had not, let her conduct have been what it might, forfeited her right to that protection and support which the law allowed, and which the Court had most undoubtedly considered her entitled to; but the measure or extent of the allowance was to be ascertained by evidence of the capacity of the complainant to answer.

The testimony, then, which was admitted relating to the original grounds of divorce, and which had been given on the issue of desertion, must have been irrelevant to an enquiry on the question of allowance of alimony. It must, I again repeat, be borne in mind, that the conduct of the wife had already been placed before the Court on the first enquiry before the Court and jury, and could not have been the subject of a second enquiry, because it was by no means necessary to a decision of the question as to the allowance of alimony. What would be a proper allowance to a person in her situation in life, and how much it would take to afford her and her child a reasonable support, and the ability of the complainant to pay that sum, or as near to it as his means would enable him, were surely the only questions in a case like the present. The amount to enable her to procure the necessary food and clothing for her child, could not be made to depend on her previous conduct, after it had been decided, that to such support and clothing she was entitled: for that would be, to make the amount of the necessaries of life requisite for her support, depend on her personal conduct before the dissolution of the marriage, and not the extent of those means, indispensable for existence. Whether this view be correct or not, still there is a reason equally forcible, indeed more so, which shows the injustice of the admission of the testimony objected to.

I think it but rational to suppose that the introduction of the evidence was not only calculated to take the party by surprise, but that it must have had that effect. In an enquiry of the kind, could it have occurred to the party that all the former causes of complaint were to be again heard? I should greatly doubt whether the most intelligent mind would have supposed that the desertion, with all the accompanying acts, would be again a matter of investigation and decision. If not, how would the party be prepared to introduce rebutting and explanatory testimony? And would not the introduction of such evidence, uncontradicted and unexplained, have had a most unfavorable effect on the mind of the judge deciding the case of alimony, if he had never heard the whole evidence on the trial before the Court and jury, for the divorce, as seems to have been the fact in the present case? Its consequences cannot be calculated, and it must be owing to this cause, that the order for an allowance of one cent was made; it can in my judgment be accounted for from no other cause. It is not intended to say that the whole conduct of the wife, is not to be taken into consideration on determining the question of an allowance of alimony, but I intend to say, that when that conduct has once been the subject of an examination, and an order made to merely ascertain the condition of the husband and his pecuniary ability to afford the wife a maintenance, it is erroneous and

improper to receive again testimony which necessarily must be in the nature of *ex parte* proof. Suppose the Court had ordered a master to have reported the amount of the complainant's real and personal estate, would he have for a moment felt himself justified in receiving evidence that the wife had deserted, or done any other act charged in the bill? Unquestionably not; and yet this interlocutory order of the Circuit Court meant no more, in my judgment, than such an order. Shall, then, the modes of arriving at the intended result, change the character of the evidence to be adduced? It cannot be; and hence, I arrive at the conclusion that it was improperly received. But there is nothing in this nominal allowance of alimony, which at once shows that it was a virtual rescinding of the judgment of the Circuit Court? Did the Circuit Court, when it made that order, intend to keep the word of promise to the respondent's ear, and break it to her hopes? Did it intend to trifle with the justice and equity of the laws of the country, and make its own decrees a mere phantom, which should elude the grasp of the respondent, and prove an idle and delusive dream? If words are not mere empty sounds, if they mean any thing, then surely in the words of the decree, the respondent was to be allowed a sum sufficent for the support and maintenance of herself and child, if on proof of the ability of the complainant, he had the property out of which such an allowance as was fit, reasonable, and just, could be made. That he had such means abundantly appears from the proof, and why that allowance was not made, can only be inferred from the introduction of the testimony objected to by the respondent. This order allowing one cent, is most unjust in its consequences, because it deprives the infant child of the protection and nurture intended to be given under the decree. This part of the case must certainly have escaped the observation of the Court, or it would not certainly, I presume, have made an order, from which such consequences must inevitably flow. The order, then, for this reason alone, was an entire departure from the former adjudication of the Court, and directly repugnant thereto, and necessarily annulled, for every practical purpose, the judgment of the Court. The order decreeing costs against the wife, was also clearly erroneous. I can see no view in which the case can be examined, that does not show the entire incorrectness of the final judgment on the allowance of alimony. It should have been a yearly allowance commensurate to the support of the wife and child, in proportion to the ability of the husband and her condition in life; what that ability and condition might be, would be subject of enquiry by evidence, and when ascertained, should be so declared.

I am of opinion that the judgment of the Circuit Court should

be reversed with costs, and the cause remanded to that Court with instructions to proceed in the cause, and allow yearly such alimony for the support of respondent and her child, as shall, from the evidence to be adduced, and the circumstances of the parties, be fit, reasonable, and just.

Judgment reversed.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

JUNE TERM, 1836, AT VANDALIA.

Note. At this term Justice SMITH was not present.

EMANUEL J. LEIGH, appellant *v.* SARAH MASON, administratrix, and PARIS MASON, administrator of JAMES MASON, deceased, appellees.

Appeal from Macoupin.

A justice of the peace has no jurisdiction of a suit for a demand exceeding twenty dollars, in which an administrator is a party, except for debts due for property purchased at an administrator's sale.(*a*)

If a court has no jurisdiction of the subject matter of a suit, consent of parties can never give it.

THIS cause was heard in the Circuit Court, at the April term, 1835, before the Hon. Stephen T. Logan, and a judgment for $53,20 rendered in favor of the appellees. The suit was brought on a note of hand executed by the appellant to the appellees. The note did not specify for what it was given.

A. P. FIELD, for the appellant.

H. EDDY and S. T. SAWYER, for the appellees.

BROWN, Justice, delivered the opinion of the Court:

This was an action of *debt* commenced in Macoupin county, before a justice of the peace, to recover a judgment in favor of administrators against the defendant in the Court below, for a sum exceeding twenty dollars. On the trial before the justice of

(*a*) Miller *vs.* McCray, 37 Ill. R. 428.

the peace, judgment was given in favor of the administrators, and on the appeal in the said cause to the Circuit Court, the judgment of said justice was affirmed. To reverse which, Leigh has brought the cause by appeal to this Court. It is clear from the statute of 1833,(1) that this is not one of those cases in which justices of the peace can exercise jurisdiction. If a court has no jurisdiction of the subject matter, consent of parties never can give it.

Judgment is reversed with costs.[a]

Judgment reversed.

(1) R. L. 415; Gale's Stat. 425.

(*a*) An Executor where he contracts as such may sue in his own right. 1 Chitty's Pl. 20.

POMEROY EASTON, HARRY WILTON, JOHN S. CARRIGAN, plaintiffs in error *v.* JAMES ALTUM, defendant in error.

Error to Clinton.

Irregularity of process, whether the process be void or voidable, is cured by appearance without objection.

The want of a seal to a summons, cannot be taken advantage of after an appearance.

A. COWLES, for the plaintiffs in error, cited R. L. 158:(2) 2 Johns. Dig. 148, title *New trial*, § 78; 18 Johns. 212; 2 Johns. Dig. 252, title *Practice*; 19 Johns. 170; 1 Johns. Dig. title *Amendment* 41; Breese 3, and notes.

H. EDDY, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *debt* brought in the Clinton Circuit Court by the defendant in error, against the plaintiffs in error, on a sealed promissory note.

The summons was returnable at the April term, 1834, of the said Court; at which term it was returned served on the defendants below, and they appeared by their attorney, and filed a demurrer to the declaration. The plaintiff below confessed the demurrer and obtained leave of the Court to amend his declaration, and the cause was continued until the September term, 1834.

At the September term, the defendants below were duly called, but made default, and judgment was rendered for the plaintiff below, for his debt and damages. The error relied on to reverse this judgment, is, that there was no seal to the summons. Can such an irregularity be assigned for error after appearance in the Circuit Court without objection.

The authorities are numerous and explicit, that irregularity of

(2) Gale's Stat. 176.

process, whether the process be void or voidable, is cured by appearance without objection.—In 1 Paine and Duer's Practice, 366, it is laid down that "It is the universal practice of the courts, that the application to set aside proceedings for irregularity, should be made as early as possible, or, as it is commonly said, in the first instance. And where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot revert back and object to it." In support of this doctrine, Paine and Duer cite a number of authorities both English and American. The same book says, "It has frequently been decided, that a defendant cannot take advantage of any error or defect in the process, after he has appeared to it, even though the process be void, and the defendant at the time was ignorant of the defect."

In the Supreme Court of New York, in the case of Pixley *v.* Winchell,(1) the doctrine is recognised that void process is rendered good by appearance, although the party and his attorney were ignorant of the defect in the process. The case was this: The *capias ad respondendum* was returnable out of term. The defendant put in special bail, neither he nor his attorney knowing any thing of the irregularity. Afterwards, at the next term, defendant discovered the irregularity, and moved to set aside the *capias*. The motion was overruled. The Court say "That without deciding whether the writ is absolutely void, we are clear that it cannot be set aside at this stage of the cause. The defendant has taken a step by which he is regularly in Court, whether there be any process or not. We will not interfere merely because the party acted in ignorance that the process was void." And the same Court, in the case of Jenkins *ex dem* Culver *v.* Brown,(2) permitted the plaintiff to amend a venire, by adding a seal, saying, that the omission of a seal was erroneous, and not void, and may be amended. The Supreme Court of the United States, in the case of Knox and Crawford *v.* Summers and Thomas(3) decided that an appearance by attorney cured all irregularity in the process.

From the authorities above mentioned, it evidently results, that the object of process is merely to bring the defendant into Court, and when he is once there without objection, he waives all irregularities as to the mode the plaintiff has resorted to, to compel appearance. It is undoubtedly true that a defendant may stand on all his legal rights, and require all the forms of law to be pursued before he can be required to answer the plaintiff, or he may dispense with process altogether, or waive irregular process and come into Court, and at once proceed to the merits of the cause. The defendants below by appearing and demurring to the plaintiff's declaration, waived all objection to the irregularity

(1) 7 Cowen 366. (2) 4 Cowen 550. (3) Peters' Cond. R. 670.

of the process, and consequently the judgment must be affirmed with costs.

Judgment affirmed.

Note. See Hannum *v.* Thompson, *Ante* 238.

THOMAS P. GILMORE, plaintiff in error *v.* JOHN BALLARD, defendant in error.

Error to Clay.

A bill of exceptions will not lie to the final judgment of a Circuit Court, where the cause is tried by the Court without the intervention of a jury.

A bill of exceptions cannot be taken unless the exceptions be made on the trial,—and lies for receiving improper or rejecting proper testimony, or deciding incorrectly point of law.

The course to be pursued in a case tried by the Court without a jury, where the defendant supposes that the plaintiff has failed to support his action, is to move the Court to nonsuit the plaintiff, or to demur to the testimony. If he does neither, and goes on and gives evidence, the office of the judge is then completely merged into that of a juror, and his decision, if wrong, can only be reviewed in the same manner as the wrong verdict of a jury, to wit, by application for a new trial.

THIS cause was tried at the May term, 1836, of the Clay Circuit Court, before the Hon. Justin Harlan, and a judgment for $39,60 rendered for the plaintiff in the Court below, the defendant in error.

LEVI DAVIS and FERRIS FORMAN, for the plaintiff in error, cited 1 Chit. Plead. 137 ; 2 Selwyn's N. P. 520 ; 12 East 614 ; 13 East 522 ; 6 East 614 ; 11 East 310 *et passim.*

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *trover* brought by Ballard against Gilmore in the Clay Circuit Court, to recover the value of a quantity of corn alleged to have been taken and converted by Gilmore. The defendant below pleaded not guilty, and the cause was, by consent of the parties, tried by the Court, without the intervention of a jury. After all the evidence had been adduced both on the part of the plaintiff below, and the defendant, the defendant moved the Court for a judgment against the plaintiff, on the ground that there was no delivery of the corn by Richardson (a former owner of the corn) to the plaintiff, which motion the Court overruled, and gave judgment for the plaintiff for the value of the corn. To this opinion of the Court the defendant below excepted.

The only point that it is necessary for the Court to decide, is, whether after both parties have given testimony in a cause tried

by the Court without a jury, either party can except to the judgment of the Court? This Court in the case of Clemson *v.* Kruper,(1) correctly lay down the rule that a bill of exceptions cannot be taken unless the exception be made on the trial,—and it lies for receiving improper or rejecting proper testimony, or deciding incorrectly a point of law. In the present case, the bill of exceptions was taken to the judgment of the Court upon the facts given in evidence by the parties.—The course to be pursued in a case tried by the Court without a jury, is clearly pointed out in the case of Swafford *v.* Dovenor,(2) decided at the December term, 1834, of this Court. Whenever the defendant supposes that the plaintiff has failed to support his action, he should move the Court to nonsuit the plaintiff, or demur the testimony.[a] If he does neither, and goes on and gives evidence, the office of the judge is then completely merged into that of a juror. He has only to decide upon the weight of testimony; and his decision, if wrong, can only be reviewed in the same manner as the wrong verdict of a jury, to wit, by application for a new trial, and consequently a bill of exceptions cannot be taken.

For this reason, the judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.

(1) Breese 162. (2) *Ante* 165. See note at the end of this case.
(*a*) See Tefft *vs.* Ashbaugh, 13 Ill. R. 602, and notes.

JAMES W. WHITNEY and GEORGE TAYLOR, plaintiffs in error *v.* EBENEZER TURNER, JR., defendant in error.

Error to Adams.

The doctrine in relation to trespass is well settled, that there are no accessaries; all are principals who are in any wise concerned in the trespass. The person who commands or approves, is equally guilty with the one who performs the act.(*a*)

THIS cause was tried at the September term, 1835, of the Adams Circuit Court, before the Hon. Richard M. Young and a jury, and a verdict and judgment rendered for the defendant in error, against the plaintiffs in error, for $22,12 and costs. There was another defendant in the Court below, who was acquitted on the trial.

J. W. WHITNEY, *in propria persona*, cited the following authorities:

1 Swift's Digest 327; 1 Strange 635, and authorities cited in

(*a*) Gilson *vs.* Wood, 20 Ill. R. 37.

note 3 ; 5 Term R. 648–9 ; Cowper 478 ; 1 Chit. Plead. 362, 168, 170, 182, 187 ; Peake's Ev. 397 ; Tidd's Pract. 6, 7, 71, 73 ; 3 East. 598 ; Breese 144 ; 3 Stark. Ev. 1447–8.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *trespass de bonis asportatis* brought by Turner against Whitney and the other defendants in the Circuit Court of Adams county. After the testimony had been adduced, Whitney, one of the defendants who had pleaded not guilty, applied to the Court to instruct the jury, that it was necessary that the trespass should be proved to have been committed by George Taylor and said Whitney, personally, and not by command, before the jury could find a verdict against them; but the Court refused to give such instruction, and stated it to be the opinion of the Court, that it was improper so to do. Was the refusal to give this instruction erroneous? The doctrine in relation to trespass is well settled, that there are no accessaries ; all are principals who are in anywise concerned in the trespass. The person who commands or approves, is equally guilty with the one who performs the act. The refusal of the Court, therefore, to give the instruction, was correct.

The judgment must be affirmed with costs.

Judgment affirmed.

John Dedman, appellant *v.* Rouanta Barber, appellee.

Appeal from Hancock.

The obvious intention of all the legislation with respect to proceedings before justices of the peace, is to simplify the proceedings, and dispense with all form and technicality consistant with a fair trial of causes upon their merits.

On an appeal from a justice of the peace to the Circuit Court, if the appeal bond filed be wholly insufficient, the Circuit Court should allow a new bond to be filed. It is error to refuse an application to file such new bond.

The appellee recovered a judgment against the appellant before a justice of the peace of Hancock county for $50 and costs of suit, from which an appeal was taken to the Circuit Court. At the April term, 1836, of the Court below, the Hon. Richard M. Young presiding, a motion was made to dismiss the appeal for want of a bond.

The bond executed by the appellant in the Court below, recited that a judgment had been rendered against the appellant "in the Circuit Court of Hancock county," from which an appeal had been taken "to the Supreme Court." No mention

was made in the bond, of the judgment of the justice of the peace, or of an appeal to the Circuit Court.

The appellant filed a cross motion for leave to file a new bond. The Court overruled this motion, and dismissed the appeal, and awarded a *procedendo* to the justice. To this decision of the Circuit Court, the appellant excepted, and tendered his bill of exceptions, which was signed and sealed by the judge. From the decision of the Circuit Court, an appeal was taken to this Court.

J. W. Whitney, L. Davis, and F. Forman, for the appellant, cited R. L. 395, § 31.

S. T. Sawyer, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:

This was an appeal taken by Dedman from the judgment a justice of the peace to the Circuit Court, and upon trial in that Court, dismissed, on account of the informality and insufficiency of the appeal bond. It is not questioned but the bond is informal and insufficient. It is in the form adapted to the case of an appeal from the Circuit to the Supreme Court. But it is equally clear that the Court erred in overruling the motion of the appellant to permit him to file a good bond in pursuance of the 31st section (1) of the "*Act concerning Justices of the Peace and Constables.*" That act, after prescribing the mode of taking appeals from judgments of justices of the peace, goes on and declares that "If upon trial of any appeal, the bond required to be given by this section shall be judged informal, or otherwise insufficient, the party who executed such bond, shall in no wise be prejudiced by reason of such informality or insufficiency: *Provided*, he will in a reasonable time file in Court a good and sufficient bond." The present case, according to my understanding of the object and language of the act, is precisely such a one as was intended to be provided for. The appellant had complied with all the requisitions of the act, up to the execution of the appeal bond, and with respect to that, he attempted a compliance; and by executing what was intended to be a good bond, with such security as was approved of by the clerk, he did all that was required of him until the bond was pronounced insufficient by the Court; and even then, the law declares that such insufficiency shall in no wise operate to his prejudice, provided he will execute a good one. This the appellant proposed doing, but the Court refused to permit it, and dismissed the appeal. The obvious intention of all the legislation with respect to proceedings before justices of the peace, is to simplify the proceedings, and dispense with all form and technicality consistent with a fair

(1) R. L. 395; Gale's Stat. 409.

trial of causes upon their merits. This wise intention would be defeated by giving to the act any other construction than the one we have adopted.[a]

The judgment of the Circuit Court is reversed, and the cause remanded with directions to that Court to permit the appellant to file an appeal bond, and to hear and determine the cause conformably to this opinion.

Judgment reversed.

(a) Boorman *vs.* Freeman, 12 Ill. R. 165, and notes.

ELI FOSTER plaintiff in error, *v.* HARVEY FILLEY, defendant in error.

Error to Madison.

Where, after pleading, a defendant stipulated that judgment might go as by default, on his failure to file a paper on a given day; and on such failure, judgment by default was entered notwithstanding the plea: *Held*, that there was no error.

JUDGMENT was rendered in this cause at the February term, 1836, of the Madison Circuit Court, the Hon. Sidney Breese presiding.

A. COWLES, for DAVIS & KRUM, for the plaintiff in error.

WALTER B. SCATES, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

Filley commenced an action of *assumpsit* upon a promissory note in the Madison Circuit Court. The defendant below pleaded *non assumpsit*. Subsequently the defendant agreed that in the event a certain paper was not filed on a particular day, that judgment migh be entered by default. The paper was not filed, and judgment was entered the day after, by default. The error relied on, is, that there was a plea on file not disposed of when the judgment was rendered. The Court is of opinion that the plea was waived by the written agreement on file in the Circuit Court, and that the judgment was correctly given by default.

Judgment is therefore affirmed with costs.

Judgment affirmed.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1836, AT VANDALIA.

THE PEOPLE OF THE STATE OF ILLINOIS, plaintiffs in error *v.* MILTON DILL, defendant in error.

Error to Edgar.

A writ of error does not lie in behalf of the People, to reverse the decision of a Circuit Court in a criminal case. *(a)*

THE defendant was indicted in the Edgar Circuit Court, at the April term, 1835, for selling liquor without a license. The cause was tried at the October term, in the same year, before the Hon. Alexander F. Grant, and the defendant acquitted. On the trial the State's Attorney excepted to the decision of the Court in relation to the admission of evidence, and embodied the same in a bill of exceptions, and subsequently sued out a writ of error to reverse the decision of the Court below.

The defendant appeared and moved the Court to dismiss the cause for want of jurisdiction. The Court unanimously sustained the motion, on the ground that a writ of error will not lie in behalf of the People in a criminal case.

O. B. FICKLIN, State's Attorney, and W. B. SCATES, Attorney General, for the plaintiffs in error.

J. PEARSON, for the defendant in error.

Writ of error dismissed.

(a) Post. 557—8.

BENNINGTON BOON, appellant *v.* JULIET, a woman of color appellee.

Appeal from Jackson.

A proviso in a statute is intended to qualify what is affirmed in the body of the act, section, or paragraph preceeding it. The proviso of § 3, Article 6, of the Constitution of the State of Illinois, does not render the persons therein named subject to servitude.(*a*)
The children of negroes and mulattoes registered under the laws of the Territories of Indiana and Illinois, are unquestionably free.
Where judgment is rendered for the plaintiff on demurrer to the defendant's plea, the plaintiff may have an inquest to ascertain the damages, or he may waive this and take judgment for nominal damages.

THIS cause was heard in the Court below, at the May term, 1835, before the Hon. Alexander F. Grant.

J. SHIELDS, for the appellant.

H. EDDY and D. J. BAKER, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *trespass vi et armis* brought by the appellee against the appellant, for an assault and battery on her sons, Peter, Harrison, and Enoch, being her servants, and restraining them of their liberty, *per quod servitium amisit.*

The defendant in the Circuit Court, Boon, pleaded specially, that one Gaston removed into this State, while it was a part of the Territory of Indiana, and brought with him Juliet, being the owner of her, then aged about nine years; and did on the 20th of July, 1808, register her name and age with Robert Morrison, clerk of the Court of Common Pleas of Randoph county, in said Territory, agreeably to the law of the Territory, entitled "*An act for the introduction of Negroes and Mulattoes into the said Territory*," passed Sept. 17th, 1807; That the said Gaston on the 13th of July, 1819, transferred the said Juliet, according to the laws of the Territory, to one Alexander Gaston, Jr., by bill of sale;—That on the 7th of October, 1819, Alexander Gaston, Jr., transferred her in like manner to one W. Boon, defendant's intestate. That said Peter, Harrison, and Enoch, are Juliet's children. That Enoch is 12 years and five months of age, born since the adoption of the Constitution, Peter 22, and Harrison 20 years of age; the two latter born before the adoption of the Constitution. The defendant, as Wm. Boon's administrator, entered plaintiff's close, and took said children and detained them as part of his goods and chattels, which are the supposed trespasses, force, and injury in the plaintiff's declaration mentioned. To this plea the plaintiff demurred, and the defendant joined. The Circuit Court gave judgment on the dumurrer

(*a*) Sarah *vs.* Borders, 4 Scam. R. 345.

for the plaintiff, and one cent in damages. The judgment on the demurrer is assigned in this Court for error.

This action was confessedly instituted to ascertain the right of the children named in the declaration, to freedom. We apprehend that the correctness of the decision of the Circuit Court is to be tested by the solution of the proposition, whether the children of registered mulatto or negro servants, recognised by the laws of the Territories of Indiana and Illinois, or either of them, while such Territories were in being; and the 3d section of the 6th Article of the Constitution of this State, can be, by virtue of those laws, and that section of the Constitution, held for any period of time whatever, in servitude. In order to arrive at this solution, it is necessary to ascertain what were the character and extent of the legislation of the Territories of Indiana and Illinois on this subject. It appears that while this portion of the country formed a component part of the then Territory of Indiana, on the 17th of Sept., 1807, the legislature of the Territory, adopted a law entitled "*An act concerning the introduction of Mulattoes and Negroes into this Territory.*" By the first section of this act, it authorized the "Owner of any negroes or mulattoes, of and above the age of fifteen years, and owning service and labor as slaves in any of the States or Territories of the United States, to bring the said negroes or mulattoes into this Territory." The second section of this act provided that the slave might agree with the owner, before the clerk of the Court of Common Pleas of the county in which the parties were, for the number of years which the slave would serve his owner, and the clerk was required to make a record of such agreement.

The third section provided for the removal of the slave in case of refusal to serve, at any time within sixty days thereafter. The fifth section declares, that any person removing into this Territory, and being the owner or possessor of any negro or mulatto as aforesaid, under the age of fifteen years, or if any person shall hereafter acquire a property in any negro or mulatto under the age aforesaid, and who shall bring them into this Territory, it shall and may be lawful for such person, owner or possessor, to hold the said negro or mulatto to service or labor, the males until they arrive at the age of thirty-five, and females until they arrive at the age of thirty-two years. The 6th section provides that any person removing any negro or mulatto into this Territory, under the authority of the preceding sections, it shall be incumbent on such person, within thirty days thereafter, to register the name and age of such negro or mulatto, with the clerk of the Court of Common Pleas for the proper county. By the 13th section of the same act, it was further provided that the children, born in said Territory, of a parent of color, owning service or labor by *indenture* according to law, should serve the master

or mistress of such parent, the males until the age of thirty, and the females until the age of twenty-eight years. So far as relates to the question of the servitude of the children of negroes or mulattoes introduced under the Territorial laws, into either of the Territories named, it is understood that there was no further legislation by the Territory. The Constitution of this State contains in the 3d section of the 6th Article, the following: "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 or mulattoes as shall have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws. *Provided, however*, that the children hereafter born of such persons, negroes, or mulattoes, shall become free, the males at the age of twenty-one years, the females at the age of eighteen years. Each and every child born of indentured parents, shall be entered with the clerk of the county in which they reside, by their owners, within six months after the birth of said child."

From an examination of the several provisions of the laws of the Territories referred to, it will be seen that no provision was made affecting the liberty of the children of registered negroes or mulattoes, and it is manifest that the Territorial governments did not adopt any act to restrict or impair their natural right of freedom. The question of the validity of those acts, and their direct repugnance to the provisions of the Ordinance of 1787, has been fully and attentively examined in the case of Phœbe, a woman of color v. Jay,(1) in this Court, at its December term, 1828, and the effect of the constitutional provision in relation to the class of indentured servants referred to in that provision. That case settled the law in favor of the rights of the master under indentures made in conformity to the terms of that Article of the Constitution, and although it might be supposed to have left us little doubt in reference to the children of indentured servants, and their liability to serve out the time prescribed by the Territorial law, still it seems to my mind equally clear, that the provision of the 3d section of the 6th Article of the Constitution, could in no way alter, abridge, or change the condition of the children of registered servants. The Territorial laws had not in any way abridged their liberty, or rendered them liable to the performance of service to the owners of their parents; and it is in my judgment absurd and unjust to deduce such consequences from the proviso contained in that section of the 6th Article of the Constitution above quoted. It is true that the words used in the proviso, " That the children hereafter born of such persons,

(1) Breese 207.

negroes or mulattoes, shall become free ; the males at the age of 21 years, and the females at the age of 18 years,"—may be considered as referring to the registered negroes and mulattoes named in the antecedent sentence of the paragraph; but when it is remembered that a proviso is intended to qualify what is affirmed in the body of an act, section, or paragraph preceding it, we discover that it was intended by the framers of the Constitution as a limitation on a supposed pre-existing right of the master to the service of the children of registered servants for a greater period of time, and designed as an exception in favor of such children, founded it is true, on the mistaken supposition that, under the Territorial laws, they had been subjected to a greater period of service ; and not as creating the liability to service, and rendering a class of persons evidently free at their birth, the subjects of a laborious and extended period of servitude. It is most manifest that this proviso was framed under such a view, and intended as a mere limitation on the imagined right of the master to the service of the children. As no such right existed at the formation and adoption of the Constitution, and as the proviso must be considered as an act intended for the benefit of, and enlarging the rights of a class of persons supposed to have been subjected to a period of servitude, when in truth and in fact, none such could be legally considered to exist, I am clearly of opinion, that the children of registered negroes and mulattoes, under the laws of the Territories of Indiana and Illinois, are unquestionably free, and that the defendant's plea was insufficient to bar the plaintiff's action. It is also to be remarked that Peter and Harrison, two of the children, were born before the adoption of the Constitution, and are necessarily excluded from the terms of the 8th section of the 6th Article ; and it is not pretended that any law of the Territory rendered them in any manner, whatever, liable to serve the owner of their mother. The demurrer to such plea was rightly sustained.

An objection is raised to the judgment for nominal damages.

The plaintiff might have had an inquest to ascertain the damages ; but we have no doubt he might waive this, and take judgment for nominal damages.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note.—See Phoebe *v.* Jay, Breese 207 ; Nance *v.* Howard, *Idem.* 183 ; R. L. 457—466 ; Gale's Stat. 501—508.

As to assessment of damages, see Clemson *et al. v.* The State Bank of Illinois, *Ante* 45 ; Vanlandingham *v.* Fellows *et al.*, *Ante* 233.

JAMES M. DUNCAN and WILLIAM LINN, plaintiffs in error *v.* THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF ILLINOIS, *et al.* defendant in error.

Error to Jackson.

It is clearly erroneous to dismiss a bill filed against several, a part only of whom having been served with process, or entered their appearance, on motion of counsel for those who are served with process. A dismissal of a bill and a dissolution of an injunction against parties who are not in Court, on motion of counsel for those only who have entered their appearance, is erroneous.
The statute exempts the old State Bank from the payment of costs: and persons who have acted merely ministerially for the bank, as agents, are not liable for costs.

THIS cause was disposed of in the Court below, at the May term, 1834, the Hon. Thomas C. Browne presiding.

WALTER B. SCATES, for the plaintiffs in error.

J. SEMPLE, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

The plaintiffs in error filed their bill in *equity*, and obtained an injunction to restrain the defendants from collecting two promissory notes given by them to the State Bank, for the sum of $99,92 each, as a consideration for the purchase of 400 acres of land bought by them of the defendants, under the provisions of the laws of this State, which authorize the sale of lands purchased of the debtors of the bank, by the president and directors of the bank, by virtue of sales made under judgments against such debtors. Such notes thus taken are made a lien on the real property of the makers, and when they become due, execution is required to be issued thereon, for the collection of the amount due. The bill avers the issue and delivery to the sheriff of Fayette county, of executions agreeably to the provisions of the law, and that the sheriff is proceeding to the collection thereof. The complainants further state that persons by the name of Kerr and Bell obtained a judgment against one Matthew Duncan in 1820, who it is alleged was then seized in fee of the premises, upon which judgment an execution issued 10th of Nov., 1820, and was continued down to 1829: that on the 3d of Feb., 1829, another execution issued, upon which the land was sold on the 13th of April, 1829, and was purchased by one Joseph Charless for Kerr and Bell. It further charges that Matthew Duncan mortgaged the premises to the State Bank on the 8th of January, 1822, which mortgage was foreclosed, and judgment upon it for $270, on the 11th day of May, 1825. Said premises were sold under an execution upon said judgment on the 20th of September, 1828,

and purchased by the bank. That afterwards by virtue of the 4th section of an act entitled "*An act to amend an act supplemental to an act establishing the State Bank of Illinois, January* 10, 1825," approved January 23, 1829, the cashier of the Brownsville Branch Bank, proceeded to sell, and on the 16th of April, 1830, sold the said premises to the plaintiffs without the notice of Kerr and Bell's judgment and lien or Charless' purchase, and that the notes described in the bill were given for the purchase aforesaid. It further charges that Kerr and Bell are asserting their right under the purchase made by Charless for them. It appears from the record, that the service of the subpœnas was made on all the defendants but Charless and Kerr and Bell, who were non-residents, and as to whom an order of publication was taken. It further appears that the cause was continued for several terms, for want of service upon all of the defendants, and that at the term at which the bill was dismissed, and the injunction dissolved, the motion to dismiss the bill and dissolve the injunction, was made in the names of all the defendants, without the previous appearance of Charless and Kerr and Bell, who were non-residents, and against whom publication had been made, to appear and answer.

The order entered on the motion to dismiss the bill, is that a nonsuit be entered. This is untechnical, but still it might be supposed to be equivalent to a dismissal, because its effect is virtually the same,—but at the same time, the order dissolves the injunction, and so far, is formally correct. But it is clearly erroneous to dismiss a bill on the motion of counsel, for parties who had never entered their appearance in Court, or been brought into Court by process. The motion to dismiss and dissolve the injunction, appearing to have been made in the names of all the defendants collectively, and for want of the appearance of the plaintiffs who were called and did not appear, was erroneous, and for that cause the judgment is reversed, and remanded to the Circuit Court of Jackson county for further proceedings. No costs can be allowed, because the statute exempts the State Bank from costs, and the other defendants, who have appeared having acted merely ministerially for the bank as agents, are not liable for costs.

Judgment reversed.

JACOB YUNT, plaintiff in error, *v.* EPHRAIM BROWN, defendant in error.

Error to Fulton.

A writ of *certiorari* to remove a cause from a justice of the peace to the Circuit Court, is given by statute in such cases only as appeals are given.
No appeal or writ of *certiorari* can be taken from the judgment of a justice of the peace, in a suit brought to recover an assessment upon a member of a class, made under § 45 of the Militia Law.

JUDGMENT was rendered in this case by a justice of the peace of Fulton county, before whom the suit was originally instituted, in favor of the plaintiff in error, for $8,33 1-3 and costs, from which Brown obtained a writ of *certiorari* to the Circuit Court.

In the Circuit Court, at the May term, 1833, the Hon. Richard M. Young presiding, a motion was made to quash the writ of *certiorari*, which was overruled by the Court. At the June term, 1834, the judgment of the justice of the peace was reversed, and a judgment for costs rendered in favor of Brown.

T. FORD and A. W. CAVARLY, for the plaintiff in error.

A. WILLIAMS, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action brought under the provisions of the 45th section of the "*Act for the Organization and Government of the Militia of this State*,"(1) in force 2d July, 1833, to recover the amount of the assessment made on the defendant in error, as a member of the class to which he belonged, for the services of the persons furnished by the class under a draft, in pursuance of orders from the commander in chief, while in actual service. This section provides for the institution of a suit, to recover from each member of the class his respective proportion of the compensation due to the substitute, before a justice of the peace; and declares there shall be no appeal from the decision of the justice.

The defendant Brown sued out a writ of *certiorari* to the Circuit Court, and the plaintiff, on its return, moved to quash the same for having been improvidently issued.

The Circuit Court refused to quash the writ; and this is now assigned for error in this Court.

The point made admits of no doubt that the Circuit Court decided erroneously in refusing to quash the *certiorari*. A writ of *certiorari* to remove a cause from a justice to the Circuit Court, is given by statute in such cases only as appeals are given, and then in such cases as the party shall account for his omission or inability to take the appeal within the time prescribed by

(1) Gale's Stat. 484.

statute, and on showing that injustice has been done, and in what the injustice consists.

But here the remedy of appeal is expressly prohibited, and consequently no writ of *certiorari* could lie. The policy of the prohibition it is not for the Court to enquire into. The law is to be administered as it is found, and not as it might be supposed it ought to be.

The judgment of the Circuit Court is reversed, and judgment is rendered in this Court for the amount of the judgment rendered before the justice, with costs of suit before the justice, and in the Circuit Court, and this Court, for the plaintiff in error.

Judgment reversed.

DAVID CARVER, appellant *v.* OLIVER C. CROCKER, appellee.

Appeal from Cook.

The notice required by § 5 of the "*Act to amend an act concerning Justices of the Peace and Constables*," in order to enable a party to prove his demand, discount, or set-off by the testimony of the adverse party, or in case of his absence or refusal to be sworn, by his own oath, must be given to the adverse party personally. A notice to his attorney is not sufficient.

THIS cause was heard in the Court below, at the October term, 1836, before the Hon. Thomas Ford. A judgment was rendered for Crocker for $53,31 1-4, for which Carver appealed to this Court.

J. CURTISS and WM. STUART, for the appellant.

G. SPRING, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

This action was originally commenced before a justice of the peace, and judgment given for Crocker, the plaintiff, against Carver, by default, on a promissory note. It was appealed to the Circuit Court of Cook county, by Carver, and the day before the trial in the Circuit Court, Carver served a notice on the attorney of Crocker "That the defendant had no means of proving his off-set to the demand of the plaintiff, except by the oath of one of the parties." On the trial in the Circuit Court, Carver offered to be sworn, whose evidence was rejected, on the ground that the plaintiff below was absent and a non-resident of the State.

The only question necessary for this Court to decide, is, whether the notice served on Crocker's attorney, was sufficient to allow Carver to be sworn. By the 5th section of the "*Act to amend an act concerning Justices of the Peace and Con-*

stables," approved February 13, 1827,(1) either party who has no witness to prove his demand, discount, or set-off, may be permitted to prove the same by the testimony of the adverse party, or in case of his absence or refusal to be sworn, by his own oath, "*Provided*, that no person shall be allowed to prove his demand, discount or off-set, unless the adverse party be present, or shall have been notified thereof, and for which purpose the justice may continue the cause for such time as may be necessary." By the 6th section of the act, it is further declared that "Upon trials of appeals in the Circuit Court, the same rules of evidence shall be observed as in trials before justices of the peace." The letter as well as the spirit of these sections of the act, are that the party litigant, and not his attorney, must be notified, in order that he may elect whether to be sworn himself, or suffer the adverse party to be sworn. The attorney could not give the evidence contemplated by the act. If an attorney knew the facts which the opposite party desired to prove, he could be made a witness, and no notice would be necessary. That the act did not contemplate that the notice to the attorney would be sufficient, is evident from the consideration that the statute authorizes the justice to continue the cause for such time as may be necessary to give the notice. If the notice to an attorney was sufficient, this provision to continue the cause was idle; for the plaintiff is always in Court, either in person, or by attorney, or his cause would be discontinued. The defendant ought to have obtained a continuance of the cause, to enable him to serve his notice on the plaintiff personally. The Circuit Court decided correctly in refusing to permit the defendant to be sworn.

The judgment is affirmed with costs.

Judgment affirmed.

(1) R. L. 409; Gale's Stat. 429.

JESSE PEARCE and LAVINA SHARP, plaintiffs in error *v.* ALEXANDER SWAN, defendant in error.

Error to Gallatin.

The statute does not require the claimant of property taken on execution, to state on whose execution the levy had been made, in the notice he serves. Notice to the officer that he claims the goods levied on, intends to prosecute his claim, and forbids the sale, is sufficient.

Surplusage cannot vitiate a notice.

Objections in the nature of a plea in abatement, must be made in the first instance. It is too late to make them on appeal. An appeal from the decision of a jury, upon the trial of the right to property levied on execution, must be taken at the trial, and the appeal bond executed before the court is dissolved. An appeal bond filed the day after the trial, is not sufficient

Pearce *et al v.* Swan.

When the process by which a court obtains jurisdiction of a cause is irregular, if no objection is made, the irregularity is waived.
If an appeal be irregularily taken to the Circuit Court, from the verdict of a jury on the trial of the right of property before a justice, and the appellee appear in the Circuit Court, he waives all objections to the irregularity of the appeal.

THIS cause was heard in the court below, at the April term, 1835, before the Hon. Alexander F. Grant.

JESSE J. ROBINSON, for the plaintiffs in error, cited Acts of 1835, 56; R. L. 538—9 ;(1) Breese 3, 32, 142.

H. EDDY, for the defendant in error.

LOCKWOOD Justice, delivered the opinion of the Court:

The facts of this case are, that an execution was issued by a justice of the peace to a constable in favor of Pearce and Sharp, the plaintiffs in error, against the goods and chattels of Lewis, Prickert, and McMurtry, and was levied on sundry articles of personal property. Subsequent to the levy, Swan served a written notice on the constable, that the property levied on in favor of John Pearce, Jesse Pearce, and Lavina Pearce executors of Wm. Sharp, deceased, was the property of said Swan, and forbade the sale. Upon the receipt of this notice, the justice who issued the execution, issued a precept to summon a jury to try the right of property between Swan, the claimant, and Jesse Pearce and Lavina Sharp, the plaintiffs in the execution. The cause was tried before the justice, constable, and jury, on the 13th day of May, 1834. Swan appeared before the court and jury, as claimant of the property, and Jesse Pearce and Lavina Sharp as plaintiffs in the execution. On the trial, the jury found a verdict against the claim of Swan, who thereupon appealed to the Circuit Court of Gallatin county, and executed the appeal bond on the 14th day of May, 1834. At the September term of the Gallatin Circuit Court, the appeal was continued. At the April term, 1835, the parties appeared, and the cause was tried by a jury, who returned a verdict that the property belonged to Alexander Swan; and thereupon the Circuit Court rendered judgment, "That the property be retained by the said Swan, and that he recover his costs against the said defendants."

To reverse the judgment of the Circuit Court, a writ of error has been brought to this Court. The errors relied on are, 1st. That the notice given by Swan to the constable alleges that the property claimed by him, had been levied on by an execution in favor of John Pearce, Jesse Pearce, and Lavina Pearce, instead of an execution in favor of Jesse Pearce and Lavina Sharp;—2d. Because the appeal bond was not executed on the day the trial was had before the justice of the peace, constable and jury;—3d. Because it is uncertain against whom the judgment is given.

(1) Gale's Stat. 587—8.

These errors will be noticed in their order. The Court are of opinion, that the "*Act prescribing the mode of trying the right of property*,"(1) passed 29th July, 1827, does not require the claimant, in the notice he serves on the constable, to state on whose execution the levy had been made. It is sufficient to notify the constable that he claims the goods levied on, forbids the sale, and intends to prosecute his claim. Anything more was surplusage, and could not vitiate the notice, particularly as no objection was made to the notice before the justice and constable.

Had Pearce and Sharp objected that the notice was insufficient to compel them to litigate the right to levy on the goods, the only effect of such an objection would have been a dismissal of the proceedings, and then the claimant could have given a new notice. This objection is in the nature of a plea in abatement, and according to the case of Conly *v.* Good,(2) ought to have been made before the justice and constable. No objection having been raised either before the justice and constable, or in the Circuit Court, it is now too late and consequently cannot be assigned for error.

The second assignment of error presents some difficulty. By an examination of the appeal bond contained in the record, it appears that the trial before the justice, constable, and jury, was had on the 13th day of April, and the appeal bond was executed on the 14th; but it is not clearly stated whether the verdict of the jury was delivered on the 13th or 14th. If it is conceded, and it is probably a fair inference, that the verdict was rendered on the 13th, the two questions are presented for consideration: 1st. Does the statute require an appeal to be taken on the day of delivering the verdict? And if it does, then does not the appearance of Pearce and Sharp, in the Circuit Court, without objection, waive the irregularity?

The appeal to the Circuit Court, is given by the 5th section of the act, and although no time is mentioned within which the appeal may be taken, yet no doubt can exist that it should be taken before the Court is dissolved, and the parties have dispersed, (3) for the following reasons. An appeal is a continuation of the former suit, and suspends all proceedings in the Court below. Unless it is taken during the sitting of the Court, the opposite party will have no means of knowing of its existence, as the statute makes no provision to give notice of the pendency of the appeal. The object of taking the appeal is defeated, if the appeal is not taken immediately; for as soon as the verdict of the jury is delivered, if the decision is in favor of the right of the execution

(1) R. L. 537; Gale's Stat. 586. (2) Breese 96. (*Post* 579)

(3) The Act of Jan. 30th, 1835, provides that "All appeals from the judgments on the trial of the right of property, shall be demanded on the day of such trial, and the bond entered into before the Clerk of the Circuit Court within five days from such trial."—Acts of 1835, 56; Gale's Stat. 588.

creditor, the officer may proceed to sell the goods; or, if the verdict is for the claimant, the property is delivered over to him. In either event, the prosecution of an appeal would be entirely useless. And lastly, when the justice, constable, and jury have separated, and the parties gone from the place of trial, the court is *functus officio*, and can do no act for the continuing the suit in existence. The functions of the court having ceased to exist, the appeal was irregularly allowed on the day subsequent to the trial.

Having arrived at the result that the appeal was irregularly taken, it becomes a question whether the plaintiffs in error, by appearing in the Circuit Court, without objection, have not waived the irregularity of the appeal, and are to be considered as appearing by consent. The statute clearly gives the Circuit Court power to re-try the right of property in the same manner as it may be done before the justice and constable. Taking the appeal, executing the bond, and delivering the papers to the clerk of the Circuit Court, are the means provided by law, by which the cause is transferred from the justice and constable to the Circuit Court. These means are in the nature of process to remove the cause from the inferior to the superior court. When the process by which a court obtains jurisdiction of a cause, is irregular, if no objection is made, the irregularity is waived. The irregularity is not like the case of a defect of jurisdiction over the subject matter, for the statute gives jurisdiction to the justice and constable in the first instance, and to the Circuit Court by appeal. Nor is it like the case where jurisdiction is given to an inferior court, which must proceed in the manner pointed out by the statute, or its proceedings will be *coram non judice* and void, because as we have seen, the justice and constable had rightfully exercised jurisdiction over the cause, and the Circuit Court being a court of general jurisdiction, may obtain jurisdiction over the cause either in the mode pointed out by the statute, by consent of the parties, or by the presumed consent of the parties where irregular process is not objected to.(1) We are therefore of opinion that the plaintiffs in error, by appearing in the Circuit Court, have waived all objections to the irregularity of the appeal.[a]

The last error relied on, as to the form of the judgment for costs, is entirely without foundation. The judgment is rendered perfectly clear when taken in connection with the verdict. The verdict finds the property to belong to Swan, and the judgment is that Swan retain the property, and that he recover his costs against the said defendants. The said defendants can mean only Pearce and Sharp, as the costs are expressly given to Swan.

The judgment, therefore, of the Circuit Court, is affirmed with costs.

Judgment affirmed.

(1) Easton *et al. v.* Altum, *Ante* 250. (*a*) Harrison *vs.* Singleton, 2 Scam. R. 31.

DAVID MARSTON, appellant *v.* JOHN R. WILCOX, appellee.

Appeal from Hancock.

Where W. held a note dated Oct. 21, 1823, for $200, made by M. and payable to W. thirty days after date; and another note for $453,10, dated Aug. 9, 1815, signed also by M., and M. died March 9, 1831; and after M.'s death, a receipt was found among his papers, given by W. to M. *in full of all demands*, dated Feb. 3, 1831, and another receipt in which W. promised to collect a note for $50, and to pay over the proceeds to the intestate, after deducting 25 per cent. for collecting, dated December 25th, 1830: *Held* that the receipts were *prima facie* evidence of the payment of the notes.

A receipt in full of all demands is *prima facie* evidence of the payment of all notes and claims existing at the time the receipt is given.(*a*)

THIS cause was decided in the Circuit Court at the April term, 1834, before the Hon. Richard M. Young.

A. WILLIAMS, for the appellant, cited 3 Blac. Com. 371; Gilbert's Ev. 204, 309; Espinasse's N. P. 3, 4; Jacob's Dict. title *Acquittance;* Comyn's Dig. title *Release* E, 1; 2 Stark. Ev. 32; 3 Stark. Ev. 1085, 1271.

T. FORD and J. W. WHITNEY, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

From the record in this cause, it appears that letters of administration were granted to Wilcox, as a creditor of the estate of one Morrill Marston, on the 7th of June, 1831. That on the 26th of Sept., 1831, on the application of the plaintiff, those letters were revoked by the Judge of Probate, on the ground that Wilcox was not a creditor of the intestate, and had obtained the same by fraudulent representation of the indebtedness of the intestate to him, and new letters were granted to the plaintiff, as next of kin to the intestate. To this decision of the Probate Court, Wilcox excepted, and appealed to the Circuit Court. The Circuit Court reversed the decision of the Court of Probate, on the ground of the want of authority in the Court of Probate to review or reverse its first decision, on the alleged ground of fraud. This decision of the Circuit Court was appealed from to this Court, at a former term. This Court reversed the decision of the Circuit Court, and remanded the cause, with direction to proceed in the cause under the evidence.(1) The Circuit Court, on a re-hearing of the cause, reversed the judgment of the Court of Probate, on the testimony given in the cause, which is all embodied in the bill of exceptions. From this decision the plaintiff has appealed to this Court.

The only questions, then, to be now decided, rest entirely on the character of that evidence, and the weight which should be

(*a*) Frink *vs.* Bolton, 15 Ill. R. 343, and notes.

(1) *Ante* 60.

atached to it, and the legal force and presumption which accompany, and may be fairly and reasonably deduced from it.

The defendant, Wilcox, to establish his being a creditor of the intestate, produced a note for two hundred dollars payable to Wilcox thirty days after date, signed by the intestate, and dated at Fort Edwards, Illinois, October 21, 1823; and another note for $453,10, payable to one Beavin Johnson, dated Salem, August 9th, 1815, and signed also by intestate. The intestate, it was proved, died 9th of March, 1831. The signature of the intestate is considered to have been proved, although a considerable number of the witnesses called to prove the hand writing, speak doubtingly and equivocally of the signature. On the part of the plaintiff, a receipt from Wilcox to the intestate *in full of all demands*, dated 3d February, 1831, and another receipt in which Wilcox promised to collect a note for $50, and to pay over the proceeds to the intestate, after deducting 25 per cent. for collecting, dated December 25th, 1830, were produced and read in evidence.

A witness on the part of the plaintiff, likewise proved that in 1830, the intestate gave an order on Wilcox for a small sum of money, which the witness presented to Wilcox, who either said he would pay it, or call and see the intestate about it. This witness, after the testimony was closed, was recalled on the next day, to establish some confession or statement that the intestate had said, "He had raised money for the said Wilcox, or had to raise some;" but the evidence is altogether loose, vague, and too uncertain to be relied on, and seems to have been elicited from the witness, after his examination in chief on the day before, by Wilcox in a conversation intended to refresh the witness' memory, and is not altogether free from suspicions as to its character and credibility, from the manner in which it was brought out. This is the whole testimony in the case deemed to be material and applicable to the matter in controversy; and the point to be determined seems to be the simple question of the effect of the receipt in full, and whether it is not *prima facie* evidence of an extinguishment of the two notes of hand held by Wilcox. When the great lapse of time is considered between the making of the notes and the time of setting up the demand under them, the period in the one case being over sixteen years, and in the other eight years, there can, I should suppose, be no doubt left on the mind, that these were stale demands. The party holding them during all that period of time, without having made a demand of payment, and no acknowledgment of the intestate at any time that he owed the several amounts, appearing, should, under every just and legal presumption, be considered as being concluded by his receipt executed in 1831; and such receipt must be taken to be—in the absence of evidence to show that the

notes were excepted from its general and comprehensive terms—what the phraseology imports, a receipt in full of all claims whatsoever. If it was not so intended by the party signing it, then it rested with him to show, by evidence, that such exception was made, and that might have been shown by the declaration of the parties at the time of making such receipt, by acknowledgment of the intestate afterwards, or by an admission of the intestate that he owed the notes, or any other act or declaration equivalent thereto. On the contrary, the force of the receipt and the strong presumption from the great lapse of time, that the notes had been liquidated and paid, are greatly fortified by the receipt given in 1830, for the note received for collection, and the testimony relative to the order given by the intestate in 1830, on Wilcox, for money, and his reply thereto. It is inconceivable to suppose that if Wilcox held these notes at the time, and they were in reality due and unpaid, he should not have asserted the indebtedness of the intestate to him on the presentation of the order, and should not also have required the application of the proceeds of the note given for collection, towards the payment of his demands arising under the two notes.

From the receipt, and the concurring acts and circumstances accompanying the whole transactions between the parties, as developed by the testimony, it is apparent that the judgment of the Circuit Court is erroneous. It is accordingly reversed; and judgment is to be entered in this Court for the appellant, with the costs in this Court, and in the Circuit and Probate Courts.

Judgment reversed.

GEORGE LEIDIG, appellant *v.* DANIEL RAWSON, appellee.

Appeal from Montgomery.

In actions for malicious prosecutions, it is a rule of law that there must be both malice and a want of probable cause, to justify a recovery.

In an action for malicious prosecution, the defendant may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted in good faith, on the ground of suspicion.

The gist of the action for malicious prosecution, is, that the prosecutor acted maliciously, and without probable cause. If there is no malice, or if there is probable cause, the action will not lie.

The rule applicable to variances, is, that whenever an instrument of writing or a record is not the foundation of the action, a variance is not material unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described.

In an action for the malicious prosecution of the plaintiff on a charge of perjury in making a complaint before a justice of the peace, that the defendant had committed a larceny, the defendant asked the following question of a witness, who was his counsel before

Leidig *v.* Rawson.

the justice: "Did the defendant understand, on the trial before the justice, that he was answering to a prosecution for stealing?"—*Held* that the question was improper.

This cause was tried at the October term, 1835, of the Montgomery Circuit Court, before the Hon. Sidney Breese. The jury found a verdict for the plaintiff in the Court below, the appellee, for $325. Judgment was rendered upon this verdict. The defendant appealed to this Court.

A. Cowles and J. Semple, for the appellant, contended,—

1st. The gist of the action is malice.

2d. It is competent for the defendant to show an honest intention, in relation to the act charged as malicious. 2 Stark. Ev. and cases cited, 921, 922.

3d. The question of malice is alone for the jury. 2 Stark. Ev. 923–4, 911, 922, 916.

H. Eddy, J. S. Greathouse, and S. T. Sawyer, for the appellee, cited 2 Stark. Ev. 912; 2 Pirtle's Dig. 170–178.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *trespass on the case*, commenced by Rawson against Leidig, in the Montgomery Circuit Court, for maliciously indicting Rawson for perjury. The defendant below pleaded not guilty. On the trial of the cause, Leidig read in evidence to the jury, without objection, an affidavit made before Josiah Wright, Esq., a justice of the peace for Montgomery county, by Daniel Rawson, in the words following, to wit:

"March 3d day, in 1834, The People of the State of Illinois, against John Steerman and George Leidig and Henry Bloodner, Whereas Daniel Rawson, of Bond county, and State of Illinois, personally appeared before me, a Justice of the Peace in and for the county of Montgomery, and State of Illinois, and made oath that the above named John Steerman and George Leidig and Henry Bloodner did forcibly take away two yoke of oxen, and other articles, which I believe I had an interest in:"

Which being read to the jury, Leidig's counsel offered to give evidence to prove that Rawson, in making said affidavit, swore falsely; but the Court decided that such evidence should not be given to the jury. To which opinion the defendant excepted.—The following exceptions were also signed on the trial, to wit: "That defendant called J. A. Wakefield, Esq., who was counsel for George Leidig, before Josiah Wright, Esq., on 3d of March, 1834, in the prosecution of the People against Leidig and others, to prove that Leidig understood that case to be for larceny in taking Rawson's oxen, and proposed this question: 'Did the defendant, Leidig, understand on the trial before Justice Wright, that he was answering to a prosecution for stealing the oxen?'

which was objected to by the plaintiff, and the objection sustained by the Court."

The refusal of the Court to permit the defendant to give evidence to prove that Rawson in making the affidavit swore falsely, and the decision of the Court in refusing to receive the testimony of Wakefield, are assigned for error.

The questions arising out of these bills of exceptions, will be examined in their order. The reason why the Circuit Court refused to permit the defendant to prove the affidavit of the plaintiff to be false, is not stated in the bill of exceptions. It is however fairly to be presumed, that it was because there was a variance between the affidavit read on the trial, and the oath alleged in the indictment to have been taken by Rawson before the justice; the making of which oath, was the foundation of the indictment for perjury. If the variance was the cause of rejecting the testimony to prove its falsity—and no other reason appears probable—the Court below erred. The affidavit being read without objection, was an implied admission on the part of the plaintiff, that it was the affidavit or oath that was before the grand jury, as the basis of the indictment against him. For what purpose did Leidig offer this affidavit to the jury, as part of his defence, unless to show the grounds he had for prosecuting Rawson for perjury? The Court can perceive no other object, and the plaintiff not objecting to it, is precluded from denying that it was relevant to the point in issue.

In actions for malicious prosecutions, it is a rule of law, that there must be both a malice and a want of probable cause, to justify a recovery. This rule of the law is founded upon principles of public policy.(1)

The defendant may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted in good faith, upon the ground of suspicion.(2)

But conceding that there is a variance between the affidavit read, and the oath mentioned in the declaration, and that the plaintiff had objected to the reading of the affidavit, ought the objection to have prevailed?[a] The rule of law applicable to variances, is, that whenever an instrument of writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described. Test this affidavit by this rule. It is to be observed that it is not stated in the indictment, whether the oath administered by the justice to Rawson, was or was not in writing. The oath mentioned in the indictment, and the affidavit, were both made before the same justice, and on the same day. The prosecutions in both were carried on in behalf of the People. The indictment

1) 2 Stark. Ev. 911, and authorities there cited. (2) 2 Stark Ev. 916.
(a) *Post* 334.

alleges that Rawson charged Leidig with feloniously taking two yoke of oxen, two ploughs, and two log chains, the property of Rawson. The affidavit states that Leidig and others did forcibly take away two yoke of oxen and other articles which Rawson believed he had an interest in. From this comparison of the two statements, no doubt can exist that they both refer to the same transaction. For what object could Rawson make his complaint to the justice, on oath, but to charge Leidig with stealing his oxen and other articles. The justice could not try an action of trespass for taking the oxen, as their value, with the other articles, was much beyond a justice's jurisdiction. Had Rawson intended to institute a civil action against Leidig, no oath would have been necessary. The complaint that was exhibited in the affidavit before the justice of the peace, was substantially, though not technically, a charge that Leidig had feloniously stolen the oxen and other articles, and so, doubtless, the justice and Rawson considered the matter when the oath was administered and the warrant issued. The language used in the indictment, is that of the grand jury and the prosecuting attorney, and for which Leidig, as the prosecutor, is not responsible, if he stated nothing but facts, however great the variance may be between the language used in the indictment, and the facts sworn to by the prosecutor. To illustrate this position: Suppose A. goes before the grand jury, and swears that B. has stolen his goods. The grand jury, however, find a bill for robbery. On the trial B. is acquitted because the charge is not proved as laid. B. then brings his action against A. Would it not be competent for A. to show that he only complained against B. for larceny, before the grand jury, and that B. was guilty of the larceny charged? Certainly he could; for the gist of the action for malicious prosecution, is, that the prosecutor acted maliciously, and without probable cause. If there is no malice, or if there is probable cause, the action will not lie. The mistake of the grand jury, in finding a wrong bill, cannot make a party liable who has acted in good faith.

Again, suppose Leidig in entering his complaint to the grand jury, had exhibited the affidavit above referred to, and complained that Rawson in making that affidavit, had sworn falsely; yet the grand jury had found the bill of indictment described in the declaration, and on the trial of the indictment, Rawson was acquitted, because the Court decided upon the production of the affidavit, that no such false oath had been taken, as the one set forth in the indictment; would it not be competent for Leidig on the trial of an action for malicious prosecution, to show that there was falsehood in the affidavit. It clearly would. The Court are therefore of opinion, that circumstanced as this case was, the Circuit Court erred in refusing to permit Leidig to prove

the falsity of the affidavit read on the trial, we are also of opinion that the Circuit Court decided correctly in refusing to permit Wakefield to answer the question asked him. Had the question been whether he, as counsel of Leidig, had informed him that he was prosecuted for larceny, the question would have been proper as part of the *res gesta*. It might have tended to show the absence of malice.(1)

The judgment of the Circuit Court is reversed with costs, and the cause remanded with directions to the Circuit Court of Montgomery county, to award a *venire de novo*.

Judgment reversed.

Note. See as to *Variance*, the case of Nowlin *v.* Bloom, Breese 98.

(1) 2 Starkie 922.

JOHN JONES, THOMAS JONES, and WILLIAM JONES, appellants *v.* JOHN DOE *ex dem* BETSEY BRAMBLET and NANCY BRAMBLET, appellees.

Appeal from Gallatin.

Where A. devised land to C., to take effect on the death of the wife of A., on condition that C. would become bound to and live with A's wife until C. should be married, evidence of the declarations of the wife of A., that she did not desire C. to be bound to her is relevant and proper. If A.'s wife voluntarily dispense with the performance of the condition, the estate will take effect.

The performance of a condition, where it has been voluntarily dispensed with, is not essential or necessary to the perfection of an estate.

The declarations and acts of a third person, are not legal evidence.

If there exist any obscurity in the language of a will, owing to its peculiar phraseology, and the seeming incongruities of its several parts, and the Court can ascertain the real intention of the testator and give effect to the several parts of the will without rendering any component part inoperative, it is bound so to do.

If there be two devises in a will of the same property to two different persons, and the first create an estate of inheritance, the second devise without words of perpetuity, will not destroy the first, and will create a life estate only, with reversion in the heirs of the first devisee.

If a testator annex a condition to the creation of an estate, the performance of which afterwards becomes impossible, the devisee will take the estate discharged of the condition.

Words of inheritance or perpetuity, are essential to create a fee.

A devise without words of perpetuity or inheritance, creates a life estate only.

THIS was an action of *ejectment* brought by plaintiff's lessors, to recover possession of the S. E. qr. of Sec. 14, T. 8, S. R. 6 East. In the year 1830, John Brown, under and by virtue of whose will the lessors of the plaintiff claim title, died seized of two tracts of land in Gallatin county, which he bequeathed with his personal property, "to his well beloved wife Sarah, for to

have the benefit and profit of the farms and improvements thereon, during her natural life, and at her death to descend to her heirs, except the S. E. qr. Sec. 14, T. 8, S. R. 6 East," (the same land this action was brought to recover,) "which is given equally to two infant children," then living in his family, "named and called Betsey Bramblet and Nancy Bramblet, (the lessors of the plaintiff in the Court below,) daughters of Benjamin and Polly Bramblet. This land is given to the aforesaid Nancy and Betsey, if they should continue to live with my wife, and are bound to her and continue to live with her, until married." Mrs. Sarah Brown, the wife of the testator, died in 1832, and Thomas, William, and John Jones, defendants below, took possession of the lands as heirs at law.

The evidence on the part of the plaintiff, material to the issue on the trial of this cause, was in substance as follows: George Wright testified, that the testator, John Brown, died in March, 1830, and that in the fall of the same year, his wife, Mrs. Sarah Brown, removed to Kentucky, leaving the children (the Bramblets) in the care of their grandmother, Mrs. Nancy Brown. That Mrs. Sarah Brown had never requested or desired that the children should be bound to her, and she was unable to take charge of them and raise them herself; but had nothing against the children's having the land.

Mrs. Nancy Brown testified that in the summer following testator's death, witness took the children at the desire of Mrs. Sarah Brown, who did not want them bound to her, and was unable to take care of them if they had been. The defendants then offered to prove by a witness, that she, as grandmother of the Bramblets, had often said they never should be bound to Mrs. Sarah Brown; which the Court refused. Whereupon the defendants, by their counsel, objected to the introduction of all the foregoing testimony, and excepted to the opinion of the Court in admitting parol evidence, except so far as it went to show a compliance with that part of the will which made it necessary for the lessors of the plaintiff to continue with Mrs. Sarah Brown, and that she, since the making of the will, had died. Judgment was entered for the plaintiff on the verdict of the jury.

Jesse J. Robinson, for the appellants, relied on the following points and authorities.

1st. If the lessors of the plaintiff had been bound under the will, to Sarah Brown, it should have appeared by record evidence alone. H. Dig. 68.

2d. If parol evidence, though erroneous, be admitted for one party, it should not be rejected as to the other. Con. Dig. 170.

3d. Where a fee simple is conveyed to one, there is no estate remaining. 4 Dane 301, § 3; 4 Dane 614, § 6. The defendants

are entitled under the will to the bequeathed land as heirs of Sarah Brown, the testator's wife : for it is given and bequeathed to them alone absolutely and unconditionally, viz. "during her natural life, and at her death to descend to her heirs." Here is clearly a life estate given to Sarah Brown, and the fee to her heirs. This may be done and is legal.

4th. But the lessors of the plaintiff say the land sued for is excepted out of the gift and bequest to Sarah Brown and her heirs, and given to them in fee simple. This cannot be the fact, for "the devise to the lessors is void, as inconsistent with the absolute, unqualified interest of defendants." The fee cannot be given to one, and a life estate afterwards carved out of it and given to another. The exception in the will is repugnant to the estate previously demised and vested, and therefore void. So that the former disposition of the land would remain as if the after excepting clause had never been made. 4 Dane's Abr. 92–4, § 1, 3, 4, 5, 9, 10, 11 ; 1 Shep. Touch. 79. The exception is also void because of the uncertainty in the description of the land or estate excepted, there being no words of reference, such as "aforesaid," or of specific identification as are used in the gift or bequest to Sarah Brown and her heirs. *Ib.* and also 4 Dane's Abr. 505 § 7.

5th. Conceding the legality of the exception, the devise in the testator's will creates only a life estate in the plaintiff's lessors, for the bequest hath no words of inheritance or perpetuity in it ; and such words are indispensible to convey a fee. 2 Blac. Com. 108–15 ; 4 Dane' Abr. 305 § 12, 307 § 22, 609 § 6, 615 § 11.

6th. The estate, before it could vest in plaintiff's lessors, was made to depend upon three separate and distinct conditions precedent, none of which were proven to have been complied with or performed. Whatever estate was given by the devise, was conditionally given, to take effect or not upon the performance or non-performance of the condition, 2 Blac. Com. 154–7; 4 Dane's Abr. 162 § 1, 164 § 9, 782 § 16, 783 § 17. If the condition be only subsequent, and the estate be given to another, it must be strictly performed. 4 Bac. Abr. 420. Conditions that destroy an estate must be performed strictly. 4 Dane's Abr. 164 § 9. The Court cannot make a will, or interpret by an arbitrary construction, nor take into their consideration any subsequent alteration of events. 4 Dane's Abr. 503 § 6. The lessors of the plaintiff, although minors, are bound by conditions in wills as other persons. 1 Bac. Abr. 401 ; 4 Bac. Abr. 413 ; 4 Dane's Abr. 162 § 3. Conditions when attached or annexed to real estate, are not *in terrorem*. But their conditions precedent or subsequent take place. 4 Bac. Abr. 411, 12, 13, 14 ; 4 Dane's Abr. 302–6.

W. J. Gatewood and H. Eddy, for the appellees, cited 2 Eq. Abr. title *Conditions*, 213 ; Prec. in Chan. 562 ; Atk. 363. There being no limitation over in the devise, such a condition as that contained in the will, is only *in terrorem : Secus* if there had been a limitation over, for in such a case a court of equity cannot interpose. 2. Frem. Rep. 10, 119.

Smith, Justice, delivered the opinion of the Court :

This was an action of *ejectment* to recover the possession of the S. E. qr. of Section 14, in T. 8, S. R. 6 East. The lessors of the plaintiff claimed the land under the will of John Brown, who devised the lands named in his said will, as follows, viz : "First, I give and bequeath to my well beloved wife, Sarah, the following quarter section of land, viz : The South East quarter of Section Eleven, in Township 8, South of Range 6 East. Also the South East quarter of Section Fourteen, in Township 8, South of Range 4 East, in the lands sold at Shawneetown, for her to have the benefit and profit of the farms and improvements that are on both quarter sections, during her natural life ; and at her death to descend to her heirs, except the South East quarter of Section Fourteen, which is given equally to two infant children that are now living with us, named and called Nancy Bramblet and Betsey Bramblet, daughters of Benjamin and Polly Bramblet. This land is given to the aforesaid Nancy and Betsey, if they should continue to live with my wife, and are bound to her and continue to live with her until married. And further, should both or either of them marry with my wife's consent, they are authorized to settle and improve on the aforesaid South East quarter of Section Fourteen ; but my wife is to have the benefit of the present improvements during her natural life." The defendant claimed title under the recited clause in the will, and this portion of the will is all that the respective parties assert their claims under. The jury found a verdict for the lessors of the plaintiff.

The defendants in the Court below, assign for error the following causes :

1. That the Circuit Court admitted improper parol testimony to go to the jury, on the part of the plaintiff's lessors.

2. That it rejected proper parol evidence, offered on the part of the defendants.

3. That the verdict of the jury was contrary to law and the evidence.

The points made will be considered in the order they are stated. It appears from the evidence embodied in the bill of exceptions, that the will of the testator was executed on the 1st of March, 1830 ; and that he died on the 12th day of the same month ; that his wife, Sarah Brown, was feeble and infirm, and

died in May, 1832. That the lessors of the plaintiff offered in evidence the declaration of Sarah Brown, as to her inability to receive and take charge of them, and did not desire to have them; and of her removal to Kentucky without them, where she died. That the lessors were at the time infants of tender age, not more than 8 or 9 years old. This is the substance of the testimony objected to under the first point as inadmissible. There can be no doubt that the testimony was proper to show that that portion of the will which made the estate, created in the lessors of the plaintiff, depend on the condition of their living with Sarah Brown, and being bound to her, had been dispensed with by Sarah Brown; and therefore the performance of those acts as conditions precedent to their taking the estate, was by no means necessary to the perfection of such estate.

On the second point made, the offer to give in evidence the declaration and acts of Nancy Brown, that the children should not live with, or be bound to, Sarah Brown, was wholly irrelevant, being the declaration and acts of a third person, and was properly rejected.

The last point made necessarily involves the construction of the will of the testator, and upon that construction must depend the tenableness of the objections, that the verdict and recovery of the lessors of the plaintiff, is not justified by the evidence. It is admitted that the language of the will is by no means free from obscurity, owing to its peculiar phraseology, and the seeming incongruities of its several parts; still it is a settled judicial maxim, that when the court can fairly ascertain the real intention of the testator, and give effect to the several parts of the will, without rendering any component part inoperative, it is bound so to do. It is believed that in the present case, that maxim can be justly applied. If there should be an adherence to the literal interpretation of the first devise in the will, it is evident that the testator created an estate for life in both the quarter sections described, in favor of his wife, with a remainder over to her heirs; but after having done so, he then excepts Section 14, being one of the two named, from the operation of this devise, and devises it to the lessors of the plaintiff, upon the condition, "*that they should continue to live with his wife, and be bound to her, and live with her until they are married.*" Now this second devise of the same land evidently operated on and destroyed the first, as it relates to Section 14, and it gave this Section *in presenti* upon a condition which might, or might not, be performed. The performance would first depend on the consent of his wife, for unless she consented to the lessors' residing with her, and being bound to her, it is evident that they could not perform either part of the condition. Doubtless the testator was desirous that they, being then of tender age, should continue under the

care and protection of his wife; and to effectuate that object more certainly, he designated the mode he supposed most likely to accomplish it; but it is seen that both the living and the indenturing of the lessors, was prevented by the voluntary act of the wife, for whose benefit it may be supposed, the condition was also in some measure originally created; and the more so, as when they became of more mature age, the testator must have supposed that they would be of great service to her. The accomplishment of this object, is, however, eventually defeated by the death of Sarah Brown, the wife of the testator, and thereupon the condition annexed to the creation of the estate, in the lessors of the plaintiff, became an impossible condition to be performed, and consequently the lessors take the estate given, without the condition thus rendered nugatory. That estate, however, is but a life estate, to take effect on the death of testator's wife, there being no words of inheritance or perpetuity contained in the devise, and such words being indispensible to make a fee.[a] The verdict then was neither against law nor evidence. The judgment of the Circuit Court is to be affirmed with costs.

Judgment affirmed.

(*a*) But see L. of 1837, p. 15; Jennings *vs.* Jennings, 27 Ill. R. 518; Seigwald *vs.* Seigwald, 37 Ill. R. 430.

CHARLES PECK, appellant *v.* WILLIAM BOGGESS, appellee.

Appeal from Jo Daviess.

Upon the overruling of a demurrer to a plea, if the plaintiff reply, he thereby waives the demurrer, and cannot afterwards assign for error, that it was overruled.

In an action brought by P., as assignee of M., to recover the amount of a promissory note made by B., the Court gave the following instructions to the jury:

"That if the jury believe from the evidence that B. and M. made a lumping trade; that if B. agreed to give $615 for M.'s interest, whatever it might be (meaning the interest in the partnership concern in which they were both interested, and to which the making of the note related,) and was not deceived or imposed on by any false and fraudulent representations or concealments, then made by M., then the note is founded on a good consideration, and is binding on B."—*Held* that the instruction was correct.

Unless a party excepts to instructions in the Court below, he cannot assign them for error in the Supreme Court.

THIS was an action commenced in the Jo Daviess Circuit Court, by Peck against Boggess upon a promissory note for $615,19, given by the defendant, Boggess, to one John D. Mullikin, and by said Mullikin assigned to the plaintiff, on the 15th day of May, 1834. The note was dated Aug. 24, 1833, and payable thirty days after date. The defendant filed three special pleas, to all of which the plaintiff demurred. The demurrer was

sustained to the first and second, and overruled to the third plea. Issue was then taken on the third plea, which alleged "that said promissory note was made and executed without any good or valuable consideration whatever," and leave taken by the defendant to file two amended pleas. The amended pleas were demurred to by the plaintiff. The Court sustained the demurrer to the first amended plea, and overruled it as to the second, which was as follows:

And for further plea in this behalf, the said defendant comes &c. when &c., and says the said plaintiff, his aforesaid action thereof against him, ought not to have and maintain, because he says that the said promissory note in said plaintiff's declaration mentioned, was executed and given by this defendant upon the settlement of a joint concern theretofore existing between the said John D. Mullikin and the said defendant, in consideration that the said Mullikin should deliver over to the said defendant all moneys then on hand belonging to said joint concern, and for no other consideration whatever. This defendant avers that the said Mullikin did not deliver over to said defendant all moneys on hand belonging to the said joint concern, but only the sum of thirty-four dollars, whereas in truth and in fact, there was then on hand belonging to said joint concern, the sum of two thousand dollars: and the said defendant says that the consideration of said note has failed in this, that the said Mullikin did not deliver over to this defendant the whole of the said two thousand dollars, but only the sum of thirty-four dollars as aforesaid, and this he is ready to verify &c. wherefore &c.

B. Mills, Atty for deft.

To this plea the plaintiff filed a general replication, and the cause was submitted to a jury, who found a verdict for the defendant. The cause was tried before the Hon. Stephen T. Logan, at the August term, 1835. The plaintiff in the Court below, appealed to this Court. On the trial in the Court below, the following bill of exceptions was taken:

On the trial of this cause on the issues joined, the witnesses having been heard by the jury on the part of the defendant, none having been produced on the part of plaintiff, the plaintiff by his counsel moved the Court to instruct the jury as follows, viz: That the dissolution of partnership between Boggess and Mullikin, the assignor, and the transfer to Boggess of the debts and accounts due the firm, and the stock and property of the firm, was a *good and valuable consideration.* That the defendant on the special plea last reversed, and upon which issue was joined, must have proved to the jury, that Mullikin had on hand two thousand dollars, as therein alleged of partnership money at the time of its dissolution and of executing the note sued on, and that

the paying over of that sum was the sole consideration of said note. But the Court as to the last instruction, said there could be no doubt such proof must be made, but that the testimony proved that the payment of the two thousand dollars was not the sole consideration of the note, and that the jury ought not to take that plea into consideration, but should be confined in their verdict to the other issue. And the Court refused to give the instructions as asked for, but gave instructions to the jury as follows, viz: The Court instruct the jury, that if they believe from the evidence, that on the dissolution of the partnership between Boggess and Mullikin, they made an estimate of the property of the partnership, and the debts due from and to the partnership, and that on such estimate Mullikin's interest was found to be worth $615, and thereupon it was agreed that Boggess should take the partnership property and debts, and pay the debts due from the partnership, and that Boggess executed his note in consideration thereof to Mullikin for $615; and if they further believe that there was a mistake in the estimate, and that either in consequence of the debts due from the partnership being greater than they were estimated to be, or the debts due to the partnership being less than the estimate, the interest of Mullikin was worth nothing, then the note is without consideration and not binding on Boggess, unless they believe that Boggess agreed to take his interest whatever it should be.

That if they believe from the evidence that at the dissolution of the partnership between Boggess and Mullikin, Boggess agreed to give Mullikin $615 for his interest in the firm, and executed his note therefor, and that Boggess was induced to do so by the representations of Mullikin, from which it appeared that Mullikin's interest was worth that sum, and that such representations were false and fraudulent, and that Boggess was imposed on thereby, when in fact the interest of Mullikin was worth nothing in consequence of the amount of debts due from the firm which were known to Mullikin and not to Boggess, and concealed by Mullikin from Boggess, then the note is without consideration, and not binding on Boggess.

That if they believe from the evidence, that the interest of Mullikin in the firm was worth $615, then the consideration of the note is good, and Boggess is bound thereby.

That if they believe from the evidence, that Boggess and Mullikin made a lumping trade, that Boggess agreed to give $615 for Mullikin's interest whatever it might be, and was not deceived or imposed on by any false and fraudulent representations or concealments then made by Mullikin, then the note is founded on good consideration, and is binding on Boggess.

To which said last instructions, so given by the Court, the plaintiff, by his counsel, excepts, and tenders this his bill of ex-

ceptions, which he prays may be signed, sealed, and made a part of the record in this cause, which is accordingly done.

STEPHEN T. LOGAN. [L.S.]

A. COWLES, for the appellant, contended:

1. The jury should have been directed that unless the proof was correspondent with the special issue, they ought to find for the plaintiff.

2. The facts as alleged in the second plea, are stated to have been the consideration of the note. It was therefore necessary to prove the consideration as alleged. 2 Stark. Ev. 349, 350, 352, 353, 354, 358.

3. When the consideration of a contract is alleged, consisting either of distinct matters forming one entire consideration, or of one matter forming an entire consideration, it must be proved as laid. 1 Chitty 96, 262 top, 263 side; 2 Johns. Digest, title *Pleadings*, 194, 118, 209,--case 275; 10 Johns. 140; Breese, 268.

4. Our statute, title *Practice*, allows pleading either an entire or total failure of the consideration. Under these issues different proof is requisite. Proof of a partial failure, will not support a total failure. So in stating the consideration, it is one entire thing.

H. EDDY and JAMES GRANT, for the appellee:

The rule of law is that a party has not a right to demand the opinion of the Court upon abstract questions of law. 1 Bibb, 369; 2 Pirt. Dig. 218, § 62; ib. 219, § 74. The evidence should appear to warrant any instructions based upon it, to enable this Court to judge whether they were applicable or not. See the last reference, and 2 Pirt. 221, § 80, where it was held the Supreme Court will not regard exceptions unless the evidence be stated at length, and that "in every kind of action, the evidence upon which the instructions or opinion of the Court is *given* or *denied*, must appear," referring to 1 Monroe, 196.

The filing of the replication to the second amended plea, was a waiver of the demurrer. 2 Pirt. Dig. 211, § 10.

SMITH, Justice, delivered the opinion of the Court:

This was an action on a promissory note assigned to the plaintiff. The defendant pleaded several special pleas of want of and failure of consideration, and fraudulent representations of the assignor, at the time of making the note; and by which fraudulent representations the note was obtained. To the first and second pleas the plaintiff demurred, and his demurrers were sustained. On the third he took issue by replication. Leave was given to the defendant to file amended pleas, and he accordingly filed two special pleas, to both of which the plaintiff demurred. The demurrer to the first amended plea was sustained, and to that of the second overruled; and thereupon the plaintiff replied to the second amended plea, and took issue thereon.

On the trial several instructions were asked by the plaintiff's counsel, which are not important to notice, no exception being taken to any of them but one, which will be noticed; and because these instructions were entirely correct, and directly applicable to the cause. The plaintiff has made three several points, and relied on them as the grounds of error in this cause.

1. That the demurrer to the defendant's amended plea was incorrectly overruled

2. That the Court erred in the last part of the instructions given to the jury contained in the following words, viz: "That if the jury believe from the evidence that Boggess and Mullikin made a lumping trade; that if Boggess agreed to give $615 for Mullikin's interest, whatever it might be, (meaning the interest in the partnership concern in which they were both interested, and to which the making of the note related,) and was not deceived or imposed on by any false and fraudulent representations or concealments, then made by Mullikin, then the note is founded on a good consideration, and is binding on Boggess."

3. That the Court erred in the general instructions given.

The answer to the first objection, on the demurrer, is that the plaintiff waived any possible ground he might have had by his replication; he should have stood by his demurrer, and not taken issue on the plea.(1) The second objection on the instructions is not tenable. It is not perceived in relation to the question of law raised on this point in the cause, how more appropriate instructions could have been given. They are not only full, guarded, and precise, but particularly just and applicable to the cause and the facts. The third ground, it is apparent, could not be raised in the cause in this Court; no objection was made to them in the Court below, and therefore none can be raised here.

It is not however to be understood that there could have been any just exception to them for their character or legality.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

(1) Breese 19.

WILLIAM CURTIS, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Madison.

An indictment for an assault with intent to kill and murder, should not only charge the intent to have been malicious and unlawful, but the *felonous* intent, and the extent of the crime intended to be perpetrated, should be distinctly set forth.

Curtis *v.* The People.

At the October term, 1833, of the Madison Circuit Court, the Hon. T. W. Smith presiding, the grand jury presented the following indictment:

"State of Illinois, } ss.
Madison County, }

Of the October term of the Madison Circuit Court, in the year of our Lord one thousand eight hundred and thirty-three, the Grand Jurors, chosen, selected, and sworn, in and for the county of Madison, in the name and by the authority of the People of the State of Illinois, upon their oaths present, That William Curtis, on the thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-three, at the county of Madison aforesaid, with force and arms in and upon the body of one Jacob C. Bruner, then and there in the peace being, did make and assault, and him the said Jacob C. Bruner, with a certain stone and also a brickbat, which he, the said Curtis, then and there held in his right hand, did then and there beat and bruise, and otherwise ill treat, so that his life was then and there greatly despaired of, with an intent him the said Jacob C. Bruner, then and there, of his malice aforethought, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

James Semple, Att'y Gen'l."

Before pleading, the defendant moved the Court to quash the indictment, which motion was overruled. He thereupon pleaded not guilty, and the jury found him "guilty of an assault and battery." The defendant then moved to be discharged, "for the reason that the jury did not assess the fine." This motion was overruled.

The Court then sentenced him to pay a fine of $20, and to be imprisoned twenty days, and to pay the costs of the prosecution, and to be committed until the said fine and costs should be fully paid.

On the trial, the following bill of exceptions was taken:

"Be it remembered, that on the trial of this cause, the Attorney General, in behalf of the People, called a witness, who was sworn, and among other things stated that the defendant threw a stone or brickbat at him; to which statement going to the jury in evidence, the defendant by his attorney objected, which objection was overruled by the Court, to which opinion of the Court the defendant excepts. The defendant by his attorney also asked the Court to give to the jury the following instructions:

1. That they must believe that the proof corresponds with the allegations of the indictment, strictly, in every material point, otherwise they must acquit.

2. If the jury have any doubt that Curtis inflicted the wounds with a stone and brickbat which he held in his right hand, as charged in the indictment, they must acquit.

3. Evidence that the defendant inflicted the wound by throwing or casting a stone or brickbat, is not sufficient to convict under the present indictment.

All of which instructions were refused by the Court; to which opinions of the Court the defendant excepts, and prays this his bill of exceptions to be signed and sealed by the Court, and made part of the record in the above entitled cause.

THEO'S W. SMITH. [L.S.]

The defendant assigned for error the refusal of the Court to quash the indictment, and the refusal to discharge the defendant after the verdict, and the several opinions of the Court to which exceptions were taken on the trial in the Court below.

JESSE B. THOMAS, Jr. and DAVID PRICKETT, for the plaintiff in error, relied upon the following points and authorities:

I. The indictment should have been quashed,

1. Because the offence is an attempt to commit a felony, and the indictment does not allege it to have been done *unlawfully* and *feloniously*.

The criminal intent must accompany the act, and from the intention alone is it determinable whether the act be criminal or innocent; *it* is alone punishable, being the very *gist* of the charge, and certain technical words alone express that intention, according to the different degrees of guilt, and they cannot be supplied by any circumlocution. 1 East's C. L. 446–7; 1 Chit. C. L. 231, C; Curtis *v.* The People, Breese 197; and brief in case of Reuben Clark *v.* The People, and the authorities there cited.(1)

In precedents of indictments for this offence, it is charged to have been done unlawfully and feloniously. Chit. C. L.

2. Because there is uncertainty in describing the offence committed, and the manner of its commission.

With the single exception that an indictment cannot be amended, all the rules that apply to civil pleadings, apply with increased force and greater strictness, to criminal; and an indictment should be as certain, clear and explicit, as a declaration. 1 Sand. 250 and n. 1; 1 Chit. C. L. 169–175, 280–1; 1 Stark. Ev. 252–255; 1 Chit. Plead. 216–237, 255; 4 Blac. Com. 306–7 *et notis;* Breese 4.

II. The Court erred in permitting evidence to be given to the jury, that the defendant threw stones and brickbats at Jacob C. Bruner, and struck him therewith, under the indictment, which

(1) *Ante* 117.

charged that he struck B. with a certain stone and brickbat, which he held in his right hand.

1. The precedents all show that indictments should be framed according to the facts, as for casting stones, &c. Chit. C. L.

III. The Court had no right to give judgment against the defendant, on a conviction of assault and battery, and should have discharged him.

1. Justices of the peace have exclusive original jurisdiction in such cases. R. L. 410 § 12.(1)

2. The Common Law of Great Britian with regard to criminal matters, is not in force in this State. R. L. 425,(2) 171;(3) enacting clause (*et seq.*) Crim. Code, 213 § 178.(4) 214 § 181, 209(5) § 159, 162.

3. The courts of this State cannot obtain jurisdiction by common law, directly or indirectly, of any matter of which their jurisdiction is taken away by statute. R. L. 410 § 178.(1)

IV. The Court erred in giving a judgment of *fine and imprisonment* against defendant, and that he should stand committed until *fine and costs* were paid.

1. The offence is defined by the Criminal Code, and should have been punished as therein provided. R. L. 180(6) § 51, 52, and 53; R. L. 209 § 159.(7)

2. If the Court had no jurisdiction in this case by the common law, they had no power to sentence defendant to imprisonment until fine and costs were paid. R. L. 239 § 163.(8)

3. The whole course of legislation in this State, shows that *imprisonment* never was intended to be inflicted as a portion of the penalty for assaults and batteries. R. L. 402, 411 § 12.(9)

V. The *jury*, in finding a person guilty of assault and battery, should assess the fine, and in such cases the Court has no discretionary power. R. L. 403(10) § 6, 411(11) § 12. The Court therefore erred in this case in fixing the amount of *fine*, which should have been assessed by the jury, if they had the power to find the defendant guilty of the offence.

The legislature, in providing punishments for crimes, seem to have intended, in most cases, that the measure of punishment should be determined by the jury. *Vide* Crim. Code.

N. W. Edwards, Attorney General, for the defendants in error.

Lockwood, Justice, delivered the opinion of the Court:

Curtis was indicted for an assault with intent, of his malice aforethonght, to kill and murder; but the indictment does not

(1) Gale's Stat. 421. (2) Gale's Stat. 440. (3) Gale's Stat. 199.
(4) Gale's Stat. 232. (5) Gale's Stat. 229. (6) Gale's Stat. 206.
(7) Gale's Stat. 229. (8) Gale's Stat. 229. (9) Gale's Stat. 422.
(10) Gale's Stat. 416. (11) Gale's Stat. 416.

charge the act to have been done *feloniously*. On the trial the defendant was convicted of an assault and battery; and the Court below gave judgment. The only point necessary to be decided, is, whether the indictment is sufficient. In the case of Henry Curtis *v.* The People,(1) this very point was made, and it was held that it was necessary "That the intent should not only be charged to be in itself malicious and unlawful, but that the *felonious design* and extent of the crime intended to be perpetrated, should be distinctly set forth, otherwise the inference would be, that the assault might be excusable or justifiable." For this defect in the indictment, the judgment below must be reversed.[a]

Judgment reversed.

(1) Breese 197.
(*a*) Fairlee *vs.* People, 11 Ill. R. 1; Perry *vs.* People, 14 Ill. R. 499.

SAMUEL SWAFFORD, plaintiff in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Franklin.

The statute does not authorize appeal bonds to be amended, in criminal cases. The statute regulating appeals in civil cases is otherwise.(*a*)

W. B. SCATES, for the plaintiff in error.

N. W. EDWARDS, Atty. Gen., for the defendants in error.

BROWNE, Justice, delivered the opinion of the Court:

This was a prosecution had under the statute of this State, entitled "*An act to extend the jurisdiction of Justices of the Peace.*"(2) A verdict was rendered before the justice, and judgment thereupon against the defendant, Swafford, for fifty dollars and costs; from which an appeal was taken to the Circuit Court of Franklin county, under the 7th section of the above recited statute, which is as follows: "If any person shall be dissatisfied with the verdict of the jury given before any justice of the peace, because of the fine being too low, or because the defendant may have been acquitted, he shall be permitted to remove the said case into the Circuit Court upon his executing bond to the People of the State of Illinois, before the clerk, &c." The appeal bond was given by the said defendant, Swafford, to Eve Reynolds (upon whom the assault and battery was committed) and to the People. The appeal was dismissed in the Circuit Court, on account of the informality of the bond. From this decision of the Circuit Court of Franklin county, the cause is

(*a*) Contra L. of 1853. p. 125 Sec. 2. (2) R. L. 402; Gale's Stat. 416.

brought here by a writ of error. The bond in this case ought clearly to have been given by the defendant, Swafford, to the People of the State of Illinois, as required by the statute. The statute does not authorize appeal bonds to be amended, in criminal cases. The statute regulating civil proceedings, has no application to this.

The judgment of the Court below is affirmed.

Judgment affirmed.

J. G. Israel, J. Taggart, and S. R. Smith, plaintiffs in error *v.* The President and Trustees of the Town of Jacksonville, defendants in error.

Error to Morgan.

Debt is the proper action to bring for a violation of an ordinance of an incorporated town. A summons from a justice of the peace to the defendant, to answer "for a violation of an ordinance of said town relative to nuisances," is informal and insufficient.(*a*)

Browne, Justice, delivered the opinion of the Court:

This was an action brought by The President and Trustees of the Town of Jacksonville, before a justice of the peace of Morgan county, against Israel, Taggart, and Smith, for a violation of the ordinance of the said town of Jacksonville, and to collect a fine for said violation.

The following is a copy of the summons issued by the justice of the peace, in favor of "The President and Trustees," &c., against the aforesaid defendants, to wit:

"State of Illinois, Morgan County,

The People of the State of Illinois,

To E. R. Metcalf, Town Constable, or any Constable of said County, Greeting: You are hereby commanded to summon I. G. Israel, J. Taggart, and S. R. Smith, to appear before me at my office in Jacksonville, on the 1st day of September, 1836, at one o'clock P. M., to answer the complaint of the President and Trustees of the Town of Jacksonville, for a violation of an ordinance of said town relative to nuisances, and hereof make due return as the law directs.

Given under my hand and seal, this 27th day of August, A. D. 1836. S. S. Brooks, J. P." [L. S.]

The defendants were summoned and appeared before the justice of the peace. Upon the trial the defendants moved to set aside the warrant for irregularity, which motion was overruled

(*a*) But see Ballard *vs.* McCarty, 11 Ill. R. 502; Ewbanks *vs.* Ashley 36 Ill. R. 180; Jacksonville *vs.* Block, 36 Ill. R. 509.

by the justice, and judgment rendered in favor of the plaintiffs for five dollars and costs. From this decision an appeal was taken to the Circuit Court of Morgan county.

Upon the cause coming on for trial, the defendants moved again, to set aside the warrant and reverse the decision of the justice, but the Circuit Court overruled the motion, and affirmed the judgment of the justice, to reverse which, the cause is brought to this Court.

The statute under which this suit was brought, is in the following words: "The President and Trustees may impose fines for the breach of these ordinances, but no fine shall be inflicted on any one person for any one breach of any ordinance of more than five dollars, which fine may be recovered before any justice of the peace by action of debt, in the name of the President and Trustees," &c. In bringing the suit the plaintiffs have not complied with the terms of the statute. Debt would have been most clearly the form of action.

The judgment of the Circuit Court is reversed.

Judgment reversed.

DAVID RANSOM, survivor of John Ransom, appellant *v.* GRIFFEY JONES, who sues for the use of Elisha G. Adams, appellee.

Appeal from Schuyler.

The possession of a note or bond, is *prima facie* evidence of the legal title to the instrument, and of a right to use the name of the person to whom it is payable.

Where there has been a transfer of a bond or instrument, without a regular assignment to authorize the assignee to institute a suit in his own name, courts will always permit the use of the name of the person to whom it is made payable, without an express power to do so. Indeed courts are bound to protect the interest of the holder, and prevent even a release of the debt after such transfer, or a discharge of the action by the person in whose name it has been commenced (*a*)

A note payable in mason work, is not assignable so as to enable the assignee to plead it as a set-off to an action against him, or to enable him to institute a suit thereon in his own name.

When an attorney commences an action in the name of another, or appears for another, the court will presume that he has authority to do so, until the contrary appear.

THIS was an action originally instituted by the appellee before Martin De Witt, a justice of the peace of Schuyler county, upon the following promissory note:

"Twelve months after date, we or either of us, promise to pay

(*a*) Dazy *vs.* Mills, 5 Gil. R. 67; Pomeroy *vs.* Manhattan L. I. Co., 40 Ill. R. 399.

Griffey Jones thirty-five dollars, for value received, as witness my hand and seal, April 14th, 1835.

his
DAVID ⋈ RANSOM,
mark
his
Test, A. PARIS. JOHN ⋈ RANSOM."
mark

The defendants produced the following due bill as a set-off to the plaintiff's demand:

"Due Hinman and Clift or bearer, thirty-five dollars, to be paid in brick work, immediately, if demanded.

his
Witness, B. HINMAN. GRIFFITH ⋈ JONES."
mark

Directly under the due bill was a memorandum in the words and figures following, to wit:

"Demand made soon after date of note, but could get no work.
B. HINMAN."

And upon the back of said due bill was the following:

"We assign the within to D. and J. Ransom or bearer.
HINMAN & CLIFT."

The justice rendered a judgment for the plaintiff, for $35 and costs, from which the defendants appealed to the Circuit Court, where the cause was tried at the June term, 1836, before the Hon. Richard M. Young, and the judgment of the justice affirmed with costs. The defendants appealed to this Court.

W. A. HINMAN, for the appellant.

W. A. MINSHALL, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

This was an action commenced before a justice of the peace, on a promissory note payable to Jones, and taken by appeal to the Circuit Court, and from the Circuit Court to this Court. The appellants objected to the form of the action, and offered a note as a set-off in the Court below. The grounds of error assumed by the appellants, are: 1st. That the suit could not be instituted by the holder of the note in the name of the payee for his use. 2d. That the note which is payable to another person in labor, and assigned to the appellants, ought to have been allowed as a set-off.

Much irrelevant evidence is embodied in the case, to which it is unnecessary to advert. The two points named, are considered

as embracing the whole case, and on the proper determination thereof, the cause must turn.

In regard to the first point, a long and undisturbed series of adjudications have settled the mode so familiarly in use, of instituting the suit in the name of the payee of the note, or obligee in the bond, by the holder, and declaring it to be for his use, for the purposes of recovery and control of the action and judgment had thereon.

The possession of the note or bond is *prima facie* evidence of the legal title to the instrument, and of a right to use the name of the person to whom it is payable. It is admitted that warrants of attorney were most usually required to be given to authorize the commencement of a suit by an attorney, or to enter an appearance for a party. Where an attorney commences an action in the name of another, or appears for another, the Court will presume that he has authority to do so, until the contrary is shown; and if such suit be instituted, or appearance entered, without legal authority, the remedy is by motion to the court founded on evidence, to show the abuse (in acting without such authority) of the process of the Court, or irregular act of the attorney in entering such appearance. Where there has been a transfer of a bond or instrument, without a regular assignment to authorize the assignee to institute a suit in his own name, courts will always permit the use of the name of the person to whom it is made payable, without an express power so to do. The party having the legal right to the debt, should have the necessary power to use the form necessary to recover the debt.(1) Indeed courts are bound to protect the interest of the holder, and prevent even a release of the debt after such transfer, or a discharge of the action by the person in whose name it has been commenced. The decision of the Circuit Court was correct on this point.

As to the second, there cannot be a doubt that the note could not be a set-off in the present action. The promise is "*to pay thirty-five dollars to Hinman & Clift or bearer in mason work.*" The statute makes only such notes assignable, as promise to pay money or articles of personal property, or any sum of money in personal property, or acknowledge any sum of money to be due to any other person.(2) The note offered as a

(1) By § 1 of the act of March 2, 1839, it is provided, "That suits instituted in the name of one, for the use of another, shall not abate by the death of the person whose name is used as plaintiff, but shall be prosecuted to judgment and execution as though the person for whose use they may have been instituted was plaintiff; and persons for whose use suits are prosecuted shall be considered as parties to the proceedings so far as to authorize judgments against them for costs, and to make them liable for all fees of officers, as though their names were used as plaintiff, and so far as to allow them to prosecute appeals, writs of certiorari and writs of error, and to execute the necessary bonds for these purposes. Acts of 1838—9, 271.

(2) R. L. 482; Gale's Stat. 255.

set-off though assigned to the appellants, was not assignable under the statute, so as to authorize an action to be commenced thereon in their names; and if they could not do this, they could not set it off in the present action.'

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. Deeds or obligations containing mutual covenants, are not assignable. Beezley v. Jones, *Ante* 34.

A note for the payment of a certain sum of money "which may be discharged in pork," is assignable. Thompson v. Armstrong, Breese 23.

Courts of law will take notice of, and protect, the rights of assignees against all persons having either express or implied notice of the trust or assignment of *choses in action.* Johnson v. Bloodgood, 1 Johns. C. 51; Wardell v. Eden, 2 Johns. C. 121; Van Vechten v. Graves, 4 Johns. 403; Littlefield v. Storey, 3 Johns. 425; Anderson v. Van Alen, 12 Johns. 343; Briggs v. Dorr, 19 Johns. 95; Henry v. Milham, Green 236; Jones v. Witter, 13 Mass. 304; Perkins v Parker, 1 Mass. 117; Day v. Whitney, 1 Pick. 504.

The assignor of a *chose in action*, cannot defeat a suit brought in his name by his assignee by a release to the defendant who has notice of the assignment. And to a release pleaded, the plaintiff may reply the assignment, and that the defendant had notice of it. Andrews v. Beecker, 1 Johns. C. 411; Raymond v. Squire, 11 Johns. 47.

So to a plea of payment. Littlefield v. Storey, 3 Johns. 425.

Where the assignor of a judgment enters up satisfaction on the record, after notice to the defendant of the assignment, the Court, on motion will order the entry of satisfaction to be vacated. Wardell v. Eden, 2 Johns. C. 121, 258.

Where an assignee recovers judgment in the name of his assignor, and takes out a *ca. sa.*, giving the sheriff notice of his equitable interest; and the sheriff, having arrested the defendant, suffers him to escape, the assignee may maintain an action against the sheriff, in the name of the assignor, which the sheriff cannot defeat, by taking a release from the nominal plaintiff. Martin v. Hawks, 15 Johns. 405.

The assignment of a *chose in action* need not be by writing *under seal*; a delivery of it, for a valuable consideration, is sufficient. Prescott v. Hull, 17 Johns. 284; Briggs v. Door, 19 Johns. 95.

The assignee of a *chose in action*, who takes it as collateral security for a debt, has a power coupled with an interest, and will be protected as an assignee against the release of his assignor, made after notice of the assignment to the debtor.

To constitute such an assignee of a *chose in action* as courts of law will protect against the acts of his assignor, the assignment need not be absolute, or of the whole subject matter. It is enough that it carry to the assignee a power coupled with an interest. Wheeler v. Wheeler, 9 Cowen 34.

A bond, executed by the plaintiff, and assigned to the defendant by the obligee, before the commencement of the action, may be set-off. Tuttle v. Bebee, 8 Johns. 152; Raymond v. Squire 11 Johns. 48; (See Wake v. Tinkler, 16 East. 36.)

In an action brought by an asignee of a *chose in action*, in the name of the original creditor, the Court will look to the person who is beneficially interested; and the defendant may set-off a debt due from him, as well as if the suit had been commenced in his name. Corser v. Craig, 1 Wash. C. C. R. 424.

A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action. Welch v. Mandeville, 1 Wheat. 233; 3 Peters' Cond. R. 554.

Where a *chose in action* is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights.

It is immaterial, in this respect, whether the assignment be good at law, or in equity only. Mandeville v. Welch, 5 Wheat. 277; 4 Peters' Cond. R. 642.

Courts of law, as well as courts of equity, will take notice of the assignment of *choses in action*, and to every substantial purpose, will protect the assignee. The beneficial interest

of the assignee is so far regarded, that the defendant may set-off a debt due the assignee, in like manner, as if the suit had been brought in his own name.

If it be necessary, in an action brought upon an assigned *chose in action*, that the interest of the person for whose benefit the suit is brought, should appear in the pleadings, it is sufficient if it appear in any part of the pleadings. Corser *v.* Craig, 1 Wash. C. C. R. 424.

The nominal plaintiff may dismiss a suit brought in his name, by a creditor who has not an assignment of the cause of action. Welsh *v.* Mandeville, 7 Cranch, 152; 2 Peters' Cond. R. 452.

The death of an assignor does not defeat the assignment, but the assignee may use the name of the executor or administrator of the assignor, to recover the money. Dawes *v.* Boylston, 9 Mass. 337; Cutts *v.* Perkins, 12 Mass. 206.

Daniel Stringer, plaintiff in error *v.* John Smith and William Smith, defendants in error.

Error to Sangamon.

A writ of error will not lie to the final judgment of the Circuit Court in a case tried by the Court without the intervention of a jury.(*a*)

This cause was tried at the October term, 1835, of the Sangamon Circuit Court, before the Hon. Thomas Ford, and a judgment rendered for the appellees for $66,88.

C. Walker, for the plaintiff in error.

J. T. Stuart and M. McConnell, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced before a justice of the peace, and was brought by appeal to the Circuit Court of Sangamon. The cause was tried by the Court without the intervention of a jury. After the plaintiff's evidence was closed, the parties being heard, the cause was left to the Court for its determination on the evidence adduced, and the law arising thereon. The Circuit Court gave judgment for the plaintiffs, and a writ of error is now prosecuted to reverse this judgment.

It appears from the record, that after the judgment had been rendered for the plaintiffs, the defendant's counsel excepted in the words of the bill of exceptions "to the judgment of the Circuit Court." This case is directly in point with the case of Swafford *v.* Dovenor, decided in December term, 1834.(1)—The bill of exceptions to the final judgment of the Circuit Court could not lie. It was neither for admitting improper evidence, nor rejecting proper evidence; and there could not occur by any

(*a*) *Ante* 167, and notes.

(1) *Ante* 165. See also Gilmore v. Ballard, *Ante* 252; White *et al.* v. Wiseman, *Ante* 169.

possibility, any misdirection to a jury, because there was none. Then the exception would be to the judgment of the Circuit Court on the facts proven and the law of the case; and would, if recognised as a proper course, be equivalent to adopting a new mode for obtaining a new trial or rehearing of the cause.

The defendant should have moved for a non-suit, and, if refused, taken his exceptions to the opinion of the Court in so refusing. He might have also demurred to the evidence, and asked the judgment of the Court on its sufficiency to sustain a recovery, or he might have had a jury, and asked for instructions on the case from the Court. It is, however, wholly unnecessary to re-investigate these points again, because they are examined at large in the case referred to, and no sufficient reasons appear to shake that decision, or show any inconvenience resulting therefrom, as a rule of proceeding, if the parties take the modes of proceeding pointed out in that decision.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See *Ante* 165, note.

WILLIAM T. THORNTON, appellant *v.* IRA DAVENPORT and SMILY H. HENDERSON, appellees.

Appeal from Morgan.

A deed made upon valuable consideration, does not come within the provisions of the statute of frauds and perjuries.

All conveyances of goods and chattels, where the possession is permitted to remain with the donor or vendor, is fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed.

But where from the nature and provisions of the conveyance, the possession is to remain with the vendor, and the transaction is *bona fide*, its so remaining is consistent with the deed, and does not avoid it.

Mortgages, marriage settlements, and limitations over of chattels, are valid against all persons without delivery of possession, provided the transfer be *bona fide*, and the possession remain with the person shown to be entitled to it by the stipulations of the deed.

Semble, that an absolute sale of personal property, where the possession remains with the vendor, is void as to creditors and purchasers, though authorized by the terms of the bill of sale.

The fact that a mortgage was executed upon the same day that a judgment was obtained against the mortgagor, unaccompanied by other circumstances calculated to cast suspicion upon the transaction, is not of itself sufficient to attach to it the imputation of fraud.

THIS cause was heard in the Circuit Court before the Hon. Samuel D. Lockwood, at the May term, 1834, and judgment rendered that the property levied on was subject to the execution

of the appellees, and that they recover their costs of suit from which an appeal was taken by Thornton to this Court.

S. Breese and Wm. Thomas, for the appellant, cited 3 Cranch. 73 ; R. L. 313–14 ; 1 Powell on Mort. 33, and notes.

J. Lamborn, for the appellees.

Wilson, Chief Justice, delivered the opinion of the Court :

By agreement of the parties, this case was submitted to the Court upon a statement of facts, accompanied by a deed of mortgage made by Wilhite to Thornton. By this deed, Wilhite conveys to Thornton a variety of personal property, for two hundred dollars, with a condition that if Wilhite will pay to Thornton, at maturity, a note of two hundred dollars, with twelve per centum interest in one year, then the deed is to be void, otherwise absolute. It is, also stipulated that Wilhite is to retain possession, and to have the use of the property until the day of payment. He is, also, at his own expense, to keep the property (part being live stock), and at the expiration of the year, if the debt be not paid, deliver it up to Thornton in good condition. The facts agreed upon, are, that Wilhite was indebted to Thornton in the sum of two hundred dollars, the amount for which he executed his note, and that the mortgage was made to secure this debt. Davenport and Henderson were also creditors of Wilhite, and on the same day that the mortgage was made, obtained a judgment against him, and soon after, but before the expiration of the year, levied their execution on the mortgaged property in the possession of Wilhite.

Upon this statement of the case, the Court below decided the deed from Wilhite to Thornton to be void as to the creditors of Wilhite, and consequently subject to the execution of Davenport and Henderson. To support this position, it must be shown that the transaction between Wilhite and Thornton was fraudulent in fact, or that the conveyance is of such a character that the law will imply fraud ; and that countervailing testimony of fair intention, will not redeem it from this inference. That the sale from Wilhite to Thornton is not fraudulent in fact, is apparent from a consideration of all the circumstances attending the transaction, as admitted by the parties. The sufficiency of the consideration upon which the mortgage was made, is not questioned. It is admitted that Wilhite was indebted to Thornton in the sum of two hundred dollars, and that the property mentioned in the deed was mortgaged to secure this debt. The only circumstance of a questionable character is, the execution of the mortgage on the same day of the rendition of the judgment against him, in favor of Davenport and Henderson. But this fact unaccompanied by any other circumstance calculated to cast suspicion

upon the transaction, is not of itself sufficient to attach to it the imputation of fraud, and thereby taint and render void the whole transaction. The transfer to Thornton, in its most unfavorable aspect, only amounts to a preference of one creditor to another; a privilege to which the debtor is always entitled. Even an insolvent debtor may prefer one creditor to another, and his motives for so doing, provided the preferred creditor has done nothing improper, cannot be enquired into; nor is the time when this preference is indicated, material, provided it is anterior to the lien set up to avoid it.(1)

There being no circumstances then attending the conveyance of the property from Wilhite to Thornton, from which fraud in fact can be inferred, it becomes necessary to enquire whether it is alike free from the inference of fraud in law. In the argument of the case, the statute of frauds and perjuries was adverted to; but as the deed under review was made upon valuable consideration, it does not come within the provisions of that statute. The case, therefore, depends entirely upon the principles of the common law; and it is to be regretted that the judicial determinations relative to the rules governing the transfer of personal property, which are of so much importance, and such general application, have not been more stable and definite. But while the decisions of the courts of several of the States have been vacillating and discordant, those of England, as well as those of a large majority of the States, have been uniform and consistent; and the principle well established by those decisions, is, that all conveyances of goods and chattels, where the possession is permitted to remain with the alienor or vendor, is fraudulent *per se*, and void as to creditors and purchasers, *unless the retaining of possession be consistent with the deed*, as in case of an absolute unconditional sale, where the possession does not "accompany and follow the deed." Here the vendor's possession is not merely evidence of fraud, but, by legal inference, is a fraud *per se*, and cannot be rebutted by testimony of fair intention; because the possession not remaining with the person shown by the deed to be entitled to it, works deception and injury. But where from the nature and provisions of the conveyance, the possession is to remain with the vendor, and the transaction is *bona fide*, its so remaining is consistent with the deed, and does not avoid it.[a]

The application of these principles to the present case, will clearly establish the validity of Thornton's title to the property in controversy. The conveyance from Wilhite was a mortgage, the legitimate object of which was to secure to a creditor a just debt; and it was expressly stipulated in the deed that Wilhite

(1) Marbury *v.* Brooks, 7 Wheat. 556; 5 Peters' Cond. R. 345; Spring *et al. v.* S. C. Ins. Co., 8 Wheat. 268; 5 Peters' Cond. R. 434.

(*a*) Rhines *vs.* Phelps, 3 Gil. R. 464; Reese *vs.* Mitchell, 41 Ill. R. 369, and cases cited.

should retain possession of the mortgaged property, until the debt became due. Had not the deed contained this authority for his possession, there is no doubt but his retaining it would have constituted a legal fraud. Such too would have been the effect of his remaining in possession, if the deed to Thornton had been an absolute, in place of a conditional one, though authorized by its terms. In the first case his possession would not be authorized by the deed; and in the other, it would be inconsistent with its character, and therefore void. Neither of these objections, however, apply in this case. Wilhite's possession of the property is consistent with the object and intent of the deed, and is warranted as well by its stipulations, as by its usual and legal operations; for it is of the nature of a security that the debtor should retain possession until the day of payment be past.

Among the numerous authorities from which these principles are deduced, there are several cases directly analogous to the present, such as the case of Cadogan *v.* Kennet,(1) where by settlement before marriage, the husband conveyed all his household goods to trustees, to the use of himself for life, with remainder over, and with a proviso that he should retain possession and enjoy the property; his doing so, the Court said, being consistent with the object, intent, and provisions of the deed, did not render it void. Such too was the decision in the case of Claybourn's Executors *v.* Hill,(2) which was the case of a mortgage of personal property, with an express stipulation that the debtor should retain possession. The only deduction from these and numerous similar cases, is, that mortgages, marriage settlements, and limitations over of chattels, are valid against all persons, without delivery of possession; provided the transfer be *bona fide*, and the possession remain with the person shown by the stipulations of the deed to be entitled to it. Were a different rule to prevail, one which would not under any circumstances sanction the separation of the title to personal property, from the possession, it would, in many cases, render the transfer of personal property to suit the convenience of parties, extremely inconvenient, and, in some cases, impossible; as where from the situation of the property at the time, it was incapable of delivery; as in the case of a sale of a ship at sea, or the limitation over of chattels, after the use of them for life or for years, to another. I admit that there are some authorities which seem to militate against, and others that are less equivocally opposed, to the rules here laid down, which permits the possession of personal property, in cases like the present, to be separated from the title. But I think the principle so well established by an overwhelming current of authorities, that no arguments drawn from policy, will justify the Court in departing from it.

(1) Cowper 432. (2) 1 Wash 177.

The judgment of the Circuit Court is therefore reversed with costs.

Judgment reversed.

Lockwood, Justice, dissenting:

I cannot concur in the opinion of the Court, because I believe that where the motive for the sale or mortgage is the security of the vendee or mortgagee, and the vendor or mortgagor is permitted to retain the possession and visible ownership for the convenience of the parties, it is a fraud, though the arrangement be inserted in the deed or mortgage. The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stay to enquire whether there was actual fraud or not; it will infer it at all events; for it is against sound policy to suffer the vendor or mortgagor to remain in possession, whether an agreement to that effect be or be not expressed in the deed. It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is thereby enabled to practice deceit upon mankind. If the possession be withheld pursuant to the terms of the agreement, some good reason for it, beyond the convenience of the parties, must appear, and the parties must leave nothing unperformed within their power to secure third persons from the consequences of the apparent ownership of the vendor or mortgagor. In support of my views on this subject, I have used the language of Chancellor Kent, commenting on the case of Clow *v.* Woods.(1) In that case the Supreme Court of Pennsylvania decided, that the delivery of the goods is held to be as requisite in the case of a mortgage of goods, as in the case of an absolute sale under the statute 13 and 27 Elizabeth, and that merely stating on the face of the deed, that possession was to be retained, is not sufficient to take the case out of the statute, even in the case of a mortgage of goods.

(1) 5 Serg. & Rawle, 277.

Joseph Kitchell, appellant *v.* Samuel Bratton, appellee.

Appeal from Crawford.

The section of the statute of frauds and perjuries which declares void as to creditors and purchasers, all conveyances of goods and chattels made upon considerations *not* deemed valuable in law, unless possession shall remain with the donee, or unless the convey-

ances be recorded, has no relation to a deed made upon a valuable consideration. The statute applies to deeds for personal property made upon *good* consideration only, as distinguished from *valuable*.

A party cannot assign for error an erroneous instruction favorable to him.

The rule governing conveyances of personal property, is, that unless possession shall accompany and follow the deed, the conveyance by legal inference is fraudulent and void as to creditors.

Where an erroneous instruction is given to the jury, but the bill of exceptions does not enable the Court to see what effect it probably had upon their verdict, the judgment of the Court below will be reversed. The bill of exceptions should have stated the proof upon the point.

THIS was an appeal from the verdict of a justice's jury upon the trial of the right of property in certain goods and chattels claimed by the appellant as mortgagee, which had been levied on by virtue of an execution in favor of the appellee.

The cause was tried at the March term, 1836, of the Crawford Circuit Court, before the Hon. Justin Harlan and a jury, and a verdict and judgment rendered against the appellant, from which he appealed to this Court.

E. S. JANNEY, for the appellant, relied upon the following points and authorities:

Contracts, where a fair and valuable consideration has been paid are not affected by the statute of frauds. R. L. 313–14;(1) 2 Hen. and Munf. 302. Possession was not necessary under the mortgage—possession being necessary only in cases of absolute bills of sale or deeds. Ham *v.* Russell, 1 Cranch. 309; same case, 1 Peters' Cond. Rep. 318; U. S. *v.* Hove *et al.* 1 Peters 458; 1 Fonb. Eq. 270, 274.

That every debtor has a right to secure his creditor. 1 Peters 318 in notes.

So that even in cases of absolute bills of sale, if a valuable and adequate consideration has been given, possession is not deemed requisite unless there is an intention to defraud. Ham *v.* Russell, 1 Peters 320.

Recording of bills of sale or mortgages of personalty, is not requisite, especially where the consideration is valuable; nor is it required at all of conveyances of personalty. R. L. 314; Hodgson *v.* Butts, 1 Peters 476.

That even in cases of loans, recording only is necessary after a lapse of five years. Last clause, § 2 st. frauds; R. L. 314.

WALTER B. SCATES and A.P. FIELD, for the appellee:

An absolute bill of sale is fraudulent, if possession remain with the vendor. 1 Cranch. 309; 2 Munf. 341; 3 Munf. 1.

A conditional bill of sale, or a mortgage, where possession remains with the vendor or mortgagor, unless it be shown upon its face to be consistent with a fair and honest intent, and the

(1) Gale's Stat. 315–16.

circumstances of the transaction, is fraudulent. 2 Kent's Com. 410, 419, and the authorities there referred to. See also generally upon the same doctrine, the same, and Espinasse N. P. 540-1, 566-7-8; Tidd. Pr. 919; Robt. on Fraud. Con. 544, 570; 2 Cowp. 434.

To make a bill of sale or mortgage good under the statute, it must be proved by two witnesses, before some court of record, within eight months. R. L. 313–14, § 2.(1)

Wilson, Chief Justice, delivered the opinion of the Court.

In this case the question in the Court below, was relative to the ownership of certain articles of personal property which were levied on as the property of J. and P. Higgins, but which were claimed by J. Kitchell, who produced and gave in evidence, a deed of mortgage from the Higgins to himself, of the property levied on. The consideration of the deed, as appears from its face, was a debt due from the Higgins to Kitchell. By the stipulations of the deed, Kitchell was to have immediate possession of the property, but he was bound to relinquish all title thereto upon the payment of his debt. Upon the trial in the Circuit Court, the counsel for the appellant, Kitchell, moved the Court to instruct the jury that if they believed the mortgage was made upon consideration deemed valuable in law, that then it was not necessary to record it. This instruction the Court refused to give; but instructed the jury that unless they were satisfied from the evidence, that the appellant had had, and *bona fide* remained in, possession of the property, that then the mortgage was void, unless recorded within eight months.

To these instructions, the appellant, Kitchell, by his counsel, excepted, and assigns for error, 1st, The refusal of the Court to give the instructions asked for; and 2d, The giving the instructions which the Court gave. From the instructions asked for and refused, as well as those given, it would seem that the Court considered the conveyance as coming within the provisions of that branch of the statute of frauds and perjuries, which renders void as to creditors, all deeds made upon consideration *not* deemed valuable in law, unless possession shall remain with the donee, or unless recorded. This view of the case is clearly erroneous. The deed to Kitchell, is upon consideration deemed valuable in law, and therefore excluded from the operation of that branch of the statute which authorizes recording. The statute applies to deeds for personal property, made upon *good* consideration only, as distinguished from *valuable*, and with respect to them, substitutes possession for recording. In the instructions given by the Court, there was no error, except in that branch of it which recognised the alternative of recording as equivalent to

(1) Gale's Stat. 315—16.

possession in the mortgagee, for the purpose of giving validity to the deed. This is not the law; but inasmuch as it was an error favorable to the appellant, by making valid his mortgage by either possession or recording, he has no ground of complaint. The refusal, however, of the Court to give the instructions asked for, was clearly erroneous. But what would have been the effect of those instructions, and whether, if given, a different result would have been produced, depends upon a fact which is not disclosed by any part of the record; that is, whether the possession of the property remained with the mortgagors, or, whether it passed according to the terms of the deed, to the mortgagee, and was by him retained. If the fact was that the mortgagee took and retained possession of the property, then the instructions asked for, had they been given, would have entitled him to a verdict, and were therefore material. But if the possession did not continue with him, the deed was by legal inference fraudulent and void, and the instructions could not have availed him. The rule governing conveyances of personal property, as laid down in the case of Thornton *v.* Davenport and Henderson,(1) decided at this term of the Court, is that "Unless possession shall accompany and follow the deed," it is by legal inference fraudulent and void as to creditors. If then, from the evidence in this case, it appeared that possession was taken and retained by Kitchell, and the transaction was otherwise fair, his title to the property was valid. But if, on the other hand, the property remained in the possession of the Higgins, its so remaining rendered the conveyance fraudulent *per se*, because inconsistent with the stipulations of the deed which gave the possession to Kitchell, until the debt was paid.[a]

The bill of exceptions should have stated the proof upon this point; but as it has not done so, the case is too imperfectly presented to enable this Court to say what should have been the decision below, or give such judgment here, as that Court ought to have given. The decision of the Circuit Court is therefore reversed, the cause remanded, and a new trial awarded, conformably to this opinion. The costs of this Court to be paid by the appellee.

Judgment reversed.

(1) *Ante* 296.

(*a*) *See* Rev. Stat. 1845 p. 91.

GEORGE BALDWIN, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Cook.

Proof that defendant stole a mare or a gelding, will sustain an indictment for stealing a horse.
An indictment alleging that the animal was stolen and carried away, will be sustained by proof that it was ridden, driven, or led away.

THIS cause was tried before the Hon. Thomas Ford and a jury. The defendant in the Court below was found guilty, and sentenced to the penitentiary for five years.

J. D. CATON, for the plaintiff in error.

JAMES GRANT, State's Attorney, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

The plaintiff in error was indicted and convicted of larceny, at the October term of the Cook Circuit Court, 1836. The indictment charged him with feloniously stealing and carrying away one horse, the proper goods and chattels of one Ashbel Steele. On the trial the prisoner's counsel asked the Court to instruct the jury, "That if they believed from the evidence that the property stolen was a gelding or a mare, that in point of law the indictment was not sustained," which the Court refused to do. This is alleged for error. There can be no doubt that the refusal was proper. The term *horse*, used in the indictment, is descriptive of the *genus* of the animal, and not of the sex or character changed by artificial means. The animal was still a "horse," no matter what the sex, and so was it still a horse, although it might be a gelding. The second ground of objection raised, that the Court refused to instruct the jury "That if they believed the animal was ridden, driven, or led away, the proof did not sustain the indictment," is without reason to sustain it, and cannot be entitled to consideration. It cannot be expected that the proof is to correspond with the literal interpretation of the words, and that the party, because he did not literally carry away the animal, is not guilty.

The judgment of the Circuit Court of Cook county is hereby affirmed, and the said Court are directed to cause the execution of the judgment and sentence of the said Court to be carried into effect without delay. The defendants in error are also to recover costs in this Court attending the prosecution of the writ of error, and have execution therefor.

Judgment affirmed.

Samuel Prevo, administrator of Rezin Beall, deceased, appellant *v.* Simon Lathrop, appellee.

Appeal from Clark.

Where B. agreed, by parol, to purchase of L., a tract of land, and to pay $400 for the same, in four equal annual instalments, but no memorandum in writing was made of the bargain, and sometime afterwards a note was executed for the amount then due of the principal of said purchase money, and a deed made for the land, but the parties not agreeing as to the rate of interest for the time payment had been delayed, that was left for future adjustment: *Held* that the contract to pay interest was not within the statute of frauds. Said agreement to purchase the land was made in 1824, and the note was executed in 1832. The suit was instituted in 1835: *Held*, also, that the contract for interest was not barred by the statute of limitations.

Where no specific agreement is entered into in relation to the rate of interest, the law will presume that the legal rate was intended.

This cause was commenced before the Judge of Probate of Clark county, on the 21st day of April, 1835. It was heard in the Circuit Court, at the May term, 1836, before Hon. Justin Harlan.

H. Eddy and D. J. Baker, for the appellant.

J. Pearson, for the appellee.

Smith, Justice, delivered the opinion of the Court:

Lathrop sued Prevo as administrator of Beall, before the Court of Probate, on a note and an account. The suit was amicable, and the parties waived service of process. The Court of Probate rendered judgment against Prevo for $148 and costs of suit. Prevo appealed from this judgment to the Circuit Court, and filed his bill of exceptions agreeably to the statute. On the trial in the Circuit Court, a judgment was rendered in favor of Lathrop against Prevo, for $157 and costs. In the progress of the trial in the Circuit Court, a bill of exceptions was taken to the opinion of the Circuit Court, for admitting and not excluding, the testimony of a witness, who deposed that sometime in the year 1823 or 1824, there was a verbal contract entered into between the plaintiff and the defendant's intestate, Rezin Beall, deceased, in relation to a certain tract or parcel of land situated in Clark county, for which said Beall was to pay said plaintiff $400 in four equal annual installments; for the payment of which no writing was entered into until the execution of the note offered in evidence, at which time a deed of conveyance was made by Lathrop to Beall; that, at the time of the execution of said note, a claim was set up by said plaintiff, for twelve per cent. interest on the said instalments, from the time they became due, up to the time of the execution of the note. Whereupon a controversy arose

between the plaintiff and Beall, the intestate, in relation to the interest. The plaintiff claimed twelve per cent., and Beall was willing to give six per cent. or more; but as they could not agree at the time, they agreed to leave it to future adjustment, as to the rate of interest to be paid. The note was executed for the sum therein mentioned, Beall refusing to include twelve per cent. interest in the note, and remarked, at the time, that he, the plaintiff, and Beall would not fall out about the amount of interest.

On this testimony, the counsel of the appellant raised in the Court below the following objections:

1. That the claim for interest, arising under the agreement and promise to pay interest, and leaving the precise amount to future adjustment, was barred by the statute of limitations.

2. That the conversations between the parties were not evidence, because the contract upon which interest was claimed, was a verbal one for the sale of lands, and void under the statute of frauds and perjuries.

The same points are now made in this Court, and relied on, for a reversal of the judgment of the Circuit Court.

To ascertain whether the statute of limitations was a bar in the present case, we must recur to the time of the promise to adjust the interest at some future day. That was the day of the execution of the note, the 26th of August, 1832; consequently, five years had not elapsed from the making of the promise, at the institution of the suit.

On the 2d point, it is a misapprehension of the state of facts disclosed, to suppose that the promise to pay the interest, was an agreement within the terms of the statute of frauds. It was a mere incident connected with the sum of money agreed to be paid on the consummation of the contract for the lands, by the making of the conveyance and note; though the exact amount of money to be paid as interest, was left to future adjustment between the parties. That amount not having been agreed upon between them, it is fair to presume, at least, that the amount should be the legal interest, and the party himself admitted his willingness to pay at least that sum.

Upon the testimony, then, as well as the legal questions arising thereon, no error is perceived in the judgment of the Circuit Court; and it is accordingly affirmed with costs.

Judgment affirmed.

Note. See Scott v. Thomas, *Ante* 58.

THOMAS VICKERS, plaintiff in error *v.* JANE HILL, administratrix, and JOHN M. WEBSTER, administrator of the estate of CURTIS HILL, deceased, defendants in error.

Error to Marion.

The granting and refusing of continuances, is a matter of sound legal discretion, resting entirely with the Circuit Court, and that Court is to judge whether the party applying for a continuance, has complied with the requisitions of the statute; and the decision of the Court in such cases cannot be assigned for error.

If an exception exist to this general rule, that exception is to be confined to the simple point of the materiality of the facts resting within the knowledge of the witness, and their tendency to prove the point directly in issue.

Where the affidavit shows that only a part of the witnesses have been legally summoned, the plaintiffs may admit the facts to be proved by the witnesses legally summoned, as set forth in the affidavit, and compel the defendant to go to trial.

THE proceedings were had in this cause at the March term, 1836, of the Marion Circuit Court, before the Hon. Jepthah Hardin and a jury. Verdict and judgment were rendered for the defendants in error, for $13,84 and costs of suit.

The following bill of exceptions was taken in the Court below:

"Charles Coker being first duly sworn, deposes and says, that he is agent for the defendant in the above cause, and that the defendant cannot go safely to trial at this term of the Court, for want of the evidence of Thomas Cottingham, Andrew Story, Jeremiah Lewis, and Eli Vickers, witnesses for said defendant. Said witnesses reside in Hamilton county in this State. A subpœna was duly issued and put into the hands of the sheriff of Hamilton county, and is returned by him served on Cottingham, the rest not found. He expects the defendant will prove by said Cottingham, that the note sued on was given by defendant for clocks, and that the clocks were warranted to be good time pieces for two years, and he expects to prove by the other witnesses that said clocks were not good time pieces, and that they did not keep time, and that the warranty wholly failed. He does not know that he can prove the same facts by any other witness or witnesses. Neither of said witnesses are in attendance. This affidavit is not made for delay, but that justice may be done. He believes the defendant cannot go safely to trial without said witnesses, and he expects to be able to procure their attendance by the next term of this Court. All of which is stated to the best of this deponent's knowledge and belief.

CHARLES COKER.

Subscribed and sworn to, this 14th day of March, 1836.

WM. W. PACE, Clerk.

And thereupon the defendant moved the Court for a continuance of this cause until the next term of this Court, and upon argument heard, the Court decided that the affidavit was sufficient as the causes and facts expected to be proved by the other witnesses, except Thomas Cottingham, but no delinquence is shown as to Cottingham, because his fees were not tendered, and ordered a continuance of the cause unless the plaintiffs *admit* the *fact* stated in the affidavit which the defendant expects to prove by Eli Vickers, Andrew Story, and Jeremiah Lewis, without admitting the facts which he expects to prove by Thomas Cottingham, which the plaintiffs admitted and went to trial, and upon the trial the Court rejected and excluded all the facts in the affidavit and all that part of the affidavit which related to the facts which the defendant stated in his affidavit he expected to prove by said Cottingham, and directed the jury not to regard the same in making up their verdict. The note sued on, and the letters of administration were read in evidence, which was all the evidence in the cause with those facts which the Court permitted to go to the jury in the affidavit. To which opinion of the Court in not requiring the plaintiffs to admit said facts, and in excluding said facts from the jury, the defendant excepts, and prays this his bill of exceptions may be signed, sealed and made a part of the record.

JEPTHAH HARDIN."

WALTER B. SCATES, for the plaintiff in error.

H. EDDY, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

This was an appeal from a judgment of a justice of the peace, to the Circuit Court of Marion. Two questions are presented for the consideration of this Court.

It is alleged for error, first, that the Circuit Court refused to continue the cause upon the application of Vickers, on an affidavit made by his agent as to the materiality of the facts within the knowledge of the absent witnesses, because he had not used due diligence in obtaining the attendance of a witness, he having omitted to tender the witness, who lived in a foreign county, his fees for attendance; secondly, because the Court compelled the plaintiff in error to go to trial in the Circuit Court, on the plaintiffs admitting the facts, expected to be proved by the other witnesses, conformably to the provisions of the practice act in relation to continuances.

On the first point it is clear, that the granting and refusing continuances of causes, is a matter of sound legal discretion, resting entirely within the exercise of that discretion by the Court, under the provisions of the statute; and it is to judge whether or not the party applying for the continuance, has com-

plied with the requisitions of the statute. So far as an intimation may have been given in the case of Cornelius *v.* Boucher,(1)decided in this Court at its December term 1820, that an exception might exist to the general rule, that exception is to be confined to the simple point of materiality of the facts resting in the knowledge of the witness, and their tendency to prove the point directly in issue. Should the Circuit Court decide erroneously in such a case, it would be considered a decision of a legal question, and to which an exception might be taken, and consequently would be a ground of error. I am not aware of any possible case other than this one, which would not involve the exercise of legal discretion in the Court in determining whether the applicant had complied with the requisitions of the practice act.

On the other ground of admitting a portion of the affidavit as evidence, and excluding that part relating to the facts which the witness might prove, to procure whose attendance, due diligence was decided not to have been exercised, it is not perceived that there was any inaccuracy of decision; as the plaintiffs in the Court below chose to admit all the statements contained in the defendant's deposition, as to the facts expected to be established by the other absent witnesses, and as that part of the statement of facts resting in the knowledge of the absent witnesses, who had not been sufficiently summoned, was not deemed sufficient cause for a continuance, the Court very properly directed the jury to disregard that portion of the defendant's statement, which had not been made evidence in the cause.[a]

Judgment is affirmed with costs.

Judgment affirmed.

Note. 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, Breese 43.

Since the decision of the above case, the following section has become a law:

Exceptions taken to opinions or decisions of the Circuit Court, overruling motions in arrest of judgment, motions for new trials, and for continuances of causes, shall hereafter be allowed; and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding.

Acts of July 1837, 109; Gale's Stat. 540.

(1) Breese 12.

(*a*) See L. of 1867 p. 157, in civil cases.

NATHANIEL BUCKMASTER, plaintiff in error *v.* WILLIAM GRUNDY, defendant in error.

Error to Johnson.

Upon the overruling of a demurrer to a declaration, if the defendant reply, he thereby waives his demurrer.
A demurrer to a plea, extends back to the declaration, and brings both under review before the court.
In an action of covenant for a failure to convey lands, it is not necessary to aver or prove a consideration.
A seal imports a consideration.
Semble, That a want of consideration may be pleaded to an action upon a bond for the conveyance of lands.
In an action of covenant for failing to convey lands agreeably to contract, the value of the lands at the time they were to have been conveyed, is the true measure of damages.
Whatever may be the practice in England, the purchaser here is not bound to prepare and tender a deed to the vendor, unless such obligation can be fairly inferred from the terms of the contract.
In cases of independent covenants, a plea of readiness to perform without averring an offer of performance, is bad, and furnishes no excuse for the non-performance.

This was an action of *covenant* commenced in the Gallatin Circuit Court, by Grundy against Buckmaster, upon the following bond:

"Know all men by these presents, that I, Nathaniel Buckmaster, of the county of Madison and State of Illinois, am held and firmly bound unto William Grundy, of the county and State aforesaid, in the penal sum of four thousand two hundred and sixty-six dollars, good and lawful money of the United States, for the true and faithful payment of which, I bind myself, my heirs and executors and administrators, as witness my hand and seal this ninth day of January, 1819.

The condition of the above bond is such that if the above bound Nathaniel Buckmaster shall make a general warranty deed in fee simple, to one undivided third part of two hundred and sixty-seven acres and ninety-seven hundredths of an acre, with the ferry thereunto belonging, lying on the east bank of the Mississippi, opposite the mouth of the Missouri, or just above it, being the tract or parcel of land the said Buckmaster purchased of Thomas Carlin, to William Grundy, by the first day of September next, then the above obligation to be void; otherwise to remain in full force and virtue in law, as witness my hand and seal this ninth day of January, 1819.

(Signed) N. BUCKMASTER. [L.S.]"

Witness present,
ISAAC C. DOUGLASS.

There was a change of venue taken to the Johnson Circuit Court, where the cause was tried at the October term, 1830, before the Hon. Thomas C. Browne and a jury, and a verdict and judgment rendered for the defendant in error for $3,562.

The following statement of the points and authorities relied on by the counsel for the plaintiff in error, was furnished to the Court:

"The defendant below demurred to the plaintiff's declaration, 1st, Because it contained no averment that the plaintiff ever tendered a deed to be executed by defendant. (See 2d Saund. P. and E. 901; Sugden 222.) 2d, Because it contained no averment that the plaintiff had paid defendant any thing for the land, for the title to which the bond was given, and consequently, no damages could accrue to the plaintiff; and the said bond contains no acknowledgment of money paid, *and in fact none was paid:* But the Court overruled the demurrer, and this is the first error assigned.

The 2d assignment of error questions the propriety of the Circuit Court's sustaining the plaintiff's demurrer to the defendant's second plea, which plea alleges that the defendant always has been and still is ready to make the deed in the said declaration mentioned.

The 3d assignment of error is founded on the supposition that, if all the facts set out in the plaintiff's declaration be true, yet it was error to render judgment for more than nominal damages, because the only true *measure of damages* in such a case is, the amount of the purchase money and the interest; and as no money, or any thing else is averred to have been paid, and as the *bond* does not admit the receipt of any, it was error to admit proof that any was paid; and without such proof, no judgment could legally have been entered up for the plaintiff: and the 4th assignment for error avers the fact that nothing ever was paid for the said land, but that a bond was given for the payment to Carlin, and the same has never been paid, &c.

We refer to 2 Peters. 102; 2 Saund. P. and E. 901; Sugden 229; 1 Saund P. and E. 136; 8 Term R. 130; Buller's N. P. 6–7; 1 Saund. Rep. 58, C."

James Semple and D. Prickett, for the plaintiff in error.

H. Eddy, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This is an action of *covenant* brought upon a bond executed by Buckmaster to Grundy, for the conveyance of land, in the penal sum of $4,266, with a condition that Buckmaster should make to Grundy a warranty deed to a specified tract of land, by

the first day of September, 1819. From the record of the proceedings in the Court below, it appears that the defendant interposed a demurrer to the plaintiff's declaration, which was overruled. He then pleaded two pleas, the first of which was a plea of covenants performed; the second plea merely alleged a readiness to perform his part of the covenants in his bond, but did not aver an offer to perform them at any time or place. To this plea the plaintiff demurred, and the demurrer was sustained by the Court. The parties then went to trial upon the issue taken on the defendant's first plea of covenants performed, and a verdict and judgment were rendered against the defendant for $3,562.

From this decision the defendant appealed, and assigns for error, 1st, The opinion of the Court overruling the demurrer to the plaintiff's declaration. 2d, The opinion of the Court sustaining the plaintiff's demurrer to the defendant's second plea; and, 3d, The rendition of judgment upon the verdict of the jury.

Owing to the earnest and somewhat confident manner with which the counsel urged the sufficiency of the errors assigned, more care has been taken in their investigation, than from the familiarity and frequent application of the principles upon which they depend, they would otherwise have been entitled to. The first and second assignment of errors must be considered together; for the defendant may be regarded as having abandoned his demurrer to the plaintiff's declaration, by pleading over, after the declaration had been sustained by the Court; yet, as the plaintiff's demurrer to the defendant's second plea extends to the declaration, and brings that as well as the plea under review,—and as a defect in the declaration will entitle the defendant to judgment, it will be proper to notice that first.[a] One of the objections to the sufficiency of the declaration, is, that it does not aver that the plaintiff tendered a deed to be executed. The next is, that it contains no averment that the plaintiff had paid any consideration for the land, and consequently he was entitled to no damages for a failure to convey. Neither of these objections are well taken. The declaration is in the usual form in an action of covenant, and by setting out the bond upon which suit is brought, sufficient is shown to entitle the plaintiff to his action. No statement of consideration is necessary, as the seal itself imports a consideration. Under the statute it is true that the want of consideration may be put in issue by plea to that effect; but this method of denial of the consideration upon which the contract in this case was entered into, has not been adopted by the defendant, and no other mode will avail him. It is also argued that the exact sum actuully paid, must not only be averred, but proved; and that the sum so paid and interest, constitute the measure of damages to be assessed by the jury. Though this may be the rule in an action upon a warranty to recover back

(a) Brawner *vs.* Lomax, 23 Ill. R. 496; Wilson *vs.* Myrick, 26 Ill. R. 34; Reeves *vs.* Forman, 26 Ill. R. 319: Schofield *vs.* Settley, 31 Ill. R. 515.

the consideration in case of eviction, it is not the rule in an action of covenant for a breach in failing to convey according to the terms in the contract. In such case the value of the land at the time it is to be conveyed (as established by evidence), is the true measure of damages.[a] As no exception was taken to the verdict in the Court below, we must presume that the damages given were warranted by the evidence.

The next objection to the declaration is, that it does not aver that the plaintiff prepared and tendered to the defendant a deed for him to execute.

The nature of the averments in a declaration, depend upon the character of the covenants contained in the deed upon which suit is brought. Where they are dependent, it is essential that the plaintiff should aver performance, or an offer to perform the agreement on his part; but where they are independent, performance on the part of the plaintiff need not to be averred. In this case the covenant of the defendant is necessarily independent, as the deed contains but one, and that is, that the defendant, Buckmaster, will make a general warranty deed to the plaintiff by a day named. No act is to be performed by the plaintiff; the undertaking of the defendant is absolute and unconditional, and expressed in language so clear and unambiguous, as to admit of but one inference as to what was the intention of the parties. To require one party to do that which he has not engaged to do, but which the other has, would be confounding all notions of justice and legal obligation. It was therefore unnecessary for the plaintiff to aver a tender of a deed. For the same reason that the declaration is considered good, the defendant's second plea must be adjudged bad. His covenant is unconditional and affirmative, that he will, by a day specified, make to the plaintiff a deed, &c. A plea, then, merely alleging a readiness to perform, furnishes no excuse for a non-performance, when unconnected with any apology for the omission.[b] If by a subsequent agreement between the parties, the time of performance had been extended, or if by the act of the plaintiff himself, he had put it out of the power of the defendant to perform his covenant, as if he had remained beyond the limits of the State until the expiration of the time fixed for the performance of the contract; either of these facts properly pleaded, would have afforded an excuse to the defendant. But as no such excuse is contained in the plea, the Court very properly adjudged it bad.(1)

With regard to the obligation of the vendee to prepare the deed according to the English authorities referred to, it is to be observed that those decisions were made with reference to the parties under a system of conveyancing which has grown up there and is well understood; but no such system exists here, and par-

(*a*) McKee *vs.* Brandon, 2 Scam. R. 344; Smith *vs.* Dunlap, 12 Ill. R. 194.
(*b*) Hall *vs.* Perkins, 4 Scam. R. 548. (1) 3 Cranch 176.

ties to the contract for the conveyance of land cannot therefore be supposed to have reference to it, as regulating the duty of each, with respect to the preparation of the title papers. Whatever, then, may be the practice in England, the purchaser here is not bound to prepare and tender a deed to the vendor, unless such obligation can be fairly inferred from the terms of the contract.(1)[a]

The third and last error assigned is, the rendition of judgment by the Court upon the verdict of the jury. This assignment is without the color of authority to support it. The action in this case was covenant, and on the defendant's plea of covenants performed, the plaintiff took issue. Upon the trial the jury found the defendant guilty, and assessed the plaintiff's damages to $3,562; for which sum the Court rendered judgment. The records shows no application to the Court to set aside the verdict, and grant a new trial, nor does there appear to be any motion in arrest of judgment. Upon what principal, then, the authority of the Court to render judgment upon this verdict can be contested, I am at a loss to perceive. The issue grows out of the character of the pleadings and involves the plaintiff's right to recover; and the verdict being responsive to the issue, the judgment of the Court followed as a necessary consequence.

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

Note. See Tyler *v.* Young *et al.*, 2 Scam.

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 judgment upon it as to the matter of the law; and if two or more of the pleadings be had in substance, the Court will give judgment against the party who committed the fault. Phœbe *v.* Jay, Breese 207. See, also, Beers *v.* Phelps, Breese 19; Peck *v.* Boggess, *Ante* 281, and 471.

To a declaration on a contract to convey a lot of land by deed, if $125 was paid at a certain time, a plea that no demand was made for the deed, and that the 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.* Whitside, Breese 132.

(*a*) Headley *vs.* Shaw, 39 Ill. R. 366; Hunter *vs.* Bilyeu, 39 Ill. R. 368.

(1) 2 Rand. 20.

GEORGE DAVENPORT, JAMES BENNETT, HORATIO NEWHALL, JOHN BOLLES, and CHARLES FARNHAM, appellants *v.* SOPHIA FARRAR, appellee.

Appeal from Jo Daviess.

A widow can only be endowed of estates of inheritance.

A pre-emption right is not an estate of which a widow can be endowed.

The statute making equitable estates subject to dower, clearly refers to equitable estates of inheritance only.

The words *owner* and *proprietor*, are insufficient in a petition for dower, as descriptive of the estate of the deceased husband of the petitioner. They do not technically, nor by common usage, describe an estate in fee simple, or fee tail.

When a party comes into a court of justice, it is incumbent upon him to exhibit a right to recover, in clear and legal language, otherwise the court cannot grant the relief sought.

A petition for dower, should state such facts as would show that the husband of the petitioner was possessed of such an estate as is contemplated by the statute.

THIS cause was finally heard in the Court below, at the August term, 1836, before the Hon. Thomas Ford.

A. COWLES and T. DRUMMOND, for the appellants.

J. PEARSON, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was a *petition* filed by Sophia Farrar in the Circuit Court of Jo Daviess county, to have her dower assigned to her under the act entitled "*An act for the speedy assignment of Dower, and Partition of Real Estate*," approved 6th February, 1827. (1). The petition states that Sophia Farrar is widow of Amos Farrar, deceased, and that her husband, in his life time, was a joint owner and proprietor with George Davenport and Russell Farnham, now deceased, of the following described real estate, situate in the county of Jo Daviess, namely: a tract of land situate at a place called the "Portage," between the Mississippi and Fever Rivers, about four miles below Galena, together with a farm and several buildings and other improvements thereon erected, formerly occupied as a trading establishment with Indians, by Davenport, Farrar, and Farnham. Also three lots of ground in the town of Galena, which are particularly described. The petition further states that Amos Farrar, her said husband, continued to hold the above described premises jointly with the said Davenport and Farnham, to the time of his death; that he left one child, an infant; and that her dower in said premises has not yet been assigned and set over to her, according to the intendment of law.

A variety of proceedings was had in the Court below, which it is unnecessary to recite, and which resulted in a decree that Sophia Farrar was entitled to dower in the tract of land and town lots mentioned and described in her petition. Numerous errors have been assigned; it will however be unnecessary to notice any but the following one, to wit: "That by the record it appears that the husband of the appellee had no such estate in the premises, during coverture, and at the time of his death, of which, by the law of the land, dower could be assigned." By the second section of the act above recited, it is declared, that "Every widow claiming dower, may file her petition in the Circuit Court

(1) R. L. 236; Gale's Stat. 252.

of the county, against the parties mentioned in the first section of the act, stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments, in which she claims dower, and praying that the same may be allowed to her," &c. Does this petition, with sufficient clearness and certainty, set forth the nature of the claim to dower? To answer this question, it is necessary to ascertain what estate a husband must have in land, to entitle his wife to dower therein. At common law, a woman is entitled to be endowed of all the lands and tenements of which her husband was seized in fee simple or fee tail general, at any time during coverture; and of which any issue which she might have had, might by possibility have been heir. In addition to this provision of the common law, the 49th section,(1) of the statute relative to wills and testaments, executors and administrators, and the settlement of estates, provides, "That equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband in his life time, the title to which may be completed after his decease." By the phrase "equitable estate," in this statute, we understand equitable estates of inheritance.[a] The legislature in making this alteration of the common law, could not have intended to embrace any estate less than an estate of inheritance; because estates for years are subject to the payment of debts, and on distribution of the surplus of the personal estate, the widow comes in for her third of that surplus, including estates for years. Does then this petition show that the husband of the petitioner was seized of the lands and lots mentioned therein in fee simple, or fee tail general? The only words in the petition, explanatory of the nature of the estate of the husband, are, that he was joint *owner* and *proprietor*, with others, of the land and lots. These words do not technically, nor by common usage, describe an estate in fee simple or fee tail, but are general words applicable to the possessors of all estates, and may mean estates for years, or for life, as well as estates of inheritance. When a party comes into a court of justice, it is incumbent upon him to exhibit a right to recover, in clear and legal language, otherwise the court cannot grant the relief sought. There should be nothing ambiguous or doubtful in the nature of the right claimed. When certain words obtain in law a particular signification, and are always used to express a given idea, they become technical; and a wilful or unnecessary departure from them ought not to be tolerated by courts of justice, unless the substituted words express the same idea, and are equally limited in their signification. The petitioner, then, not having set forth by words known to the law, that her husband was seized of such an estate of inheritance as was necessary in

(1) R. L. 627; Gale's Stat. 697.

(*a*) Owen *vs.* Robbins, 19 Ill. R. 554; Woolley *vs.* Magie 26 Ill. R. 526. Atkin *vs* Merrell, 39 Ill. R. 62.

order to entitle her to dower in the premises, but having used words that are of such general signification as to include other estates than those of inheritance, has failed to bring such a case before the Court, as to entitle her to recover. If the petition relied upon the equitable estates mentioned in the statute, it still would have been necessary to state such facts as would show that her husband had such an equity as is contemplated by the statute. The Court being of opinion that the petition is insufficient to justify a claim for dower, might refrain from expressing an opinion upon other questions that were argued in this cause; but as it is probable that new proceedings may be instituted, if no opinion is given upon what are probably the meirts of this cause, they deem it advisable to state their views, as to the question whether a right of pre-emption under the laws of Congress, is such an estate in the husband, that a widow can be endowed of it. A pre-emption interest in land, is unknown to the common law. Does then a pre-emptioner under the acts of Congress, possess in law or equity, an estate of inheritance? It would seem to be sufficient merely to state the question, to answer it in the negative. What is his right? It is a right to purchase at a fixed price, within a limited time, in preference to others. If he is either unable or unwilling to purchase at the price, or by the time mentioned in the law, the land can be sold to others, and the pre-emptioner turned out of possession as an intruder. These conditions annexed to his possession, clearly show that his interest is only temporary, and may never ripen into an estate of inheritance. While, therefore, the pre-emptioner remains in possession, his estate cannot be considered of a higher nature than an estate for years, and consequently the widow cannot be endowed of it.[a]

The judgment must therefore be reversed with costs.

Judgment reversed.

(*a*) Brown *vs.* Throckmoton 11 Ill. R. 529

JOHN CHOISSER, plaintiff in error *v.* BARNEY HARGRAVE, defendant in error.

Error to Gallatin.

The act of 1807, of the Territory of Indiana, in relation to the indenturing and registering of negroes and mulattoes, is clearly in violation of the Ordinance of 1787, and therefore void.

The Constitution of this State confirms only those indentures of negroes and mulattoes, that were made in conformity to the act of 1807, of the Territory of Indiana, and one of the essential requisites to the validity of an indenture under that act, was, that it be made and entered into within thirty days from the time the negro or mulatto was brought into the Territory.

Choisser v. Hargrave.

This cause was heard in the Court below, at the July term 1835, before the Hon. Alexander F. Grant.

W. J. Gatewood, for the plaintiff in error.

H. Eddy and J. J. Robinson, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This action, for an *assault and false imprisonment*, was brought by the defendant in error, Barney Hargrave, a colored man, against John Choisser, (who claimed the defendant in error as an indentured servant,) to try his right to freedom. Upon the trial in the Circuit Court, judgment was rendered in favor of Barney Hargrave, from which judgment Choisser has appealed. The facts in the case, as admitted by the parties, are, that Barney "was brought into the Territory of Illinois at or before 1816, but that he was not indentured or registered until the 15th day of August, 1818," when he was indentured to Willis Hargrave, who transferred him to A. G. S. Wright, and he to Choisser. The indentures and subsequent transfers are all in point of form according to the statute of the Territory. The only question is whether a compliance with the forms prescribed by the statute, does, under the circumstances of this case, give to Choisser a valid title to the services of Barney, according to the tenure of the indentures. By the Ordinance of Congress for the government of the Territory North West of the Ohio, passed in 1787, it is declared, "There shall be neither slavery nor involuntary servitude in said Territory, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." Notwithstanding the prohibition of this ordinance, an act of the Territory of Indiana, passed in 1807, and which was continued in force here, provides "That 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 citizens of the said States or Territories purchasing the same, to bring the said negroes or mulattoes into this Territory," and "The owners or possessors 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 presence of said clerk, &c." The owner and the slave shall agree upon the time the slave shall serve his master, and the clerk shall record such agreement. But if the negro shall refuse to enter into this agreement, then the master is authorized within sixty days to remove him from the Territory. This act of the Territorial legislature, is clearly a violation of the ordinance of Congress of 1787, and consequently void. But by the 3d section of the 6th

Article of the Constitution, it is declared, that "Each and every person who has been bound to service by contract or indenture heretofore existing and in conformity with the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures, and such negroes or mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws."

By this provision of the Constitution, it is contended that Choisser's title to Barney, as an indentured servant, is recognised and confirmed. But to sustain this position, it must appear that the Territorial statute has been complied with. The Constitution confirms only those indentures that were made in conformity to the act of 1807, and one of the essential requisites to the validity of an indenture under that act, was, that it be made and entered into within thirty days from the time the negro or mulatto was brought into the Territory. This requirement has not in the present case been complied with. It appears both from the depositions and the admissions of the parties, that Barney was brought into the Territory "at or about the year 1816, but that he was not indentured or registered until the 15th of August, 1818," thus leaving an interval of at least eighteen and a half months between the time when he was brought into the Territory, and the time when he was indentured. This circumstance is conclusive against the claim of Choisser, and no inference in favor of the regularity of the indentures can be drawn from the lapse of time, in contradiction to the admitted facts.

The judgment of the Circuit Court is therefore affirmed with costs.

Judgment affirmed.

Note. See Boon v. Juliet, and note at the end of the case, *Ante* 258.

AUGUSTUS T. McKINSTRY, appellant *v.* HENRY PENNOYER, AUGUSTUS PENNOYER, and FREDERICK PENNOYER, appellees.

Appeal from Cook.

The judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is that the writ or bill be quashed; or if a temporary disability or privilege be pleaded, that the plaint remain without day, until, &c.
On an issue in fact the defendant is entitled to costs, but not on an issue in law.
The doctrine of discretion in the Circuit Court, ought not to be carried too far; and this Court will not extend it beyond previous decisions.

THIS cause came on to be heard at the May term, 1836, of the Cook Circuit Court, the Hon. Thomas Ford presiding.

The appellant was sued by the name of Augustus McKinster. He pleaded in abatement of the writ that his name was Augustus T. McKinstry. The plaintiffs demurred to this plea. The demurrer was overruled, and the plaintiffs asked leave to reply, which was granted them. The defendant excepted to the decision of the Court permitting the plaintiffs to reply. Issue was taken upon the replication that the appellant was "called and known as well by the name of Augustus McKinster, as by the name of Augustus T. McKinstry," and the cause submitted to the jury, who returned a verdict for the plaintiffs in the Court below, for $270. Judgment was rendered on this verdict, and an appeal taken to this Court. Among the authorities cited by

James Grant and W. B. Scates, for the appellant, the following relate to the point decided by the Court: 2 Saund. 210 f.; Steph. Plead. 176, 178, 140, 184; 1 Chit. Plead. 501; Comyn's Dig. *Pleader* 28; Bac. Abr. *Abatement*, 28.

G. Spring, for the appellees.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *trespass on the case*, brought by Pennoyer and others against McKinstry. The defendant below in proper person pleaded in abatement, a misnomer of his name, and prayed judgment of the writ that it be quashed. To this plea the plaintiffs below demurred, and defendant joined in demurrer. After argument in the Circuit Court, the demurrer was overruled, whereupon the plaintiffs moved the Court for leave to answer over to the defendant's plea which was granted; the granting of which motion was excepted to by the defendant's counsel, who moved for final judgment on the demurrer. Granting leave to the plaintiffs below, to reply, and the refusal to give final judgment on the demurrer, are among the causes assigned for error.

The question arising from this assignment of error, is, whether the decision of the Circuit Court on the demurrer was final, or had the Court a discretionary power to grant the plaintiffs leave to answer over. The rule laid down in the books of practice and pleading, is, that when a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue in fact be thereupon joined, and found for him, the judgment is peremptory, *quod recuperet*:[a] but if there be judgment for the plaintiff on demurrer to a plea in abatement, or replication to such plea, the judgment is only interlocutory, *quod respondeat ouster*. The judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is that the writ or bill be quashed; or if a temporary disability or privilege be pleaded,

(*a*) Haldeman *vs.* Starret, 23 Ill. R. 393; Brown *vs.* Ill. Cen. Mut. I. Co. 42 Ill. R. 369.

that the plaint remain without day, until, &c. On an issue in fact the defendant is entitled to costs, but not on an issue in law.(1)

According to the principles above laid down, the Circuit Court, upon overruling the plaintiff's demurrer to the defendant's plea in abatement, should have given judgment that the writ be quashed. This is conceded to be the law in the written arguments presented to this Court by the defendants in error; but they contend that the Circuit Court might in its discretion permit the plaintiffs below to amend by taking issue on the plea in abatement.[a] This doctrine of discretion ought not to be carried too far. It tends to produce contradictory decisions in the Circuit Courts, without power in the appellate tribunal to correct error, and thus produce uniformity. This Court, therefore, cannot extend the doctrine of discretion farther than previous decisions have done, unless it be where from the nature of the case, the Court must necessarily have a discretionary power. As neither the books of practice nor adjudged cases, as far as they have come to our knowledge, recognise any such discretion in the Court, as is claimed in this case, the judgment below must be reversed, with costs of reversal, and a judgment entered in this Court, that the suit be quashed. As this was a decision on an issue in law in the Circuit Court, no costs of defence in that Court are given.

Judgment reversed.

(1) 1 Tidd's Prac. 693—4, 2d American, from the 8th London Edition; 1 Chit. Plead. 405.
(*a*) Motherell *vs.* Beaver, 2 Gil. R. 71; Eddy *vs.* Brady, 16 Ill. R. Cushman *vs.* Savage. 20 Ill. R. 330.

JAMES W. CRAIN, plaintiff in error *v.* DAVID BAILEY, JOHN SUMMERS, SETH WILSON, ENOS COLDREN, and NATHAN DILLON, defendants in error.

Error to Tazewell.

In appeals from the Probate Court to the Circuit Court, the statute requires that the appeal bond shall be made payable to the People of the State of Illinois. A bond payable to the appellee, is not in compliance with the statute.

As the statute makes no provision for amending the bond, or for filing a new bond, in the case of a defect in the bond filed on appeal from the Probate Court, an application so to do, is necessarily addressed to the discretion of the Court, and the manner of the exercise of that discretion, cannot be assigned for error.

Quere, Whether the Circuit Court cannot, in its discretion, authorize the amendment of an appeal bond, in case of an appeal from the Probate Court.

The rule is well settled, that error cannot be assigned for the refusal of a Court to grant a motion addressed to its discretion.

UPON application of the defendants in error, who were sureties for the plaintiff in error, as executor of the estate of Lewis F. Crain, deceased, the Court of Probate of Tazewell county re-

voked the letters testamentary granted to said executor. The plaintiff in error excepted to the opinion of the Court of Probate, and appealed to the Circuit Court. The appeal bond was made payable to the defendants in error.

At the May term, 1836, of the Tazewell Circuit Court, the Hon. Stephen T. Logan presiding, the defendants in error moved the Court to dismiss the appeal, because the appeal bond was made payable to the appellees, instead of to the People of the State of Illinois. The plaintiff in error moved the Court for leave to amend the bond by making it conform to the requisitions of the statute, or to give a new bond *nunc pro tunc*, in conformity to the statute as to the requisites of the bond. The Court refused to allow the appellant either to amend the appeal bond, or to file a new bond, and dismissed the appeal, and awarded a writ of *procedendo* to the Court below. The plaintiff in error excepted to the opinion of the Circuit Court, and tendered his bill of exceptions, which was signed and sealed by the judge.

Dan Stone and Cyrus Walker, for the plaintiff in error.

O. H. Browning and Robert Stuart, for the defendants in error.

Lockwood, Justice, delivered the opinion of the Court:

This cause was brought into the Circuit Court of Tazewell county by appeal from the decision of a Judge of Probate. The following errors are relied on to reverse the judgment of the Circuit Court, to wit: That the Circuit Court refused to permit Crain, the appellant in the Circuit Court, to amend the appeal bond, or file a new bond; and that the Court dismissed the appeal. It appears, by the record, that the appeal bond was made payable to Bailey and others, and not to the People of the State. By the 136th section of the act entitled "*An Act relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates*,"(1) it is declared, that "The party appealing shall at the time of taking such appeal, file with the Judge of Probate, a bond with good security, payable to the People of the State, conditioned to prosecute his appeal and pay all costs, should the judgment be affirmed; and said bond may be put in suit by and for the use of the party entitled to such costs."[a] The statute makes no provision to amend the bond, or file a new bond, in case an insufficient one is filed. The bond executed in this case, was not in conformity with the statute. Without power in the Court to dismiss an appeal brought without filing any bond, or such a bond as the act requires, the statute could be completely evaded. The Circuit Court consequently possesses the power to dismiss an appeal, in order to prevent

(1) R. L. 654; Gale's Stat. 719.
(*a*) L. of 1849, p. 65 Sec. 12; Scott *vs.* Crow 4 Scam. R. 183.

parties from prosecuting appeals in a mode different from that pointed out in the statute. Whether the Circuit Court could not, in its discretion, have authorized a new bond to be filed, or an insufficient bond amended, is not a question before this Court. As the statute makes no provision for amending the bond, or filing a new bond, the application to be permitted to do so, was necessarily addressed to the discretion of the Court; and the rule is well settled, that error cannot be assigned for the refusal of a court to grant a motion addressed to its discretion.

The judgment, therefore, of the Circuit Court, must be affirmed with costs.

Judgment affirmed.

Note. See the cause of Swafford *v.* The People, *Ante* 289; Dedman *v.* Barber, *Ante* 254.

JOHN DOE, *ex dem.* JAMES S. SMITH, and HARRIET, his wife, WILLIAM WEAVER, JAMES WEAVER, WILLIAM ECHOLS, and SOPHIA, his wife, and BARTHOLOMEW J. EVANS, and MARIA, his wife, plaintiffs in error *v.* DANIEL HILEMAN, defendant in error.

Error to Union.

The act of 1827, did not, like the act of 1829, require that application to sell real estate by administrators, should be made to the Circuit Court of the county in which administration was granted. Under that act, an application to the Circuit Court of the county in which the real estate was situated, was sufficient.(*a*)

§ 6 of the act of 1827, required that an administrator's deed of real estate, should set forth "at large, the order of the Circuit Court directing the sale." A recital of the substance of such order, is not a compliance with the act.(*b*)

A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate ought to be strictly pursued, and should so appear on the face of the proceedings.

The Circuit Court has no power to direct a sale of real estate by an administrator, to be made for any other funds than the legal currency of the State. The direction to take payment in notes of the State Bank of Illinois, was not warranted by law. But such direction did not render the proceedings void, but voidable only. Such a direction does not render a record of an order of sale inadmissible as evidence.

An administrator's deed under the act of 1827, which does not contain the order "at large," for the sale of the premises, is sufficient, and cannot be received as evidence in an action of ejectment, to support the title of the grantee in such deed.

THIS cause was tried at the November term, 1835, of the Union Circuit Court, before the Hon. Jepthah Hardin and a jury. A verdict and judgment were rendered for the defendant.

(*a*) Bowles *vs.* Rouse, 3 Gil. R. 409, and notes; Lane *vs.* Bomelman 17 Ill. R. 97.
(*b*) See Thompson *vs.* Tolmie, 2 Peters U. S. R. 157.

DAVID J. BAKER and HENRY EDDY, for the plaintiff in error.

J. DOUGHERTY, W. J. GATEWOOD, and W. B. SCATES, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *ejectment* brought by the heirs of J. Weaver, deceased, for the recovery of the possesion of a quarter section of land in Union county, sold by the administrators of Weaver, and purchased by the father of the defendant, Hileman, and devised to the defendant. There were separate demises laid for each heir, and a plea of not guilty; a verdict and judgment for defendant. The cause is brought to this Court on a writ of error. During the progress of the trial, a bill of exceptions was taken to the opinion of the Court in admitting the petition, proceedings, and judgment of the Circuit Court of Union county some years previous, under the laws relative to the sale of the real estate of intestates, whose personal estates were insufficient to pay the debts of such intestates, and the evidence of such sale, and the deed made to Jacob Hileman, the purchaser, at such administrators' sale. Under the exceptions taken, the counsel for the plaintiffs in error, now make the following points for the consideration of this Court, and assign the same for error.

1st. The Circuit Court erred in permitting said defendant to read to the jury the order of said Circuit Court, directing the sale of the land in question.

2d. The Circuit Court erred in permitting said defendant to read in evidence to the jury, the paper purporting to be a deed from the administrators of Weaver, deceased, to Jacob Hileman, deceased.

3d. The deed is defective and void, because it does not set forth the order of sale at large.

4th. It does not show a sale made according to the order of the Court.

5th. The order of the sale authorizing the notes of the State Bank of Illinois to be received in payment, was unauthorized, and the Court had no legal power to make such order.

6th and 7th. The application for the order of sale, was not made in the county in which the letters of administration were granted.

The preceding objections seem to resolve themselves, except that made under the fifth head, into two, and are embraced in them.

1st. That the application for the order to sell the lands was addressed to a tribunal having no legal cognizance of the subject.

2d. That the deed does not conform to the pre-requisites of the law giving the form and mode of conveyance.

The first objection is not tenable. The act of 1827, under which the proceedings were had, does not, like the act of 1829, (1) require that the application should be made to the Circuit Court of the county "in which administration shall have been granted." The application is not restricted, and as it was made to the Circuit Court of the county where the lands lie, we perceive no objection to the power of the Court to direct the sale on the score of jurisdiction. On the second point it seems very clear that the deed is not conformable to the statute. The words are imperative. The 6th section of the act of 1827, declares that "the conveyance for the same shall set forth such order at large." The reason of this precision we are not at liberty to enquire into, nor what the supposed necessity may have been in the opinion of the legislature for its adoption. It is sufficient to perceive that a recital of the substance of the order, is not a compliance with, or an observance of the act. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and should appear to be so on the face of the proceedings.

In the present case, the contents of the order are not set forth in the deed; there is a mere recital that the sale had been made in pursuance of the order of the Court, but what the terms of that order were, is no where declared in the deed. It cannot then be doubted that the omission to set out the order is fatal.[a]

The order as to the description of funds to be received under the sale, was irregular. The Court could only direct a sale to be made for the legal currency of the State. None other could be recognised; and the direction to take payment in notes of the State Bank of Illinois, was not warranted by law.

The proceedings of the Circuit Court of Union county, in relation to this order, were not however absolutely void for that cause, but voidable only. The defendants might reverse the proceedings for the error, but still the record of them for that cause was not inadmissible as evidence.

But the deed ought not to have been admitted as evidence, and the decision of the Circuit Court by which it was admitted, was clearly erroneous.

For these reasons the judgment of the Circuit Court is reversed with costs.

Judgment reversed.

(1) R. L. 641—5; Gale's Stat. 711.

(*a*) Has purchaser a remedy in equity? Thorp *vs.* McCullum, 1 Gil. R. 625.

KINMAN, appellant v. BENNETT, appellee.

Appeal from Pike.

Where a cause is dismissed upon motion of the plaintiff, it should be at his costs.
Where the record of the Circuit Court does not show for what cause an appeal was dismissed, and a judgment for costs is rendered against the appellant, the judgment will be reversed.

This was originally a suit before a justice of the peace of Pike county, by Bennett against Kinman. On the return of the summons, to wit, on the 9th day of January, 1836, the parties appeared before the justice, and after the hearing of the cause judgment was suspended by the justice for ten days, at the end of which time, to wit, on the 18th day of January, 1836, judgment was rendered against Kinman for $64 and costs. Kinman appealed to the Circuit Court of Pike county, filed his bond in the Clerk's office, which was approved by the clerk, on the 23d day of January, 1836.

At the April term, 1836, of the Court below, the cause was continued; and at the September term following, the Hon. R. M. Young, presiding, the defendant moved to dismiss the suit for want of jurisdiction in the justices of the peace, and the plaintiff also moved the Court to dismiss the appeal. The Court dismissed the appeal, and rendered a judgment for costs against Kinman, from which he appealed to this Court.

ALPHEUS WHEELER, for the appellant, cited R. L. 387 § 3, 390 § 9, 395 § 30.(1)

J. W. WHITNEY, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This cause was originally tried before a justice of the peace, from whose decision in favor of Bennett, the plaintiff below, Kinman took an appeal to the Circuit Court, and that Court upon the motion of both the plaintiff and the defendant, dismissed the appeal, and gave judgment against defendant, Kinman, for costs; from which decision he prosecutes this appeal. There is no bill of exceptions, nor any thing in the record from which we can learn what the subject matter of the suit was, or for what cause it was dismissed. We are therefore of opinion that the Circuit Court erred in giving judgment against the defendant below, for costs. If the cause was dismissed for want of jurisdiction in the Court, it should have been dismissed at the costs of the plaintiff; or if it was on the plaintiff's own motion, that his cause was dismissed, it ought to have been done at his costs.

(1) Gale's Stat. 403, 405, 409.

The judgment below is therefore reversed at the costs of the appellee.

Judgment reversed.

Aiken *v.* Deal.

Motion to set aside a default, and vacate a judgment, in the Peoria Circuit Court.

The Supreme Court will not, on motion, set aside a default, and vacate a judgment of a Circuit Court.

At this term of the Court came Joshua Aiken and filed his affidavit, stating that on or about the 25th day of August, 1834, a suit was instituted against him in the Peoria Circuit Court, by Philip G. Deal. That affiant understood and believed that the suit was commenced by Compher and Deal, of which firm Philip G. Deal was a partner, and with which firm he had had dealings, and against whom he had a set-off. That affiant never had any transactions with Deal individually, and owed him nothing. That the affiant left the State, on business, before the session of the April term of the Court, 1835, to which the summons in said suit was returnable, and did not return until after said term had passed. That he employed an attorney residing at Peoria, to attend to his defence in the suit of Compher and Deal against him, but the said attorney, in consequence of the mistake in the title of the cause, or for some other reason unknown to the affiant, neglected to attend to his defence. That before affiant left, he filed a statement of his set-off against Compher and Deal, with the clerk of the Peoria Circuit Court, and made affidavit of its correctness. That at the said April term of said Court, a judgment was rendered by default against him in said cause of Deal against him, for $239,83 1-2. That Compher and Deal are insolvent. That an injunction had been granted, staying the proceedings on said judgment; but, owing to some informality in the bond, said injunction had been dissolved by the Peoria Circuit Court. That affiant was indebted to Compher and Deal in the sum of $28,79 1-2, upon the same account upon which judgment was recovered by Deal, and no more; and that said judgment is unjust, except for the sum of $28,79 1-2; and moved the Court to set aside the default in said cause, and vacate said judgment in the Peoria Circuit Court.

E. Southwick, for the applicant:

1. The defendant in the Court below has been guilty of no *laches*, and has acted *bona fide*.

2. The defendant has lost his remedy or redress by appeal, in consequence of not having it in his power to comply with the requisition of the statute in relation to appeals.

3. The defendant's remedy is ineffectual against the firm of Compher and Deal, in consequence of their insolvency.

4. The general equity of the case, the defendant having lost his opportunity for a set-off in the Court below.

5. The Court has an equity jurisdiction where a defence has not been made in the Court at law. Hughes *v.* McConn, 3 Bibb 254.

6. A motion in a superior court, founded on an affidavit, to set aside a judgment by default in the court below, is not informal. Cogswell *v.* Vanderburgh, 1 Caines, taken from 2 Johns. Dig. 97.

7. Nothing shall be intended to be out of the jurisdiction of a superior court, which does not expressly appear to be so. 1 Saund. 74, Peacock *v.* Bell and Kendall.

Per Curiam:

The motion is denied.

Motion denied.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

JUNE TERM, 1837, AT VANDALIA.

Note. At this term Justice BROWNE was not present.

CORNELIUS HURLEY, plaintiff in error *v.* BENJAMIN F. MARSH and CHARLES MARSH, defendants in error.

Error to Hancock.

The venue, in an action for assault and battery, is transitory.
Where a declaration stated that the assault and battery were committed "at Montebello, in the county of Hancock, and within the jurisdiction of this Cour;." *Held* that it was was unnecessary to prove that the assault and battery were committed within the town of Montebello.

THIS cause was heard in the Hancock Circuit Court, at the April term, 1836, before the Hon. R. M. Young.

J. W. WHITNEY, for the plaintiff in error cited the following authorities:

Stephen on Pleading 153–4 ; *Idem.* § 4, Rule 1, 297–312 ; Appendix to do., notes 60, 61, 262; R. L. 379–80,(1) § 1, 2, 6 ; Norris' Peak, 292–3 ; *Idem.* 501; 1 Chit. Plead. 143,

J. H. RALSTON, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

THIS was an action for an *assault and battery* commenced in the Hancock Circuit Court. The declaration states that the defendants "at the town of Montebello, in the county of Hancock,

(1) Gale's Stat. 396—7.

and within the jurisdiction of this Court, with force and arms made an assault on the plaintiff, and him then and there did beat," &c. On the trial, the plaintiff to maintain his cause of action, proved that the defendants committed an assault and battery upon the plaintiff; but the witness on being asked if the defendants committed the assault and battery within the town of Montebello, stated that the assault and battery were committed without the town of Montebello, about five miles off, but within the county of Hancock. Whereupon the defendants' counsel objected to any assault and battery being proved, unless they were committed within the town of Montebello; because the plaintiff had laid his venue to be "at Montebello." This objection the Court below sustained, and non-suited the plaintiff. The cause is brought into this Court by writ of error, and the only question, is, whether the plaintiff was bound to prove an assault and battery within the town of Montebello.

The venue in an action for an assault and battery is transitory, and may be laid in the county where the action is brought, without rendering it necessary for the plaintiff to prove that the cause of action arose where laid. The words "at Montebello, in the county of Hancock, and within the jurisdiction of this Court," are the usual words for laying the venue, and ought not to be construed to be descriptive of the place where the injury was committed. "At" means either "in" or "near," and by considering it as laying a venue, and not descriptive of the place, no variance existed between the declaration and proof.(1)[a]

The Circuit Court erred in non-suiting the plaintiff.

The judgment below is reversed with costs, and the cause remanded for a new trial.

Judgment reversed.

(1) 2 East. 477; 4 Term. 557.
(*a*) Owen *vs.* McKean, 14 Ill. R. 461.

JOHN DOE, *ex dem.* PETER W. BALLINGALL, plaintiff in error *v.* THOMAS SPRAGGINS, defendant in error.

Error to Jo Daviess.

In a cause tried by the Court without the intervention of a jury, a bill of exceptions cannot be taken to the final judgment of a Circuit Court non-suiting the plaintiff, even where it is agreed by the parties, that either party shall have the same right to except as if the cause were tried by a jury.

A bill of exceptions will only lie for receiving improper testimony, or rejecting proper testimony, or for misdirecting the jury on a point of law.

THIS cause was heard at the April term, 1836, of the Jo Daviess Circuit Court, before the Hon. Thomas Ford.

L. Bigelow, for the plaintiff in error.

W. J. Gatewood, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

This was an act of *ejectment* brought in the Jo Daviess Circuit Court, to recover the possession of a lot of ground in the town of Galena. The cause was tried by the Court, by consent of parties, without a jury, and it was agreed by the parties, "That both or either party should have the same right to except, as if this cause were tried by a jury."

A bill of exceptions was taken by the plaintiff on the trial, by which it appears that testimony was given by both parties on the question raised on the trial, whether a deed purporting to have been executed by Spraggins to Ballingall, had been duly delivered. The Court was of opinion that there was not sufficient proof of the delivery of the deed, and non-suited the plaintiff. This decision the plaintiff assigns for error.

The point presented in this case for our decision, is whether a bill of exceptions will lie to the opinion of the Court, where the Court hears the testimony on both sides, and then decides according to the weight of testimony? Had this cause been tried by a jury in the ordinary mode, the bill of exceptions would have been signed. The judge neither received improper, nor rejected proper testimony, and as there was no jury, there was no misdirection on a point of law. The bill of exceptions, then, according to the decision of this Court in the case of Swafford *v.* Dovenor,(1) decided in February, 1835, was improperly allowed.

The judgment below is consequently affirmed with costs.

Judgment affirmed.

(1) *Ante* 165. See also White *et al. v.* Wiseman, *Ante* 169; Gilmore *v.* Ballard, *Ante* 252; Stringer *v.* Smith *et al.*, *Ante* 295; note, *Ante* 197.

Robert Garrett impleaded with Eli Mintoyne, plaintiff in error *v.* John Phelps, who sues for the use of Henry D. Rhea, defendant in error.

Error to Madison.

A judgment by default is irregular unless it appear by a return on a process, that it had been served, and on what day service was made.

The reversal of a judgment by default, where process from the Court below had not been served on the defendant in that Court, does not prejudice any future proceedings.

J. Semple, for the plaintiff in error.

J. B. Thomas, D. Pricket, and J. M. Krum, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court;

It is assigned for error in this case, that it does not appear from the record that the summons had been served on the defendant below. The summons in the Court below was issued against Garrett and another, but no return was made on the summons of service on either of the defendants. The record, however, states that Garrett "who was alone served with process, made default," and judgment was rendered against him. This was clearly erroneous. In order to render a judgment by default regular, it should appear by a return on the process, that it had been served, and on what day service was made. From this error the judgment is reversed with costs; but the reversal is not to operate to the prejudice of any future proceedings.

Judgment reversed.

Note. See Ditch *v.* Edwards, *Ante* 157; Wilson *v.* Greathouse, *Ante* 174; Clemson *et al* *v.* Hamm, *Ante* 176; Ogle *v.* Coffey, *Ante* 239.

Abijah Hull, plaintiff in error *v.* Abner Blaisdell and John C. Smith, defendants in error.

Error to Madison.

The rule of law applicable to variance, is, that whenever an instrument in writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described.

A justice of the peace has not jurisdiction of an action by attachment, for a demand exceeding $30.

Where the writ of attachment described in a declaration, in an action of trespass against a justice of the peace for issuing an attachment where he had no jurisdiction, was not for $38,12½, and the writ of attachment produced in evidence was for $37,50. *Held* that there was no material variance.

The justice of the peace who issues, and the constable who executes, process in a case where the justice has not jurisdiction, are both liable as trespassers.

This cause was tried at the April term, 1833, of the Madison Circuit Court, before the Hon. Theophilus W. Smith and a jury, and a verdict and judgment rendered for the defendant.

A. Cowles, for the plaintiff in error, cited 20 Johns, 355; Nowlin *v.* Bloom, Breese 98; Snyder *v.* Lafromboise, Breese 268; 8 Cowan.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *trespass* brought by Hull against Blais-

dell and Smith, for taking and carrying away the plaintiff's goods. The declaration states, in substance, that Blaisdell on the second day of July, 1832, was a constable of the county of St. Clair, and Smith, a justice of the peace, and on the day and year aforesaid, said Smith unlawfully issued an attachment in favor of one John White, against the goods and chattels of the plaintiff, for a greater debt than thirty dollars, to wit: for thirty-eight dollars twelve and a half cents. That the attachment came to the hands of Blaisdell, as constable as aforesaid, and the said Blaisdell and Smith did by means of the said process unlawfully, and with force and arms, take, seize, and carry away, two hundred bushels of lime and other property, all being the proper goods and chattels of the plaintiff.

The defendants pleaded the general issue. On the trial, the plaintiff, to sustain his cause of action, gave in evidence to the jury, the following writing (produced by the defendants upon notice to produce the papers described in the declaration), which was read to the jury without objection; and in the words and figures following, to wit: "The people of the State of Illinois, To any constable of Saint Clair county, Greeting. Whereas John White has complained on oath, before me, John C. Smith, an acting justice of the peace for said county, that one Abijah Hull is justly indebted to him in the sum of $37,50, and has absconded, so that the ordinary process of law cannot be served upon him, and the said John White having given bond and security according to the directions of the act in such case made and provided;—We therefore command you, that you attach so much of the personal estate of the said Abijah Hull, if to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint; and such estate, so attached, in your hands to secure and provide, so that the same may be liable to further proceedings thereupon, according to law, at a Court to be holden by me on the 10th day of July instant, at the town of Illinois, in said county of St. Clair, and have you then and there this writ. Given under my hand and seal, this 2d day of July, 1832. John C. Smith, J. P. St. C. C."

On the back of said paper is endorsed the following, to wit:

"John White,	Attachment debt,	$37,50
v.	Costs,	2,00
Abijah Hull,		

This attachment came to my hands the 2d July, at 2 o'clock P.M.—Served this attachment by levying on 200 barrels of lime, and about 500 feet of plank. July 3, 1832. A. Blaisdell, Constable.

Serving attachment, $1,00

A. B. Const."

On the trial, the plaintiff's counsel moved for the following instructions, which were refused, to wit: 1st, That the attahment exhibited in evidence to the jury, of John White *v.* Abijah Hull, is competent evidence to prove the matters charged in the plaintiff's declaration. 2d, That the gist of the offence consists in the taking by unlawful process, and the variance in the description, is immaterial. The following instructions, asked for by the plaintiff, were given, to wit: That the signature of the justice, and the return of the acts of the officer upon the back of the attachment, prove themselves.

Instructions were also asked by the defendants' counsel and given, but it is unnecessary to state them, for if the instructions prayed for by the plaintiff and refused, ought to have been given, then the instructions asked for by the defendant, should have been refused.

Ought the instructions asked for by the plaintiff and refused by the Court, to have been given? By the 6th section of the "*Act to amend an act concerning attachments*," justices of the peace are authorized to issue attachments on any sum under $30. The attachment issued in this case being for a sum over $30, was clearly unwarranted by law, and in issuing it, the justice, and in serving it, the constable who acted under it, became trespassers. Was there then such a variance between the evidence offered and the declaration, as to have justified the Court in rejecting the evidence, if its reception had been opposed?

The rule of law applicable to variances, as laid down in the case of Leidig *v.* Rawson,(1) is, "That whenever an instrument of writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record described."[a] The gist of this action consisted in issuing an attachment for any sum over $30, however great or small that excess might be. The issuing of the attachment for a sum over $30, and the subsequent execution of the illegal process, are the acts that rendered the defendants liable to an action; consequently the variance was immaterial; and the only enquiry ought to have been, was the attachment given in evidence, the illegal attachment complained of? On this point there can be no doubt. In addition to its exact conformity in most particulars, to the one described in the declaration, the defendants produced it on the trial, under a notice to produce the paper described in the declaration. Would the defendants have produced this paper under such a notice, and suffered it to be read to the jury without objection, if it had not been the paper described in the declaration? We think not. The refusal, therefore, of the Court to give the instructions asked for, was

(1) *Ante* 272. (*a*) Prather *vs.* Vinyard, 4 Gil. R. 48; Plumleigh *vs.* Cook, 13 Ill. R. 670; Boynton *vs.* Robb 41 Ill. R. 351.

erroneous. The judgment must be reversed with costs, and the cause remanded with directions to award a *venire de novo*.

Judgment reversed.

Note. Since the cause of action accrued in the foregoing cause, acts have been passed by the General Assembly, giving to justices of the peace jurisdiction of causes by attachment, where the amount does not exceed $50. R. L. 84; Gale's Stat. 74; Acts of 1836–7, 12.

Moses Garrett, plaintiff in error *v.* John Doe, *ex dem.* Samuel Wiggins, defendant in error.

Error to Franklin.

Courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the Constitution, unless the intention of the legislature be clearly expressed in favor of such retrospective operation.

Where land was sold for taxes under the law of 1827, and a deed was made to the purchaser in pursuance of such sale in 1829, after the repeal of the law under which the sale was had, and after the passage of a new act upon the same subject: *Held* that the law of 1827 must govern as to the effect of the deed.

It is a settled principle of the common law, that a party claiming title under a summary or extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale which the law has prescribed, has been complied with.(*a*)

A party claiming under a deed given upon a sale of lands for taxes by the Auditor, must show that all the requirements of the law in relation to the sale of lands for taxes, have been complied with.

This cause was heard in the Circuit Court of Franklin county, at the April term, 1834, before the Hon. Thomas C. Browne and a jury, and a verdict rendered against the defendant in the Court below, the present plaintiff in error.

Walter B. Scates, for the plaintiff in error, cited the following authorities:

Statute of 1827,(1) § 1, 2, 3, 4, 7, 8, 9, 10, 12, 13; 23, 24, 25, 28; 6 Wheat. 119; 2 Peters' Cond. R. 151, 154, 171–2; 3 Peters' Cond. R. 28, 271, 275; 4 Cranch 403; 2 Am. Dig. 430, 431, 508; 3 Am. Dig. 488–9; Runnington's Eject. 182; 1 Johns. Dig. 84–5, § 59, 60.

H. Eddy and W. J. Gatewood, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This was an action of *ejectment* brought by Wiggins against Garrett, to recover the possession of a tract of land which was sold to him by the Auditor of Public Accounts, as the property of Garrett for the non-payment of taxes. On the trial, Wiggins adduced in support of his title, a deed from the Auditor, executed

(*a*) Williams *vs.* Peytons Lessee, 4 Wheaton U. S. R. 77; Doe &c. *vs.* Wiley 1 Gil. R. 302; Doe &c. *vs.* Leonard, 4 Scam. R. 140.

(1) R. L. of 1827.

in the form prescribed by law, and upon this evidence of title, submitted his cause. The defendant's counsel then moved the court for several instructions as to the law applicable to the case, and the insufficiency of the plaintiff's evidence of title; all of which the Court refused, and upon motion of the plaintiff's counsel, gave instructions directly opposite to those asked for by the defendant, as follows,—

1st. That the statute in force at the time of the execution of the Auditor's deed, and not that which was in force at the time of sale, was the one applicable to the case.

2d. That the Auditor's deed is evidence of the regularity and legality of the sale, and in the absence of proof of any other title, the jury must find for the plaintiff, Wiggins.

These instructions were excepted to by the defendant on the trial, and are now assigned for error. Some other errors were also assigned, which it is considered unnecessary to notice. In order to understand the effect of the first branch of the instructions given by the Court, it is necessary to recur to the order of time in which the different acts connected with the plaintiff's title were performed, and also to the different legislative provisions upon the subject.

The sale to Wiggins was made on the 17th day of January, 1829; but the deed was not executed till 1831, after the revenue law of 1829,(1) which had repealed that 1827, had gone into operation. This last statute is essentially different from the preceding one, upon the same subject, and it is contended, dispenses with proof, on the part of the purchaser at an Auditor's sale, of the pre-requisites of the statute. But we are not called upon in this case to give a construction to that statute, as I am clearly of opinion that it is not applicable to this case. Without the clearly expressed intention of the legislature, courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the Constitution; but no such intention can be collected from the law of 1829. Its language and objects are prospective. It relates only to contracts and proceedings under its provisions, and cannot by a fair construction be so extended, as to interfere with, or impair, prior contracts, rights, or obligations.[a] The fact of the deed's not having been executed till after the statute of 1829 went into operation, has no influence upon the character of the transaction. The statute under which the sale was made, gave to the purchaser, at his option, the privilege of demanding from the Auditor a deed immediately, or of taking a certificate of purchase, and waiting for his deed till the expiration of two years. In either case the form of the deed was the same; either would contain the same reservation in favour of the right of

(1) R. L. 523; Gale's Stat. 569.

(a) Jones *vs.* Bond, Beechers Breese R. 288; Robinson *vs.* Rowan, 2 Scam. R. 499; Rhinehart *vs.* Schuyler, 2 Gil. R. 528; Bruce *vs.* Schuyler 4 Gil. R. 221; Marsh *vs.* Chesnut 14 Ill. R. 223; Conway *vs.* Cable, 37 Ill. R. 82.

redemption, which by the law was two years, where the owner was of age, and in the case of an infant, one year after he became of age. If the purchaser, Wiggins, had demanded and received his deed at the time of sale, I presume it would not be contended that a subsequent law would change its effect and operation. Upon what principle, then, can his situation be different from that of other individauls who purchased at the same time and upon the same terms, but whose deeds were executed earlier. They certainly are all upon the same footing. The Auditor's sale constituted a contract between the State and the purchaser, which in connection with the then existing law, determined the rights and obligations of the parties. The certificate of purchase in the one instance, and the deed in the other, are but the evidence of the contract, and that must be construed with reference to the law in force at the time it was entered into. A different rule would substitute the varying will of after legislatures, for the intention and stipulations of contracting parties. The statute of 1827, then, being the law applicable to this case, its construction presents the next point for consideration. It is a settled principle of the common law, that a party, claiming title under a summary and extraordinary proceeding, must show that all the indispensible preliminaries to a valid sale, which the law has prescribed, in order to give notice to those interested, and to guard against fraud, have been complied with, or the conveyance to him will pass no title. The Auditor's authority to make the sale under which the plaintiff claims title, is one of this class. It is therefore incumbent upon him to prove that all the pre-requisites to a legal exercise of that power, have preceded it, or he must show that the statute under which the auditor acted, has dispensed with the proof or those pre-requisites, or inferred them from the deed of conveyance. In examining the law conferring the authority, and prescribing the manner of selling the land of non-residents, for the non-payment of taxes, it will be perceived that the tax upon land is required to be paid upon the first day of August annually, and that the Auditor is required as soon thereafter as practicable, to make and publish a descriptive list of all lands upon which taxes are due, after which he is required, at the time and place specified, to "sell all the lands advertised as aforesaid, on which the taxes and costs shall remain unpaid." The purchaser at this sale, shall, at his option, be entitled to receive a certificate of purchase or a deed. "Which deed (the law says) shall vest in the purchaser a perfect title, unless the land be redeemed according to law, or the former owner shall show that the taxes, for which it was sold, had been paid as required by law, or that the land was not legally subject to taxation."

This act will not, by any fair construction, warrant the opinion that the Auditor, selling land without authority, could, by his

conveyance, transfer the title of the rightful owner. It is admitted that it is competent for the law making power to change the rule of evidence, and declare, by an arbitrary rule, that from the proof of certain facts, others shall be presumed. This statute has done so to some extent. Under it several preliminary facts to legal sale by the Auditor, are inferred from his conveyance, and the responsibility of proof shifted from the purchaser to the original owner. But the publication of notice of sale by the Auditor, as required by law, is not one of those facts inferred from his deed, nor is the proof thereof thrown upon the former owner. The duty of the Auditor to publish this notice is imperative; his authority to sell is limited by the express words of the law to "the land advertised as aforesaid," and as the rule of law which required the purchaser to show the performance of this pre-requisite, was not changed by the act of 1827, he should therefore have adduced evidence to that effect. Without proof of this fact, the Auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser, Wiggins, who was the plaintiff below.

The decision of the Circuit Court is therefore reversed with costs; the cause remanded to that Court with directions for a *venire de novo*, and that the cause be tried conformably to this opinion.

Judgment reversed.

WILLIAM PICKERING, plaintiff in error *v.* DANIEL ORANGE, defendant in error.

Error to Edwards.

The owner of a dog of a mischievous and ferocious disposition, if he permit it to go at large, knowing that it has done mischief in the destruction of one kind of animals, will be liable for the destruction of other animals by the same dog, though of a different species.(*a*)

THIS cause was tried at the March term, 1837, of the Edwards Circuit Court, before the Hon. Justin Harlan and a jury, and a verdict rendered for the defendant.

O. B. FICKLIN, for the plaintiff in error.

E. B. WEBB, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action on the *case* brought by Pickering, to recover damages for the destruction of a certain number of sheep

(*a*) *Post.* 392; See L. of 1853, p. 124.

and lambs, alleged to have been killed by the dogs of Orange. The declaration contains three counts. The first alleges that the dogs were accustomed to hunt, chase, bite, worry, and kill sheep and lambs, the defendant well knowing their propensities and habits. The second sets forth the killing of the sheep and lambs; that the dogs were of a mischievous and ferocious disposition, and accustomed to bite, hunt, chase, worry, and kill sheep, the defendant well knowing, &c. The third count is the same, with the additional allegation, that the dogs were also accustomed to kill hogs, cattle, and other live stock, in addition to sheep.

Issue was joined on the first and second counts, and a demurrer interposed to the third. The Circuit Court sustained the demurrer to the third count, and gave judgment for costs. On the trial of the cause, the plaintiff offered to produce evidence that the dogs of the defendant were of a ferocious and mischievous disposition, and accustomed to bite and worry men and hogs, which being objected to by defendant's counsel, was rejected by the Court, to which decision the plaintiff excepted. The errors assigned are that the Circuit Court erred in sustaining the demurrer, and in rejecting the evidence offered. Both errors are well assigned. The third count is sufficient in every particular. The grounds of action, in cases of the present kind, are the vicious and dangerous habits and propensities of the animals kept by the owner, and his negligence in not taking proper care to prevent the commission of injury by them, after a knowledge of their propensities and habits. This has been assigned in the counts, as well as the particular acts done; and the count is not vitiated by the averment that the dogs were accustomed to attack and kill other animals, than those alleged to have been killed. The evidence offered was competent. It tended to prove the issue, and was therefore admissible; and it ought to have gone to the jury. Besides, the ground of the action being the ferocious and mischievous habits of the dogs of the defendant, and his knowledge thereof, and want of care in not restraining them, but permitting them to go at large, it was competent for the plaintiff to show their vicious habits by proof of the attack by them on other animals than the particular ones named in the declaration. The rule of evidence on this point is well settled. It has been held that it may be shown that if the animal had once done mischief in the destruction of one kind of animals, and the owner permit it to go at large, he will be held answerable for other injuries afterwards done by the same animal, though of a different kind from that before done, if he knew of the commission of the previous injury.(1)

The judgment of the Circuit Court is reversed, with the costs attendant on the judgment of demurrer in the Circuit Court; and

(1) Ld. Raym. 110; 2 Stark. Ev. 533, and cases there cited.

full costs in this Court; and the cause remanded with directions to award a *venire de novo*.

Judgment reversed.

Francis Arenz, appellant *v.* William Reihle and Joseph Bains, appellees.

Appeal from Morgan.

Where the Court below hear the testimony on both sides, a bill of exceptions will not lie to the judgment of the Court, though the parties agree that there shall be "the same right to except to any opinion of the Court during the progress of the trial and upon final judgment, as though the cause were tried before a jury, and such exception shall be considered in the Supreme Court, as though the cause were tried by a jury."(*a*)

A party cannot assign for error an erroneous decision which does not prejudice his rights.

Where an attachment was levied on goods in the possession of S., and upon a trial of the right of property between S., and the attaching creditors, the property was found to be subject to the attachment, and S. gave security to the sheriff who attached them, for their return, but subsequently put them into the possession of A., who sold them, and who was thereupon summoned as garnishee in the attachment suit: *Held* that in determining whether A. was liable as garnishee, the record of the trial of the right of property between the creditors in the attachment, and S., was properly admitted, and that it was conclusive as to the ownership of the property.(*b*)

A judgment binds parties and privies.

Semble, That a trial of the right of property, under the statute, is conclusive between the parties and privies.

This cause was heard at the October term, 1835, of the Morgan Circuit Court, before the Hon. Thomas Ford, without the intervention of a jury. Judgment was rendered for the appellees, for $1,782,18, from which Arenz appealed to this Court.

C. Walker and J. B. Thomas, for the appellant.

Wm. Thomas, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:

The record in this cause being very voluminous, and presenting a great variety of proceedings and decisions that this Court is not called upon to review, only so much of the record will be stated as is necessary to present the points of our decision. The record shows that two attachments issued at different times, from the Morgan Circuit Court, in favor of Reihle and Bains against one Samuel P. Judson, and that in each case Francis Arenz was summoned as a garnishee. During the progress of the proceedings on the first attachment, several decisions were made, to which the three first assignments of error apply. At the October term, 1835, of the Morgan Circuit Court, it was agreed between

(*a*) *Ante* 167 and note.

(*b*) But see Cassel *vs.* Williams, 12 Ill. R. 387; Ice *vs.* McLain, 14 Ill. R. 62.

the parties, that both the cases against Arenz, as garnishee of Samuel P. Judson, should be consolidated; and that thereafter the proceedings should be carried on as if there had been but one suit. It was further agreed between the parties, that both matters of law and fact should be tried by the Court; and that the parties should have the same right to except to any opinion of the Court during the progress of the trial, and upon final judgment, as though the cause were tried before a jury; and that such exceptions should be considered in the Supreme Court, as though the cause was tried by a jury.

On the final trial of the cause, pursuant to this agreement of the parties, the Court below, after hearing the testimony adduced, decided that, in the first cause against Arenz, as garnishee, the plaintiffs below were not entitled to recover, and gave judgment in favor of Arenz for costs; and in the second cause, that the plaintiffs were entitled to recover seventeen hundred and eighty-two dollars and eighteen cents, and accordingly gave judgment against Arenz, as garnishee, for that amount. During the progress of the trial, Arenz excepted to the reading of a record offered in evidence by the plaintiffs, which was a record of the trial of the right of property that was had between David Sheldon, who claimed the property levied on by the attachment of Reihle and Bains, at whose suits the attachments issued. The goods levied on by these attachments, were, subsequently to their being thus attached, delivered by Judson to Arenz, which delivery was the ground of summoning said Arenz as garnishee. The Court overruled the objection to the record, and permitted it to be read in evidence.

The errors assigned by the appellant, are,

1. The Court below erred in permitting appellees to file additional interrogatories to appellant, as garnishee.

2. The Court erred in progressing to give a judgment against appellant, after having discharged him and rendered a judgment in his favor.

3. In setting aside the judgment in favor of appellant.

4. In permitting appellees to give in evidence the record stated in the bill of exceptions.

5. In rendering judgment for appellees on the evidence.

In relation to the three first errors assigned, it clearly appears that Arenz could not have been prejudiced by the decisions referred to, because the Court subsequently, upon a final determination of the first cause, to which those decisions relate, decided that case against Reihle and Bains, and in favor of Arenz, the appellant; he cannot, therefore, if those decisions were erroneous, assign them for error. The fourth error relates to the reading in evidence of the record of the trial of the right of property between David Sheldon, claimant, and Reihle and Bains, the

attaching creditors. In order to understand whether the record was properly received in evidence, it will be necessary to ascertain the object in introducing it. It appears from the record of this case, that Reihle and Bains levied their attachment on goods in the possession of Sheldon, who claimed the goods as his own property, and in order to retain possession of them, after the sheriff had levied on them, gave security to the sheriff for their return, in case a return should be adjudged. He subsequently delivered the same goods to Arenz, who sold them, and who was in consequence thereof summoned as garnishee, on the ground that the goods that thus came to his possession, were the goods of Judson, and not the goods of Sheldon. On the trial of the right of property between Sheldon and Reihle and Bains, the jury decided (and judgment was accordingly given) that the goods belonged to Judson. They were consequently liable to the attachment of Reihle and Bains. The object, then, of introducing this record in evidence, was to establish the fact that the goods which Sheldon had delivered to Arenz, were the goods of Judson, and liable to be applied to the debts of the attaching creditors.

A judgment binds parties and privies. Consequently, to establish the fact that the goods belonged to Judson, and not to Sheldon, the record was not only the best evidence, but conclusive as to the fact. It was clearly part of the *res gesta* to ascertain who was the legal owner of the goods, and for that purpose the record was properly received in evidence. Whether Arenz was to be effected by the fraud of Judson, was a different question, and must depend upon evidence *aliunde* the record. The record proved but one or two facts necessary to be made out, so as to make Arenz liable to account for the goods as garnishee; but whether such other evidence was given in the progress of the cause or not, does not affect the propriety of receiving the record in evidence. The record was therefore good evidence as far as it went; and consequently the fourth assignment of error cannot be sustained.

The fifth assignment, that the Court erred in rendering judgment for the appellees, cannot be sustained. This Court has frequently decided, that where the Court below hear the testimony on both sides, a bill of exceptions does not lie to its judgment on that testimony.

The decision of the Circuit Court is therefore affirmed with costs.

Judgment affirmed.

Note. See note to Swafford *v.* Dovenor, *Ante* 167; and Ballingall *v.* Spraggins, *Ante* 330.

WILLIAM P. GRIMSLEY and LAURISON LEVERING, appellants *v.* JOSEPH KLEIN, appellee.

Appeal from Sangamon.

A landlord who has distrained upon the goods of his tenant, has a sufficient interest in them to enable him to be the claimant of the same on a trial of the right of property, if they are subsequently taken in execution.

Semble, That any person having an interest in goods and chattles, may be a claimant of the same, and have a trial of the right of property between the creditor in an execution levied on the same, and himself.

A lease cannot be read in evidence, except between the parties to the same, without proof of its execution.

THIS cause was heard in the Sangamon Circuit Court, at the October term, 1836, before the Hon. Stephen T. Logan. On the trial a motion was made by the appellants, to dismiss the cause for want of jurisdiction, because the claimant was not the absolute owner of the goods levied upon by virtue of their execution, but only interested in the same as a landlord who had distrained upon the goods for rent. This motion was overruled by the Court, and the appellants excepted. Judgment was rendered for the appellee.

J. T. STUART and M. MCCONNELL, for the appellants.

WILSON, Chief Justice, delivered the opinion of the Court:

This was a *trial of the right of property*. During the progress of the trial in the Court below, several exceptions were taken to the opinion of the Court, which are also assigned for error here. None of the exceptions, however, are considered well taken, except that which relates to the reading in evidence of a paper purporting to be a lease from Klein, the appellee, to one Bailey.

The record shows that Klein as the landlord of Bailey, distrained the goods of Bailey for rent due. Those goods were afterwards taken in execution at the suit of Grimsley and Levering, and upon the trial of the right of property between Klein, the landlord, and Grimsley and Levering, the execution creditors, Klein, in order to prove the indebtedness of Bailey to him for rent, and his right of property by virtue of his distress, was permitted to read in evidence, without any proof of its execution, a lease from him to Bailey. The reading of the lease was objected to by the counsel of the appellants, but the Court overruled the objection, and after hearing all the testimony in the cause, gave judgment in favor of the appellee.

Upon what ground the introduction of the lease as evidence in the case, was sought to be excluded, does not appear from the bill of exceptions; but inasmuch as it professes to contain all the

testimony given in the cause, and as there appears to have been no proof of the execution of the lease, we are bound to say that the Court erred in overruling the motion to reject it. Under the statute a party to a written agreement upon which suit is brought, or which is relied upon by way of defence, or set-off, cannot deny its execution except under oath. This statutory provision, it is clear, is not applicable to the present case. The appellants' names were not signed to the lease, nor were they any way privy to it; they therefore had a right to require proof of its execution; and the party offering it was bound to make such proof before it could be legally given in evidence. For this reason, the judgment of the Court below is reversed, the cause remanded with an order for a *venire de novo*, and that the Court proceed according to this opinion.

Judgment reversed.

JOHN JACKSON, *ex dem.* MURRAY MCCONNELL, plaintiff in error *v.* DE LA FAYETTE WILCOX, defendant in error.

Error to Cook.

The decision of the Register and Receiver of a Land Office, like that of all other tribunals where no appeal is allowed, is final and conclusive, upon all the facts submitted by law, to their examination and decision. Their determination, in relation to the right of pre-emption to a tract of land within their jurisdiction, is conclusive.

There can be neither a reservation, nor an appropriation of the public domain, for any purpose whatever, without express authority of law.

Neither the President, nor any officer of the government, have power to make such appropriation or reservation, without such authority.

The acts of the Secretary of War, and the Commissioner of the General Land Office, in making a reservation of Fort Dearborn, or the land upon which it was situated, were unauthorized by law, and void.

The North Western Territory was ceded by Virginia to the U. S., as a common fund for the use and the benefit of all the States, according to their usual respective proportions in the general charge and expenditure, and should be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever.

The assent of a State legislature is necessary to the erection, by the U. S., of forts and permanent garrisons within the boundaries of a State.

The term "appropriation," used in the pre-emption laws, means an application of lands to some specific use or purpose, by virtue of law, and not by any other power.

An action of ejectment can be maintained against a military officer, in the occupation of lands, as such.

McConnell *v.* Wilcox.

To constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person by depriving him of some right, or otherwise imparing it, must be shown. Actual fraud is not to be presumed, but ought to be proved by the party who alleges it; and if the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred.

Fraud may consist in making a false representation with the knowledge at the time that it is false, with a design to decieve and defraud, or in the wilful concealment of the truth, for a similar purpose.

The pre-emption laws grant to the pre-emptioner an estate in land upon conditions, which becomes absolute upon the performance of those conditions.

The law of the State where the land is situated, is to govern both as to the form of the remedy, and the evidence of title.

In regard to municipal rights and obligations, the government, as a moral being, must be in contracting, subject, in the absence of a law of Congress in relation thereto, to the laws of the States, and the same principles and rules of interpretation of contracts and acts growing out of them, as prevail between individuals, must be applicable to it.

The character of a general law, and the force, effect, and application thereof, are not to be determined by the character of the parties to the action. If the act of the legislature making a Register's certificate of the purchase of a tract of land of the U. S., evidence of title, is valid as a rule of decision between citizens of the State of Illinois, it is also valid between a citizen and the U. S.

The act of the legislature of the State of Illinois, making the Register's certificate of the purchase of land at the U. S. Land Offices, evidence of title, does not conflict with the Ordinance of 1787.

The act of Congress of 1830, provided "That the right of pre-emption under this act does not extend to any lands which are reserved from sale by an Act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever, or for the use of the United States, or either of the States in which they may be situated." The Proclamation of the President advertising the lands for sale, stated that "The lands reserved by law for the use of schools, and for other purposes, will be excluded from sale." The Commissioner of the Gen. Land Office wrote a letter to the Secretary of War, stating that the whole Fractional Section 10 was reserved for military purposes. This letter was in reply to a request from the Indian Agent at Chicago, to the Secretary of War, requesting that Section 10 might be reserved for the Indian Department, and by the latter transmitted to the Secretary of War. *Held* that there was no legal reservation of Section 10. *Held*, also, that under a fair construction of the aforesaid act, and the act authorizing the President to reserve such lands as he may deem necessary for military posts, lands not expressly reserved in the proclamation of the President, were subject to sale, though they had previously been reserved by law.

The admitting of a portion of Section 10, the whole of which the Commissioner of the General Land Office had declared was reserved for military purposes, to be entered by a pre-emptor, is a declaration on the part of the government that there was no legal reservation.

A patent is not the *title* itself, but the evidence thereof.

In a republic, the title to land derived from the government, springs from the law.

The certificate of a Register of a Land Office, of the purchase of a tract of land from the U. S., is of as high authority as a patent.

The words "*better, legal, paramount title,*" used in the act of the legislature, making the certificates of the Land Officers evidences do not mean the title of the U. S.; but they refer to cases where the U. S. had not the title at the time of the sale and issuing of the certificate.

The United States could not be a defendant in a State court to any action whatever, such court having no jurisdiction over her; and consent could not give it. And although it is certainly true that the tenant, in all actions of ejectment, may defend himself by showing the title of his landlord, it does not follow that the party, who could not be a defendant for want of jurisdiction in the court over him, may defend himself in such case in the name of a person, who, upon no reasonable supposition, could be considered as standing in the relation of a tenant.

THIS cause was tried at the October term, 1836, of the Cook Circuit Court, before the Hon. Thomas Ford. Judgment was rendered for the defendant in that Court.

M. MCCONNELL, for the plaintiff in error.

D. J. Baker, for defendant in error.

Smith, Justice, delivered the opinion of the Court: (1)

This was an action of ejectment, commenced in the Circuit Court of Cook county, to recover possession of a part of the S. W. fractional quarter of Section 10, T. 39 N., R. 14 E., on which Fort Dearborn is situated; and was submitted for the decision of the Circuit Court upon an agreed case, in the nature of a special verdict. The Circuit Court, after mature examination of the various points presented in the case, and deliberation thereon, delivered an opinion, in which it decided that the entry and purchase by Beaubien, of the tract of land in question, under the pre-emption act, was valid and legal in every respect; but that, for the reason given in its opinion, which will be examined hereafter, he could not assert his right against the "*United States* in the present *form* of action," and accordingly rendered judgment for the defendant.

To revise this judgment, the present writ of error has been prosecuted.

The principal and direct error relied on by the plaintiff, in this cause, is, this portion of the decision of the Circuit Court; and it might, perhaps, be sufficient to merely review the grounds upon which that part of the decision has been predicated; but as the case is marked with facts which bring into discussion principles of a peculiarly interesting and important character, it has been considered more necessary and proper, to examine the whole case as presented by the record. And here it may not be amiss, in the consideration which is to be bestowed upon it, and to a correct elucidation of the respective rights of the parties to the controversy, to recur very briefly to a review of the history of the public lands in the Western States. 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; and she insisted that the same was within her chartered limits. During the war of the Revolution, her gallant troops, under the command of George Rogers Clark, conquered the country, and she came into the possession of the French settlements at Vincennes, and those situated on the Mississippi river. The States of Massachusetts, Connecticut and New York also claimed considerable portions of the same territory. Many of the other States, whose limits contained but a very small portion of waste and uncultivated lands, contended that a portion of the immense body of waste land lying within the territory claimed by Vir-

(1) This cause was heard at the last December term of this Court. Lockwood, Justice, dissented from the opinion of the majority of the Court: and Wilson, Chief Justice, being interested in the decision of the questions involved in the cause, gave no opinion.

ginia and the other States who had advanced their respective claims to the same, ought to be appropriated, as a common fund, to pay the expenses of the war. Congress, with the desire and hope of composing their conflicting claims and opinions, recommended to the States having these large tracts of unappropriated and waste lands in the now Western States to make a liberal cession to the United States of a portion of their respective claims, for the benefit of all the States composing the Union. Virginia, acting on the suggestion, on the 1st of March, 1784, ceded to the United States, all her right, title and claim to the territory north-west of the river Ohio, on certain conditions, some of which were, "that the rights of the old French settlers should be secured, that 150,000 acres near the rapids of the Ohio for her State troops, who had reduced the country, and another of about 3,500,000 to satisfy bounties promised to her troops, on the continental establishment, should be reserved;" but the most important condition of the cession was, that "all the lands within the territory so ceded, and not reserved or appropriated to the purposes named in the act of cession, should be considered a common fund, for the use and benefit of such of the United States as had, or should become, members of the Confederation, Virginia inclusive, according to their usual respective proportions, in the general charge and expenditures, and should be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatever." In June, 1786, Congress recommended to the legislature of Virginia to take into consideration their act of cession, and revise the same, so far as to empower the United States to make such a division of the territory of the United States, lying northerly and westerly of the river Ohio, into distinct republican States, not more than five nor less than three, as the situation of that country, and future circumstances, might require; which States should hereafter become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence as the original States, in conformity with the resolution of Congress, of the 10th of October; to which revision and alteration so proposed, the State of Virginia, on the 30th of December, 1788, by her legislature, assented; and did ratify and confirm the same, and the 5th Article of the Ordinance of Congress in relation thereto. New York, Massachusetts, and Connecticut made similar cessions, and thus the conflicting claims of these States were adjusted. This succinct narrative of the manner, and the objects for which these several cessions were made, will be obvious, when the power of the United States to make appropriations of the public domain, and the particular manner in which they may be done, and objects to which such appropriations are applied, shall have been considered.

From the facts disclosed in the agreed case, of which we shall recite such parts as we deem material to be examined and considered, it appears that Beaubien, in the year 1817, bought a house on the fraction of land in question, from one Dean, an army contractor, for $1,000; also, an enclosure and garden attached thereto, which were in possession of and occupied by said Dean; that thereupon, Beaubien took possession thereof, and occupied the same, and cultivated a part of the enclosure and garden in every year, from 1817 to the 19th of June, 1836; that in 1823, certain factory houses, built on the said land, were by the order of the Secretary of the Treasury, sold, and one Whiting became the purchaser. In the same year, Whiting sold the same to the American Fur Company; and the said company sold the same to Beaubien for five hundred dollars, who took possession thereof, and continued to occupy the same, together with a part of the said quarter section of land, to the date of the commencement of this suit. The occupation and use of the buildings and ground, by Beaubien, was undisturbed and undisputed, by any person whomsoever, from the year 1817, to the time of commencing the present action. It further appears, that upon this state of facts, Beaubien having cultivated a part of the S. W. fractional qr. S. 10, T. 39 N., R. 14 E., and being in actual possession of the part cultivated, on the 29th May 1830, (the date of the first pre-emption law) and that he also cultivated a part in 1833, was in actual possession, on the 19th June, 1834, (the date of the last pre-emption law) and that being thus possessed, on the 7th May, 1831, he made application for a pre-emption to the Land Officers at Palestine, which was rejected, though on the same day, a pre-emption was granted, at the same office, to one Robert A. Kinzie, for the north fractional quarter of the same Section. He also applied, in June, 1834, to the Land Office at Danville, for a pre-emption, which was refused; and he was informed that the tract claimed had been reserved for military purposes; that after the establishment of the Land Office at Chicago, the President of the United States, on the 12th February, 1835, by Proclamation, directed various lands in that District, in which it is admitted the lands in question are to be exposed to sale on the 15th of June, 1835, including the South-West quarter of Section 10, unless the same is excepted in the terms used in said Proclamation, under the words "The lands reserved by law for the use of schools, and for other purposes, will be excluded from sale." Appended to this Proclamation, is a general notice to all persons claiming pre-emptions to any of the lands directed to be sold, requiring them to appear before the Register and Receiver, before the day of sale, and make proof of their pre-emption. The Commissioner of the General Land Office transmitted to the Land Office at Chicago, the extended plat of the lands in

the Proclamation described, marking and coloring thereon certain lands to be reserved from sale; but no part of fractional Section 10, was so marked to be reserved. On the 28th of May, 1835, it further appears, that Beaubien applied at the Land Office at Chicago, and there proved to the satisfaction of the Register and Receiver, that he was entitled to a pre-emption on said lands, under the Act of the 19th of June, 1834; and on the same day entered and purchased, by means of his pre-emption, the South-West fractional quarter of Section 10 aforesaid, in due form of law, by paying the purchase money, and obtaining the Receiver's receipt, and Register's certificate of entry and purchase. It also appears, in the agreed case, that the lessor of the plaintiff, duly and formally purchased of Beaubien, before the commencement of this suit, so much of fractional Section 10 as is now in controversy, including the stockade and fort, with notice that a controversy existed as to the title of the same.

It further appears that at the commencement of the suit, the defendant, as an officer of the army, with soldiers under his command, occupied the post (consisting of some wooden buildings, and a stockade of pickets agreed to be worth three dollars per month) by orders from the Secretary of War. This post was first occupied by the troops of the United States, in 1804, and such occupation continued until the 16th of August, 1812, when it was taken by the savages, and the troops all massacred. On the 4th of July, 1816, it was re-occupied by the United States troops, and such re-occupation continued until May, 1823, when it was abandoned by the order of the government, an Indian Agent being left in possession. Some factory houses were built on the fraction for the use of the Indian department. On the 10th of August, 1828, it was again occupied by the United States troops, and in May, 1831, evacuated, and left in the possession of a citizen, who authorized another citizen to take possession thereof. In 1832, it was re-occupied by the troops, and such re-occupation continued up to the commencement of this action. The lands in question were surveyed in 1821. On the 2d of September, 1824, the Indian Agent at Chicago, wrote a letter to the Secretary of War, requesting that the tract in question might be reserved for the use of the Indian Agency at that place; which letter, it appears, was, on the 30th of the same month, transmitted to the Commissioner of the General Land Office, with a request that fractional Section 10 aforesaid might be reserved for the use of the Indian Department. In reply to this letter, the Commissioner, on the first of October following, directed that the whole of fractional Section 10 aforesaid, should be reserved for military purposes. In January, 1834, the Commissioner of the General Land Office addressed a note to the Secretary at War, enquiring whether the said fraction was re-

served for military purposes, or for the use of the Indian Department, and was answered that it was wanted and then used, for military purposes.

The case also exhibits as evidence, the duplicate receipt of the Receiver of public moneys of the Land Office at Chicago, expressing on its face full payment of the purchase money by Beaubien, for the fractional quarter Section of land in controversy, under the pre-emption act of the 19th of June, 1834, also a certificate of the Register of the same Land Office, stating the fact of purchase and sale, under the same pre-emption law, by the same individual; the original of which, it is admitted, is on file in the General Land Office; and another certificate, by the same Register, given to the purchaser, stating the fact, that the sale and purchase are matters of record in his office; and lastly, a deed for the premises in question, from the pre-emptor to the lessor of the plaintiff, and all the facts connected therewith, as disclosed, and the several acts of Congress applicable thereto, and the laws of this State, he insists that he is entitled to recover the possession of the premises sued for, having, as he contends, shown a legal title to the same, and the right of possession. The defendant insists, 1st. That no action of ejectment will lie against the commander of a fort; 2d. That the fraction of said land in question, was reserved, or appropriated by lawful authority, for military purposes; and that, therefore, the Land Officers had no jurisdiction over it to authorize the granting of a pre-emption to it, or to sell it; and that their acts are necessarily void, and convey no title whatever to the pre-emptor; 3d. That the legal estate in the land is still in the United States, and that a patent is necessary to be issued before a divestiture of the title of the government can take place; 4th. That the government, though no party to the suit, may assert its right to the ground, through the officer in the possession thereof.

In the investigation proposed to be given to the case before us, the several points, in the natural order in which they occur, with the facts and principles they involve, will be discussed, and such conclusions stated as seem to be justly inferrible therefrom. Adhering to this order, we propose to examine, first, all the essential facts connected with the disposition and title to the land, as set forth on the part of the lessor of the plaintiff;—and we are necessarily led to the enquiry, What is the character of the title exhibited? To ascertain this, it will, we apprehend, be unnecessary to particularly enumerate more of the provisions of the various acts of Congress, which provided for the sale and disposal of the public lands, than relate directly to the pre-emptions authorized by the laws of 1830 and 1834; and such other acts, as taken in connection therewith, have a bearing on

this case; and from which, to ascertain whether the acts of the Register and Receiver, in this particular case, are within the scope of the power conferred, and the duties required of them, by law. It cannot, we apprehend, be denied, that if these acts have been confined within the limits of the jurisdiction confided to these officers, such acts must be valid and binding, unless an appeal has been provided for, or a revision of their decision in some other mode is prescribed by law. The Supreme Court of the United States have, in a variety of cases, asserted this doctrine, and particularly in the cases of Brown *et al v.* Jackson, 7 Wheaton; Polk's Lessee *v.* Wendell, 5 Wheaton; 1 Cranch 171; 4 Wheaton 423; 3 Peters 412; 4 Peters 563; 2 Peters 147, 168. That Court has said, in these cases, "That the decisions of the Board of Commissioners, under the acts of Congress providing for indemnification of claimants to public lands, in the Mississippi Territory, are conclusive between the parties, in all cases, within the jurisdiction of the Commissioners:" That as to irregularities committed by the officers of the government prior to the grant, the Court does not express a doubt, but the government, and not the individual, must bear the consequences resulting from them. This Court disavows having ever decided more than that an entry, or other legal incipiency of title, was necessary to the validity of a grant issued by North Carolina, for lands in Tennessee, after the separation. They have never expressed an inclination to let in enquiries into the frauds, irregularities, acts of negligence, or of ignorance, of the officers of government prior to the issuing of the grant; but on the contrary, have expressed the opinion that the government must bear the consequences. 'It is a universal principle, that, where power or jurisdiction is delegated to any public officer, or tribunal, over a subject matter, and its exercise is confined to his, or their discretion, the acts so done, are binding and valid, as to the subject matter; and individual rights will not be disturbed collaterally, for any thing done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer, and fraud in the party; all other questions are settled by the decision made, or act done, by the tribunal, or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate, or supervisory tribunal, is prescribed by law.' Proceeding then to ascertain what those powers and duties are, it will be seen, that by the act of 1830, it is provided that every settler and occupant of the public lands, who cultivated any part thereof in 1829, and was in actual possession, on the 20th day of May, 1830, should be entitled

to enter, at private sale, a quarter section, to include his improvements.

The act further provides, "That the right of pre-emption under this act, does not extend to any lands which is reserved from sale by an act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever, or for the use of the United States, or either of the States in which they may be situated." The act of 1834, provides, "That every settler and occupant of the public land, who cultivated any part thereof in 1833, and was in actual possession on the 19th June, 1834, should have a similar right to enter at private sale, a quarter section, to include his improvements." This act, also, revives the act of 1830, and continues in force for two years. Now under these acts, what were the duties the Land Officers had to perform? Were they not to satisfy themselves that the applicant for the pre-emption had proven himself an occupant and settler within the provisions of these acts; and had cultivated a part of the tract applied for, according to the requirements thereof. If satisfied of these facts, and the land is not reserved, or appropriated within the meaning of the recited provisions of the pre-emption laws, but, on the contrary, had been proclaimed for sale, by the order of the President of the United States, by what right, or the exercise of any other than an arbitrary will, could they have refused to permit the applicant to enter and purchase the tract in question? The proof shows, that this land, with others in the district, was ordered for sale, and that while other tracts were designated, by coloring them on the maps as excluded from sale, this tract was not so colored; that no information had been communicated to the officers, from any department of the government, that the land had been reserved or appropriated, or that it in any way fell within the exceptions enumerated in the pre-emption acts, anterior to the entry, sale, and purchase by Beaubien. In the absence of any such information, they were necessarily bound to decide, that they had no power themselves to withhold it from sale; and had they not granted the pre-emption to Beaubien, by what authority would they have been justified from exposing it to public sale, as they were ordered by the President's Proclamation? How were they to determine that the government had not chosen to expose it to public sale, in the absence of all instructions to the contrary, and with no evidence whatever that it was legally reserved from sale, or excluded by the provisions of the pre-emption acts? An analogous case, which seems to be striking, has been put, and for the sake of illustration, it will be stated. By law, all lands containing lead ore, are reported by the surveyor. If, however, a tract not so reported, should contain lead ore, and not be discovered before the sale, after it should have been duly sold, could the

United States annul the sale? It would be difficult to affirm it could, because the officers had jurisdiction to sell, and had no evidence that it contained ore. But the present case is supposed to be much stronger than the one put, as there is an express reservation from sale in the case of lands containing ore, and, as is contended, no reservation by law in the present instance. It might, however, be asked, whether the Register and Receiver were merely to examine into the cultivation and occupancy of the lands, or whether they were required to ascertain whether the land was public land?—whether it was within the district, and had it been reserved from sale, or appropriated by law to any purpose whatever? If it were their duty to investigate the three latter points, then it seems clear, that they only were to be satisfied on all the questions presented, and that their decision, like that of all other tribunals, where no appeal is allowed, is final and conclusive, upon all the facts submitted to their examination and decision. This Court could not review, or reverse their decision, nor could its propriety be enquired into.

The Proclamation of the President had declared that certain lands were reserved from sale; but how were the Land Officers to ascertain which those lands were? So far as the Proclamation had specified them, and as to those which they had been apprized by official information from the proper department of the government, were of that character, there could be no doubt. But as to the ascertainment of others, they must necessarily rest altogether upon extrinsic evidence. And if this supposition be correct, then it necessarily implied a power and jurisdiction, in them, to ascertain and decide all the points stated. It is not deemed important to directly decide the question, as to the authority of the officers to make the three latter enquiries, though the right to investigate and determine all the points, would seem to be admitted by a recent opinion of the constitutional law officer of the general government, in which he affirms, "That the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption, is exclusively vested in the Register and Receiver of the land district in which the lands are situated, without any power of revision elsewhere; and that in weighing the evidence, and in deciding on its sufficiency, these officers act in a judicial capacity; if it proves to their satisfaction, that the settlement and improvement required by law have been made, they must allow the entry; if it fails to satisfy them of these facts, they must disallow it. The law has not authorized any other officer to reverse, or revise their decision; nor can they be compelled to decide according to the dictates of any judgment but their own." These views are undoubtedly in accordance with the opinions of the Supreme Court of the United States, already referred to, and, we think, imply full power in the officers

to investigate and decide all the points presented. Those of settlement and cultivation, are exclusively and undeniably within their jurisdiction. The assumption that the Land Officers were bound to enquire into and ascertain, whether the land was not reserved or appropriated, would clearly imply a right of investigation into all the facts connected therewith, and jurisdiction over the subject matter of their investigation; and if so, according to the foregoing views, would be exclusive and final. Waiving this view of the case, let us suppose that the enquiries of these officers were confined to settlement and cultivation only; and that the right of the pre-emption depends on the fact, whether the fraction was not reserved or appropriated, in the manner, and to any of the objects specified in the pre-emption laws of 1830 and 1834. We take it for granted, that there can be neither a reservation nor appropriation of the public domain, for any purpose whatever, without the express authority of the law. It cannot, surely, be seriously contended, that the President of the United States, or any of the executive officers in the several departments of the government, possess an absolute and inherent power to do any official act not authorized by the Constitution or laws of the United States. To the Constitution and laws they must alone look for the source of their power and authority, because they can derive them from no other. The government itself is a limited one, and the great charter under which it exists, has prescribed bonds which cannot be rightfully transcended; and all its functionaries are necessarily restrained, by its provisions, and the laws made in pursuance thereof, from the exercise of an authority not granted thereby. If it be considered that the President may reserve, or appropriate, the public domain, to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects? The one may be as laudable as the other; but both would be equally unauthorized and illegal. To admit for a moment, that the President, without the authority of law, may direct the application of the public moneys of the nation, to even such objects as may undeniably be salutary and highly useful, would be to admit the exercise of a power in direct violation of the Constitution; and yet, the exercise of a power appropriating and applying the public lands to purposes not authorized by law, but in direct violation of the express condition on which they were ceded, and the purposes to which they were solemnly stipulated to be applied, it is contended, is an implied power, rightfully exercised, by an inferior officer of the government, without the assent of the executive of the nation. This position is most assuredly untenable: neither the officer, acting in his own name, or that of the President, nor the President himself, possess any

such authority. To appropriate the public land, seems to us to be an appropriation—at least virtually so—of the treasure of the nation, inasmuch as it is property, and out of which the moneys of the nation are raised by sale.

Admitting, however, for the sake of argument, the power of the Commissioner to make the reservation agreeably to the request of the Secretary of War, it will be found not to have been made in conformity to the object required; nor does it appear that any act was ever done, setting it apart from the common mass, for any purpose whatever. No record appears to have been made of it. The letter of the Commissioner is only evidence that the act was directed to be done; but whether it was, or in what manner it was performed, or by whom, it does not appear. As late as 1834, the Commissioner of the General Land Office was not aware that it had been reserved, and he accordingly applies to know whether it was wanted; having probably learnt from other sources than from the archives of his office, that a garrison was on it. Indeed, the frequent abandonment of the post, and subsequent temporary occupation of it, afford strong presumptive evidence, that it never was considered a permanent post, much less a reservation, made for the object of a permanent garrison.

But the Commissioner had no such power. On examination of the organization of the General Land Office, it will be perceived that it is constituted, by the act of the 25th of April, 1812, a subordinate office, in the Treasury Department, and is placed under the immediate direction, supervision, and control of the Secretary of the Treasury; without his authority, or that of an express law, the Commissioner can do no act whatever, much less that of making a reservation of the public domain, or of appropriating it to any object whatever. To make, then, the act of the Commissioner valid, in the present case, admitting that the power existed in the Treasury Department, the Commissioner should have acted in obedience to the direction and authority of the Secretary of the Treasury; but the Secretary, for aught that appears, was and remained, in total ignorance of the attempt to create the reservation—never directed it—nor subsequently sanctioned the act of the Commissioner. We must therefore come to the conclusion, that the acts of the Commissioner of the General Land Office, and of the Secretary of War, in attempting to reserve and appropriate this fraction, were unauthorized, and not warranted by law. It has been said that the act of these officers may be considered as the act of the President, and therefore valid. The President does, doubtless, exercise many of the powers conferred on him by law, through the agency of officers of the Executive Department; and had there been an act of Congress, authorizing the President to make reservations of the

public lands for military purposes, the argument would have had much force; but none such has been shown; and we understand it is conceded that none such exists. Some obsolete laws, authorizing the President to erect fortifications and trading houses in the Indian country, have been referred to, as authorizing the reservation; but they are considered as having no application whatever to the case before us. In the absence of any law authorizing the application of the lands in question, to the objects to which they have been applied, it will be remarked, that they were requested to be set apart for the use of the Indian Department; but the Commissioner declares he had directed them to be reserved for military purposes; a singular discrepancy between the object for which they were applied, and the use to which they are said to have been reserved; and one by no means reconcileable with the intent and objects for which the reservation was sought. Independent of the absence of power in the President, or the heads of the Department, to make the reservation contended for, it appears to us that it was not competent for either thus to apply the public domain, because it was not one of the objects for which we have seen Virginia had made the cession. It was agreed by all the parties to the cession, that the land so ceded, "should be considered a common fund, for the use and benefit of such of the United States as had or should become members of the Confederation—Virginia inclusive—according to their usual respective proportions in the general charge and expenditure, and should be faithfully and bona fide disposed of, for that purpose, and for no other use or purpose whatever." Now can it be contended, that, in direct violation of the terms of this compact between the United States and Virginia, and instead of faithfully applying the land in question to the objects stated, by a bona fide disposition thereof, the President, of his mere arbitrary will, could appropriate the same, without law, to a use and purpose expressly prohibited. If it were competent for any power whatever thus to apply the land, most certainly Congress could alone give the authority thus to use it; though it might still be questioned, whether such an act could be in conformity to the use and trust upon which Virginia ceded the territory. What would be the legal effect of a violation of the terms of the compact under the deed of cession? Would it not be a reversion of the lands ceded to the original donor? Be the effect what it may, the United States, as the trustee of the States, had no power to divert the funds from the objects of their application, nor to misapply their use in any manner whatever. It may be said, that Congress has, in repeated instances, applied the public lands to objects confessedly without the terms of the grant. Admitting that she has, and that the States, by their representatives, are supposed assenting thereto, and that therefore the objection is

removed, does it follow, that because this assent is thus presumed —though in truth, in many instances, it is never given, because on many occasions the whole delegation of a State in Congress, have disapproved and voted against these appropriations—that the President, or a subordinate officer of the government, may, when it is apparent no such assent can be given, do an act which, if it can be done at all, Congress alone possesses the power to do.

The Supreme Court of the United States, in the case of Jackson *v.* Clark,(1) in discussing the principles involved in that case, having quoted the terms of the deed of cession from Virginia, remark, "That the government of the United States then received this territory, in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the Confederation, and this trust is to be executed by a faithful and *bona fide* disposition of the lands for that purpose." Language cannot be stronger, nor more directly applicable to the case before us, and it shows, most conclusively, that the highest tribunal in the nation sanctions the rule here asserted. In reflecting on his branch of the case, another, and not inconsiderable objection has arisen, in our opinion, to the exercise of the power contended for, which seems to conflict with the spirit, if not the letter, of the 16th paragraph of the eighth section of the first Article of the Constitution of the United States, which provides that "Congress shall have power to exercise exclusive legislation, in all cases whatsoever, over such district, (not exceeding ten miles square,) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and all other needful buildings." From the paragraph quoted, it seems apparent that the members of the Convention who formed the Constitution, contemplated that places for forts, magazines, arsenals, dock-yards, and other buildings connected therewith, would be required to be purchased from individuals, in the several States, where their selection and erection might be deemed necessary; and that it was still more important to give exclusive legislation over the places ceded, for public convenience and safety; but still the consent of the State legislature was required, before such purchases could be made of individuals, and the places be so used. May it not, also, have been intended that forts, and permanent garrisons, should not be thus erected without the consent of the State; and that to prevent the accumulation of military power, in such permanent works, the assent of the State legislature should be required, before they could be erected? This view seems to be neither unreasonable,

(1) 1 Peters 635.

nor overstrained. On the contrary, this inference would be warranted by the supposition that the State authority would view, with natural jealousy, the collection of the numerous armed forces, stationed among them in permanent works, established without their consent, and beyond their control; and hence we have seen, that in the cessions made by the States, under this power, there has been a reservation of the right to serve all State process, civil and criminal, upon persons found therein. If, however, the construction contended for, of that part of the Constitution, is not warranted, then, it would seem to follow, that Congress might, and the President too, if it be conceded that he has, without the authority of law, rightfully the power to erect forts, magazines, and arsenals, upon any and all of the public lands within the new States; thus appropriating them to objects never contemplated by the deed of cession, but in positive violation of the trust delegated; and establishing a cordon of military posts within the body of a State, without its consent, and against its inclination. The view we have taken, denying this power, is greatly aided by an act of Congress of the 3d of March, 1819, "*Authorizing the sale of certain Military Sites*," which provides "That the Secretary of War be, and he is hereby authorized, under the direction of the President of the United States, to cause to be sold, such military sites belonging to the United States, as may have been found, or become, useless for military purposes; and the jurisdiction which has been specially ceded for military purposes to the United States, by a State, over such sites, shall hereafter cease."(1) This act, it will be perceived, relates exclusively to such sites as had been found, or had become, at the time of the passage thereof, useless; and it is evident that Congress did not, from the very phraseology of the act itself, contemplate, that any other military sites existed, but such as had been purchased of individuals by the consent of the State legislatures, by the retrocession or cessation of the jurisdiction before ceded by the States. The idea never occurred, that the public lands had been permanently appropriated to such purposes; but that the occupations, in such cases, were merely temporary, and terminated with the cause that produced them. It is not very probable that such a state of things would be likely to occur; yet, if the reasoning in this case, for the defendant, be correct, it would seem inevitably to lead to such conclusions. It cannot be, that reasons and inferences, drawn from the exercise of implied power, can be neither sound, or just, which would tend to consequences so dangerous and liable to abuse, if not affording means to him who, should he be so disposed, might overturn, in succession, the sovereignty and independence of all the States. Satisfied, however, that there has been no act of Congress passed,

(1) 3 Story's Laws, 1742.

expressly reserving from sale the particular tract of land on which the stockade called Fort Dearborn is situated, appropriating it to military purposes; and that the President has not made any order previous to the passage of the pre-emption laws, reserving this tract for such objects; and moreover, considering it as admitted, that the Commissioner of the General Land Office, or any other officer of the government, was not authorized, in any way whatever, to make the reservation contended for; and that there is nothing in the general laws regulating the sale of the public land, and conferring the powers, and prescribing the duties of the public officers of the United States, to sanction, much less authorized, this act of reservation, and that it is not confirmed by the reservation in the pre-emption laws, we must arrive at the conclusion, that the reservation, if there was one, at the time and manner in which it was made, was unauthorized by any law of the United States, or any other legal authority whatever, and that it could not be included in the reservations named in the President's Proclamation. A further and necessary enquiry remains to be made, to ascertain whether the Land Officers had jurisdiction over this particular tract, for the purpose of allowing the pre-emption, and making the sale to Beaubien, supposing it admitted that they could not determine themselves the question of reservation, or no reservation. We have satisfied ourselves that the land was not reserved from sale by an act of Congress, or by order of the President of the United States. Let us now consider whether it has been appropriated for any purpose whatever; or for the use of the United States, or for the use of the State of Illinois. It has been shown, we think, satisfactorily, that no act of Congress exists, making the reservation contended for; and we take it for granted, that there is no such act of appropriating the land, in any manner whatever. It seems equally certain, in our judgment, that an appropriation of the public domain can no more be made by the President of the United States, or any subordinate officer acting under him, without the warrant of law, than in the case of a reservation. Indeed, the objection is stronger; because, as we understand the use of the terms, the word "reservation" does not imply an absolute disposition of the lands, in all cases, but a withholding of them from some other disposition, such as sale, or for the use of schools, and other objects. While on the contrary, the term "appropriation," would imply, most clearly, a setting apart, or application to some particular use; when applied in reference to the public revenues, it will be seen, that in the Constitution of the United States, it is used to express the disposition of the public moneys from the Treasury by law. The phrase is, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." As to the mean-

ing of the term, in the sense in which it is used in the pre-emption law, we suppose we shall best ascertain that sense, by comparing it with the context of the section itself: It will be seen that it is applied in a general sense; first—the words are, "or which may have been appropriated for any purpose whatever;" secondly—"or for the use of the United States;" thirdly—"or either of the States in which they (the lands) may be situated." Now let us enquire, by what power can the public lands be appropriated to a State in which they may be situated? Certainly not by the order of the President of the United States; but most clearly alone by the authority of an act of Congress; nor could the same lands be appropriated to the nse of the United States, without such authority; because, we have shown, that certainly without the assent of the representatives in Congress of the several States in the Union, the lands could not be appropriated, or in other words, set apart, or applied to, the use of a State in which they are situated; nor to the use of the United States. In what manner, or by what means, other than the authority of an act of Congress, could they be appropriated, set apart, or applied to any other purpose whatever? Surely, if it could not be legally and justly done in the one case, it could not, most clearly, in the other. It is, in our judgment, entirely useless to discuss the precise meaning of the term "appropriated," in its general and extended sense; because its meaning and application, in the manner it has been used in the pre-emption law, cannot, we think, admit of a doubt. It means nothing more, in the sense in which it is used, than an application of the lands to some specific use or purpose, by virtue of law, and not by any other power. The next, and, in our view, most important feature in this cause, which remains to be considered, is, the 4th section of the act of Congress, creating the Land Office at Chicago, passed on the 29th June, 1834, which contains the following provisions:

"The President shall be authorized, so soon as the survey shall have been completed, to cause to be offered for sale in the manner prescribed by law, all the lands lying in said land district, at the Land Offices in the respective districts, in which the land so offered is embraced; reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals, and such reservations as the President may deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

The President of the United States, in directing the sale of the public lands, by his Proclamation of the date of the 12th of February, 1835, in this district—and in which it is admitted the land in question is situated—to be holden on the 15th of June, 1835, at Chicago; and among which lands the South West frac-

tional quarter Section 10, T. 39, N. R. 14 E, was included, made no other exception in his Proclamation of lands excluded from sale, than is contained in these words: 'The lands reserved by law, for the use of schools, and for other porposes, will be excluded from sale.' From the character and tenor of this Proclamation, taken in connection with the 4th section of the act creating the Land Office at Chicago, and the duty devolved on the President, by the provisions of that section, it is impossible to conceive, that in the proper discharge of his duty, specifically enjoined thereby, he had not examined, and ascertained, that the site in question was not necessary to be retained for military purposes. The words of the act, it will be perceived, are, that the President shall cause, "to be offered for sale, in the manner prescribed by law, all the lands lying in the land district, in which the lands so offered are embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals, and the State of Illinois; and such reservations as the President may deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding." Can it be supposed, when the act declared, that notwithstanding any law of Congress heretofore existing to the contrary, all the lands in the district, except those specially enumerated, should be offered for sale, unless the President should determine that some portion thereof was necessary to be retained for military posts, that, under his Proclamation, made in pursuance, and in accordance with that act, any military post had been reserved. Is it not more consonant with reason, and a just interpretation of his acts, in reference to this matter, that as the law had confided to his judgment and discretion, the decision of the question, whether such military posts were necessary to be retained, he had, on full consideration of the subject, determined that the land in question was not necessary to be so retained. The act, by its very terms, contemplates the possible disposition of such reservations; and that cases might exist, where it might promote the public interest so to dispose of them. The language of the act, unless thus interpreted, would be idle and unmeaning. The legal presumption is, that the President discharged the public duty imposed on him by the terms of the law, and that the land was in market, as proclaimed by himself; and as is further established, by the extended plat furnished to the Land Officers; and on which there was no evidence by coloring, (the process used and adopted in other cases to note reservations,) or other marks, that it was reserved from sale. In a further view to be given to the provisions of this 4th section of the act, establishing the Chicago Land Office, it is most evident, that the law intended to subject all such reservations to sale, as the Pres-

ident might decide not necessary to be retained for a specific and defined object; to wit—military post; so that under this act, it would seem to be a matter of no importance, whether the fraction had beeen reserved by law or not. It was to be offered for sale, if the judgment of the President determined it not necessary to be retained; such, in our opinion, is the only admissible and just interpretation of that section. The latter words of the proclamation cannot exempt the lands from the general operation of the order to sell, for the exclusion from sale is only of such lands as are reserved by law for the use of schools, and for other purposes; and the 4th section of the act recited, declares that these reservations by law shall be inoperative in certain cases, if the President determines that they are not necessary to be retained. Upon this view of the facts and the law relating to the case before the Court, it is difficult to conjecture upon what grounds the Land Officers can be supposed to have exceeded their jurisdiction, and that their acts are necessarily void; we confess we are at a loss, in whatever aspect the questions affecting the legal rights of the parties are considered, to see the least excess of jurisdiction; nor can we imagine how the officers can be liable to the charge, or in any way censurable for their acts. There are, however, other additional grounds, which seem to have a direct bearing on the case, and in our judgment, recognize the legal character of the entry and purchase by Beaubien. It will be recollected that the case shows, that the North fractional quarter of this identical fractional section 10, which the Commissioner of the General Land Office directed the whole of to be reserved for military purposes, was, on the 7th day of May, 1831, entered at the Palestine office, by one Robert A. Kinzie, by virtue of his pre-emption right, purchased and paid for by him, at the minimum price, and has since been patented. Now, how is it, if the reservation contended for, was duly and legally made, and embraced (as it is undoubtedly contained) in the description of the supposed reservation made by the Commissioner, that in the one case the reservation is effectual, as is contended, to bar the right of entry and purchase by pre-emption, and not in the other? On the facts of the case, it is wholly irreconcileable with a just interpretation of the rights of these parties; and the recognition by the government, in the case of Kinzie, must be considered as a clear interpretation, by itself, that there was no legal reservation whatever; because, if there was, the entry and purchase of the North fraction of Section 10, by Robert A. Kinzie, being a part of the same fraction, was necessarily as much inhibited by law, as that of Beaubein's could be. By this act, the government has manifestly put its own interpretation on the character of the supposed reservation, and admitted, we think, thereby, that it was alto-

gether nugatory as such. On the 2d of July, 1836, an act of Congress was passed, entitled "*An act to confirm the sales of Public Lands.*" The first section of this act of the 2d of July, provides. "That in all cases where public lands, taken from the bounds of a former land district, and included within the bounds of a new district, have been sold by the Officers of such former district, under the pre-emption laws, or otherwise, at any time prior to the opening of the Land Office in such new district; and in which the Commissioner of the General Land Office shall be satisfied, that the proceedings, in other respects, have been fair and regular, such entries and sales shall be, and they are hereby confirmed; and patents shall be issued thereupon, as in other cases." The second section declares, "That in all cases where an entry has been made under the pre-emption laws, pursuant to instructions sent to the Register and Receiver, from the Treasury Department, and the proceedings have been in all other respects fair and regular, such entries and sales are hereby confirmed, and patents shall be issued thereon, as in other cases." The first section was evidently intended to cure cases of defective jurisdiction, where the officers of the former district had sold lands under the pre-emption laws, or otherwise, lying in the new district, and prior to the opening of the Land Office in the new district. But the second section provides for another class of cases. From the extreme generality of the language used, the section must apply to all cases where the officers allowing the pre-emption, have proceeded agreeably to the instructions sent to them from the Treasury Department; and the proceedings in the words of the act, have been in all other respects fair and regular. It is, however, urged that this section has no application whatever to the case before the Court. Let us enquire whether this affirmation is true? Upon the supposition that there was no reservation nor appropriation of the fraction of land in controversy; and that the President of the United States had determined that the land was not necessary to be retained for a military post, and that, by his Proclamation, it had been offered for sale according to law; we ask whether it would not have been liable to be entered under the pre-emption law of Congress; and whether an entry and purchase so permitted by the officers of the Chicago Land Office, who had entire jurisdiction in the case, would not have been in pursuance of the general instructions (special ones are not and cannot be allowed) sent to the Register and Receiver from the Treasury Department? And moreover, whether it could be denied, upon proof entirely satisfactory to those officers, of the undeniable right of the applicant to the right of pre-emption, that the proceedings in the present case could possibly be determined to be other than fair and regular in all other respects? We confess that we are at a loss upon any rational principle of

induction to determine otherwise: Consequently, in this act of Congress, we find a full, complete, and entire recognition of the validity of the entry of the tract of land in question by the applicant; and that, as such, he is upon every principle of legal right and moral justice, entitled to the lands agreeably to the laws of the United States, providing for the disposal of the public domain. We have, however, the construction of the constitutional law officer of the government, on the provisions of this act in an opinion, under date of the 10th of August, 1836, addressed to the Secretary of the Treasury, wherein he remarks, "I would observe that as the second section (meaning of the act above quoted) is enacted in connection with a provision curing certain specified irregularities, the irregularities so cured, must be deemed totally excepted from the second section, and that the same principle must be applied to the first section. That is to say, in the case provided for in the first section, the patent should be issued, provided the proceedings have been fair and regular in all particulars, other than that provided for and remedied in the second section; and in the case provided for in the second section, the patent should be issued, provided the proceedings have been fair and regular in all particulars, except that remedied in the first section." Then we understand by this illustration of that act, if, under the second section, the lands were within the district of the officers offering them for sale, and the proceedings have been fair and regular, that then there is no doubt that a patent should issue. We may be permitted to ask if this construction be a fair and rational interpretation of the intention of the law maker as evidenced by the second section of the act, whether this section remedied any pre-existing defect in the entries it professes to cure and confirm? It would seem, under such a construction, as we understand it, to have been a nugatory and useless act of legislation; but admitting the construction to be correct, still we conceive that it was a direct confirmation of such pre-emptions as had been regularly obtained, and sanctioned every allowance by the Land Officers of a pre-emption so by them granted. Whether the act was absolutely necessary to secure the right, it is unnecessary now to enquire. The effect alone is to be determined; and it must be considered as a legislative sanction of the right granted to pre-emptors. The terms of the section are general. In all cases where an entry has been made under the pre-emption laws, pursuant to instructions sent to the Register and Receiver from the Treasury Department, such entries and sales are confirmed. This is an universal confirmation of all cases of the regular purchase of land under pre-emptions. The next question to be considered, is, whether there was fraud in obtaining the pre-emption by Beaubien? And here we are first to enquire what is fraud, and in what does it consist?

It is defined by all judges, jurists, and commentators on law, "That to constitute actual fraud between two or more persons, to the prejudice of a third, contrivance and design to injure such third person by depriving him of some right, or otherwise impairing it must be shown; actual fraud is not to be presumed, but ought to be proved by the party who alleges it; and if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred."(1)[a] It may consist in making a false representation with the knowledge at the time that it is false, with a design to deceive and defraud, or in the wilful concealment of the truth for a similar purpose. There is nothing appearing in the case imputing to Beaubien any false or fraudulent representations in regard to his claim, or the facts upon which he founded his right to his pre-emption; nor does it appear that he concealed at any time from the knowledge of the officers with whom he communicated, any fact, whatever, necessary to a fair understanding of his claim, and the supposed right of the government, under the reservation, as made at Washington. Equally free from, and above all suspicion, is the conduct of the officers granting the pre-emption to him. No design or contrivance is imputed to any of the parties in the transaction, and none has been shown; because none has been attempted. The transaction is admitted to have been untainted, and above the breath of suspicion. For aught, then, that we can see, it must follow, upon a consideration of all the facts of the case, and laws applicable to it, that this pre-emption was duly and formally granted, by an authority having exclusive jurisdiction and power over the subject matter upon which it acted at the time; and that it is conclusive and binding on the government. Having thus far, in the investigation of the legal character of the claim advanced by the lessor of the plaintiff, necessarily considered and examined the objections urged in the defence, except the first, third, and fourth, we proceed to the consideration of those, and the arguments advanced by the counsel for the plaintiff's lessors, in support of the legal title, and a right to maintain the present action. The first objection, that no action of ejectment can be sustained against a military office, in the occupancy of lands, as such, is readily disposed of. In the case of Meigs and others *v.* McClung's Lessee,(2) in an action of ejectment, brought to recover a tract of land which was claimed under a grant from the State of North Carolina, upon which the defendants resided, as officers, and under the authority of the United States, which had a garrison there, and had erected works, at an expense of thirty thousand dollars, one of the grounds of the defence was, because the land was occupied by the United States' troops and the defendants, as officers of the United States, for the

(1) Conrad *v.* Nicoll, 4 Peters 295. (*a*) Wright *vs.* Grover, 27 Ill. R. 430. (2) 9 Cranch 11.

benefit of the United States, and by their direction. Chief Justice Marshall, in delivering the opinion of the Court in that case, says: "The fact that the agents of the United States took possession of the land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation." The defence is not tolerated for a moment; such an act was clearly military usurpation, and illegal and indefensible in every point of view in which it could be placed. This objection then, is necessarily altogether untenable. We are not yet prepared to admit the maxim, "*Inter arma leges silent.*" The remaining questions are, we admit, of much moment, and involve principles of deep interest. These objections having been sustained in the Circuit Court, for whose legal learning and accurate judgment, we entertain the highest respect, has rendered it more important to examine cautiously the principles upon which this decision is made; and we are free to confess, that nothing but a firm and settled conviction of the soundness of their character, and the evident justice in which they are founded, has led us to adopt them as the basis of our deliberate judgment. In examining the question whether the legal estate is yet in the United States, or has passed by law, and the acts of the Land Officers, to the pre-emptor, it may be well to consider the character of the proof offered, as evidence of a legal title. The first two certificates produced in evidence, bear date on the day of purchase, and are required by the several acts of Congress relating to the sale and disposal of the public lands. The second of these, is in strict conformity with the mode pointed out by Congress, for the primary disposal of the public domain, and should be considered a regulation provided by them for securing the title to the *bona fide* purchaser. The third is the same as the preceding, except that it is not issued at the time of the purchase; nor is it required to be filed in the General Land Office, but is made evidence of title, in an action of ejectment, in this State, by an act of the General Assembly, "declaring what shall be evidence in certain cases,"(1) and to which we shall have occasion hereafter to advert; and lastly a deed from the pre-emptor to the lessor of the plaintiff. It is insisted by the defendant, that as the law of Congress provides that a patent shall issue on this final certificate, that the United States cannot be concluded by any other evidence less than a patent. It will be recollected that neither Congress, nor the legislature of this State, have made a patent evidence of title. That it is evidence, in courts of law,

(1) R. L. 280; Gale's Stat. 287.

and of a conclusive character. where the power granting had title to the lands granted, and the officer's authority to issue it, no one doubts; but it is certainly true, that there may be other evidence of title, equally conclusive. The patent is not understood to be the title itself, but the evidence thereof. From what source does the title to land derived from a government spring? In arbitrary governments, from the supreme head—be he the emperor, king, or potentate; or by whatever name he is known. In a republic, from the law, making, or authorizing to be made, the grant or sale. In the first case, the party looks alone to his letters patent; in the second, to the law, and the evidence of the acts necessary to be done under the law, to a perfection of his grant, donation, or purchase. If a grant should be made by the Executive of the nation, for a tract of land, to an individual, by patent, not warranted by a previous act of Congress, it must be void the moment it is made, because it is not authorized. The law alone must be the fountain from whence the authority is drawn; and there can be no other source. It will be found that numerous cases exist, of legislative grants to States and individuals, by Congress, where patents have not been required to be issued; and in which cases, we learn, the practice, if we are rightly informed, is not to issue them. How is it with reference to grants of the 16th sections in each township of the public lands, those made to States for internal improvements, for schools and colleges, and of salines and towns, and various other public objects? Will it be contended, that in these cases, the legal title in the lands is not vested according to the terms of the grant, from the moment it becomes a law, in the party to whom the grant is made, but remains in the government until a patent shall be issued? Surely not. We take it for granted, that in cases of legislative grants, the law is not only evidence of title, but the title itself. "A legislative grant vests title which cannot afterwards be divested by legislative action."(1) We esteem it unnecessary to pursue this illustration further; but proceed to consider whether the grants of lands made to pre-emptors, under, and by virtue of the pre-emption laws of the United States, are not estates in the lands intended to be granted, upon conditions, and which become absolute upon the performance of those conditions? Such would seem to be the spirit and intent of those laws, when attentively considered. We are to look at the benificent character of those acts, and the peculiar objects they were intended to protect and secure. A class of enterprising, hardy and most meritorious and valuable citizens had become the pioneers in the settlement and improvement of the new and distant lands of the government. Disregarding the privations, toils and sufferings incident to their condition, they

(1) Powlett *v.* Clark *et al.* 3 Peters' Cond. R. 408.

had, by their perseverence, not only expelled the savage from their borders, but had carried civilization, with all its attendant lights and blessings, into the wilderness. By their industry and untiring exertions, they improved the lands, subdued the forests, and by the acceleration which they had given to population and agriculture, increased the value of the lands in a tenfold degree. The government, as a reward for these exertions, granted to the individuals thus situated, rights on these lands, to a certain number of acres, upon proof of settlement and cultivation, and the payment of the minimum price of the public lands, within the time specified in the pre-emption laws. It may be worthy of enquiry here, whether, upon a full compliance of a party with the terms and conditions of these laws, that right so given, can be any more divested than an express legislative grant, without any conditions whatever? Certainly not. It is not then, an estate resting on a contingency, which, if it happen, or be consummated, vests the estate in fee?

Congress possesses the power to grant away these lands, absolutely or conditionally, and they have done so in the case of the pre-emptioner, upon conditions specified in the pre-emption laws; but it is said that this is only a previous right to purchase. Concede this, and what does it establish? That there is a right, and that right is, that the party who settled and cultivated the land within a given period of time, on proof thereof to the officers of the government, to their satisfaction, and payment of the money required therefor, shall be the purchaser and hold the estate. Now will it be denied that this is an interest in land—imperfect it may be—but to become perfect and absolute on performance of the conditions prescribed? When those conditions have all been performed, and the certificates of the Land Officers, which evidence those facts, have been executed and delivered, has not the grant, which under the law was provisional, become perfect and absolute; and is not the law the source, and these evidences of the conditions performed, proof of his title, and as much so as in the case of an absolute grant? Congress, in its legislation on the subject of pre-emptions, in various acts, speaks of the pre-emptors as persons having rights, and state in certain cases that their rights shall be forfeited.(1) We understand, also, that it has been the practice of the Land Office Department, at Washington, to permit assignments of certificates, and to issue patents where the assignment is in conformity to the rules prescribed, to the assignee, and that it so appears on the face of the patent. This is stated as some evidence at least of the character of the interests in these certificates, as understood by the government itself. The act of the 18th of May, 1796, however, expressly authorized the patent to issue to the heirs or assignees of the purchaser.

(1) Act of Feb. 7. 1813, § 2; Act of March 3, 1803; Act of May 18, 1796.

A case of illustration will now be put. A is appointed to office, by action of a legislative body, in pursuance of powers derived from the constitution of the State: Would the action of this body be the source of his right to the office, or would such source be his commission? Would not his commission be only evidence of his title to the office, and the election by the legislature, the source of his right? Certainly so, because a commission might be issued to a person not so elected, who in such case would be a mere usurper.

We are led to the conclusion that the laws of Congress by every fair interpretation must be considered as saying to every pre-emptor on the public lands, if you show yourself within the provisions of the pre-emption laws, and that you have honestly and truly performed the conditions required of you by law, the interest or estate which has been provisionally given you, shall become absolute. It may be further asked, whether this right, be it an estate in the lands on conditions performed, or a mere right of previous purchase, can, where it clearly exists, be taken away or destroyed, against the will and consent of the party entitled to the pre-emption? Clearly not. The government is committed by its own voluntary acts, and no third party can interfere with, or impair, or destroy it. A case of seeming analogy has been decided in this Court. We refer to the case of Doe on the demise of Moore *v.* Hill *et al.*, decided at the December term, 1829.(1) The lessor of the plaintiff, in that case, claimed title to the tract of land sold by the government of the United States to Hill, who had purchased the same at the public sale, and obtained a patent therefor, by virtue of a confirmation made by the Governor of the Territory North-West of the river Ohio, in pursuance of the acts of Congress of 1788, and the instructions to the Governor of said Territory. In that case the following points were settled: 1st. 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 the said Territory, is, under the resolution and instructions of Congress of June and August of 1788, valid, and operates as a release on the part of the United States of all their right. 2d. 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. 3d. A confirmation so made by the Governor, cannot be nullified by any act of Congress. 4th. In order to show the act 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 claim presented to him, is binding on the United States. 5th. By the deed of cession of 1784, from Virginia to the United States, Congress was obliged

(1) Breese 236.

to confirm the settlers in their possessions and titles. By an examination of this case, it will be seen that by an act of Congress passed sixteen years after the powers given to the Governor of the North-Western Territory, to confirm the lands referred to in the act creating his duties, a Board of Commissioners was appointed to set at Kaskaskia, to hear proof relative to British and French grants, and report to the Secretary of the Treasury. The Court say, "That 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 enquire 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-Western and Indiana Territories respectively, and they shall report to the Secretary of the Treasury, to be laid by him before Congress." The Court proceed to say, "That the soundest principles of policy, as well as good faith, require that the Governor's confirmations should be considered, at least, *prima facie*, valid." The report of the Commissioners is next adverted to, and it is further stated, "That the Secretary of the Treasury considered those confirmations void, and directed the sale of the lands; but the Secretary of the Treasury had no power to order the sale of any lands except those belonging to the United States;" and his act in ordering the sale, is treated as a void act; and it is further said, "That the confirmation was a release of the interest of the United States, and the presumption was, that the deed of confirmation was made in a case authorized by the resolutions of June and August, 1788." To our minds, there is, on principle, an analogy in the two cases, so far as the acts and discretionary powers of the agents of the government are to be viewed, and the character in which these acts are to be considered in point of evidence relating to titles to land originally held by the government, or claimed to be so held. In the case referred to, the certificate of confirmation by the Governor, is held to be at least *prima facie* evidence of title to the estate in the lands claimed; and in the present one, it is not perceived why the same rule should not obtain. The patent of the government to a subsequent innocent purchaser, is held invalid; because the government could not grant the same land twice; and because the patent for that reason was void. In the case of the United States *v.* Arredondo,(1) the Supreme Court of the United States held this language. "If it was not a legal presumption, that public and responsible officers claiming and exercising the

(1) 6 Peters 727.

right of disposing of the public domain, did it by the order and consent of the government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite." "The acts of public officers in disposing of public land, by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who oppose the title set up under it; and deny the power by which it is professed to be granted. Without the recognition of this principle, there would be no safety in title papers, and no security for the enjoyment of property under them." The law of Congress requiring patents to issue, was passed when the old credit system of disposing of the public lands existed, and that patent was to issue on the certificate of final payment. We think it important that the laws providing for the sales of the public lands, under the old and new system, should be noticed, and the distinction kept in view. Under the old system, the purchase, being on credit for three-fourths of the purchase money, was contingent; but under the present, it is for cash in full, and perfect and absolute. The patent was, however, on the final payment, to be issued to him, or his heirs, or assigns. It may be important, as an early evidence of the intentions and views of Congress on the subject of the sales of the public lands, and to show in what light they considered the sales thereof, to note the act of the 18th of May, 1796. After prescribing the terms on which the land shall be sold, it directs the form of the certificate which shall be given, and requires the land sold to be described—the sum paid on account—the balance remaining due—the time when such balance becomes payable, and that the whole land sold will be forfeited if the said balance is not then paid; but that if it shall be duly discharged, the purchaser or his assigns, or other legal representative, shall be entiled to a patent. "On payment of the balance, a patent is directed to be issued. It declares, if there should be a failure in any payment, the sale shall be void, all money theretofore paid on account of the purchase, shall be forfeited to the United States; and the land thus sold, shall be again disposed of in the same manner as if a sale had never been made." Here we see that a direct and positive sale is recognized, and the land sold in case of non-payment of any part of the balance, is declared to be forfeited.

It is manifest, from this language, that Congress considered the purchaser as having a legal estate in the lands purchased, of some description, under this certificate; otherwise they would not have declared in what cases the land should be forfeited. Such, however, seems to be the whole course of legislation on the public lands, and in almost every act the right acquired by the purchaser, seems to be viewed as a conditional or absolute estate in the lands, and the invariable practice has been for the

purchaser under all the systems and regulations for the sale of these lands, to enter into possession of them, either before or after the purchase, if he so desired. It would be singular indeed, if the purchasers of the millions of acres of the public domain, which have been recently paid for by them, and from which they have received the evidence thereof, from the public officers of the government, should be told that they had only some inchoate, indefinite, and imperfect and equitable title to the lands thus sold by the government, and that the legal estate was yet in the government; and that as the government could not be coerced by suit to issue a patent, and the public officers might use their discretion to issue or not issue the patent, intruders on the lands could not be removed, and might enjoy unmolested the possession thereof, committing what destruction and injury they pleased, until they could produce a formal patent therefor. The mere statement of such a supposition would have a most startling effect; and those thus situated would indeed gravely ask whether they lived under a government of laws in which justice was equally dispensed, and the rights of all protected alike? To silence forever and put at rest these quaint and refined subtleties, and to protect the purchasers of the public domain within the limits of this State, the General Assembly, with a forecast worthy of all praise, as early as 1823, (and which was incorporated in the revised code of 1827,) passed "*An act declaring what shall be evidence in certain cases.*"(1) By the 4th section of that act it is provided "That the official certificate of any Register or Receiver of any Land Office of the United States, to any fact or matter of 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, 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 exhibited for the same." To this statute this Court has, in the case of Bruner *v.* Manlove,(2) given an exposition by the unanimous opinion of the Court, which every day's experience shows to be based on the firmest principles of policy and justice. In that case it was said, "That the Register's certificate is raised to as high a point of evidence in this form of action, as a patent possibly could be. Its effect is to be the same, and the rights derived from it, for the purpose of recovering or maintaining possession of lands described in it, are co-extensive with the most formal regularly issued patents. These certificates not only vest the title acquired by purchase from the govern-

(1) R. L. 280; Gale's Stat. 287. (2) *Ante* 156.

ment, in the purchaser for the purpose named, but make that title transmissible to the heirs or the assignee. For any purpose then, so far as regards the character of these certificates, as evidence in an action of ejectment, they must be considered of as high a dignity as patents, and partaking of all their legal attributes. Having settled their character and effect, the rights of the parties under them, must be governed by the same rules of interpretation as in the case of patents. No reason can exist for an exception." Whatever doubt may have existed as to the character of the right or interest acquired by the purchaser of land from the government of the United States, and the light in which the certificates of the Land Officers should be considered as evidence in the courts of this State, we apprehend has been for ever put to rest by this necessary and provident law. We appeal to the unsophisticated and sober judgment of every rational and unbiassed mind, and ask, whether the idea that purchases so held by these evidences of title, which have doubtless passed through various and numerous hands, are to be for a moment thus impaired by the toleration of such arguments against their validity? It is a matter of universal notoriety, that these are the only evidences of title, in nine cases out of ten, held by the purchasers of the public lands, for some years past; and that it has become, and will remain, impossible, for years to come, under the present force in the General Land Office, to issue patents for millions of acres of land thus purchased. The necessity of the case, then, most imperiously admonishes us of the profound wisdom and necessity of the act. It has therefore been considered altogether unnecessary to refer to and adduce the numerous decisions of the various courts in the United States, departing from the rigid doctrines of the common law, as to what should be considered evidence of title in an action of ejectment. Among which the most prominent is, the case of Sim's Lessee *v.* Irvine, in which it was adjudged that payment of the purchase money to the State, and survey of the land, gave a legal right of entry, and was sufficient evidence in an action of ejectment. The Supreme Court of the United States, in reviewing this case, say, "This having become in Pennsylvania an established legal right, and having incorporated itself as such with property and tenures, must be regarded by the common law Courts of the United States in Pennsylvania, as a ruling decision." Numerous other cases might be cited, decided by the Supreme Court of the United States, in which it is held that evidence of title to land, is to be governed by the "*Lex loci rei sitae.*" That the law of the State where the land lies, is to govern both as to the form of the remedy and the evidence of title seems to be so well settled by a long and uniform course of decisions, that we have supposed it beyond the possibility of doubt. The Circuit Court have, in our

opinion, fallen into an error on this point, which has, in our judgment, arisen from the light in which it has viewed the pre-emptor's purchase. It seems to have confounded this purchase with the imperfect, uncertain, and anomalous modes heretofore pursued in acquiring lands in the States of North Carolina, Kentucky, and other States of the Union, where those States were the proprietors of the soil; and it has adopted the opinion of the Supreme Court of the United States on those inceptive and inchoate titles, as the rule to be applied in the present case, without regarding the manifest distinction. In these cases, the person entering was to procure a warrant of survey, and pay money at a future day; and from the inception of the title by entry, his right, though it might be considered legal, was necessarily inchoate. In the case before us, the purchase and acquistion of the title is an entire act, performed at one and the same time; the certificate, as evidence of that purchase and acquisition, is given on the payment of the consideration money, and the sale being completed, the title passes, and the certificate is evidence thereof, at least *prima facie*, and warrants a right of entry on the land. By the terms of the Ordinance admitting the State of Illinois into the Union, it was among other things stipulated, "That every and each tract of land sold by the United States, from and after the first day of January, 1819, shall remain exempt from any tax laid by order or under the authority of the State, for any purpose whatever, for the term of five years from and after the day of sale."(1) Now at what time would this exemption begin to run? Certainly from the day of sale, and not from the time of issuing the patent. As long as the estate is in the United States, the lands are not taxable; and if the legal estate did not pass at the time of the purchase and sale, the land could not be taxed until the patent issues.—The proposition that the estate remains in the United States, until the patent issues, could never be adopted as a rule from whence to compute the time for such purpose, because of its extreme uncertainty and perpetual variableness. The sale must be considered as severing the particular tract purchased, from the mass of the public land, "*eo instanti*," as has well been remarked, from which time the five years are to be computed, and a divestiture of the title of the United States ensues, and the purchaser's title necessarily vests thereby. The legislature in the enactment of the law just quoted, must have so considered it, and with the view to remove all doubt, never presumed their constitutional right to pass it could be questioned. It is however, said, that while this act is admitted to be just and politic as between individuals, it cannot be applied where the rights of the government are in issue. It is also admitted that the State had the undoubted right to pass the law, and to prescribe

(1) R. L. 51; Gale's Stat. 39.

what should be the rules of evidence in the courts of the State; but that it cannot be obligatory on the United States, because it violates the Ordinance of 1787, being an "interference with the primary disposal of the soil by the United States, and the regulations which Congress has adopted to secure the title to the *bona fide* purchasers." We lay it down as an incontrovertible position, that the character of a general law, and the force, effect, and application thereof, are not to be determined by the character of the parties to the action. It would be strange, indeed, if such a rule could prevail; it must be of universal application, within the State which has adopted it as a rule of action, if it has been constitutionally adopted, and the courts of the States being bound to regard laws so passed, must so consider them. Unless, then, the act is void, for the reason that it conflicts with the Ordinance of 1787, its binding force on all parties in the State courts, is undeniable. Let the alleged conflict of the provisions of this law, with the Ordinance, be now considered; and here we confess we are at a loss to conjecture in what part of the provision of the section of the law, that conflict is to be found. In what manner does it interfere with the primary disposal of the soil? Does it not adopt the mode prescribed by Congress, and declare that this mode shall be evidence of title, until a better one is shown? Has it said the lands shall not be sold? No. Has it attempted to prescribe to the government of the United States in what manner such sales shall be made? No. Has it, by indirect means or oppressive provisions, in any way whatever, embarrassed the sales made or proposed to be made? No. Has it imposed a tax on the lands, or prohibited an entry, or prevented the purchaser from occupying the same? No. In what then does this interference consist? In nothing. On the contrary it has recognised the right of the government to the fullest possible extent, to sell and dispose of those lands; and has not only recognised, to the fullest extent, the rights of the purchaser under such sales, but has provided a means for him to acquire his possession when his right is disputed unjustly; and as a measure of preventive justice, protected him from the acts of the lawless intruder, without leaving him to the tardy and uncertain process of the production of his patent, from the notoriety of the difficulty of obtaining which, he might have to wait in years of expectation, without remedy. But we are told that it "interferes with the regulations adopted to secure the title to the *bona fide* purchasers." With what regulation does it interfere? Does or can it prevent the issue of the certificate or patent? Is it an interference because it is ancillary to the assertion of the rights of which the patent would be evidence, and removes the difficulty under which the party must labor until its obtention,—because it protects the party in his purchase, advances the means

of proof of his legal interest and right of entry on the lands by him honestly and fairly purchased, and dispenses with the law's delays attendant on the production of the patent, and above all adds greatly to the security of the party's rights and possessions? Can it be asserted, with reason, that this beneficial and remedial law, is an interference with the regulations of Congress to secure the title to the purchasers of the public domain? In vain shall language be tortured, to prove satisfactorily such a result. But if it were admitted for the sake of argument, to be so, it is equally so in the case decided between Bruner and Manlove. This Court did not, in that case, so esteem it; nor yet in the case of Doe on the demise of Moore *v.* Hill, in which it adjudged the certificate of Governor St. Clair, more effectual than the patent issued by the President for the same land some years since. The judiciary committee of the United States Senate, in a report by Judge Burnet, of Ohio, as chairman thereof, on the class of claims of which this thus decided formed one, expressed opinions in exact coincidence with that decision. The decision of this Court in that case, and the report, were made nearly simultaneously. If the law be an interference in any case, it must be so in all. The conclusion is inevitable. It cannot be valid in one case, and invalid in another precisely similar, though the parties may differ in name and person. The incongruity and unsoundness of the assertion, seems too apparent to require further comment. It is also contended that the better legal and paramount title to the lands in question, is in the government, and that this has been shown. It may be worthy of consideration, to ask, what the framers of this law considered a better legal and paramount title? Is it rational to suppose that they conceived, when they were providing an additional and auxiliary means of proof for the purchaser of the public domain, and by which he was either to obtain his possessions, having the right in himself, or to protect himself therein, that they contemplated the idea, that although the party had purchased and paid the government for the land, the better legal and paramount title remained in the government; and that against the assertion of such title, he should be protected. It would, in our estimation, be putting an intention into the minds of the legislators of too unjust and ungenerous a suspicion against the government, which, from the uniform character of its acts, and high sense of the principles of universal justice, would have been as derogatory to those entertaining such opinions, as it could not fail to be to those who should act on them. This view could never have entered into their conception. But as the history of the country had shown, and as the case of Doe on the demise of Moore *v.* Hill, before referred to, proves, there were many British and French grants which had been located on the public lands in this State, some of which the government had

recognised, and others having been considered void, the government had sold, and intended to sell the lands thus claimed. The case of Hill shows a case of the kind, and is one of the class of cases intended by the description of a better legal and paramount title; for by the decision of this Court in that case, it overreached the patent of the United States, and was therefore decided to be the better legal and paramount title. This case abundantly illustrates what the legislature of Illinois intended by the better legal and paramount title. This accords with the sense of the terms used, and the intentions of the framers of the act. The words, the context, the subject matter, the effects, and the consequences, and the reason, and the spirit of the law, all establish, to our minds, the intepretation we have put on it; we think it can justly admit of no other. Hence we conclude, that the application of this part of the statute to the case, as showing the title in the government, and adverse to the right of recovery, is by no means warranted. For the reasons given, there can be no paramount title in this case, because the government had parted with all they had, according to the forms of law prescribed for the mode of disposing of the public lands, and are concluded and estopped by the acts of their own officers.—Other examples are not wanting of similar provident and useful legislation of this State, in reference to title to land. By acts in force, July 1st, 1827 and 1829,(1) it is provided that conveyances of lands shall be valid, notwithstanding the grantor is out of possession at the time of the grant, or the lands are held adversely, and that the words "grant, bargain and sell," shall be held an express covenant to the grantee, his heirs, and assigns, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances from the grantor, except rents and services that may be reserved, unless limited by express words contained in such deed. We hold, in regard to municipal rights and obligations, that the government, as a moral being, must be, in contracting, subject, in the absence of a law of Congress in relation thereto, to the laws of the States, and that the same principles and rules of interpretation of contracts and acts growing out of them, as prevail between individuals, must be applicable to it. "Thus, if the United States becomes the holder of a bill of exchange, they are bound to the same diligence, as to giving notice, in order to charge an endorser upon the dishonor of the bill, as a private holder would be."(2) With these views we arrive at the conclusion, that the third ground of objection fails. In connection with this part of the case, an argument has been started by one of the counsel for the lessor of the plaintiff, which if entered into, would embrace a wide field of enquiry, not only interesting for the character of the question it discusses, but certainly involving

(1) R. L. 130, 510; Gale's Stat. 149, 555. (2) Story's Const. 408.

a subject of grave import, affecting the rights of the Western States. The question whether, if at all, or how far, the Western States are bound by the Ordinance of 1787, after they have become sovereign, free, and independent States; and whether the exercise of the powers appertaining to all sovereign States, connected with the principles of eminent and high domain, may not be asserted by the States, are subjects which we hope may, by a just and liberal policy on the part of the general government towards the new States, give repose to the disturbing character which the agitation of this question is calculated to produce. The exercise of powers and jurisdiction by the new States over the public lands within their respective limits, for the purpose of intercommunication between their citizens, by the means of roads, and the political and legal organization of new counties in this State, on and over districts of country not even yet surveyed, has been so long permitted and acquiesced in, as to ripen into an acknowledged right; and we are not aware that for any other object, it would be useful to examine questions which it is sincerely hoped may remain undisturbed.

As to the last and remaining ground assumed in defence, it must be conceded that the United States could not be a defendant in a State court, in any action whatever, such court having no jurisdiction over her; and consent could not give it. And although it is certainly true that the tenant, in all actions of ejectment, may defend himself by showing the title of his landlord, it does not follow that the party who could not be a defendant for want of jurisdiction in the court over him, may defend himself in such case in the name of a person, who, upon no reasonable supposition, could be considered as standing in the nature of a tenant. Can it be that a military officer, charged with the command of troops in the occupation of a garrison, is the tenant of a power, which not only commands his movements at will, but whose physical action, if the term be admissible, is entirely dependent on the direction of his superior, and that the relation of landlord and tenant is created by this military connection? Is not the idea repugnant to all our notions of legal rights, whether drawn from the civil, statute, or common law? And although it has been held that every person may be considered a landlord for the purpose of being admitted to defend an ejectment, whose title is connected to, and consistent with, the possession of the occupier, can it be that the United States could so appear where jurisdiction is not given? If not, how is it that the converse of the rule is applied? and that if the officer cannot defend by showing title in another, that another may defend in the name of him who has neither title nor defence? It is however deemed of little importance to decide this particular question, because all those affecting the real merits of the controversy, and

the rights of the parties, are considered to have been fully and particularly examined and decided. In arriving at a final conclusion in this case, it is but just to remark, that the principles upon which it turns, cannot for a moment be supposed to be in any way affected by the value of the lands in controversy, be it small or great. Satisfied of the legality and justice of the case presented by the lessor of the plaintiff, and that the granting of the preemption to Beaubien was a matter of simple right, disconnected with the equity with which his claim would be necessarily connected, marked as it is with the continued and protracted occupation during a period of 19 years—a much greater portion of which the spot so by him occupied was in the midst of a wilderness, exposed to all the dangers and vicissitudes necessarily connected with a location so immediately surrounded by savages, and that this view of the whole case cannot be considered repugnant to the universal principles of justice, and the sense of right entertained by the government itself; it is the opinion of a majority of the Court, that the judgment of the Circuit Court be reversed; and this Court, proceeding to render such judgment as the Circuit Court ought to have rendered, do order and adjudge, that judgment be rendered herein for the lessor of the plaintiff, that he recover his term of years unexpired and yet to come in the premises in the declaration described, with his costs of suit in this Court, and the Court below; and that a writ of possession and execution be awarded for such purpose.

Judgment reversed.

Note. Since the decision of this case, the following act has become a law:

AN ACT to amend an act, entitled "An act declaring what shall be evidence in certain cases," approved January 10, 1827.

SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That 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 purchase of the same land.

APPROVED, by the Council, February 27, 1839.

Acts of 1838–9, 196.

A purchaser of land from the government of the United States or of this State, acquires a right to all the improvements made upon it anterior to his purchase. The act of February 23, 1819, giving the right to remove fences made by mistake upon the land of other persons, applies only to natural persons; it has no relation to a case where a fence is erected by mistake upon the lands of the United States, or of this State. Blair *v.* Worley. *Ante* 178.

It is a principle of the common law, that the government cannot be guilty of laches. It is also well settled, that a State is not barred by a statute of limitations, unless expressly named. Madison county *v.* Bartlett. *Ante* 67; State Bank of Illinois *v.* Brown *et al.*, *Ante* 106. See also, U. S. *v.* Kirkpatrick *et al.*, 9 Wheat. 720; 5 Peters' Cond. R. 733; Dox *et al. v.* The P. M. G., 1 Peters 325.

The certificate of the Register of a Land Office, of the purchase of a portion of the pub

lic lands of the U. S., is, under the statute of this State, of as high a character in point of evidence as a patent, in an action of ejectment; and is to be governed by the same rules of interpretation. The elder certificate is conclusive against a subsequent one. Bruner *v.* Manlove *et al.*, *Ante* 156.

As to the estate of a pre-emptioner, see Davenport *v.* Farrar, *Ante* 314.

The title to, and disposition of, real property, by deed or will, must be exclusively subject to the laws of the country where it is situated. Kerr *v.* Devisees of Moon, 9 Wheat. 565; 5 Peters' Cond. 682.

It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. McCormick *et al. v.* Sullivan *et al.*, 10 Wheat. 192; 6 Peters' Cond. R. 71.

The foregoing case of McConnell *v.* Wilcox, was appealed to the Supreme Court of the U. S., where the following points were decided.

Ejectment for a tract of land in Cook county, Illinois, being a fractional section, embracing the military post called Fort Dearborn, at the time of the institution of the suit, in the possession of the defendant as the commanding officer of the United States. The Post was established in 1804, and was occupied by the troops of the United States until August 16th, 1812, when the troops were massacred, and the fort taken by the enemy. It was reoccupied by the United States in 1816, and continued to be so held until May, 1823, during which time some factory houses, for the use of the Indian Department, were erected on it. It was evacuated by order of the War Department in 1823, and was, by order of the Department, again occupied by troops in 1828, as one of the military posts of the United States; was again evacuated in 1831, the government having authorized a person to take and keep possession of it. It was again occupied by troops of the United States in 1832, and continued so to be at the commencement of this suit, being generally known at Chicago, to be occupied as a military post of the United States. The buildings about the garrison were not sold in 1831, when it was evacuated; although a great part of the moveable property in and about it was sold. In 1817, Beaubien bought of an army contractor, for one thousand dollars, a house built on the land. There was attached to the house, an enclosure occupied as a garden or field, of which Beaubien continued in possession until 1836. In 1823, the factory houses on the land were sold by order of the Secretary of War, and were bought by Beaubien, for five hundred dollars. Of these he took possession, and continued to occupy them, and to cultivate the land, without interruption by the United States, until the commencement of this suit. The United States in May 1834, built a lighthouse on the land, and have kept twenty acres enclosed and cultivated. The land was surveyed by the government of the United States in 1821; and in 1824, at the instance of the Indian Agent at Chicago, the Secretary of War requested the Commissioner of the General Land Office to reserve this land for the accommodation and protection of the property of the Indian Agency; who, in 1821, informed the Secretary of War that he had directed this section of land to be reserved from sale for military purposes. In May, 1831, Beaubien claimed this land, at the Land Office in Palestine, for pre-emption. This claim was rejected, and, by the Commissioner of the Land Office, he was, in February, 1832, informed that the land was reserved for military purposes. This information was also given to others who applied on his behalf. In 1834, he applied for this land to the Office in Danville, and his application was rejected In 1835, Beaubein applied for the land to the Land Office at Chicago; when his claim to pre-emption was allowed; and he paid the purchase money, and procured the Register's certificate. Beaubien sold and conveyed his interest to the plaintiff in the ejectment. *Held* that Beaubien acquired no title to the land by his entry; and that the right of the United States to the land was not divested or effected by the entry at the Land Office at Chicago; or by any of the previous acts of Beaubien.

The decision of the Register and Receiver of a Land Office, in the absence of fraud, would be conclusive as to the facts that the applicant for the land was then in possession and of his cultivating the land during the preceding year; because these questions are directly submitted to those officers. Yet, if they undertake to grant pre-emptions to land on which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a Court, whose jurisdiction was declared not to extend beyond a given sum, should attempt cognizance of a case beyond that sum.

Appropriation of land by the government is nothing more nor less than setting it apart for some particular use. In the case before the Court, there has been an appropriation of the land, not only in fact, but in law, for a military post; for an Indian Agency; and for the erection of a lighthouse.

McConnell *v.* Wilcox.

By the act of Congress of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President of the United States. The President speaks and acts through the head of the several departments, in relation to subjects which appertain to their respective duties. Both military posts, and Indian affairs, including agencies, belonging to the War Department. A reservation of lands, made at the request of the Secretary of War, for purposes in his department, must be considered as made by the President of the United States within the terms of the act of Congress.

Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated, becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no other reservation were made of it.

The right of pre-emption was a bounty extended to settlers and occupants of the public domain. This bounty, it cannot be supposed was designed to be extended to the sacrifice of public establishments, or of great public interests.

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 general rule applies as well to pre-emptions as to other purchases of public lands.

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 are 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.

Every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created, its judgment is final: and even where there is such an appellate power, the judgment is conclusive where it only comes collaterally in question; so long as it is unreversed. But directly the reverse is true, in relation to the judgment of any court, acting beyond the pale of its authority. This principle is concisely and accurately stated by this Court in the case of Elliott and others *v.* Piersol and others, reported in 1 Peters 349. 13 Peters 498-9.

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 issues the fee is in the government; which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment. Bagnell *et al. v.* Broderick, 13 Peters 439.

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 *Ibid.*

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 land 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. *Ibid.*

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1837, AT VANDALIA.

JOHN WARNOCK, appellant *v.* WILLIAM RUSSELL, appellee.

Appeal from the Municipal Court of the City of Alton.

A security for costs, entitled "The same *v.* The same," is insufficient.(*a*)

THE record in this case shows that a precipe was filed in the Court below, in an action commenced by Russell against Warnock, and that

"Afterwards, to-wit, on the same day and year aforesaid, and at the place aforesaid, the plaintiff in this cause, by Davis & D'Wolf, his attorneys, filed in the Clerk's office of said Court, the following bond for costs, which said bond is in the words and figures following, to-wit,

"THE SAME *v.* THE SAME.

We hereby enter ourselves as security for costs in this entitled cause, and acknowledge ourselves bound to pay all costs that may accrue either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

DAVIS & D'WOLF."

Alton, Sept. 4th, 1837.

At the October term, 1837, of the Municipal Court of the City of Alton, the Hon. Wm. Martin presiding, a motion was made by the defendant in the Court below, to dismiss the cause because

(*a*) *Post*. 451.

no security for costs was filed. This motion was overruled. Judgment was rendered for the appellee, from which the appellant appealed to this Court.

U. F. Linder, for the appellant.

A. Cowles, for the appellee.

Smith, Justice, delivered the opinion of the Court:

The appellant, who was the defendant in the Court below, by his counsel, moved to dismiss this cause, because the plaintiff, at and before the institution of this suit, was a non-resident of this State, and did not, before or at the commencement of the suit, file such a bond for costs as is required by the statute. From the facts disclosed by the bill of exceptions, it satisfactorily appears that the plaintiff was a non-resident; and the only question to be decided, is, whether the bond filed as security for costs, is sufficient.

The objection to the bond, is, that it does not appear in what cause the paper purporting to be a bond, is given, nor who the parties to the action are. The entitling the cause, "The Same *v.* The Same," being entirely isolated and disconnected with the names of any parties to any other cause, none such appearing, cannot admit of any interpretation to aid the defect by a reference to another cause between the parties to this action.

The Municipal Court should have dismissed the cause; and not having done so, the judgment of the Municipal Court is reversed with costs of this Court and the Court below.

Judgment reversed.

John B. Moffett, appellant *v.* John Clements, appellee.

Appeal from Macon.

An averment in a bill in chancery, that the payment of a note was made on the day the same became due, is not sustained by proving that the money was paid, or tendered at a subsequent and remote day.(*a*)

The rule at law, that the evidence must substantially support the plaintiff's declaration, is applicable to bills in chancery.

This cause was heard in the Court below, at the September term, 1836, before the Hon. Stephen T. Logan.

A. Williams, Wm. Thomas, and Wm. Brown, for the appellant.

Josiah Fisk, for the appellee.

(*a*) Morgan *vs.* Smith, 11 Ill. R. 194.

Lockwood, Justice, delivered the opinion of the Court:

This was a bill in chancery filed in the Macon Circuit Court by Moffett against Clements, to obtain the specific performance of an agreement in writing, dated 29th of April, 1834, to convey a tract of land. The bill alleges that Clements was to convey the land upon the complainant's paying to the defendant a promissory note for $100, dated April 9th, 1834, when said note became due, which was sixty days after date. The bill further alleges that the complainant fully paid and discharged the note according to its tenor and effect. The defendant in his answer, states that no portion of the purchase money has ever been paid or tendered to him. The depositions show that in the year 1832, the complainant leased to the defendant a stock farm with stock on it for eight years; that the defendant was also to furnish some stock, and manage the whole for their joint benefit; that each should share alike in the benefit of all sales of stock. That on the 29th of March, 1836, the defendant furnished an inventory of sales of stock amounting to about $1200. That complainant offered to defendant on or about the 29th of March, 1836, to credit the defendant on the account, the amount of the note executed for the purchase of the tract of land above mentioned, if defendant would convey the land, which offer the defendant refused to accept. That on the 22d of April, 1836, the defendant paid one Emerson, the attorney for complainant, the sum of $372, 24, the balance due the complainant, on the sales of stock mentioned in the inventory, and that at the time of said payment, said Emerson offered to said defendant, that he might retain the money due on the note, provided the defendant would give up the note, which offer the defendant refused to accept, and paid the whole money to Emerson. The depositions also show that the defendant once called on complainant to pay the note, and once sent to him for the money. The case was decided in the Circuit Court on the bill, answer, replication, and depositions. The Court below was of opinion that the complainant had failed to pay the defendant the sum of $100, the purchase money for the land as specified in the written agreement, according to the tenor and effect thereof, and therefore decreed that the bill be dismissed. To reverse this decree, an appeal has been taken to this Court. The only error assigned is, the general error that the decree ought to have been in favor of the complainant, and not in favor of the defendant. It was urged on the argument, on behalf of the complainant, that time in general is not of the essence of a contract to convey land, so as to prevent a specific execution of the contract. Without however deciding how far the time of payment, in this case, was of the essence of the contract, it is sufficient for this Court to say, that the bill stating that payment was made on the day the money became due, is

not sustained by proving that the money was paid, or offered to be paid, at a subsequent and remote day.

In this case, however, the answer wholly denies the payment of the note, and the depositions only show an offer to credit the defendant for the money nearly two years after the note became due. This offer does not sustain the allegations in the bill. The rule at law, that the evidence must substantially support the plaintiff's declaration, is applicable to bills in chancery. As the proof wholly fails to show any payment of the note, the decision of the Circuit Court was correct. Whether the complainant may not present such a case by a proper bill, as to authorize a decree for specific performance, is a question this Court is not called on to decide.

The decree is affirmed with costs.

Judgment affirmed.

MARK BEAUBIEN, appellant *v.* JOHN M. BARBOUR, appellee.

Appeal from Cook.

Where a writ is tested in the name of a person who was not, at the date of the test, judge of the court, the objection can be taken advantage of only by motion in the court from which the process issued. The mistake cannot be assigned for error in this Court. The act of July, 1837, provides for the cases of irregular tests of writs, and legalizes them.

THIS was an action commenced in the Cook Circuit Court, by John M. Barbour against Mark Beaubien. The summons was dated on the 23d day of March, 1837,(1) and tested in the name of Thomas Ford, as judge of said Court. The summons was duly executed and returned. At the May Term of said Court, 1837, Beaubien failing to appear, judgment was rendered against him by default, for $764,15 damages and costs of suit. From this judgment Beaubien appealed to this Court.

GILES SPRING, for the appellant.

J. YOUNG SCAMMON, for the appellee, cited 2 Sellon's Practice 363, 382, 384; Story's Pleadings, title *Error;* R. L. 64, § 3; (2) Breese 133, and cases there cited; 1 Bac. Abr. 212; 1 Cowen 199, 203; 4 Cowen 163; 9 Wendell 486; Stephen on Plead. 106.

(1) On the 4th Feb. 1837, the county of Cook was, by an act of the General Assembly, included in a new circuit, and at that date, Judge Ford ceased to be a judge of the Circuit Court.

(2) Gale's Stat. 49.

SMITH, Justice, delivered the opinion of the Court:

In this case it is assigned for error that the process was not tested in the name of a Circuit judge of this State, nor of any clerk of any Circuit Court. On inspection of the process, it appears to be tested in the name of Thomas Ford, judge of the Circuit Court of Cook county. This Court must presume this test to be true, until the contrary appears. If the individual was not judge of that Court, at the time of the emanation of the writ, this would be a fact to have been shown by evidence. The misconception of counsel, in assigning here an error in fact, for a supposed error in law, is not only irregular, but unavailing. If there had been an erroneous test, the defendant might, by motion in the Court below, have availed himself of the objection;[a] but the record, we apprehend, cannot now be contradicted. Besides the acts of the last session of the legislature(1) have provided for the cases of the irregular tests of writs of the kind here supposed, and legalized them.

The judgment is affirmed with costs.

Judgment affirmed.

(*a*) Beaubien *vs.* Hamilton, 3 Scam. R. 215; McKindley *vs.* Buck, 43 Ill. R. 488.
(1) Acts of July 1837, 51; Gale's Stat. 194.

MERRITT LYON, plaintiff in error *v.* NATHAN BARNEY, defendant in error.

Error to McLean.

Where 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 rendered.(*a*)
In an action of assumpsit, it is erroneous to enter up a judgment for debt and damages.

LEVI DAVIS and FERRIS FORMAN, for the plaintiff in error, cited Breese 5, 43.

T. FORD, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* on a promissory note. The declaration is in the usual form; plea non-assumpsit. On the same day that the plea was filed, the plaintiff took a judgment by default, and entered up a judgment for debt and damages. It is now assigned for error, that this judgment is erroneous,—the taking judgment by default, after plea pleaded; and also, that the form of the judgment, being in debt, is likewise erroneous. It is contended by the defendant in error, that the

(*a*) Quære; Should not all presumptions be in favor of the judgments? Rich *vs.* Hathaway, 18 Ill. R. 548; Martin *vs.* Barnhard, 39 Ill. R. 9; Miner *vs.* Phillips, 41 Ill. R. 123.

judgment being on the same day that the plea was filed, this Court will presume that the judgment was entered antecedently to the filing of the plea. We cannot accede to this presumption. The record, which is our only means of ascertaining the facts in the cause, shows the plea to have been entered previous to the rendition of the judgment. In order of time it precedes the judgment on the record, and no presumption can be raised to contradict the record. The form of the judgment is also erroneous; it should have been for the sum due as damages, and not for debt and damages.

The judgment of the Circuit Court is reversed, with costs, the cause remanded with instructions to proceed in the cause.

Judgment reversed.

LUCIEN PEYTON and ALFRED ALLEN, appellants *v.* ALEXANDER TAPPAN, appellee.

Appeal from the Municipal Court of the City of Chicago.

Where the declaration averred that the defendants made their promissory note to the plaintiff, Alexander Tappan, and the note produced in evidence, was made payable to A. H. Tappan, and the plaintiff proved by parol, that Alexander and A. H. was one and the same person, and the holder of the note: *Held* that the proof sustained the declaration.

THIS cause was tried at the July term, 1837, of the Municipal Court of the City of Chicago before the Hon. Thomas Ford. Judgment was rendered for the appellee for $212,44 and costs.

JAMES GRANT, for appellants.

J. YOUNG SCAMMON, for the appellee, cited 1 Stark. Ev. 415, 420, 431; 3 Stark. Ev. 1545 note 1, 1582 and note 1, 1580 and note 1; 13 Johns. 486; 1 Blackf. 59.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *assumpsit*, commenced in the Municipal Court of the City of Chicago, by Tappan against Peyton and Allen. The plaintiff declared on two promissory notes. The declaration alleges that the defendants made their notes, and thereby promised to pay the plaintiff the sums of money therein named. The declaration also contains the common money counts. The defendants pleaded non assumpsit. The cause was tried by the Court without a jury. On the trial of the cause, the defendants demurred to the evidence of the plaintiff, to which the plaintiff joined. The demurrer states that the plaintiff read the notes on the trial, by which it appeared that the notes were payable to A. H. Tappan. The plaintiff also proved that

Alexander Tappan, the plaintiff, and A. H. Tappan were the same person, and the holder of the notes. On this evidence, the Court below gave judgment for the plaintiff.

It is assigned for error that the Court overruled the defendants' demurrer to the plaintiff's testimony. It was contended on the argument, that in order to receive the note and oral testimony as evidence, it ought to have been alleged in the declaration, that the note was made to the plaintiff by the name of A. H. Tappan. This mode of declaring is unneccessary. The averment in the declaration that the note was made to the plaintiff, is proved by producing a note payable to A. H. Tappan, and proving that A. H. Tappan and Alexander Tappan are the same person. The evidence was also admissible under the money counts. The judgment is therefore affirmed with costs.[a]

Judgment affirmed.

(*a*) Chenot *vs.* Lefevre, 3 Gil. R. 641.

EDWIN LONGLEY and WILLIAM LONGLEY, appellants, *v.* LIENDAMAN NORVALL, appellee.

Appeal from Schuyler.

The plea of *non est factum* may be interposed in an action of covenant, without being verified by affidavit; and under it the defendant may avail himself of any legal defence that he could have done at common law, except merely denying or disproving the execution of the instrument declared on.(*a*)

In an action of covenant, there is no plea which can strictly be termed the general issue; but the general issue in debt, is correctly used to answer, under the statute, the same end it does in debt.

S. T. LOGAN and E. D. BAKER, for the appellant.

G. W. P. MAXWELL, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

Norvall commenced an action of *covenant* in the Schuyler Circuit Court, against William and Edwin Longley, on a sealed note. The defendants pleaded *non est factum*, without accompanying the plea with an affidavit of its truth. To this plea the plaintiff demurred, and the Court sustained the demurrer.

By the 12th section of the "*Act concerning Practice in Courts of Law*,"(1) it is enacted "That the defendant may plead as many matters of fact in several pleas, as he may deem necessary for his defence, or may plead the *general issue*, and give notice under the same, of the special matters intended to be relied on, for his defence, on the trial, under which notice, if adjudged by the Court to be sufficiently clear and explicit, the

(*a*) Governor &c. *vs.* Lagow, 43 Ill. R. 135, 143.
(1) R. L. 480; Gale's Stat. 531—2.

defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon; but no person shall be permitted to deny on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, unless the person so denying the same, shall, if defendant, verify his plea by affidavit."

It was contended on the argument, that the plea filed in this case, was bad, because it was not verified by affidavit. This is not the true construction of the act. In an action of covenant, there is strictly no plea which can be termed a general issue; but the plea of *non est factum*, the general issue in debt on speciality, is correctly used, to answer in this action the same end it does in debt. At common law, when such a plea was interposed and issue joined thereon, the plaintiff was under the necessity of proving the execution of the sealed instrument declared on by the subscribing witness, if there was one, and the hand writing of the defendant, if there was no subscribing witness. This rule of evidence was considered by the legislature as imposing an unreasonable burthen upon the plaintiff, and hence the passage of this act to dispense with proof of the execution of written instruments, unless the defendant denied their execution on oath. The legislature did not intend to change the rules of pleadings, as respects this plea; but to dispense with a rule of evidence that was oppressive. If a party when he files his plea, does not verify it by affidavit, he may, notwithstanding this omission, rely on any legal defence under his plea, that he could have done at common law, except merely denying or disproving the execution of the writing declared on. The Circuit Court consequently erred in sustaining the plaintiff's demurrer.

The judgment below is reversed with costs, and the cause remanded with directions to the Court below to overrule the demurrer.

Judgment reversed.

JONATHAN D. MANLOVE and MOSES MANLOVE, appellants *v* JOHN GALLIPOT, *ex dem.* JOHN BRUNER, appellee.

Appeal from Schuyler.

After a plea of not guilty has been filed, putting a cause at issue, the Court cannot on calling of the defendants, render a judgment by default; a jury should be empanelled, and a trial had, in the same manner as if the defendants had answered when called.

M. McConnell, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *ejectment* brought in the Schuyler Circuit Court. The defendants filed their plea of not guilty, on which the plaintiff joined issue. Subsequently to the joining issue on the plea of not guilty, the plaintiff had the defendants called, and upon their not appearing, had their default entered, and judgment that the plaintiff recover his term and costs of suit. This was clearly erroneous. After issue is joined, the plaintiff to obtain judgment, must proceed and try his cause by a jury, in the same manner as if the defendants had answered to their names when called.

The judgment of the Circuit Court is reversed with costs, and the cause remanded with directions to the Court below to set aside the judgment by default.

Judgment reversed.

Note. See the case of Lyon *v.* Barney, *Ante* 387; and the case of Covell *v.* Marks, *Post.* 535.

Merrit L. Covell, Ortogrul Covell, and Jesse W. Fell, plaintiffs in error *v.* Jacob Marks, defendant in error.

Error to McLean.

It is erroneous to take judgment by default where a plea of non-assumpsit is interposed. A jury should be empanelled to try the issue, whether the defendant be present or absent.

L. Davis and F. Forman, for the plaintiffs in error.

T. Ford, for the defendant in error.

Lockwood, Justice, delivered the opinion of the Court:

It appears by the record in this case, that on the 26th day of September, 1837, the defendants filed their plea of non-assumpsit; and on the 27th of the same month, the Court below gave judgment by default against them. This was erroneous; the Circuit Court should have empanelled a jury and tried the cause, whether the defendants answered when called or not.

The judgment of the Court below is reversed with costs, and the cause remanded with directions to the Circuit Court to set aside the default.

Judgment reversed.

Note. See the preceding case.

George Highland, plaintiff in error *v.* The People of the State of Illinois, defendants in error.

Error to Cook.

On a trial for larceny, the jury should find the value of the property stolen, otherwise the Court cannot pass sentence upon the prisoner.

Where the verdict of the jury in a trial for larceny, was, "We, the jury, find the defendant guilty, and sentence him to the penitentiary for the term of three years," and a motion was made in arrest of judgment, because the value of the property stolen was not stated in the verdict: *Held* that the defect was fatal, and that the judgment should have been arrested.

Nothing can be taken by implication in a criminal case.

This was an indictment against the plaintiff in error, found by the Grand Jury of Cook county, at the May term, 1837, of the Cook Circuit Court, for *larceny*. The indictment contained two counts. In the first, the defendant below was charged with feloniously stealing among other things, "Twenty dollars in bank bills and silver coin, of the value of twenty dollars," the property of, &c. The second count was not preferred and carried on "*In the name and by the authority of the People of the State of Illinois.*"

The defendant below, before he was arraigned, by his counsel moved the Court to quash the said indictment for the following reasons:

I. Because the allegation in the indictment for taking bank notes, is uncertain in this, to wit:

1. Because it is not alleged whether they were bank bills issued by any corporation, or what corporation, or whether they were notes of individuals, payable at the bank.

2. Because there is no description whatever of any note, bill, or other instrument in writing, &c.

II. The prosecution preferred in the second count of the indictment, was not preferred and carried on "*In the name and by the authority of the People of the State of Illinois.*"

Which motion to quash was overruled by the Court. The defendant below then pleaded not guilty. A jury was called and sworn, and after hearing the evidence, returned the following verdict: "We the jury find the defendant guilty, and sentence him to the penitentiary for the term of three years."

Whereupon the defendant below, by his counsel, moved the Court to arrest the judgment upon the said verdict for the following causes.

I. The indictment is insufficient, for the same reasons stated on the motion to quash.

II. The verdict is insufficient for the following causes:

1. The jury did not find, by their verdict, that the defendant was guilty in manner and form as charged in the indictment.

2. The jury did not find, by their verdict, the amount of property stolen by the defendant.

3. The jury did not find, by their verdict, that the value of the goods stolen amounted to five dollars or more.

4. The verdict is in other respects insufficient, &c.

This motion was overruled by the Court, and sentence was accordingly pronounced, and carried in execution.

The cause was tried at the said May term, before the Hon. John Pearson.

J. D. Caton and Norman B. Judd, for the plaintiff in error, cited State Const. Art. 4, § 7; Crim. Code § 63–65.(1)

Usher F. Linder, Attorney General, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

The prisoner was indicted, tried, and convicted of larceny, at the last May term of the Cook Circuit Court. The indictment contains two counts, and charges the plaintiff in error with stealing various articles of personal property, of different amounts in value, from twelve and a half cents to twenty-five dollars. The jury who tried the prisoner, returned a general verdict in these words: "We, the jury, find the defendant guilty, and sentence him to the penitentiary for the term of three years." On this verdict the Circuit Court rendered judgment, and sentenced the prisoner to three years' imprisonment in the penitentiary at hard labor, except that for one month of this time he was to suffer solitary confinement. During the progress of the cause the counsel for the prisoner moved to quash the indictment, on several grounds, which, however, are not now considered important to be reviewed in the decision of this case, because the motion to arrest the judgment ought to have prevailed for the reasons specified in the third ground assigned in the Court below, and now here re-assigned for error.

That cause is the insufficiency of the verdict in not finding the value of the property charged to have been stolen.

By the 63d section of the "Act relative to Criminal Jurisprudence,"(2) it is declared that "no person convicted of larceny, shall be condemned to the penitentiary, unless the money or the value of the thing stolen, shall amount to five dollars;" and by the 158th section(3) of the same act, it is declared that "The jury who try the case, shall designate in their verdict, the term of time the offender shall be confined; and the Court shall pronounce the sentence, designating the extent of solitary confine-

(1) R. L. 182—3; Gale's Stat. 208.
(2) R. L. 182; Gale's Stat. 208.
(3) R. L. 208; Gale's Stat. 229.

ment, and of hard labour in the penitentiary." From the provision of the 63d section, it became the duty of the jury to designate in their verdict the value of the property stolen by the prisoner, as otherwise, without that finding, it was impossible for the Court to legally determine whether the prisoner was a subject of penitentary punishment. The value of the articles charged to have been stolen, may or may not have been the value alleged, and the proof may not have shown that all were stolen; and as some were of small and others of greater value, the jury might have been satisfied of the guilt of the prisoner, on the proof of any one having been stolen. The guilt might have been confined to one of less value than five dollars, and if so, the sentence could not stand.[a]

The jury in appointing the time, should, also, show enough on the face of their verdict, that they acted, in giving their sentence, within the provisions of the 63d section of the act. This ought to appear affirmatively, and not require inference or implication to sustain it. Nothing can be taken by implication in a criminal case. The clear and absolute ascertainment of facts should alone warrant the character of the punishment pronounced by a court of justice. No possible doubt should be entertained whether the verdict of the jury warranted the judgment to be given. Where inference and intendment are to be resorted to, to supply the defect in the verdict, as to the value, as in the present case, doubts cannot but arise as to the correctness of such inference and intendment of the law.

It is one of the boasted principles by which the character of our criminal jurisprudence is said to be marked, that in all cases of doubt, the criminal shall be entitled to the benefit thereof; and it is not more wise than it is humane. We cannot in this decision have the advantage of precedents, because of the peculiar feature of our code in criminal cases, giving to the jury the power of awarding the time of punishment; but the practice that prevailed in England and in some of the United States, while the distinction existed between grand and petit larceny, the punishment of which differed essentially, is considered analogous. The jury in their finding always designated whether they found the prisoner guilty of grand or petit larceny; and this depended on the value of the articles stolen. For the reasons assigned, we are of opinion that it was an indispensable requisite of the verdict in this case, to authorize the judgment pronounced, that it should have contained the value of the property of which the jury found the prisoner guilty of stealing; and as that does not appear, the Circuit Court erred in not arresting the judgment.

The judgment of the Circuit Court is reversed.

Judgment reversed.

(a) *Post.* 414; Sawyer *vs.* People, 3 Gil. R. 53; Hildreth *vs.* People, 32 Ill. R. 36; Collins *vs.* People, 39 Ill. R. 234.

Valentine S. Anglin, appellant *v.* Royal A. Nott, appellee.

Appeal from Clark.

Where a summons is issued not under the seal of the Court, the Court should, on motion, quash it. It is error to refuse such a motion.

This was an action instituted by the appellee against the appellant, in the Clark Circuit Court. The seal to the summons was omitted by mistake. The summons was returned by the sheriff, with the following endorsement: "Executed October 23d, 1837. J. Stockwell, Shff." The defendant in the Court below moved to quash the summons because it was not under seal. This motion was overruled by the Court, and judgment rendered for the appellee, for want of a plea, for $175 and costs. The appellant excepted to the opinion of the Court overruling his motion, and tendered a bill of exceptions which was signed and sealed by the Court. The cause was heard at the November term, 1837, of the Clark Circuit Court, before the Hon. Justin Harlan.

O. B. Ficklin, for the appellant, cited Ditch *v.* Edwards, *Ante* 127; Breese 3; 3 Chit. Pract. title *Process;* 1 Bac. Abr. title *Abatement;* 13 Johns. 127; 2 Johns. 190; 5 Johns. 166; 5 Monroe 121; 1 Chit. Plead.; R. L. 486–7.(1)

Cooper, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:

The record in this case shows, that upon the first appearance of the defendant, by his counsel, in the Court below, he moved the Court to quash the summons, upon several grounds, one of which was, that the summons was not issued under the seal of the Court. This motion the Court overruled, and the defendant making no further defence, judgment by default was rendered against him.

The statute authorizing a summons to issue in a case like the present is explicit, as to the manner of its authentication. It declares in express terms, that it shall be under the seal of the Court; and as the defendant did not by his appearance or otherwise, dispense with this requisite of the statute, and the defect appearing upon the face of the process, the Court should have sustained the motion and quashed the summons.

The judgment of the Court below, is therefore reversed with costs.

Judgment reversed.

Note. See Hannum *v.* Thompson, *Ante* 238, Easton *et al. v.* Altum, *Ante* 250; Pearce *et al. v.* Swan, *Ante* 266.

(1) Gale's Stat. 529.

NATHAN E. ROBERTS, appellant *v.* SILAS C. GAREN, appellee.

Appeal from Wayne.

A promise by a purchaser of a portion of the public lands of the U. S., made subsequent to his purchase, to pay for improvements made thereon previous thereto, is without consideration and void.

In an action to recover upon a promise to pay for improvements made upon the public lands of the U. S., it is incumbent upon the plaintiff to prove not only the promise of the defendant, but that the improvements which are the consideration of the promise, were at the time the contract was entered into, upon the lands of the government.

Where a witness is sworn in chief he is bound to state all the facts in his knowledge, that are applicable to the case, and that can be proved by parol; and it can make no difference whether such testimony is given in answer to the interrogatories of the party against whom it operates, or not.

O. B. FICKLIN, for the appellant.

WILSON, Chief Justice, delivered the opinion of the Court:

This action was brought upon a promise to pay for an improvement upon Congress land. Upon the trial of the cause, the defendant's counsel moved the Court to instruct the jury, "That if it appeared from the evidence adduced by the plaintiff, that the defendant had entered the land before the promise to pay for said improvement, was proved to have been made, that then they must find for the defendant." This instruction the Court refused, but instructed the jury that if such evidence was given by any witness without being called for by the plaintiff, they must not regard it, otherwise they should.

The refusal of the Court to give the instructions asked for, and also the giving the instructions which it did give, are assigned for error by the defendant. The principle is uncontroverted, that a promise that is not founded upon either a legal or moral obligation, is not binding in law; and in the case of Carson *v.* Clark,(1) this Court decided, that a promise made by a purchaser of government land, to pay for improvements upon such land, was a promise within this rule, and therefore void, where the promise was made after the promisor had acquired title to the land and improvements by purchase from the government. It was incumbent, then, upon the plaintiff in this case, to have proved not only the promise of the defendant, but that the improvements, which were the consideration of the promise, were at the time the contract was entered into, upon the land of the government, and not upon the land of the defendant. If he had failed in making out either of these points, he was not entitled to recover; and any testimony which showed the promise of the

(1) *Ante* 113 and 170.

defendant to have been subsequent to his purchase of the land upon which the improvements were made, was entitled to equal weight, whether adduced by the plaintiff or defendant. If the plaintiff's own testimony show a state of facts which defeats his title to recover, the defendant is entitled to the benefit of it, and is under no obligation to adduce testimony by way of confirmation, and to make assurance doubly sure. The Court erred therefore in refusing the instructions asked for, and also in the instructions which it gave. The distinction drawn by the Court in this instruction, with respect to the different degrees of credit which the jury should give to those statements of the plaintiff's witnesses which were drawn from them by his interrogatories or examination, and such as were voluntarily made, or made upon the cross examination of the defendant, is without any foundation. The circumstance of a witness' being called to support the plaintiff's cause, does not render illegal, or discredit, such portions of his testimony as may make against his cause, whether the facts were brought out by the plaintiff's examination or otherwise. When a witness is sworn in chief, he is bound to state all the facts in his knowledge, that are applicable to the case, and may legally be proved by parol, and neither the Court nor the party calling him, can separate his testimony, and take such part as they may like, and reject the balance.

The judgment of the Circuit Court is reversed with costs; and the cause is remanded with directions that the Court proceed to rehear the case conformably to this opinion.

Judgment reversed.

William Bell, plaintiff in error *v.* The People of the State of Illinois, defendants in error.

Error to the Municipal Court of the City of Chicago.

The criminal jurisdiction of the Municipal Court of the City of Chicago, is confined to the territorial limits of said city.

An indictment purporting to be found by "grand jurors chosen, selected, and sworn in and for the City of Chicago and County of Cook," is bad, and should be quashed on motion.

The "*Act supplemental to An Act to incorporate the City of Chicago*," has no application to criminal proceedings.

The plaintiff in error was indicted and convicted of the crime of *larceny*, at the November term, 1837, of the Municipal Court of the City of Chicago, and sentenced to the penitentiary. The indictment was signed "N. B. Judd, Attorney for the People."

The following bill of exceptions, taken on the trial of the cause in the Court below, shows the points in the case:

"Be it remembered that upon the arraignment of the prisoner in this cause, for trial, and before pleading, the defendant by Butterfield his counsel, moved to quash the indictment in this cause, on the ground that the indictment alleges that the bill was found a "true bill" by a grand jury, chosen, selected, and sworn in and for the city of Chicago and county of Cook, when the jury, in fact, came from the City of Chicago, in said county; which motion was overruled by the Court. To which opinion of the said Court, the said defendant, by his counsel, excepts, and prays that the said bill of exceptions may be signed and sealed by the Court, and make a part of the record herein, which is accordingly done.

And be it further remembered, that the prisoner upon the same occasion, and at the same time, moved to quash the said indictment on the ground that the said indictment was not signed by any officer, in behalf of the State, duly authorized to act and officiate as State's Attorney: And also, that the said indictment was not signed by the State's Attorney of the 7th Judicial Circuit, nor by any officer appointed by the Court to discharge the duties of State's Attorney; but was signed by the City Attorney of said city, duly appointed by the Common Council thereof; whose duty it is made by an Ordinance of said Council, to prosecute for the People, &c., in said Municipal Court; which motion was also overruled.

To which decisions, the said defendant, by his counsel, excepts, and prays the Court to sign and seal this his bill of exceptions, which is accordingly done.

THOMAS FORD, [L. S.]
Judge of the Municipal Court."

JAMES GRANT, for the plaintiff in error, cited Acts of 1837, 77 *et seq.*; R. L. title *Attorney General.*

U. F. LINDER, Attorney General, for the defendants in error.

WILSON, Chief Justice, delivered the opinion of the Court:

The plaintiff in error was convicted in the Municipal Court of the City of Chicago, upon an indictment found by "The grand jurors chosen, selected and sworn in and for the City of Chicago and county of Cook." Upon his arraignment, the prisoner, by his counsel, moved the Court to quash the indictment. The Court overruled this motion, and proceeded to the trial and conviction of the defendant. This opinion of the Court is assigned for error. In deciding this point, it is necessary to look to the act of the legislature incorporating the City of Chicago. By this act the jurisdiction and powers of the Municipal Court of the City were created and defined; and it cannot legally exercise

any which are not thus conferred. The 69th section of the act alluded to, provides "That there shall be established in the said City of Chicago, a Municipal Court, which shall have jurisdiction concurrent with the Circuit Courts of this State, in all matters civil or criminal arising within the limits of said City."(1) The 72d section further provides "That the grand and petit jurors of said Municipal Court, shall be selected from the qualified inhabitants of said City." By these provisions, the territorial limits of the City of Chicago are made the boundaries of the criminal jurisdiction of the Municipal Court; and within those limits the jurors must be selected, and can then only investigate offences committed within the same. The law gives to the Municipal Court concurrent jurisdiction with the Circuit Courts. This jurisdiction is general as to the subject matter, but limited in point of territory. It surely requires no argument to prove that a Circuit Court sitting in one county cannot try and convict a man for an offence committed in another, or that it cannot empanel a grand jury from another county, to enquire into offences committed within the one in which it is sitting. The same rule is applicable to the Municipal Court; and the grand jurors must be selected in and for the City of Chicago alone. The indictment in this case is found by "grand jurors chosen, selected, and sworn in and for the City of Chicago and county of Cook." They are taken as well from the county as the city, if we look, as we must, to the indictment alone, for the evidence of that fact. This is wrong, and the motion to quash the indictment ought to have been sustained. The supplement to the act incorporating the city, has been cited. That act has no application to criminal proceedings.

The judgment of the Court is reversed.

Judgment reversed.

Note. See the case of Beaubien v. Brinkerhoff, 2 Scam.

(1) Acts of 1837, 75.

ARCHIBALD P. WILLIS, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Gallatin.

Certainty, in criminal proceedings, where attainable, will not be dispensed with.

It is well settled that in indictments for offences against the persons or property of individuals, the Christian and sur-names of the parties injured, must be stated, if known. In cases where the owners are unknown, the fact must be so stated.

Willis *v.* The People.

The admission of an affidavit for a continuance, on the ground of the absence of a material witness, in evidence, is an admission of the truth of the facts which the affidavit states can be proved by such witness, and they cannot be contradicted.
The propriety of introducing affidavits in criminal cases, is not sanctioned.

THIS cause was tried at the September term, 1837, of the Gallatin Circuit Court, before the Hon. Walter B. Scates. The defendant in the Court below was convicted of stealing a pair of shoes, of the value of $1,75, and sentenced to pay a fine of $10, and to be confined in the county jail for one month. On the trial the following bill of exceptions was taken:

"Be it remembered that on the calling of this case for trial, the defendant made the following affidavit for continuance, (to wit,) "This defendant makes oath that Absalom Ashley is a material witness for him in this case, by whom he expects and believes he can prove, that if he took said shoes at all, he took them in the way of a joke, and without any intention of stealing them. That said Ashley was believed by him to be one of the owners of said shoes; and he cannot prove the same facts by any other persons that he knows of. That the said Ashley left this country for Kentucky, shortly after the finding of this bill at the last July term, and before this affiant knew the same was found; and he has been advised by his counsel that he could not take his deposition without the consent of the State's Attorney, even if he had known, which he did not, in what county in Kentucky the said witness lived. This affidavit further says that he has only found out since this Court commenced, that the said witness resides in Hopkins county, Ky.; and that he believes he can obtain the deposition of said witness by the next term of this Court, provided the Hon. State's Attorney will consent thereto. This affidavit is not made for delay, further than that thereby to obtain justice.

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ARCHD. ⋈ P. WILLIS.
mark

And moved the Court for a continuance of the case until the next term of this Court. Whereupon the State's Attorney agreed to admit the said affidavit in evidence to the jury and claimed to try the cause at this term. Whereupon after the evidence closed, the defendant's counsel moved the Court for the following instruction, (to wit,) That what was stated in the affidavit should be positively taken as incontrovertible by other evidence. Whereupon the Court instructed the jury that they should give such weight to the affidavit of said defendant, and no more, as if the witness therein named, had been present and sworn to the fact or facts therein stated; and that it was competent for the prosector to prove the facts to be otherwise; and that they might weigh

the evidence as expected by the defendant to be made by his absent witness, and give such weight to it in connection with the other evidence, as they pleased, acting under their oaths as jurymen. Whereupon the jury found the defendant guilty; and thereupon the defendant moved for a new trial, on the ground, among others, that the Court misinstructed the jury as above stated; which motion the Court overruled, and also overruled the motion of said defendant in arrest of judgment, made on the ground assigned that the owners of the goods charged to have been stolen, were not sufficiently described by the initials of their names. To which opinions of the Court in so instructing the jury as aforesaid, and in so overruling the motions for a new trial, and in arrest of judgment, the defendant by his counsel excepts, and prays that this his bill of exceptions to be sealed and allowed. WALTER B. SCATES," [L.S.]

H. EDDY, for the plaintiff in error.

U. F. LINDER, Attorney General, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

At the July term, 1837, of the Gallatin Circuit Court, Willis was indicted for larceny, and at the September term following, tried and convicted. To revise the judgment rendered on the conviction in this case, the present writ of error is prosecuted, and two grounds are assigned and relied on, as causes of reversal.

1. That the Circuit Court should have arrested the judgment, because the owners of the goods charged to have been stolen, are not sufficiently described.

2. That the Court misdirected the jury as to the effect of the affidavit admitted by the prosecution, to be read in evidence on the trial.

As to the first ground, it is well settled, that, in indictments for offences against the persons or property of individuals, the Christian and sur-names of the parties injured, must be stated, if the injured party be known. The name so stated must be either the real name of the party injured, or that by which he is usually known.(1) In cases where the owners are unknown, it must be so stated.

In the present case, the indictment alleges the goods to be the property of T. D. Hawke and E. Dobbins, doing business in the town of Equality, under the style and firm of T. D. Hawke & Co. This was clearly erroneous, and there is no reason whatever to justify the omission to state the Christian names of the owners. It appears that the residence of the owners was known, and the least enquiry would have enabled the prosecution to have obtained and inserted the Christian names at length. Certainty in crimi-

(1) Arch. Crim. Plead. 30, 31, 32; Hawkins C. 25 § 71-2.

nal proceedings, where attainable, will not be dispensed with; and it becomes highly essential to enable a party to plead either a formal acquittal or conviction, in case of a second prosecution for the same offence.

In regard to the second objection, it appears from the bill of exceptions, that an affidavit made for the purpose of continuing the cause to another term, in which the defendant declared he could prove, by an absent witness, certain facts which, if true, disproved his guilt, was agreed by the prosecuting attorney to be admitted as evidence in the cause, and was accordingly read to the jury as such, under a misconception of the statute relating to similar admissions in civil cases. The Court, however, instructed the jury that they might give to the facts stated, such weight as they would give if the witness was present and had stated them himself, and that they might be contradicted. The instructions of the judge on the effect of the facts contained in the affidavit, and its admission to the jury, were most clearly erroneous. The prosecution having admitted the affidavit as evidence, admitted the truth of the statements therein contained: and having done so, was not at liberty to impeach or contradict them.[a] By his voluntary act, and to prevent a continuance of the cause to another term, he precluded himself from the exercise of the right. Such has been the decisions in civil cases, and the rule ought not to be relaxed in a criminal one. It is not, however, meant to recognise the propriety of the introduction of affidavits in criminal cases, though under some peculiar cases they might be introduced by consent, nor to sanction a practice of admitting those of the accused in evidence in any case, whether for the purpose of preventing a continuance of the cause, or for any other object.[a]

The judge should either have continued the cause on the application under the affidavit, or denied it; but having permitted the parties to introduce, by agreement, the deposition, it should have been given to the jury without the right to impeach it; and he should have so instructed the jury.

The defect in the indictment, and the erroneous instructions of the judge require a reversal of the judgment of the Circuit Court of Gallatin county, and it is accordingly ordered.

Judgment reversed.

(*a*) Same in Chancery cases—Supervisors *vs.* M. & W. R. R. Co., 21 Ill. R. 368-369.

MARSHALL KEY, impleaded with ASHER E. MILLER and JOHN E. MILLER, plaintiff in error *v.* JAMES A. COLLINS, administrator of the estate of William H. Witham, deceased, defendant in error.

Error to Morgan.

Original process can be issued to a different county from that in which the action is commenced, in the three following cases only:
1. When the plaintiff resides in the county in which the action is commenced, and the cause of action accrued in such county.
2. Where the contract is made specifically payable in the county in which the action is brought. In this case, no regard is paid to the residence of the plaintiff.
3. Where there are several defendants residing in different counties, and the action is commenced in the county in which some one of the defendants reside.

Where process is issued to a foreign county, the declaration should contain an averment of the facts necessary to authorize the emanation of the writ to such foreign county. An averment that the cause of action accrued in the county where the suit was brought, without averring that the plaintiff resided there at the time of the commencement of the suit, would not be sufficient.

An affidavit of the facts which give the Court jurisdiction, is not necessary to authorize the issuing of process to a foreign county; and if it is made, it does not thereby become a part of the record, or dispense with the averment of those facts in the declaration.(*a*)

J. LAMBORN, L. DAVIS, F. FORMAN, for the plaintiff in error.

MURRAY MCCONNELL, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *debt* commenced in the Circuit Court of Morgan county. The summons was directed to the sheriff of Pike county, and by him returned served on Key, one of the defendants below, the others not found. The declaration is in the usual form, on two promissory notes, stating them to be made at Naples, in the county of Morgan, but it contains no averment that the county of Morgan is the residence of the plaintiff, or that the notes were specifically made payable in that county.

Previous to the issuing of the summons, the attorney for the plaintiff filed an affidavit stating that "The suit is instituted to recover two notes of hand given to Witham, in his life time, and that the said contracts were entered into between the parties in the county of Morgan, and the notes executed there; but that the defendant had since removed to the county of Pike. On the return of the summons, the defendant Key, by his attorney, moved the Circuit Court to dismiss the cause for want of jurisdiction, which motion was overruled, and judgment given for the plaintiff below by default. The point relied on to reverse this judgment, is, that the Circuit Court had no jurisdiction over

(*a*) Overruled—Kenney *ex.* Greer 13 Ill. R. 450, and notes.

the person of the defendant below. This Court decided in the case of Clark *v.* Harkness,(1) "That the Circuit Courts are limited in their jurisdiction to the several counties in which they are erected, unless there be, by some particular law, an express power extending that jurisdiction in specified and enumerated cases." With respect to the emanation of process, and the power to reach defendants who reside out of the particular county in which the Court exists, and to compel their appearance, it is necessary to examine the act of the legislature of 30th December, 1830.(2) By the provisions of this act, which is amendatory to the "*Act concerning Courts of Law.*" passed January 29, 1827, it is enacted, "That so much of the act entitled an act concerning practice in courts of law, as authorizes the directing of original process to the sheriff or coroner of any other county than the one in which the suit is commenced, be, and the same is hereby repealed. And that hereafter it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in cases where the debt contract, or cause of action accrued in the county of the plaintiff, or where the contract may have specifically been made payable; when it shall be lawful to sue in such county, and process may issue against the defendant, to the sheriff of the county where he resides; *Provided*, That where there are several defendants living in different counties, the plaintiff may sue, either in the county where the cause of action arose, or in any county where one or more of said defendents may reside, and shall have like process against such as reside out of the county where the action shall be brought, as above."

This act authorizes original process to be directed to a different county from that in which the action is commenced, in the three following cases only:—1st, The plaintiff may commence an action in the county where he resides, if the cause of action accrued in such county. 2d, It authorizes an action to be commenced in any county where the contract is specifically made payable, without regard to the residence of the plaintiff: And, 3d, Where there are several defendants living in different counties, the plaintiff may commence his action either in the county where the cause of action accrued, and in which he resides, or in any county where one or more of the defendants may reside.

If the plaintiff had a right to direct his summons to Pike county, it must be under that part of the statute which authorizes a defendant to be sued in the county where the plaintiff resides. But under this portion of the statute, two facts must concur. The cause of action must accrue, and the plaintiff must reside, in the same county. The declaration contains no averment as to the residence of the plaintiff, and the affidavit merely states that the

(1) *Ante* 56. (2) R. L. 145; Gale's Stat. 166.

notes were executed in Morgan county, but says nothing as to the residence of the plaintiff. In this respect the affidavit is clearly insufficient and did not authorize the clerk to issue the summons to Pike county.

Had, however, the affidavit been sufficient as to both the residence of the plaintiff and the place where the cause of action accrued, still, according to the decision of the case of Clark *v.* Harkness, a special averment ought to have been made in the declaration, that the plaintiff was at the time the suit was commenced, a resident of Morgan county. The suggestion contained in that case, of the propriety of filing an affidavit, seems only intended as evidence to the clerk, (where the summons issues before the declaration is filed,) that in issuing a summons to another county, there is no attempt to stretch the jurisdiction of the Court, to cases and persons improperly, and thus harass those over whom the Court possesses no jurisdiction. The affidavit in this case is not required by the statute, and is not essential to authorize the issuing of process to a different county than that from which it eminates. It consequently is no part of the record, and its insertion therein does not dispense the averments in the declaration, that the cause of action accrued, and the plaintiff resided, in the same county. For the want of an averment that the plaintiff resided in Morgan county, at the time of the commencement of this suit, the judgment must be reversed with costs.

Judgment reversed.

Note. See Beaubien *v.* Brinckerhoff, and note at the end of that case. 2 Scam. 269.

ALBERT H. GUILD and JAMES T. DURANT, appellants *v.* SETH JOHNSON, appellee.

Appeal from the Municipal Court of the City of Chicago.

Where in an action of debt, a judgment for damages is rendered, the judgment will be reversed; but the error will be corrected in this Court, and such a judgment given as the Court below should have rendered.

THIS was an action of *debt* brought by the appellee against the appellants in the Municipal Court of the City of Chicago. Judgment was rendered for the plaintiff below, *for damages* only, and costs of suit.

J. R. SCAMMON, for the appellants.

G. Spring, for the appellee.

Per Curiam: Let the judgment be reversed, and let judgment be rendered in this Court *in debt* for the amount of the judgment of the Court below. The costs of this Court will be taxed against the appellants; those in the Court below against the appellee.[a]

Judgment reversed, and judgment rendered in this Court.

(a) But see Heyl *vs.* Stapp, 3 Scam. R. 96; Holliday *vs.* People, 5 Gil. R. 217.

Theodorus Davis, Jr., plaintiff in error *v.* Tristram P. Hoxey, defendant in error.

Error to Macoupin.

Where the evidence tends to prove the issue, the jury should be left to determine the cause under the evidence offered. In such a case, the Court has no power to take the cause from them, nor to advise them that the defendant is entitled to their verdict.

A. Cowles and Josiah Fisk, for the plaintiff in error, cited R. L. 475, § 37; (1) Stark. Ev. 440, 470; 1 Bibb 209.

S. T. Logan and E. D. Baker, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:

This was an action of *trespass de bonis asportatis*. The declaration is in the usual form, and the plea, not guilty. On the trial of the cause, the plaintiff offered evidence tending to prove the issue; and it appears by the bill of exceptions, that witnesses established these facts: One witness had seen two hogs which had been killed by the defendant, and supposed them to belong to the plaintiff, but could not say, as the hogs were partially cleaned. By another, that the defendant had offered to give the plaintiff $22 for the killing of said hogs, as he supposed from the circumstances, that the hogs belonged to the plaintiff; and by another witness, it appeard that the defendant haa said he would plead guilty to the action of the plaintiff against him for killing the hogs in question, this was said when the defendant was talking of compromising the suit, and in the absence of the plaintiff. This is the substance of the whole testimony.

On the application of the defendant to instruct the jury as in case of a non-suit, the Court instructed the jury that they should find a verdict for the defendant, to which an exception was regularly taken.

This instruction was manifestly erroneous. The evidence tended to prove the issue, and the jury should have been left to

(1) Gale's Stat. 536.

determine the case under the evidence offered. It might have satisfied them of the commission of the trespass as laid, and the Court had no power to take the case from them, nor to advise them that the defendant was entitled to their verdict. The facts of the case are too obvious to admit of a doubt that the jury should have passed on the evidence; and the instructions were clearly wrong.[a]

The judgment of the Circuit Court is reversed with costs, and a *venire facias de novo* will be awarded by the Circuit Court.

Judgment reversed.

(*a*) Tefft *vs.* Ashbaugh, 13 Ill. R. 602, and notes.

Ralph Atkinson, appellant *v.* Lewis Lester, John Lester, and Marshall Lester, appellees.

Appeal from Cook.

To constitute a forcible entry and detainer under the statute of this State, it is not necessary that actual force and physical violence should be used.

The statute in relation to forcible entry and detainer provides for three cases:

1. A wrongful or illegal entry, as contradistinguished from a forcible and violent one
2. A forcible entry committed with actual force and violence.
3. A wrongful holding over by a tenant.(*a*)

In an action for forcible entry and detainer, the description of the premises in the affidavit was as follows: "The premises enclosed by us, situate in the County of Cook, and State of Illinois, being the same on which you now reside, containing about one hundred acres, more or less, and commonly called North Grove:" *Held* that the description was sufficient.(*b*)

A Court is not bound to instruct the jury upon mere abstract propositions of law, which do not refer in any way to the evidence in the case.

This cause was tried at the May term, 1837, of the Cook Circuit Court, before the Hon. John Pearson. Judgment and verdict were rendered for the appellees.

On the trial the following bill of exceptions was taken:

"This was an action of *forcible entry and detainer*, based on the following affidavit:

'State of Illinois, } ss.
Cook County, }

Lewis Lester makes complaint to the undersigned, two of the justices of the peace in and for the county aforesaid, on oath, and says that he, the said Lewis Lester, Marshall Lester, and John Lester, of the county aforesaid, are justly and lawfully entitled to the possession of the premises mentioned and described in the notice hereto annexed, situate in the county of Cook aforesaid; that said Lewis, Marshall, and John were heretofore, to wit:

(*a*) Whitaker *vs.* Gautier, 3 Gil. R. 443. (*b*) Fitch *vs.* Pinckard, 4 Scam. R. 83, and note.

on the first day of May last, in the lawful and peaceable possession of said premises, and the said Ralph Atkinson, afterwards, to wit, on the said first day of May, wilfully and forcibly entered into the possession thereof, and forcibly detained, and still detains the possession of said premises, from the said Lewis, Marshall, and John, unlawfully, without right, contrary to the statute in such case made and provided; although the said Marshall, Lewis, and John, have caused a demand of the possession of said premises, to be made in writing, on the said Ralph Atkinson: Wherefore they pray process against said Ralph, to answer said forcible entry and detainer.

LEWIS LESTER.

Subscribed and sworn to before the undersigned justices, this 17th day of August, A. D. 1836.

EDWARD E. HUNTER, J. P.
SIDNEY ABELL, J. P.'

Copy of the notice alluded to in said affidavit.

' To Mr. Ralph Atkinson.

Sir:—We hereby demand immediate possession of the premises enclosed by us, situate in the county of Cook, and State of Illinois, being the same on which you now reside, containing about one hundred acres of land, more or less, and commonly called North Grove: Mr. Edgar Wait, our agent, is authorized to receive the possession of said premises from you for us.

Yours, &c., LEWIS LESTER & Co.

August 10th, 1836."

The Court, on the trial of the cause, gave to the jury the following, among other instructions:

' This is an action under our statute, and is not governed in all respects by the laws quoted of other countries and States, relating to actions of the same character in name. The Court takes a distinction between this law of ours and the ' English law.'

' If you, the jury, shall believe from the evidence, that the defendant entered wrongfully, and without lawful right, and then kept the plaintiffs out from regaining possession, it is sufficient to sustain this action; and it is not necessary to prove actual force and physical violence to sustain the action.' To which several opinions of the Court the defendant then and there excepted, and prayed the Court to sign and seal his bill of exceptions.

The defendant also moved the Court to instruct the jury, as follows, among others, to wit;

6. That a mere trespass, without other acts of force and violence, is not such force and violence as will constitute a forcible entry and detainer.

9. That to constitute a forcible entry, the party must enter with strong hand, or force and violence.

Which sixth in the precise language stated, and ninth instructions of the defendant, the Court refused to give; but the Court did instruct the jury, that if they believed from the evidence, the defendant first entered on the land in possession of the plaintiffs unlawfully, and took possession and kept the plaintiffs afterwards out of the possession, he was a trespasser, and the law was for the plaintiffs; and that actual force and positive violence, spoken of in the English authorities quoted, was not necessary to sustain this action under our statute. To which opinion of the Court, the refusal of the Court to give the 6th and 9th instructions, the defendant by his counsel excepted; and prayed the Court to sign and seal this his bill of exceptions, which is done in open Court.

JOHN PEARSON. [L.S.]"

JAMES GRANT, for the appellant, cited 3 Burrow 1731; 1 Russell on Crimes, 283, 287; 1 Yates 501; Breese 35.

T. Ford, for the appellees.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *forcible entry and detainer*, prosecuted before two justices of the peace, and removed by appeal, to the Circuit Court of Cook county, and by appeal from that Court to this. The following points are made and relied on as grounds of error by the appellant:

1. That the affidavit and notice do not contain a sufficient description of the premises.

2. That the Circuit Court in refusing to instruct the jury, "That a mere trespass without other act of force and violence, is not such force and violence as will constitute a forcible entry and detainer; and that to constitute a forcible entry, the party must enter with strong hand or force and violence;" and also, in instructing the jury, "That, if they should believe, from the evidence, that the defendant entered wrongfully and without lawful right, and then kept the plaintiffs out from regaining possession, it is sufficient to sustain this action; and it is not necessary to prove actual force and physical violence to sustain this action."

The description in the affidavit and notice is, "of the premises enclosed by us, situated in the county of Cook, and State of Illinois, being the same on which you now reside, containing about one hundred acres of land, more or less, and commonly called North Grove." This description, although general, is sufficiently certain for the purposes of this action.

In considering the second point, it may be remarked, that the

instructions asked are mere abstract propositions of law, and do not in any way refer to the evidence in the cause, though they may be referrible to a case of forcible entry and detainer, and might have been, as mere abstract questions, refused to be given by the Court; but they were properly refused, and the instructions given were correct.[a]

The act of the legislature of this State in regard to forcible entry and detainer, is peculiar in its phraseology, and evidently provides a remedy for three classes of cases under the law.

The first section declares, that "If any person shall make entry into lands, tenements, or other possessions, except where entry is given by law, or shall make any such entry by force; or if any person shall wilfully, and without force, hold over any lands, tenements, or other possessions, after the determination of the time for which such lands, tenements, or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible entry and detainer, or of a forcible detainer, as the case may be, within the intent and meaning of this act."(1)

From this section it will be perceived that there is, First, a wrongful or illegal entry, as contradistinguished from a forcible or violent one; Secondly, a forcible one by means of actual violence; and, Thirdly, that of a wrongful holding over of a tenant.

This case may then be arranged to the first class contemplated by the statute; and the instructions of the Court were directly applicable to it, and properly given.

The judgment is affirmed with costs.

Judgment affirmed.

(*a*) Hessing *vs.* McCloskey, 37 Ill. R. 342. (1) R. L. 311; Gale's Stat. 313.

A. H. D. Butts, appellant *v.* Joseph Huntley, appellee.

Appeal from Adams.

The law is well settled, that where there is a written contract to perform a particular piece of work and the workman performs a part of the work, and is prevented from finishing it by the other party, that he may treat the contract as rescinded, and recover the value of his labour in an action of assumpsit.(*a*)

A justice of the peace has jurisdiction in such case.

This cause was tried at the September term, 1836, of the Adams Circuit Court, before the Hon. Richard M. Young. Judgment was rendered for the appellee for $64,62 and costs.

(*a*) Shelby *vs.* Hutchinson, 4 Gil. R. 329; Brigham *vs.* Hawley, 17 Ill. R. 38; Carney *vs.* Newbery, 24 Ill. R. 203; Doggett *vs.* Brown, 28 Ill. R. 493.

On the trial in the Court below, the following bill of exceptions was taken:

"Be it remembered that on the trial of the above cause, the plaintiff called Huntley, as a witness, who, after being duly sworn, stated that sometime in March, 1836, the plaintiff was employed as a millwright by the defendant, to build for the defendant a saw mill—that the plaintiff employed one other hand and witness to assist him, and that the three worked upon the timbers of the defendant's mill, about twelve days, and in this time performed nearly all the work that could be performed upon the timbers until the mill irons were furnished. The timbers were not entirely finished, but the principal part of the work had been done upon them; and they might be regarded as in a state of readiness for the mill irons, and for being placed in the mill when that should be raised. Plaintiff then remained at defendant's, till the time at which the mill was to have been completed, and the defendant not having furnished the irons for the mill, the plaintiff and the hands he had to assist him, left the defendant's employment, and never returned to complete the work. The witness further stated, that all the work which was done by the plaintiff for the defendant, was done under and by virtue of a written agreement between plaintiff and defendant. They at one time had to quit work for want of some of the necessary irons. They went home and remained a week, and returned to defendant's to proceed with the work, but defendant had not yet procured all the necessary irons, and after waiting several days at defendant's, they left there on the 21st day of April, 1836, and did not again return. The defendant had not yet had his mill-dam built, nor had he furnished any head of water with which to run the saw. They had done all that they could conveniently do, for want of materials to be furnished by defendant, and in doing what they did, they had worked to a disadvantage for want of said materials. About two-thirds of said work was done, and plaintiff could have finished it in the time stipulated, if he had not been prevented by default of defendant.

Greenhill Tucker was then called, and being sworn, stated that he had been employed by the plaintiff to assist him in doing the wood work of a saw mill for the defendant, and that he worked with the plaintiff on the timbers of said mill, about twelve days; that in that time they had done nearly all the work that could be done upon the timbers, till the irons were furnished, and they might be considered as prepared for the reception of the irons. Plaintiff remained at defendant's until the day on which the mill was to have been completed; and as the irons for the mill were not furnished, the plaintiff left, and did not afterwards return to

finish the work. The witness further stated, that all the work which was done on and about the mill of the defendant, by the plaintiff, was performed under and by virtue of an agreement in writing entered into between the plaintiff and defendant.

The plaintiff then produced the written agreement spoken of by the witnesses, and gave the same in evidence, which said agreement is in the words and figures following, to wit:

'Article of agreement made and concluded this 18th day of March, in the year of our Lord 1836, between A. H. D. Butts of Adams county, and State of Illinois, of the one part, and Joseph Huntley, of Schuyler county, and State aforesaid, of the other part, WITNESSETH, That the said Joseph Huntley agrees to do all the millwright work to a saw mill for A. H. D. Butts, and warrant the said mill to cut three thousand feet of good merchantable lumber, one inch thick, of white oak, black walnut, white walnut, and hackberry, equally divided, in twenty-four hours, for the sum of one hundred and seventy-five dollars; and all the said mill cuts over the said three thousand feet, in the said twenty-four hours, the said A. H. D. Butts is to pay the said Huntley ten dollars per hundred for all over,—and the said Butts is to furnish a six feet head of water, and to board the said Huntley, and do all the drawing of the mill timber, and the said Huntley is to use two, and not exceed two and a half feet from the bottom of the wheel to the head of water. The said parties both agree to be ready by the 21st day of April, for the said mill to go into operation. The said Huntley is to do his work good and substantially, and in a workmanlike manner; and the said Butts agrees that the time of filing is not to be included in the twenty-four hours.

In witness our hands and seals the above date.

A, H. D. BUTTS. [L. S.]

his

JOSEPH ⋈ HUNTLEY. [L. S.]

Witness, mark.

B. G. H. TUCKER.'

This being all the evidence offered on the part of the plaintiff, the defendant, by his counsel, moved the Court to instruct the jury to find for the defendant as in case of nonsuit; but the Court overruled the motion, and refused to give the instruction asked to which opinion of the Court, in overruling said motion, and refusing to give said instruction, the defendant by his counsel excepts, and prays the Court to sign and seal this his bill of exceptions. Exceptions allowed."

O. H. BROWNING and T. FORD, for the appellant, contended, that as the terms of the agreement were not performed, covenant, and not assumpsit, was the proper action, and that the justice of

the peace had no jurisdiction. 1 Selw. N. P. 64 and note; 2 Starkie, new ed. 55 *et seq.*

A. Williams, L. Davis, and F. Forman, for the appellee, relied on the following authorities:

12 Johns. 275; 15 Johns. 224; 13 Johns. 53; 7 Johns 132 and cases there cited; 10 Johns. 36; 5 Johns. 87; Wendell's Dig. 44; 2 Stark. Ev. 70 and cases there cited; Chit. Cont. 87; 2 Com. Cont. 84 and 85; 1 Chit. Plead. 118 note 1, as to valid contracts.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *asusmpsit* commenced originally before a justice of the peace, by Huntley against Butts, for work and labor. On the trial of the cause in the Circuit Court, it appeared from the testimony, that the parties entered into a written agreement under seal, that Huntley should do the millwright work to a saw-mill by the 21st of April, 1836, and that Butts should furnish the materials. It was further proved that Huntley and two hands worked at the mill for twelve days each, and would have completed the mill by the day stipulated, but that Butts did not furnish the mill irons and other materials, and so prevented Huntley from finishing the mill. The action was brought to recover the value of the work done. After the testimony of the plaintiff below was concluded, the defendant moved the Court to instruct the jury to find for the defendant as in case of nonsuit; which instructions the Court below refused to give. This refusal of the Court is assigned for error. It was contended, on the argument, that as some work was done under the written contract, that covenant, and not assumpsit, was the proper form of action. This position would have been correct had Huntley sought to recover the full sum stipulated to be paid upon the completion of the mill; but by bringing an action of assumpsit, the plaintiff could only recover the value of the work done. The law is well settled, that where a written contract exists to perform a particular piece of work, and the workman performs part, and is prevented from finishing it by the other party, he may treat the contract as rescinded, and recover the value of his labor. The Circuit Court, consequently, decided correctly in overruling the motion to instruct the jury as in case of nonsuit.

The judgment is affirmed with costs.

Judgment affirmed.

WILLIAM LAWRENCE and JOHN DONOVON, plaintiffs in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Cook.

The Circuit Court may set aside a defective verdict, and award a *venire de novo*, in a criminal case, where the facts found are so defective that no judgment can be rendered upon such verdict.

THIS was an indictment for *larceny* against the defendants below, who appeared and pleaded not guilty, to the indictment, and went to trial. The jury returned the following verdict:

"Guilty of feloniously stealing, taking, and carrying away one blue coat of the value of ten dollars, of the personal goods and chattels of one John Holbrook, one cap of the value of two dollars, of the personal goods and chattels of one John Holbrook, and seven pairs of pants, of the value of thirty-five dollars, of the goods of one John Holbrook, in manner and form as charged in the indictment. Not guilty as otherwise charged in the indictment."

The defendants moved the Court for a new trial, but after argument had, and before any decision, the motion was withdrawn, and a motion made in arrest of judgment. The Court overruled said motion, and ordered the verdict to be set aside, and a *venire facias de novo* to be awarded. A new trial was then had, a verdict of guilty rendered by the jury, and the ages of the defendants found to be under eighteen years. The defendants again moved the Court in arrest of judgment, which motion was overruled, and the Court pronounced judgment upon the last verdict.

The cause was tried at the May term, 1836, of the Cook Circuit Court, before the Hon. Thomas Ford.

WILLIAM STUART, for the plaintiffs in error, contended,—

That as the first verdict—inasmuch as it did not find the age of the defendants to be under eighteen years, by reason whereof no judgment could be nor was pronounced—was insufficient and defective, the first motion in arrest of judgment should have been sustained by the Court.

That the Court erred in granting a new trial—for no new trial can be granted in cases of felony or treason, and cited:

R. L. Crim. Code, § 158; 2 Black. Com. 167; 6 Term R. 638; 13 East. 416, cited by Chitty in 1 Crim. Law 657; Const. of Ills. Art. 8, § 11.

JAMES GRANT, State's Attorney, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

The only question presented in this case, is, on the power of the Circuit Court to set aside a defective verdict, on which no judgment could be rendered, and to award a *venire de novo*. The right to exercise this power cannot be questioned. It has been exercised and practised on in numerous criminal cases, and is undoubted. If the verdict does not sufficiently ascertain the facts of the case, the Court may award a *venire facias de novo*; also where the facts are found so defectively, that no judgment can be given.(1)[a]

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

(1) Stark. Crim. Plead. 391—395; Hazell's case, Leach 406; Cro. Eliz. 112,150; 1 Salkeld 47, 53; People v. Olcutt, 2 Johns.; Ld. Raym. 1521.

(a) Huggins vs. People, 39 Ill. R. 241.

Hiram Pearsons, appellant *v.* Richard J. Hamilton, Commissioner of School Lands for Cook county, appellee.

Appeal from Cook.

The statute regulating the amount of interest which a borrower of the school fund shall be subject to pay, as a penalty for not paying the principal and interest punctually, when due, does not authorize a judgment for interest *in futuro*, and it cannot be rendered at common law.

Where, upon the reversal in part of the judgment of the Court below, final judgment can be rendered in this Court, the cause will not be remanded.

Semble, That in an action by *scire facias* to foreclose a mortgage to the School Fund, the jury may assess a penalty of twenty per cent. upon the amount of principle and interest, after the mortgage became due, although there is no averment of the penalty in the scire facias.

This was a suit by *scire facias* to forclose a mortgage executed by the appellant to the appellee, for money borrowed of the School Fund of Cook county.

The *scire facias* contained no averment in relation to the rate of interest due on the note secured by the mortgage.

The cause was tried at the May term, 1837, of the Cook Circuit Court, before the Hon. John Pearson and a jury. The jury returned the following verdict:

"We, the jury, find for the plaintiff, the sum of four thousand eight hundred dollars, his debt in the said mortgage mentioned, and four hundred and eighty dollars, damages for the detention of the same for twelve months at ten per cent., and ten hundred and sixty-four dollars and seventy cents the penalty at twenty per cent, for twelve months and three days detention of the same,

making together the debts and damages the sum of six thousand three hundred and forty-four dollars and seventy cents."

Judgment was rendered upon this verdict, that the plaintiff have and recover of the defendant his debt and damages aforesaid, "with twenty per centum interest per annum thereon, until paid."

On the trial in the Court below, the following bill of exceptions was taken:

"Be it remembered that on the trial of the above entitled cause, the said defendant by his counsel moved the Court to instruct the jury, that the plaintiff is entitled to recover no more than ten per cent. interest, per annum, on the amount of the note and mortgage given in evidence, and the principal, the note and mortgage given in evidence specifying ten per cent. interest only. And also to instruct the jury, that the plaintiff can only recover the amount of principal and interest alleged in the pleadings, and not twenty per cent. penalty or interest on principal and interest—which said instructions the Court refused to give, and instructed the jury that if they believed from the evidence, that the defendant executed the mortgage and note given in evidence, and failed to pay the same when it became due, that the amount of principal and interest became principal from the time the mortgage became due and payable, and the jury had a right to assess a penalty on principal and interest then being principal, at the rate of twenty per cent. from the time said note and mortgage became due, on said principal. To which instruction, and to the refusal to give the instructions above prayed for, the defendant by his counsel on the trial of said cause excepted, and prayed the Court for leave to file this his bill of exceptions, which is done in open Court.

JOHN PEARSON. [L. S.]"

The errors assigned are,

"1. The said Circuit Court erred in ordering said judgment to bear twenty per cent. interest *in futuro*.

2. The Court erred in instructing the jury that the amount of principal and interest on the mortgage, became principal after it became due, and that they might assess a penalty of twenty per cent. thereon."

T. FORD, for the appellant.

J. YOUNG SCAMMON, for the appellee, cited R. L. 486, § 43;(1) R. L. 376, § 18;(2) Acts of 1825, 27 § 2; as to *Averment*, Prince *v.* Lamb, Breese 299.

SMITH, Justice, delivered the opinion of the Court:

(1) Gale's Stat. 529. (2) Gale's Stat. 393.

The question presented for the consideration of the Court in this case, is, whether, in an action by a commissioner of the school fund, on a mortgage given by the borrower of a portion of the fund, judgment can be rendered for prospective interests on the amount for which the judgment is rendered. The statute regulating the amount of interest which the party who borrows that fund shall be subject to pay, as a penalty for not paying the principal, sum and interest punctually, when they become due, does not authorise a judgment for interest prospectively; and it cannot be rendered at common law. The original contract is merged in the judgment; and although, by law, six per centum is allowed for interest on such judgment, this is to be collected under the execution on such judgment, by a special provision of law.

So much of the judgment as gives interest on the amount of the judgment at the rate of "*twenty per cent, until paid,*" being clearly erroneous, is reversed, and judgment entered in this Court for the amount of $6,344,70, being the sum for which judgment ought to have been rendered in the Circuit Court. The appellee to recover his costs in that Court.[a]

But as it is competent for this Court to render such judgment as the Court below ought to have rendered, it is therefore considered and ordered, that the said Richard J. Hamilton, Commissioner of School Lands, recover against the said Hiram Pearson, the sum of six thousand three hunndred and forty-four dollars and seventy cents, and that he have execution thereof, &c.

Judgment reversed in part, and final judgment rendered in this Court.

Note. See case of Hamilton *v.* Wright *et al.* decided December term, 1839. *Post.* 582

(*a*) Peck *vs.* Stephens. 5 Gil. R. 127; Constant *vs.* Matteson, 22 Ill. R. 561; Boyle *vs.* Carter, 24 Ill. R. 51.

Mathew Stacy administrator of Samuel Hitt, deceased, appellant *v.* Robert E. Baker, appellee.

Appeal from Morgan.

Where there is a general demurrer to several pleas, if any one of the pleas be good, the demurrer must be overruled.

No principle is better settled, than that the laws of the country where the contract is made shall govern its construction, and determine its validity.(*a*)

Where a note was made, in Kentucky, the laws of which State allow the same defence to be made against a note in the hands of an assignee, whether assigned before or after it becomes due, that may be made against the original holder or payee, and suit was brought upon said note, in Illinois, against the administrator of the maker, who had removed to this State: *Held* that the laws of Kentucky at the time of the making and assignment of the note, should be the rule of decision, and the defendant might avail himself of any defence that he could have availed himself of, if the suit had been prosecuted in Kentucky.

(*a*) *Ante* 35.

Stacy *v.* Baker.

The existing laws of a State, at the time of the making and assignment of a promissory note, form a portion of the contract, and the liability of the maker should be determined under them.

The admission of an assignor of a promissory note, as a witness, to prove the time of assignment, is contrary to the rules of evidence.

THE appellee instituted a suit in the Morgan Circuit Court against the appellant, by *petition and summons;* on the following notes:

"On or before the first day of September, eighteen hundred and thirty-four, we promise to pay William Miller, Jr., three hundred dollars, in silver, for value rec'd this 13th day of Oct. 1826.

SAMUEL HITT,
IRA HITT.

Attest, H. PARKER."

On which is the following assignment:

"I assign the within note, for value received, to Robert E. Baker, this 14th day of October, 1828.

WILLIAM MILLER, Jr."

"On or before the first day of September, eighteen hundred and thirty-five, we promise to pay William Miller, Jr., three hundred dollars, in silver, for value rec'd this 13th day of Oct. 1826.

SAMUEL HITT,
IRA HITT.

Attest, HENRY PARKER."

On which is the following assignment:

"I assign the within note, for value received, to Robert E. Baker, this 14th day of October, 1828.

WM. MILLER, Jr."

The defendant pleaded five pleas, to wit, 1. That he did not detain the debt; 5. Payment by his intestate; and the three following special pleas:

2. "And for further plea herein, he says, *actio. non*, because he says that the notes sued on were executed in Kentucky State, in part consideration of the sale of a tract of land and mill thereon situated, in the State of Kentucky, in Bourbon county, sold by William Miller, Jr., to the defendant;—that at the time of the sale and execution of said notes, William Miller, Sen., who had sold said property to said William Miller, Jr., had a lien on said property, as vendor, for the price equal to the value of said property, and that since the execution of said notes, the representative of said William Miller, has, by a decree of the Scott Circuit Court, having acquired jurisdiction by a change of venue from the Bourbon Circuit Court, both Courts of competent jurisdiction, enforced said lien on said mill and property, by a decree *in rem*, and that said property will not more than satisfy said lien:

and the defendant avers that said William Miller, Jr., is not solvent, so that any part of said lien could be collected out of his estate; and so the defendant says that the consideration of said notes has failed, and that by the laws of Kentucky the same defence is permitted against assignee as against obligee of said notes, and this he is ready to verify, &c. Wherefore he prays judgment, &c.

BROWN & WALKER, pd."

3. "And for further plea in this case, the defendant says *actio. non*, because he says the notes sued on were executed in the State of Kentucky, in part consideration of the sale of a tract of land and mill, situate in the county of Bourbon and State aforesaid. He also avers that William Miller, Jr., at the time of the sale of said property, was indebted to William Miller, Sen., for the purchase money thereof, he having bought the same of William Miller, Sen., and that said William, Sen., held a lien upon said property for said purchase money. He avers further, that a decree has been rendered in the Circuit Court of Scott county, Kentucky, a Court of competent jurisdiction, and which obtained jurisdiction by a change of venue from the Circuit Court of Bourbon county, and State aforesaid, also a Court of competent jurisdiction, enforcing said lien by a decree *in rem*, and that said property is not more than sufficient to satisfy said lien. Wherefore the defendant says that the consideration for which said notes were executed, has wholly failed, and this he is ready to verify. Wherefore he prays judgment, &c.

BROWN & WALKER, Attorneys pd."

4. "And the defendant for further plea, says *actio. non*, because, he says, that the notes sued on were executed in the State of Kentucky, in Bourbon county; that by the laws of Kentucky, in force at the time said notes were executed, it was permitted a defendant to plead, as a valid defence to any action on such notes, that they were executed without any consideration, as well when the notes were assigned before, as after, they became due—that said law of Kentucky is still in force, and that said notes were assigned in the State of Kentucky. And the defendant avers that the notes sued on were executed without any consideration whatever, and this he is ready to verify, &c. Wherefore he prays judgment, &c.

BROWN, W. & H. pd."

To the 2d, 3d, and 4th pleas, the plaintiff demurred, and the demurrer was sustained by the Court. Issue was taken on the 1st and 5th pleas, and a trial had. On the trial, the following bill of exceptions was taken:

"Be it remembered, that on the trial of this cause, the plain-

tiff called a witness by the name of William Miller, Jr., who on examination by defendant's counsel, (he having been sworn,) stated that he was the assignor of the notes sued on, and in case the action was decided in favor of defendant, he was bound, as assignor, to pay the plaintiff the amount of the notes sued on, To his competency the defendant, by his counsel, objected; but the Court overruled the objection, and permitted the witness to give evidence to prove the assignment of the notes; but in relation to no other fact, in behalf of plaintiff, to which opinion and decision of the Court, the defendant by his attorney, excepts, and prays that this his bill of exceptions may be signed, sealed, and enrolled, which is done accordingly.

S. T. Logan. [L.S.]

Judgment was rendered for the plaintiff in the Court below, for $600 debt, and $49,80 damages, and costs of suit; from which the defendant appealed to this Court.

The appellant relied upon the following points:

"1. That Miller was an incompetent witness, because of his actual interest as assignor of the notes sued on.

2. That he was an incompetent witness, because of his supposed interest.

3. That the *lex loci contractus* is always to be considered in ascertaining the essence, extent, and obligation of a contract, and that parties contract in reference thereto.

4. That the legal obligation of a contract consists in the existing remedies to enforce it.

5. That the sale of the mill and the execution of the notes was but one contract, and that it would be stripping the appellant of his legal remedies, to take away the defence set up in his pleas, and consequently so far as he is concerned, destroying the obligation of the contract. If the money was paid, it would deprive him of assumpsit to recover it. If notes given, of a bill in Chancery to have them cancelled.

6. That a removal from Kentucky to Illinois, should not be held to vary the extent of the contract, and hence the 2d, 3d, and 4th pleas are good.

7. An argument drawn from inconvenience, is strong in law, against the application of the statute of Illinois, in relation to the assignment of promissory notes, to cases like the present. The statute does not suit the condition of our agricultural people—it works great hardships, when the honest man, who, had he remained in Kentucky, would have been solvent, has by a removal to Illinois, so far changed the nature of his contracts, that without any consent on his part, or any new consideration to him accruing, his whole estate is swept from him by an enforcement of contracts, which had he not possessed sufficient enterprise to

emigrate to Illinois, could never have been enforced against him in Kentucky; because, there, after the failure of the consideration, they had neither moral nor legal obligation. *Argumentum ab inconvenienti est fortissimum in lege.*"

Authorities cited for the appellant:

To 1st point. Barnes *v.* Ball, Mass. 73; Rice *v.* Stevens, 3 do. 225; note to Am. ed. N. Peake 212; Sturnits *et al. v.* Carey, 1 Dall. 270; note to Am. ed. N. Peake. 214; Esp. N. P. 705; Brown *v.* Vance's Ex'rs. 4, Non. 418; Jackson *v.* Hallenback, 2 Johns. 394; Swift *v.* Dean 6 do. 525; Mumf. 600; Herbert *et al. v.*, Herbert, Breese 281; Am. ed. N. Peake 215.

To 2d point. Sentney *v.* Overton, 4 Bibb. 445; 2 J. J. Marshall 391, Freeman *v.* Tuckett; 2 Bac. Abr., Am. ed. and authorities there cited, 592; Richardson's Ex'r. *v.* Hunt, 2 Mumf. 148; Trustees of Lansingburg *v.* Willard, 3 Johns. 428; Plumb *v.* Whiting, 4 Mass. 518.

To 3d point. Pearsall *v.* Dwight *et al.* 2 Mass. 84; Powers *v.* Lynch, Term R. 77; Humphrey *v.* Collier, Breese 231; Kissam *v.* Burrell, Kirby 326; Amer. Dig. title *Lex Loci*, 238; 2 Kent. 364; Lewis *v.* Breckenridge, 1 Blackf. 221.

To 4th point. Blair *v.* Williams, 4 Littell 34; Lapsley *v.* Brashears, 4 Littell 47; 3 Blac. Com. 23; 1 Blac. Abr. title *Actions in General*—letter B.

To 5th Point. 2 Blackf. 365; 2 Bibb.; Story on Conflict of Laws 503—501; 1 Black. 221.

To 6th point. 2 Blackf. 316, 365; Chit. Cont. 21; Latest Am. ed Chitty on Bills 86.

Cyrus Walker and William Brown, for the appellant.

William Thomas, for the appellee, cited Baker *v.* Hitt's Admr's, 8 Peters; Bank U. S. *v.* Donally, 8 Peters 368.

Smith, Justice, delivered the opinion of the Court:(1)

The sustaining the demurrer to the pleas of the defendant, and admitting the assignor of the notes as a witness, are now assigned for error.

On the first point, as the demurrer was a general one to the pleas of the defendant, if either of them are good, it follows that the judgment on the demurrer was erroneous. Whatever may be the opinion of the Court on the second and third pleas, they can entertain no doubt of the validity of the fourth. It alleges an entire want of consideration for the notes, and avers that they were made and assigned in Kentucky, and further avers what the laws of Kentucky were at the time of making and assigning of

(1) The facts having been already given, the statement of the case in the opinion of the Court, is omitted.

the notes, in regard to the defence set up under this plea. This Court has determined in the case of Bradshaw *v.* Newman, "That no principle is better settled, than that the laws of the country where the contract is made, shall govern its construction and determine its validity;"(1) and this decision is but in accordance with the acknowledged rule of decision of the courts in the United States.

We are equally well satisfied that the fourth plea, setting up a defence under the laws of Kentucky, which was clearly available there, should be permitted in our courts; and that a change of the residence of the defendant has not changed his rights, or those of his representative, under a contract made under and with reference to those laws. The existing laws of Kentucky, at the time of making and assigning the notes, form a portion of the contract when made, and the liability of the maker should be determined under them.[a] To this both parties assented in making and receivning the notes.

The admission of the assignor, as a witness, was contrary to the rules of evidence, and we cannot see how he could be sworn to testify to a single fact, and not be an admissible witness for any other which could be legal evidence in the cause. His interest is apparent; and he seems to have admitted the conclusion of law as to his liability himself.[b]

The Court having decided the demurrer erroneously as to the fourth plea, and improperly admitted the assignor as a witness, the judgment is reversed, the cause remanded with instructions to issue a *venire de novo*, and proceed in the cause.

Judgment reversed.

Note. See Bayley on Bills 586—590, notes.

The endorser of a note is a competent witness to prove whether he endorsed the note previous or subsequently to its becoming due. Baker *v.* Arnold, 1 Caines 258; Baird *v.* Cochran, 4 Serg. & Rawle 397; Smith *v.* Lovett, 11 Pick. 417.

In an action by the endorsee against the acceptor of a bill, the drawer or endorser is a competent witness, *for the plaintiff*, to prove his own endorsement. Byles on Bills 237.

Note. See 4 Cowen 510, which contains a very able note by the Reporter, upon the subject of the *lex loci*, and the *lex fori*.

In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was endorsed. The endorsement is a new and substantive contract. Slacum *v.* Pomery, 6 Cranch 221; 2 Peters' Cond. R. 351.

It is a well settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. M'Cluny *v.* Silliman, 2 Peters 270.

The general rule of law is well settled, that the law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract; unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed. Cox *et al. v.* The United States, 6 Peters 172.

The general principle adopted by civilized nations, is, that the nature, validity, and

(1) Breese 94.

(*a*) Coon *vs.* Nock, 27 Ill. R. 235. (*b*) Bond *vs.* Bragg, 17 Ill. R. 69.

interpretation 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; or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky on an unsealed contract made in that State, therefore a like action will lie in another State, where covenant can be brought only on a contract under seal. Bank of the United States *v.* Donally, 8 Peters 361.

The law of the country where a contract is made, is the law of the contract, wherever performance is demanded; and the same law which creates the change, will be regarded, if it operate a discharge of the contract. Green *v.* Sarmiento, Peters' C. C. R. 74.

The laws of a foreign country where a contract is made, will be regarded by foreign tribunals as to the obligations of the contract, and its discharge; but as to the mere forms of proceeding, the laws of the country to whose tribunals appeal is made, must govern. Webster *v.* Massey, 2 Wash. C. C. R. 157.

James B. Campbell and Richard J. Hamilton, impleaded with John Tillson, Jr., plaintiffs in error *v.* The President, Directors and Company of the State Bank of Illinois, defendants in error.

Error to Fayette.

Where a supersedeas bond purported to be executed by a person as attorney in fact, in the name of his principal, and the authority of the attorney did not appear: *Held* that the Court would presume that the attorney had authority to execute the bond, unless his authority was questioned by affidavit.

The defendants in error moved the Court to quash the supersedeas in this case, for the following reasons, to wit: "That the order making the writ of error a supersedeas, required that James B. Campbell and others should enter into bond, &c. It appears that the bond was not entered into by James B. Campbell, but purports to have been entered into in the name of Campbell, by his attorney, &c. &c. and the authority of the attorney does not appear."

The bond purported to be executed in the presence of George Manierre, a subscribing witness, and was signed as follows:

"James B. Campbell, [L. S.]
By Solomon Wills, his att'y in fact.
Richard J. Hamilton. [L. S.]
Lucien Peyton, [L. S.]"

There was no power of attorney on file.

Smith, Justice, delivered the opinion of the Court:

It is the duty of the clerk of this Court to see that the bonds he accepts, are duly executed. The Court will presume that he

has discharged his duty, untill the contrary appears. If the defendants in error can show by affidavit, that the person who executed the bond in the name, and as the attorney, of Campbell, was not authorized to do so, the Court will then enquire into his authority; not otherwise.[a]

Motion overruled.

Note. The following order was made at the December term, 1840, of the Supreme Court.

ORDERED, That 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.

(*a*) Meyer *vs.* Hutchison, 2 Gil. R. 265; Sullivan *vs.* Dollins, 11 Ill. R. 16.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE LA FAYETTE BANK OF CINCINNATI, plaintiffs in error *v.* CALEB STONE, impleaded with JOHN B. GLOVER, defendant in error.

Error to the Municipal Court of the City of Alton.

The act of Congress prescribing the mode of authenticating the acts of the several legislatures, declares that such acts shall be authenticated by having the seal of their respective States affixed thereto. An act certified by the Secretary of State, to which is appended a certificate of the Governor, with the seal of State affixed, certifying to the official character of the person signing himself as Secretary; and that full faith and credit are to be given to his official acts, is not a compliance with the act of Congress.

THIS cause was heard at the October term, 1837, of the Municipal Court of the City of Alton, before the Hon. William Martin.

The defendant pleaded in abatement that there was not at the time of the commencement of said suit "any such person called The President, Directors and Company of the La Fayette Bank of Cincinnati." Issue was taken on this plea.

The plaintiffs to support their action, offered in evidence a paper purporting to be the act of the legislature of the State of Ohio, incorporating the plaintiffs, which was certified as follows:

"Secretary of State's Office, Columbus, Ohio, March 18, 1834.

I do hereby certify that the foregoing act is a correct copy of the original roll thereof, remaining on file in this office.

B. HINKSON, Secretary of State."

"United States of America.
The State of Ohio, Executive Office.

I, Robert Lucas, Governor and Commander in Chief of the State of Ohio, do hereby certify that B. Hinkson, by whom the act hereto attached appears to have been certified, now is, and was at the date of said certificate, the acting Secretary of State, in and for the said State of Ohio, having been duly elected and duly commissioned as such; and that his official acts are entitled to full faith and credit as well in courts of justice as thereout.

In testimony whereof, I have hereunto subscribed my name, and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this nineteenth day of March, in the year of our Lord one thousand eight hundred and thirty-four.

ROBERT LUCAS."

[Great Seal of State.]

A. COWLES, for the plaintiffs in error, cited U. S. Const. Art. 4, § 1; 2 U. S. Laws 102, Ch. 38; 3 U. S. Laws 621, Ch. 409, Duane and Bioren's Ed.; 2 Peters' Cond. R. 32 note; 4 Dallas 412; 3 Peters' Cond. R. 395 note; 11 Wheaton 392, U. S. *v.* Amadey.

U. F. LINDER, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action on the *case* brought to recover the amount of a bill of exchange made by the defendant and endorsed to the plaintiffs. On the trial of the cause, the plaintiffs offered in evidence, to prove the existence of the corporation, a paper purporting to be a copy of their charter, to which was appended,—first, a certificate by B. Hinkson, Secretary of State, declaring that the foregoing act is a correct copy of the original roll thereof, remaining on file in the office of the Secretary of State, at Columbus, in Ohio; secondly, a certificate of Robert Lucas, Governor of the State of Ohio, declaring that B. Hinkson, by whom the act thereto attached, appears to have been certified, was at the date of the certificate, the acting Secretary of State in and for the State of Ohio, and that his official acts are entitled to full faith and credit; to which latter certificate is attached the Great Seal of the State of Ohio.

To the introduction of this paper thus certified, as evidence, the defendant objected, and the Court sustained the objection.

The plaintiffs now assign the exclusion of this paper from the jury for error.

In considering the correctness of this decision, it is proper to look at the act of Congress directing in what manner the acts of the legislatures of the several States shall be authenticated. This act has declared that these acts shall be authenticated by having

the seal of their respective States affixed thereto. The paper offered in evidence is not so authenticated. The seal of the State, it appears, by this certificate of the Governor, is affixed for the purpose only of adding verity to the fact declared in his certificate, that B. Hinkson is Secretary of the State of Ohio, and that full faith and credit are due to his official acts; not that the facts declared in the Secretary's certificate, are true. This is not a compliance with the provisions of the act of Congress, which manifestly intended that the seal should be affixed, for the purpose of authenticating the act, and that the transcript thereof was an exact copy of the law passed by the State legislature. However much it may be regretted that objections, technical in their nature, are to prevail in cases like the present, the Court cannot depart from the plain and obvious provisions of the law. It has no discretion to dispense with the forms prescribed: and parties who offer testimony, the manner of authenticating which is thus provided, must conform to the mandates of the law. The Court below properly rejected the paper offered.

The judgment is affirmed with costs.

Judgment affirmed.

The plaintiffs in error filed the following petition for a rehearing:

To the Supreme Court of the State of Illinois, December term, 1837.

The President, Directors, & Co. of the La Fayette Bank of Cincinnati *v.* Caleb Stone, impleaded with John B. Glover. } In error.

The undersigned of counsel for the plaintiffs in error, respectfully request for the plaintiffs a rehearing of the aforesaid cause, and a revision of the record and authorities herein referred to.

They entertain a strong confidence, upon a careful revision of the whole case, that the judgment will be reversed; and they present for the consideration of the Court the following grounds and authorities:

1. That the evidence presented does in fact show a compliance with the law of the United States, and the decisions of the Courts thereupon. 1 Laws U. S. 102; Gordon's Digest 142 note a; 2 Peters' Cond. R. 30, in notes; 3 *Idem.* 305 notes; Amadey *v.* U. S., 6 Peters' Cond. R.; 1 Blackford 159.

2. That the appending the Great Seal is not invalidated by the cumulative certificates, and the verification of additional facts, besides the truth of the record.

3. That one of the facts certified by the Secretary, is, that the exemplification is a *correct copy* of the roll on file in his office.

4. That by the constitution of Ohio, the Governor is the keeper

of the Great Seal, and his affixing of it to the certificate, is intended, and does in fact, verify all that is certified.

5. That the evidence was admissible by the rules of the common law.

6. That the judgment below is erroneous for matter apparent on its face, besides the rejection of the testimony. 1 Chitty 405.

For these and other reasons that might be urged we pray a re-hearing.

ALFRED COWLES.
S. T. LOGAN.

Note. The Constitution of the United States provides that
"Full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Art. 4, § 1.

The acts of Congress upon this subject, provide as follows:
"The acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto. The records and judicial proceedings of the courts of any State, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And such records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken.(1) 1 Story's U. S. Laws 93.

All records and exemplifications of office books, which may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted into any other court or office in any other State, by the attestation of the keeper of such records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is, or may be kept; or of the governor, the secretary of state, the chancellor or keeper of the great seal of the state, that such attestation is in due form, and by the proper officer; and such certificate, if given by the presiding justice of a court, shall be farther authenticated by the clerk or prothonotary of said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or if the certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the certificate is made. And the records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State from whence the same are, or shall be taken.(2)

All the provisions of the acts of 1790 and 1804, shall apply, as well to the public acts, records, office books, judicial proceedings, courts, and offices, of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices, of the several States.(2) 2 Story's U. S. Laws 947.

"The act of Congress above referred to, does not require the attestation of any public officer, in order to authenticate copies of the legislative acts of the several States; but the Seal of the State affixed by an officer having the custody thereof, to a copy of the law sought to be proved, will be conclusive evidence of the existence of such law; no other formality is necessary; and in the absence of all evidence to the contrary, it must be presumed that the seal was annexed by an officer having competent authority to the act. (United States *v.* Amadey, 11 Wheat. Rep. 392. United States *v.* Johns. 4 Dall. Rep. 412, S. C., 1 Wash. C. C. Rep. 363; Henthorn *v.* Doe. 1 Blackf. Rep. 157; State *v.* Carr, 5 N.

(1) Act May 26th, 1790. (2 Act March 27th, 1804.

Hamp. Rep. 367; Warner *v.* The Commonwealth, 2 Virg. Cas. 95.)" 3 Phillips Ev. Cowen and Hill's notes 1141.

ALBERT G. SLOO, plaintiff in error *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE STATE BANK OF ILLINOIS, defendants in error.

Error to St. Clair.

The record of a cause should present the proceedings in the order of time in which they transpired.

A writ of error will lie to the decision of a Circuit Court upon a motion to set aside a judgment, and quash an execution, issued thereon.(*a*)

Semble. That the defendants in error, by joining to error, waive all objection to the assignment of errors, if the rigid rules of pleading be adhered to; the joinder being only considered as a demurrer to the assignment of errors, in cases where the errors are not well assigned, and contradict the record.

Whenever a decision takes place in any of the Circuit or inferior Courts of record in this State, which is final, and of which a record can be made, and which decide the right of property, or personal liberty, complete jurisdiction is conferred on the Supreme Court to hear and determine the same.

One partner cannot confess a judgment in the name of his co-partner.

A power of attorney to confess a judgment, is usually under seal; but if it be made without a seal, still one partner cannot by it bind his co-partner.

Quere. Whether a judgment confessed for a larger amount than is actually due, can be valid.

Quere Whether one partner can, after the rendition of a judgment against both upon a power of attorney to confess a judgment, executed by one only in the name of the firm, without the knowledge of the other, ratify and make valid such judgment.

THE bill of exceptions taken on the trial of this cause in the Court below, at the August term, 1837, before the Hon. Sidney Breese, contains a full settlement of the case, and omitting the declaration and the notice to the defendants in error of the motion of the plaintiff in error, to set aside the judgment rendered at the May special term, is as follows:

"Albert G. Sloo & Horatio G. McClintoc *v.* The President, Directors and Co. of the State Bank of Illinois.	Circuit Court of St. Clair county, August term, 1837.

Be it remembered that at this present term of the Court, August, 1837, the above named Albert G. Sloo moved the Court, by his counsel, to set aside the judgment *as to him* rendered at the last May term of this Court, against him and the said McClintoc, for the sum of $125,000, or to enter an order that no execution issue on said judgment against him, the said A. G. Sloo, for the following reasons:

'1. It appears from the record in the cause, that no process

(*a*) Such a motion is proper, Lyon *vs.* Baldwin, 2 Gil. R. 635; Griggs *vs* Gear, 3 Gil. R. 14; Lake *vs.* Cook, 15 Ill. R. 357; McKindley *vs.* Buck, 43 Ill. R. 488; Harris *vs.* Hardeman 14 How. U. S. R. 334.

was issued and served upon the said Sloo; neither does it appear that he was brought into Court by any other means.

2. It appears that the Judgment was rendered upon a plea of confession, filed by Alfred Cowles, Esq., as attorney for the defendants, acting under a power or warrant of attorney, executed by the said McClintoc *only*, as a partner in business with the said Sloo, and not executed, or in any way assented to, by the said Sloo.

3. The power or warrant of attorney is entirely insufficient to authorise the confession of the judgment.

4. The Court had no jurisdiction of the case.

5. The judgment ought to be set aside as to the said Sloo, for reasons disclosed in the affidavits of the defendants.

HENRY STARR,
J. ROBINSON,
JAMES SEMPLE.'

The judgment referred to, is in the following words and figures, to wit:

'Be it remembered, that on Thursday the fourth day of May, A. D. eighteen hundred and thirty-seven, came the President, Directors and Co. of the State Bank of Illinois, by their attorney, J. M. Krum, and filed in open Court their warrant of attorney, of A. G. Sloo and Horatio G. McClintoc, in the words and figures following, to wit:

'To any Attorney of any Court of Record in and for the State of Illinois—

You are hereby authorized to appear before Albert G. Sloo and Horatio G. McClintoc, (trading and doing business under the firm and style of A. G. Sloo & Co., in Alton,) in any such Court, at the suit of the President, Directors and Company of the State Bank of Illinois, and to receive a declaration for us in such suit, in an action of trespass on the case on promises, and thereupon to suffer judgment to pass against us in such action, for the sum of one hundred and twenty-five thousand dollars, by confession, *nil dicit, or non sum informatus*, and to release all errors of such judgment, and this shall be your sufficient authority.

Given under our hands, at Alton, this 20th day of April, A. D. 1837. A. G. SLOO & Co.

In presence of J. M. Krum.

State of Illinois, } ss.
Madison county, }

J. M. Krum being duly sworn, says that he is the subscribing witness to the foregoing instrument and warrant of attorney, that the same was subscribed in his presence by Horatio G. McClintoc, for the firm of A. G. Sloo & Co., and this deponent further

says that the said firm of A. G. Sloo & Co. is composod of Albert G. Sloo and Horatio G. McClintoc, and that they are trading and doing business as such firm, in Alton, Madison county, and State of Illinois. And this affiant says, that the said above warrant of attorney was signed executed, and delivered to the said President, Directors and Company of the State Bank of Illinois, on the 20th day of April, 1837, the day of the date of said instrument, and that at the time of signing and delivering the same, the said McClintoc, for the said A. G. Sloo & Co., acknowledged that he signed the same freely and voluntarily, for the uses and purposes therein expressed. J. M. Krum.

Subscribed and sworn before me, this 3d day of May, 1837. In testimony whereof I have hereto set my hand and Notarial Seal, this 3d day of May, 1837.

[L. S.] JOHN H. SPARR,
Notary Public, M. C.

At which day, to wit, on the said fourth day of May, A. D. eighteen hundred and thirty-seven, came the said plaintiffs by their attorney, and pray that judgment be entered up on said warrant, and which is entered in the words following, to wit:

President, Directors and Company of the State Bank of Illinois *v.* Albert G. Sloo and Horatio G. McClintoc, trading and doing business under the name, style, and firm of A. G. Sloo & Co.	On warrant of atty. *Narr—Cognovit.* Case. Damages $200,000 00

This day came the plaintiffs, by their attorney, and filed their declaration herein, and the said defendants, by Alfred Cowles, Esq., their attorney, duly constituted by warrant of attorney, come and file their confession and cognovit, and by their attorney aforesaid, confess judgment to the said plaintiffs for the sum of one hundred and twenty-five thousand dollars. It is therefore considered by the Court, that the said plaintiffs recover from the said defendants, the said sum of one hundred and twenty-five thousand dollars, so as aforesaid confessed, and that they have execution thereof, &c.

The said Sloo, in support of his motion, introduced the following affidavits:

'Albert G. Sloo and Horatio G. McClintoc, *advs.* The President, Directors and Co. of the State Bank of Illinois.	Judgment, May term, 1837, for $125,000.

I, Albert G. Sloo, one of the above defendants, being sworn, depose and say, that I was not in the State of Illinois when the warrant of attorney was executed, (the 20th April, 1837,) under

which the judgment was confessed, as I understand, nor did I know any thing of its execution till some days after, nor did I suspect that it was contemplated. The first information I had of it, was communicated to me by Mr. McClintoc, when I objected to it I immediately went to my attorneys, Messrs. Martin and Murdock, and enquired of them if it was binding upon me, or to that effect. They told me it was not binding upon me. I further depose and say, that when I learned from Mr. McClintoc, that he had given the power of attorney, he stated to me that when it was brought to him to sign, the Cashier of the Branch of the Bank at Alton, and the attorney of the Bank, enquired of him if he had any authority to sign for me, when he told them he had not. I never assented to the execution of the power of attorney, or the confession of the judgment under it.

I further depose and say, that when the judgment was rendered, there was not then due and owing to the Bank, by the firm of A. G. Sloo & Co., more than from forty to fifty thousand dollars, the precise sum I cannot now state; that the judgment extended to and covered the future liability of A. G. Sloo & Co., and was for certain drafts or orders made by them on a mercantile house in New Orleans, and by that house accepted, but which were thereafter to become due, and which A. G. Sloo & Co. would not be liable to pay to the Bank, except upon the default of the acceptor, that these drafts formed at least seventy-five thousand dollars of the amount of the judgment.

A. G. Sloo.

Sworn to and subscribed in open Court,
23d August, 1837. John Hay, Clerk.

I, Horatio G. McClintoc, being sworn, depose and say, that when I executed the power of attorney under which the judgment was confessed, the said Sloo was not present; that he was not at the time in the State of Illinois, nor did he return for several days after; that I first informed him that I had executed it, when he expressed a great surprise that I had done it, and observed that I had no right to do it, or something to that effect. I further say, that before I executed the power of attorney, I was enquired of both by the Cashier and the attorney for the Bank, (Mr. Krum,) whether I had any authority to extend it for Mr. Sloo; I replied I had not. Mr. Sloo being absent in New Orleans, the Cashier of the Bank (for its safety no doubt) seemed desirous of securing to the Bank Mr. Sloo's property against other creditors, and with a view to accomplish this purpose, and under an impression that an arrangement would be made between the Bank and Mr. Sloo, on his return, I executed the power of attorney; I did not believe the Bank would use it, nor should I have signed it, if I had been under the impression that the Bank

would have used it, as has been done. This impression was derived from my conversations with the Cashier. I acted in full persuasion that an arrangement would be made with the Bank when Mr. Sloo returned, and such I believe was the impression of the Cashier, and I felt that the object was rather to secure the property of Mr. Sloo from his other creditors, in the meantime, than any thing else. I further depose and say, that when the power of attorney was given, and the judgment confessed, not more than from forty to fifty thousand dollars was *then* due to the Bank by the firm of A. G. Sloo & Co., and that more than one half of the judgment was for money thereafter to become due, and extended to future liabilities, or to paper, on which the said A. G. Sloo & Co. were liable, but not then due.

H. G. McClintoc.'

Sworn to and subscribed in open Court,
23d August, 1837. John Hay, Clerk.'

And now on Thursday, the fourth day of St. Clair Circuit Court, in the year aforesaid, the said motion came on to be heard; the said Bank appeared by their counsel, and filed the following affidavits, to wit:

'J. M. Krum, being duly sworn, says, that on or about the 20th day of April, A. D. 1837, Horatio G. McClintoc and Albert G. Sloo were partners in trade under the name and firm of A. G. Sloo & Co., at Alton, county and State aforesaid; that said A. G. Sloo & Co. were at that time indebted to the President, Directors and Company of the State Bank of Illinois, as this affiant was then informed by said Horatio G. McClintoc, in the sum of one hundred and twenty-five thousand dollars; which amount of indebtedness was admitted by said McClintoc, in my presence, and in the presence of James H. Lea, Esq., agent of said Bank. On the said 20th day of April aforesaid, it was proposed, in my presence, by said James H. Lea, and in the presence of the said McClintoc, that said A. G. Sloo & Co. should confess a judgment in favour of said Bank for the said sum of one hundred and twenty-five thousand dollars, which proposition was agreed to by said McClintoc; and this affiant was requested by said Lea and said McClintoc to draw and prepare a warrant of attorney, for the purpose of confessing said judgment; which was done, and the said McClintoc signed the name of the said firm of A. G. Sloo & Co. to the same. And this affiant says that at the time of signing said warrant of attorney, this affiant explained the contents, force, and effect of signing the same, and said McClintoc, after such explanation, signed the same with a full knowledge of the contents, force, and effect of the same, as he admitted to me at the time of signing the same; which said warrant of attorney was the only one ever signed by said

McClintoc in favor of said Bank, to the knowledge or informarion of this affiant. And this affiant further says, that soon after said warrant of attorney was signed and delivered as aforesaid, on or about the third day of May last past, said Albert G. Sloo, one of said firm of A. G. Sloo & Co., at Alton, enquired of this affiant whether I had the said warrant of attorney in my possession, to which I replied, it was in the possession of James H. Lea, Esq. aforesaid. The said Sloo then enquired the date of the said warrant of attorney, and its contents, force, and effect, which enquiry this affiant answered by explaining to said Sloo, as I had previously explained to McClintoc, the contents, force, and effect of the same, after which said Sloo replied "*It is all right, I suppose.*" During the same conversation with said Sloo, relative to said warrant of attorney, he remarked that he had never authorized his partner, McClintoc, to confess such a judgment, but said he supposed it would make no difference, as he intended to effect some amicable adjustment with the Bank relative to his indebtedness—or words to that effect; the whole conversation I cannot now recall to mind verbatim; the above is in substance what passed between us. And this affiant further says that the above conversation was had before the said judgment on the warrant of attorney was perfected—but was during the same week that judgment was entered up. During said conversation above mentioned, the said A. G. Sloo did not dissent to the signing of said warrant of attorney, in any other way or by any other words than the foregoing. From the foregoing conversation, the impression was left on my mind at the time, that he (Sloo) ratified the act of McClintoc in signing said warrant of attorney. About two days after said first conversation, (and after said judgment by confession had been entered up,) said Sloo met this affiant at his office in Alton, and in conversatoin said he had never authorized said McClintoc to sign a confession of judgment for him, and that he should not assent to it. This affiant further says that said Sloo first received information of the signing of said warrant of attorney from some person other than this affiant, for the reason that he (Sloo) introduced the subject in conversation, at the time first above named; and that he never, to my knowledge, gave notice to the said Bank, that he did not ratify the act of McClintoc, until after judgment had been entered up on said warrant of attorney. The foregoing contains in substance the whole of the conversations referred to above, to the best of my knowledge and belief.

J. M. Krum.

James H. Lea, being duly sworn, deposeth and saith, that he is the Cashier of the Alton Branch of the State Bank of Illinois, and has been for the last ten months. That he is well acquainted

with Albert G. Sloo and Horatio G. McClintoc, lately doing business in the town of Alton, county and State aforesaid—and that said Sloo and McClintoc were partners in trade, doing business under the name, style, and firm of A. G. Sloo & Co., on the twentieth day of April last past, and for some days afterwards. That this deponent as Cashier as aforesaid, previous to the twentieth day of April last past, called upon the said McClintoc as one of the firm of A. G. Sloo & Co., to give to this deponent, as Cashier as aforesaid, a warrant of attorney to the State Bank of Illinois, for the amount of A. G. Sloo & Co.'s indebtedness to the Bank. That on the twentieth day of April last, as aforesaid, the said McClintoc as one of the firm, and in the name of the firm, gave to Davis and Krum, the then attornies for the Bank, a warrant of attorney, for the sum of one hundred and twenty-five thousand dollars, which amount was agreed upon, between the said Lea and the said McClintoc, acting for the firm of A. G. Sloo & Co., would be sufficient to cover the entire indebtedness of A. G. Sloo & Co. to the State Bank of Illinois. And this deponent further saith, that he, this deponent, also agreed with said A. G. Sloo & Co., that he, as the Cashier of the Alton Branch as aforesaid, would endorse upon the execution, or cause the attornies for the Bank to have endorsed upon the execution issued upon the judgment which should be entered up by virtue of the warrant of attorney, so executed as aforesaid, by the said McClintoc, as one of the firm, and in the name of the firm of A. G. Sloo & Co., any amount which should prove not to be due to the State Bank of Illinois, after the bills of exchange, either drawn or endorsed, by A. G. Sloo & Co., as aforesaid, should be returned to the Bank. And this deponent further saith, upon a careful calculation which this deponent caused to be made, and which he believes to be correct, there is due and owing from the said A. G. Sloo & Co., to the President, Directors and Company of the State Bank of Illinois, for bills of exchange, either drawn or endorsed by the said A. G. Sloo & Co., the just and full sum of one hundred and ten thousand seven hundred and thirty-seven dollars and thirty-nine cents; and that the difference between the said above mentioned sum, and the sum of one hundred and twenty-five thousand dollars, he, this deponent, has directed George T. M. Davis, as the attorney of the Bank, to have entered on the execution now in the hands of the sheriff of the county of Madison and State of Illinois—which said execution was issued upon the judgment entered up as hereinbefore particularly set forth, by the State Bank of Illinois, and against Albert G. Sloo and Horatio G. McClintoc as aforesaid, trading and doing business under the name, style, and firm of A. G. Sloo & Co. And this deponent further saith that the entire indebtedness of the said Sloo and McClintoc was created in the name of A. G. Sloo

& Co., and at the Alton Branch of the State Bank of Illinois; and that the amount above set forth as due and owing to the Bank, is so due and owing from said Sloo and McClintoc as partners in trade, &c., and that no part thereof is the individual indebtedness of either Albert G. Sloo or Horatio G. McClintoc, but that the whole amount aforesaid, is due and owing to the Bank aforesaid, as the indebtedness of A. G. Sloo & Co., and this deponent further saith that the warrant of attorney above referred to, is the only one that has been executed either by the said A. G. Sloo & Co. or by Albert G. Sloo or Horatio G. McClintoc to the State Bank of Illinois, and this deponent further saith that at the time the aforesaid A. G. Sloo & Co., by Horatio G. McClintoc, as one of the firm and in the name of the firm of A. G. Sloo & Co., made and executed the aforesaid warrant of attorney, A. G. Sloo was absent from the town of Alton, county and State aforesaid, and that the said firm of A. G. Sloo & Co. had failed—but that within a day or two after the execution of the aforesaid warrant of attorney, the said A. G. Sloo returned to Alton—that between the time of the said A. G. Sloo's return, and the day upon which the judgment was entered up, some eight or ten days intervened, and that during said term of eight or ten days, this deponent and the said Sloo had conversations relative to A. G. Sloo & Co.'s indebtedness to the Bank as aforesaid, in several of which said conversations, the power of attorney to confess judgment and upon which the judgment was confessed by A. G. Sloo and Co. to the State Bank of Illinois, was mentioned and referred to by the said Sloo, that in each and all of those conversations so had, and in which the aforesaid warrant of attorney was spoken of by the said Sloo to this deponent—the said Sloo never did either directly or indirectly intimate to this deponent that he, the said Sloo, did not consider the warrant of attorney to confess judgment as aforesaid binding upon him the said Sloo, but on the contrary from the tenor and effect of each and all of such conversations so had as aforesaid, the said Sloo always left the firm impression upon the mind of this deponent, that such confession so made and executed as aforesaid, was all right, and that he, the said Sloo, acquiesced in the said McClintoc's giving the confession as aforesaid—that such impressions, so made upon the mind of this deponent as aforesaid, were always made from the conversation had by the said Sloo and this deponent.

And this deponent further saith, that on or about the second day of May last past, and previous to the entering up of the judgment as aforesaid, this deponent called upon said Sloo and proposed to him to offer to the Bank a mortgage on his the said Sloo's real estate, and to hold the personal security the Bank then had in addition to said mortgage—that said Sloo replied thereto, he the

said Sloo would think of it, and inform this deponent the next day—that this deponent saw said Sloo the next day, and asked said Sloo if he had thought of it, that said Sloo replied to this deponent he had, but that it was too hard, and further replied to this deponent as follows—"The bank does not intend to come to fair terms with me, they have me in their power, and next will be down upon me with our confession of judgment, and ruin me." And this deponent further saith he distinctly recollects the last above referred to conversation, as it was the last conversation had with said Sloo upon the subject, and that immediately thereafter he instructed John M. Krum, then of the firm of Davis and Krum, to cause the judgment to be entered up in the St. Clair Circuit Court, which was accordingly done. And this deponent further saith that to the knowledge or belief of this deponent, the said Sloo never has given any of the officers of the State Bank of Illinois, or of the Alton Branch of the State Bank, any notice whatever that he did not consider himself, the said Sloo, as bound by the act of H. G. McClintoc in giving the aforesaid warrant of attorney, until within the last five days—and from the usual and common mode of said Bank's transacting its business—if any such notice had been given to any other of the officers of the Bank than this deponent, said notice or a copy thereof would have been given to this deponent. And this deponent further saith, that no such notice as aforesaid was ever given to this deponent either in writing or orally. And this deponent further saith that he has no interest either directly or indirectly in the event of this suit, and further this deponent saith not.

J. H. Lea.

Benjamin F. Edwards being duly sworn, deposeth and saith, that he is a director in the Alton Branch of the State Bank of Illinois, and that he is acquainted with Albert G. Sloo and Horatio G. McClintoc lately trading and doing business under the name, style, and firm of A. G. Sloo & Co.; that a day or two after A. G. Sloo's return to Alton, this deponent was present at a conversation had between said Sloo, this deponent, and two or three others, that the whole of said conversation so had as aforesaid, was relative to A. G. Sloo & Co.'s indebtedness to the State Bank of Illinois, and for which said indebtedness the judgment at the St. Clair Circuit Court was obtained by the Bank against the said Sloo and McClintoc—that in the course of said conversation, the said Sloo remarked to this deponent and to the others in the room "I am in the power of the Bank and next you will" (meaning the Bank can) "come down upon me," or words to that effect—that from the tenor of the whole of said conversation, this deponent expressly understood the said Sloo to allude to the power of attorney executed by H. G. McClintoc in the

name of and as one of the firm of A. G. Sloo & Co., and then held by the Bank, and upon which the judgment in the St. Clair Circuit Court was confessed by said Sloo and McClintoc. And that from the whole tenor of said conversation, this deponent expressly understood the said Sloo as assenting to the act of the said McClintoc in giving the aforementioned warrant of attorney. That the said Sloo did not at that time or at any other time previous to entering up the judgment aforesaid, dissent either directly or indirectly in my presence from the act of said McClintoc in giving the aforementioned warrant of attorney, and that said conversation took place some days previous to entering up the judgment aforesaid against said Sloo and McClintoc.

B. F. Edwards.

Henry K. Lathy being duly sworn, deposeth and saith, that he is a director in the Alton Branch of the State Bank of Illinois, and that he is acquainted with Albert G. Sloo and Horatio G. McClintoc lately trading and doing business under the name, style, and firm of A. G. Sloo & Co.; that the next day after A. G. Sloo's return to Alton, this deponent was present at a conversation had between said Sloo, this deponent, and three or four others, that the whole of said conversation so had as aforesaid, was relative to A. G. Sloo and Co.'s indebtedness to the State Bank of Illinois, and for which said indebtedness, the judgment of the St. Clair Circuit Court was obtained by the Bank against the said Sloo and McClintoc—that in the course of said conversation the said Sloo remarked to this deponent and to the others in the room, "I am in the power of the Bank, and next week, you" (meaning the Bank) "can come down upon me"—that from the tenor of the whole of said conversation, this deponent expressly understood the said Sloo to allude to the power of attorney executed by H. G. McClintoc, in the name and as one of the firm of A. G. Sloo & Co., and then held by the Bank, and that from the whole tenor of said conversation, this deponent expressly understood the said Sloo as assenting to the act of the said McClintoc in giving the aforementioned warrant of attorney. That the said Sloo did not at that time or any other time previous to entering up the judgment aforesaid, dissent either directly or indirectly from the act of said McClintoc in giving the aforementioned warrant of attorney, and that said conversation took place some days previous to entering the judgment aforesaid against the said Sloo and McClintoc—and this deponent further saith he has no interest either directly or indirectly in the event of this suit.

H. K. Lathy.

And after arguments of counsel and due consideration, the Court overruled said motion, to which opinion and decision of

the Court, the said Sloo, by his counsel, excepts, and prays the Court to sign and seal this his bill of exceptions.

SIDNEY BREESE, [L. S.]

The record also states, "And thereupon on Wednesday the 23d of August, 1837, the following entry is entered on the records of this Court, to wit:

The President, Directors, and Company of the State Bank of Illinois *v.* A. G. Sloo and Horatio G. McClintoc.

And now at this day came the plaintiffs by Geo. T. M. Davis their attorney and freely here in Court remit to the said defendants the sum of fourteen thousand two hundred and twenty-two dollars and sixty-one cents, part of the damages above by the said defendants confessed to be due."

J. SEMPLE, D. J. BAKER, and H. EDDY argued the cause for the plaintiff in error. A written argument on the part of the plaintiff in error, by J. ROBINSON, was also read.

A. COWLES, S. T. LOGAN, T. FORD, and H. GAMBLE, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:(1)

This is a writ of error, prosecuted on the part of Sloo, to reverse the judgment entered in this cause against him, on the following statement of facts appearing on the record:

A judgment, by confession, was entered in the St. Clair Circuit Court, in favor of the defendants in error, against Sloo and McClintoc, trading under the firm of Sloo & Co., for $125,000.

This confession is made by Alfred Cowles, an attorney of that Court, under a warrant of attorney, executed by McClintoc alone, in the name of the firm, without seal, authorizing any attorney of any Court in this State to appear for the partners and confess the judgment. It further appears that the residence and place of business of the plaintiffs in error, was at Alton, in the county of Madison, where the warrant of attorney was executed. No bond or evidence of previous indebtednes was filed or exhibited to the Court with the power of attorney on which the judgment was confessed, but the bare authority only to confess the judgment for the sum specified, appears to have been filed when the confession was entered.

At the term immediately subsequent to the rendition of this judgment, Sloo appeared, and upon affidavits filed, moved the Circuit Court to set aside the judgment, or restrain the levying of the execution upon his property, because he never executed the power, nor authorized McClintoc to execute it for him.

The Circuit Court denied the motion, to which the plaintiff in error excepted and filed his bill of exceptions.

(1) LOCKWOOD, Justice, dissented from the opinion of the Court.

The plaintiff in error, Sloo, assigns for error the refusal of the Circuit Court to grant his application, and to set aside the said judgment as to him, or to restrain the execution of the judgment as to him, and also makes a general assignment of errors, to which the defendants have joined.

A preliminary question has been raised by the counsel for the Bank, which it is necessary to dispose of, as, on that disposition, the further action of this Court will depend.

It is contended that the assignment of errors in this case, is an assignment of errors in fact, not cognizable in this Court.

The transcript returned upon the writ of error, commences with the application, notice of motion, and reasons for moving to set aside the judgment as to the applicant, and then recites that judgment, together with the warrant of attorney, the proof its execution and the declaration and confession; after which follow the affidavits of the several parties, and the refusal of the Court to grant the motion; all this is contained in the bill of exceptions, signed by the circuit judge; after which is a *remittitur*, entered on the next day after the decision on the motion, by the plaintiffs' attorney, for $14,222 61.

That the record is inartificially drawn up, may be readily conceded. The record should have presented the proceedings in the order of time in which they transpired, commencing with those on the rendition of the judgment. Then the subsequent application and proceedings had thereon, should have followed; but because this clerical error has transpired, it will not, we conceive, make the assignment of errors an assignment of errors in fact. We apprehend the counsel has been misled in this particular, and considered the question in a different aspect from that in which the proceedings appear. But are we to sacrifice substance to mere form? And is the inverted order of time in which the proceedings are presented here, to be a sufficient reason for refusing that justice which the very right of the case, as presented by the record, shall demand, and turn the party round to sue out a writ of error *coram vobis*, which has been disused and superceded by the more summary mode of a direct application to the Court for the rightful exercise of its own powers, over its proceedings and those of its officers?

We think the exception not well taken. The question presented in the Court below, was whether a judgment, unauthorized and illegal, had been rendered as to Sloo? That depended on the authority of McClintoc to authorize the confession in favor of the Bank, in the name of Sloo. The affidavit establishing the due execution of the power by McClintoc, filed with the declaration, and on which proof the judgment was ordered to be entered, shows that McClintoc, as the partner, without the consent or authority of Sloo, executed the power in question; and consequently

the legal point to be determined, is, whether such a power, so executed, will authorize the rendition of the judgment against the other partner, who neither authorized nor assented to the confession. Apart then from the affidavits on which Sloo based his application for setting aside the judgment as to him, the Circuit Court had, in the original proceedings, evidence entirely sufficient, on which to determine the irregularity of the proceedings and of the erroneous character of the judgment rendered, without recurring to evidence *aliunde* the record. It is true, the special errors assigned in this Court, go to the refusal to grant the motion, and do not specify this particular ground in the original record. Still we conceive we are bound to consider the whole proceeding as fairly before the Court, without regarding the manner in which the clerk has made them up, and that this portion of the record, as well as that relating to the facts stated in the affidavits by both parties, was equally before the Circuit Court, as it most clearly is here.

The defendants in error, having joined in error, might also be considered as waiving all objection, if the rigid rules of pleading were insisted on, the joinder being only considered as a demurrer to the assignment of errors in cases where the errors are not well assigned, and contradict the record. It is strenuously insisted, that this Court connot decide this case without determining questions of fact without the record, in judging whether the Circuit Court erred in refusing to set aside the judgment on the application made, and that it has no jurisdiction for such purpose.

It is a sufficient answer to this objection to quote the jurisdiction expressly conferred by statute: "To determine all matters of appeal, error, or complaint from the judgment or decree, of any of the Circuit Courts in this State, and from such other inferior courts as may hereafter be established by law, in all matters of law and equity, wherein the rules of law or principles of equity, appear, from the files, records, or exhibits of any such court, to have been erroneously adjudged and determined."

It is then the judgment of the law on the facts, as they appear in the record, which is to be investigated to ascertain whether it has been correctly pronounced, as it shall appear to have been decided in the proceedings brought up, and not a new investigation of facts *de hors* the record. The expressions used in the statute defining the jurisdiction of this Court, we agree, are not to be extended to give this Court cognizance of cases in proceedings or judgments merely interlocutory; but we aver that whenever a decision takes place in any of the Circuit or inferior Courts of record of this State, which is final, and of which a record can be made, and which shall decide the right of property or personal liberty, complete jurisdiction is conferred on this Court to hear and determine the same. Coke, in his Commen-

taries on Littleton, saith, that "A writ of error lieth when a man is grieved by an error in the foundation, proceedings, judgment, or execution in a cause;" and can it be said there is no grievance in the rendering a judgment against one who is not summoned to appear in court, and who has not authorized the judgment, nor been, by his consent, a party to it? This Court having a revisionary power over all errors happening in the Circuit Court where the cause was prosecuted, and that Court having entertained jurisdiction of the cause, and of the particular point presented, it cannot now be objected here, that this Court has no power to revise those proceedings. It seems to us, that, if the reasoning of the defendant's counsel was correct, the adoption of his doctrine would lead to an almost entire subversion of the object for which this tribunal was created. There is nothing, then, in the present case, to distingush it from an ordinary case of a writ of error, and as such we proceed to the merits of the grounds assigned for error.

That the Circuit Court should have vacated the judgment as to Sloo, we cannot entertain a doubt; for, as has been before remarked, the affidavit of the witness to the execution of the power of attorney, under which the judgment was confessed and entered up, expressly declares that the power was signed by McClintoc for the firm of A. G. Sloo & Co., and it does not appear that McClintoc had the least authority whatever for doing the act.

Without then recurring, for the present, to the affidavits and proofs exhibited on the motion, the simple question is presented, whether one partner can confess a judgment in the name of his co-partner.

It is undeniable, that unless there be an express authority to the partner from the other, or he assent to it, the power of attorney executed by one partner in the name of the other, as to him, is void. The whole current of British and American authorities sustains this rule. Indeed, we have not seen, nor do we know of a single case to the contrary.

In general, the power of attorney to confess the judgment, is accompanied by a bond, as evidence of the indebtedness or amount due.

How or when this peculiar security for a debt authorizing a creditor to sign a judgment and issue execution without even issuing a writ, was first invented, does not appear. Chitty, in commenting on it, says, "It has now become one of the most usual collateral securities on loans of money, or contracts to pay an annuity, and for debts due, but is usually accompanied with some other deed or security." It is also under seal. In the present case, the power has no seal, and it has therefore been supposed to place the case on a different footing from the adjudged cases, most of which assign, as a reason why one partner

cannot confess a judgment in the name of the other, that he cannot bind the co-partnership by an act under seal. The ancient reason, in the earliest cases in which the question arose, was, that the seal of the other partner was his private property, and could not be subject to the control or use of the other. Another given is, that it is an act not within the limits of co-partnership business.

In the case of Harrison v. Jackson, Sykes, and Rushforth,(1) the agreement related to a partnership transaction, was under seal and executed by Sykes, the other partners not being present. In an action of covenant against the three partners, on this agreement, Lord Kenyon, who gave the opinion of the Court, said he admitted the authority of the partners according to the law merchant, or mercantile transactions, but denied that any power existed to bind each other by seal, unless a particular power be given for that purpose; and furthermore remarked, that it would be a most alarming doctrine to the mercantile world, if one partner could bind the others by such a deed as the one in question. It would extend to cases of mortgages, and would enable a partner to give a favorite creditor a real lien on the estates of the other partners. In the cases of Ball v. Demsterville,(2) Clement v. Brush,(3) Murphy v. Bloodgood,(4) Green v. Beal,(5) Motteux v. St. Aubin,(6) Ton v. Goodrich,(7) the same principle was recognized. In Pearson v. Hooker,(8) it was decided that one partner may release a debt due the partnership by a deed under seal.

Kent, Chief Justice, however, distinguishes this particular case from the class of cases referred to, "because there was no attempt to charge the partnership with a debt by means of a speciality, but it is the ordinary release of a partnership debt. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands; each having an entire control over the personal estate."

The Supreme Court of New York, in the case of M'Bride v. Hogan, after an elaborate examination of all the cases bearing on this question, came to the conclusion, "That one partner cannot do any act under seal, to affect the interest of his co-partner, unless it is to release a debt." It follows, then, according to the recognised doctrine of these adjudicated cases, that this power of attorney, had it been under seal, would have been a case identical with those cited.

We may be permitted to ask, what difference there can possibly be in principle, and effect of the act done, in the cases cited, and the one under consideration. Whether the power to confess

(1) 7 Term R. 207. (2) 4 Term R. 343. (3) 3 J. C. 180.
(4) 9 Johns. 285 (5) 2 Caines R. 254. (6) 2 Black. 1133
(7) 2 Johns. 213. (8) 3 Johns. 68.

the judgment be under seal or not, can surely make no difference in its consequences or intended objects.—If the power is valid, not being under seal, the consequences and results of the act are precisely similar to those which the principles of the decisions cited, most strongly urge as unjust and illegal; and if void for want of a seal, the case is only thereby rendered more clear and certain.

To judge of the power of the partner, and the legality of his act, we are necessarily required to examine the consequences and effect of his act. And what are they? To subject all the private as well as joint property of the partner, both real and personal, to execution and sale; a still further consequence, his person to imprisonment, in execution of the judgment so confessed, without his authority or assent, express or implied—nay, against his most solemn protestations, or possibly obtained through misapprehensions, or fear, or through deceitful representations held out to a weak and indecisive mind; or it might happen by collusion, and for the purpose of fraud. When such results may be readily conceived—nay, be like to happen, can it indeed make any real difference whether the act, from which such consequences might flow, is or is not under seal? What magic is there in a scrawl, for that is, by our law, in effect, a seal? Can the legality, reason, or justice of the case, depend on a legal subtlety, or shall the case be decided on the broad and firm basis of reason and right?

We cast aside the distinction as unworthy the consideration of the tribunals of the present age, and unhesitatingly decide, that justice and right ought not in any case to be sacrificed to mere forms, however ancient they may be, or however numerous may have been the precedents produced. We do not, however, wish to be understood as discarding those which are essential to the correct and regular order of proceedings, and which are necessary to be observed in the proper and systematic conducting of cases.

We have thus far considered the case without reference to the affidavits read on the motion. From an examination of the contents of those, our opinion is strengthened as to the views already expressed. There can be no doubt, from the statement of McClintoc, and all those who testify on the part of the Bank, that McClintoc had no authority whatever, from Sloo, to make the power of attorney. The judgment is also for a much larger sum than was actually due at the time, it embracing contingent liabilities not then at maturity, and was, in fact, entered up for $14,222,61 more than was due, being the amount remitted on the next day after the Circuit Court refused to grant the application of Sloo.

An attempt is made to draw from some expressions of Sloo,

an inference of his sanction of the act of McClintoc, long after the power had been signed and delivered. It may be doubted whether a subsequent agreement to, or assent of, the act of McClintoc, after the judgment had been rendered on an invalid power, would legalize the irregular and unauthorized confession; but it is sufficient in the present case to say that, in our opinion, the attempt to establish such assent or approval has signally failed.

In every aspect in which this case can be viewed, we have no hesitation in saying that the judgment of the Circuit Court is erroneous and void, as to Sloo, having been entered up without authority, and that the Court below ought to have vacated the judgment on the application of Sloo. It is therefore ordered, that the judgment of the Circuit Court, as to Sloo, be reversed, and that Court directed to cause the execution thereon, as to Sloo, to be set aside. The plaintiff in error to recover his costs in this Court and the Court below.

Judgment reversed as to Sloo.

Note. After a general appearance by an attorney for both the defendants, who were partners, and the pleadings entered by him in the name of both, one of the defendants cannot plead that he was not served with process, and had not appeared in the suit. Field *v.* Gibbs *et al.*, 1 Peters C. C. R. 155.

A warrant of attorney to confess judgment, cannot be expressly revoked. A warrant of attorney authorized the confession of judgment at a certain term, for a certain sum, in an action of debt; and the judgment was confessed accordingly. *Held*, that the judgment was not erroneous, merely because the nature of the debt was not particularly described in the warrant.

The defendant's appearance to the action by attorney, prevents him from making any objection relative to the process. Eldridge *v.* Folwell *et al.*, 3 Blackf. 207.

Where an attorney appears for a party, the Court will look no further, but will proceed as if he had sufficient authority, and leave the party to his action against him. Jackson *v.* Stewart, 6 Johns. 34; Henck *v.* Todhunter, 7 Har. & J. 275; Harding *v.* Hull, 5 Har. & J. 478; Munnikuyson *v.* Dorset, 2 Har. & Gill, 374.

If an attorney appear for a defendant, (whether process has been served or not,) without his authority, and confess judgment, or let it go by default, the judgment is regular, and will not be set aside; but the attorney is liable to an action. Denton *v.* Noyes, 6 Johns. 296. See 4 Monr. 377.

But if there were fraud or collusion between the plaintiff and the defendant's attorney or if he be not responsible, or perfectly competent to answer to his assumed client, the Court will relieve against the judgment. 6 Johns. 296.

A default for not pleading will be opened, if it were suffered by the neglect of an attorney who is insolvent. Meacham *v.* Dudley, 6 Wend. 514.

In Ohio, a party is not concluded by the acts of an attorney who appears without authority; and if no process has been served on the defendant, the Court will set aside a judgment, even at a subsequent term, obtained after such unauthorized appearance. Crichfield *v.* Porter, 3 Ham. 518.

Though in Kentucky an authority will be presumed, when an attorney appears for a defendant not served with process, yet if the defendant proved that he had no authority, his rights cannot be affected by the attorney's acts. Handley *v.* Statelor, 6 Litt. 186.

An appearance by an attorney without authority, is good. Rust *v.* Frothingham *et al.*, Breese 260.

Where an attorney commences an action in the name of another, or appears for another, the Court will presume he had authority to do so, until the contrary appears. Ransom *v.* Jones, *Ante* 291.

DECISION

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

JUNE TERM, 1838, AT VANDALIA.

Note. Lockwood and Smith, Justices, were not present at this term.

Justin Butterfield, plaintiff in error *v.* James Kinzie, defendant in error.

Error to Cook.

In an action against the maker of a note or the acceptor of a bill of exchange, payable at a specified place, it is not necessary to aver or prove a demand of payment at such place.(*a*)

This cause was heard in the Circuit Court of Cook county, at the March term, 1838, before the Hon. John Pearson. The judgment of the Court below was in favor of Kinzie, the defendant in error.

This cause was by agreement of parties submitted to the Supreme Court for its decision.

J. Butterfield and James H. Collins, for the plaintiff in error.

James Grant, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

The only question presented for adjudication by the record in this cause, is whether or not in an action against the maker of a promissory note, or the acceptor of a bill, payable at a specified

(*a*) *Post*. 546; President &c *vs.* Perry, 11 Ill. R. 467; Hunt *vs.* Divine, 37 Ill. R. 138; Wood *vs.* Mer. S. L. &c., 41 Ill. R. 482.

place, the plaintiff is bound to aver and prove a demand of payment at the time and place specified, to maintain the action. The negative of this proposition is maintained by the plaintiff in error, and the affirmative by the defendant. Without going into an examination of the numerous decisions bearing upon the question, or the reasons advanced in support of those decisions, this Court has no hesitation in saying, that the weight and current of authorities fully sustain the position assumed by the plaintiff.(1) It is not a question of first impression, but one which has been so repeatedly decided, that this Court does not feel itself called upon to examine the reasons upon which former decisions have been maintained. The Circuit Court having decided in favor of the defendant, the decision must be reversed, and the cause remanded, with directions to that Court, to overrule the demurrer, and proceed to a trial of the cause upon its merits.

Judgment reversed.

(1) 17 Johns. 248; 4 Johns. 183; 11 Wheat 171; 6 Peters' Cond. R. 257; 1 Campbell N. P. 423; 2 do. 498; 8 Cowen 271; 3 Wendell 1; Bailey on bills 263; 4 Littell 225.

In actions on promissory notes, against the maker, or on bills of exchange, where the suit is against the maker in the one case, and the acceptor in the other, and the note or bill is made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand was made in order to maintain the action. But if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part. Wallace *v.* McConnell, 13 Peters 136.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1838, AT VANDALIA.

BENJAMIN GODFREY, WINTHROP S. GILMAN, SIMEON RYDER, and CALEB STONE, plaintiffs in error *v.* NATHANIEL BUCKMASTER, defendant in error.

Error to Madison.

There can be no impropriety in including several notes in one count in a declaration, where each of the notes is of precisely the same description.
It is not error to render final judgment upon demurrer. If a party wishes to answer over, he should withdraw his demurrer.

ON the 22d day of July, 1837, Nathaniel Buckmaster instituted a suit in *assumpsit*, in the Madison Circuit Court, against the plaintiffs in error and one John B. Glover, upon six promissory notes, made by the plaintiffs in error, and payable to the order of the defendant in error, Buckmaster. Process was executed upon all except Glover.

The declaration contains but one count, and is as follows:

"In the Circuit Court of Madison county, of August term, Anno Domini 1837.

State of Illinois, } ss.
Madison county, }

Benjamin Godfrey and Winthrop S. Gilman, trading and doing business in name of Godfrey, Gilman & Co., Simeon Ryder and Caleb Stone and John B. Glover, trading and doing business in name of Stone & Co., were summoned to answer Nathaniel Buckmaster, of a plea of trespass on the case on promises, &c., and thereupon the said plaintiff, by his attorneys, Martin and Mur-

dock, complains, for that whereas, the said defendants, at Alton, to wit: at the county aforesaid, on the seventeenth day of January, in the year of our Lord one thousand eight hundred and thirty-seven, made their six certain promissory notes, in writing, and thereto subscribed their proper hand writings, the date whereof is the day and year aforesaid, by one of which said promissory notes, the said defendants on or before the eighteenth day of May then next, promised to pay to the order of Nathaniel Buckmaster, one thousand dollars, for value received, with interest at the rate of ten per centum after due and payable. By another of said promissory notes, the said defendants on or before the eighteenth day of May then next, promised to pay to the order of Nathaniel Buckmaster, one thousand dollars for value received, with interest at the rate of ten per centum per annum, from the said eighteenth day of May, eighteen hundred and thirty-seven. By another of said promissory notes, the said defendants, on or before the eighteenth day of May then next, promised to pay to the order of N. Buckmaster, one thousand dollars for value received, with interest thereon at the rate of ten per centum, after the said note becomes due and payable. By another of the said promissory notes, the said defendants, on or before the eighteenth day of May then next promised to pay to the order of Nathaniel Buckmaster, one thousand dollars for value received, with interest at the rate of ten per centum per annum, from the said eighteenth day of May last. By another of said promissory notes, the said defendants, on or before the eighteenth day of May then next ensuing, promised to pay to the order of Nathaniel Buckmaster, one thousand dollars for value received, with interest at the rate of ten per centum per annum, from and after the said eighteenth day of May last. By another of said promissory notes, the said defendants, on or before the eighteenth day of May then next ensuing, promised to pay to the order of Nathaniel Buckmaster, one thousand dollars for value received, with interest at the rate of ten per centum, from and after the said eighteenth day of May aforesaid.

Nevertheless, the said defendants, not regarding their several promises and undertakings aforesaid, in form aforesaid made, not regarding the said several promissory notes, or any or either of them, or the said several sums of money, or any part thereof, to the said Nathaniel Buckmaster, the said plaintiff, have not paid, or any or either of them, or any part thereof, although the same to pay, they, the said defendants, have been often thereto requested, to wit, at the county aforesaid, but the same to pay have hitherto wholly neglected and refused, and still do refuse, to the damage of the said plaintiff, ten thousand dollars, therefore he brings suit, &c.

MARTIN & MURDOCK,
Att'ys of Plff."

At the August term of said Court, 1837, the Hon. Sidney Breese presiding, the plaintiffs in error, by Cowles and Krum, their attorneys, filed their demurrer to the foregoing declaration, "And for cause of demurrer say, that there is duplicity in said declaration of the plaintiffs, in this there are six distinct causes of action embraced and included in the same count: 2d, There are several promises and undertakings alleged in one count."

To the demurrer there was a joinder, and the Court overruled the demurrer, and gave judgment for the defendant in error, (the clerk assessing the damages,) for the sum of $6,450 against the plaintiffs in error.

To reverse this judgment, the plaintiffs in error brought their cause to this Court, and assigned for error the overruling of the demurrer, and giving judgment for the defendant in error. There was a joinder in error by Buckmaster.

A. Cowles and J. M. Krum, for the plaintiffs in error, relied upon the following points and authorities.

1. That although the plaintiff could join the several causes of action in one declaration, yet, being several, they could only be in separate counts. Comyn's Digest, title *Action* C; Bac. Abr. *Pleas* C. B. 3, *Actions in general* C; 1 Term 276; 2 Wilson 319; 1 *Ib.* 252; 2 Saunders 117 c; Gould's Pleadings Ch. 4, § 80, 81; 13 Johns. 484—5; 2 Saunders 123 a; 3 Conn. 1; 15 Johns. 432.

2. The demurrer of the defendants below reached the fault or duplicity in the declaration, and should have been sustained. Although the different causes of action are of the same nature, they cannot be joined in the same count, the action being to enforce a single right of recovery. Gould's Pleadings, Ch. 4, § 99, 100, 103.

3. The judgment of the Court on the demurrer, should have been interlocutory and not final, such being the settled practice of the courts in Illinois.

Wm. Martin, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* brought in the Madison Circuit Court.

The plaintiff counted on six several promissory notes, made payable at the same time, for the sum of one thousand dollars each, and included the whole of the notes in a single count of the declaration. The count describes the notes according to their tenor and legal effect; and assigns the breach of the promise to pay, as to each and to the whole of the notes.

To this declaration the defendants specially demurred, and assigned for cause, a want of form by joining the notes in the

same count. The Circuit Court, holding the demurrer not well taken, overruled it, and rendered final judgment for the plaintiff. A writ of error has been prosecuted, and it is now assigned for error—First, That the declaration contains different and distinct causes of action, in one count, and that this count is therefore double; Secondly, That the judgment on the demurrer should have been *respondeas ouster.*

It is now argued by the counsel for the plaintiffs in error, that although the several and distinct promises of the defendants could be joined in one action, yet the promises being several and distinct, they should have been declared on in separate and distinct counts.

To this position it may be remarked, that the present case is not one of a misjoinder of causes of action so different in their nature as to fall within the rule which would render a declaration bad, because of such joinder; nor can we perceive how it is a cause even for special demurrer, for want of form. The count is no way defective in its form, but it is said to be defective in substance, because it combines the six notes in the description thereof, and has assigned the breach of non-payment of all, in the same count. And it is further insisted, that each note should have been set out in different counts; and, that not being done, the declaration is double.

The cause assigned in the special demurrer, and the argument used to support it, are inconsistent. One alleges the want of form as the defect, and the argument charges the act of joining the notes, in the description of them in the count, as matter of substance, and insists on this ground, that this fact sustains the want of form alleged.

There is no misdescription, no incongruity, or want of accuracy, or certainty in the count, which is even formally perfect; and hence the cause of demurrer assigned, is not established. We are entirely satisfied that no valid objection can be raised to the count.

The six notes are identical with each other, being for the same sum, of the same date, and payable at the same time; and might well be joined in the same count most conveniently, without ambiguity or perplexity. Indeed it is most desirable, where it can be done without producing confusion, when the causes of action are of the same nature, and may be clearly set forth together, that this mode of declaring should be adopted. No possible embarrassment can arise, for the defendant may avail himself of every defence. He may plead specially to each note separate matters of defence; or he may plead the general issue and give special matter in evidence, in defence to any or to all the notes. Suppose, instead of the six notes, there had been but one payable by installment on six different days, would it be

objected that the promises and breaches could not be set forth in the same count? We apprehend not. The promises then being on separate pieces of paper, will not surely change the rule, nor the reason of it; nor can the count be double because it describes several notes. The description of the six notes in separate counts, would have been no more clearly nor accurately described than they have been in one; and the useless verbiage, which would, in framing them, have to be observed, is thus desirably avoided.

The authorities cited by the counsel for the plaintiffs in error, and particularly those in Gould's Pleading, are far from sustaining the grounds assumed in support of the writ of error, while those in the 4th and 13th Johnson's Reports, clearly sustain the Court. In our system of practice it is of infinite importance to introduce precision and conciseness; and whatever tends to dispense with prolixity and useless recapitulation, should be encouraged.[a]

On the second point the practice is plain. The judgment in chief was correct. If the defendants wished to plead to the merits of the action, they should have withdrawn their demurrer, and applied to Court to answer over. This doubtless would have been granted. It could not compel the withdrawal of the demurrer; and as the defendants chose to stand by it, the Circuit Court could render no other than a final judgment on the pleadings as they stood.

The judgment is affirmed with costs.

Judgment affirmed.

(*a*) Short forms. Zimmerman *vs.* Wead, 18 Ill. R. 304; Brady *vs.* Spurk, 27 Ill. R. 482.

William Linn, plaintiff in error *v.* Charles Buckingham and Wolcott Huntington, defendants in error.

Error to Fayette.

In an action upon a promissory note against the maker, the declaration described the note, as made by William Linn. The note produced in evidence, was signed "Wm. Linn:" *Held* there was no variance, and that the proof was sufficient.

It is no objection to a security for costs, that it is signed by a firm in their co-partnership name.

Where a security for costs was written upon the back of the declaration in a cause, but the title of the Court did not appear in the same; *Held* that it was a sufficient compliance with the statute.

A defendant cannot deny the execution of a promissory note, upon which he is sued, or dispute its genuineness, unless he verify his denial by affidavit.

This cause was tried at the October term, 1838, of the Fayette Circuit Court, before the Hon. Sidney Breese. Judgment was rendered for the defendants in error.

Upon the declaration, the following security for costs was endorsed:

"Charles Buckingham and Wolcott Huntington v. William Linn.

We hereby enter ourselves as security for costs in this entitled cause, and acknowledge ourselves bound to pay all costs that may accrue, either to the opposite party, or to any of the officers of this Court, in pursuance of the laws of the State of Illinois.

COWLES & KRUM."

L. DAVIS and F. FORMAN, for the plaintiff in error, cited R. L. 170, § 23,(1) 165–6, § 1 ;(2) Printed Opinions 288,(3) 201, (4) 114 ;(5) 13 Johnson 486.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* on a promissory note. The declaration is in the usual form, with the money counts, to which the defendant pleaded non assumpsit. The defendant, before pleading in the Circuit Court, moved the Court to dismiss the cause from the docket, because the plaintiffs were non-residents at the time of the commencement of the action, and had not filed a sufficient bond for the payment of costs, in conformity to the provisions of the statute in such cases. Proof of non-residence was made, and a bond, it appears from the record, was endorsed on the declaration, signed in the partnership name of the attorneys. The Circuit Court refused the application; and the defendant's counsel excepted. The cause was then submitted to the Court for trial, without the intervention of a jury; and the plaintiffs, having proved the co-parnership, produced in evidence a note corresponding to the one described in the declaration, signed "Wm. Linn," and there rested their case. Whereupon the defendant moved for a nonsuit, because the plaintiffs had failed to prove that the note offered in evidence, signed "Wm. Linn," was executed by William Linn.

Two grounds are now assigned for error. First, The refusal of the Court to dismiss the suit for the alleged insufficiency of the bond for costs; Secondly, the refusal of the Court to nonsuit the plaintiffs upon the evidence produced.

Upon the first point it is to be remarked, that the record shows a bond written on the declaration entitled in the cause, and substantially in the form prescribed by the act requiring security for costs to be given in certain cases. It is urged, that because the entitling of the cause does not state it to be in any court, it cannot relate to the action described in the declaration;

(1) Gale's Stat. 199. (2) Gale's Stat. 195. (3) Ante 388.
(4) Ante 252. (5) Ante 165.

and that therefore the bond is not in conformity to the law. We do not perceive the force of the objection. On the contrary, it would be doing violence to a reasonable interpretation of the facts of the case, to suppose that the security given, related to any other cause than the one described in the declaration, and corresponding with the one entitled in the bond for security of costs. The bond is entirely sufficient and perfect. The further objection that it is signed in the co-partnership name of the attorneys, omitting their Christian names, seems not to be a sufficient objection to its validity. The proceedings to be had to enforce the performance of the condition of the bond, might be rendered as effectual as if each had subscribed his name at full length. The second objection cannot be sustained. By the 12th section of the "*Act Concerning Practice in Courts of Law*,"(1) approved 29th of January, 1827, it is declared, "That no person shall be permitted to deny on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, unless such person so denying the same, shall, if defendant, verify his plea by affidavit."

By the practice under this section of the act, it was unnecessary for the plaintiffs to prove the execution of the note; and having shown the existence of the co-partnership, to whom the note was payable, the defendant could not controvert its validity, or dispute its genuineness.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. See Kettelle *v.* Wardell, decided Dec. term, 1839, *Post.*; Warnock *v.* Russell *Ante* 383; Seward *v.* Wilson, and note, *Ante* 192.

See also, Vance and Breese *v.* Funk *et al.*, decided June term, 1840, where it was held that the execution of a note signed J. E. Vance & Co., could not be denied under a plea of the general issue unaccompanied by an affidavit of its truth. 2 Scam.

Variances: *Ante* 193, 206, 272, 332; Peyton *et al. v.* Tappan, *Ante* 388.

(1) R. L. 489; Gale's Stat. 531.

William Hunter, Bartholomew Whalen, and James Whalen, plaintiffs in error *v.* The People of the State of Illinois, defendants in error.

Error to Edgar.

Where A, B, C, and D were jointly indicted in the Edgar Circuit Court, and A alone moved for and obtained a change of venue to the Clark Circuit Court, without the consent of the others, where he was tried; and after his trial the indictment, without any order of Court, was returned to the Edgar Circuit Court, and B, C, and D called upon to plead to the same: *Held* that the proceedings were regular, and that the indictment

as to B, C, and D, must be considered as remaining under the control of the Edgar Circuit Court, and that no trial could be had elsewhere. The Circuit Court of Clark county should have ordered the original indictment to be returned to Edgar county, and retained a copy thereof upon its own records.

O. B. Ficklin, for the plaintiffs in error,

A. C. French, State's Attorney, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

This case was submitted on the following agreed state of facts. The defendants were jointly indicted at the April term of the Circuit Court of Edgar county, 1837, for a *riot*. At the September term of the same year, Andrew Hunter, one of the defendants, applied for a change of venue, for himself only, which was ordered, and the indictment, together with the other papers in the cause, were transmitted to the Clark Circuit Court, where Andrew Hunter was tried at the November term, 1837. After the trial in the Clark Circuit Court, the same indictment on which Andrew Hunter was tried, was brought back to the Edgar Circuit Court, without any order of the Court therefor; and William Hunter, Bartholomew Whalen, and James Whalen were called to plead to the indictment. It is now submitted by the attorney for the People, and the counsel for the defendants, who did not join in the change of venue, whether or not the Circuit Court of Edgar county was ousted of its jurisdiction over them, by the change of venue to Clark Circuit Court.

In the case of Clark *v.* The People, decided in this Court in 1833,(1) it is said, "It is argued that if the venue should be changed on the application of one of several defendants indicted jointly, that it would be difficult if not impossible to try the others,—as the indictment would have to be sent to the adjoining county with the accused." The only point decided in that case, was, the right of one of several defendants indicted jointly, to a change of venue, which the Circuit Court had refused, which judgment was reversed.

It is not to be disguised that the act allowing a change of venue, in regard to criminal offences, is extremely defective; and particularly as to the disposition which shall be made of the other defendants, after a change of venue, and trial shall have been had as to one or more of them. No provision is made for the disposition of the indictment by the Court to which it is transmitted, after the change of venue is awarded, and its final action has been had on the party, who sought the change. The policy of the act, in its present shape, may well be doubted,—and however just the principles on which it has been founded, from the means it affords, there can be no doubt that it is often

(1) *Ante* 117.

resorted to, and used in many cases, for the prostration of the criminal justice of the country. Its terms are too general and indefinite,—and no corroborating facts, or the details of circumstances, to establish the truth of the cause for the change sworn to by the defendant, to sustain his belief, is required.

If he swears, in his mere belief, that any one of the causes named in the statute, exists, no matter how or by what means or information he has arrived at the conclusion,—nor how improbable or untrue it may appear, no discretion is left to the Court to determine the justice of the application. The change must be awarded.—The present case must be decided on its own merits. The Court, in its own opinion (in the case of Clark *v.* The People) merely recapitulated the arguments of counsel, without at all admitting, much less deciding, that a defendant in a case like the present, could not be properly and legally tried, notwithstanding the embarrassments suggested.

The case, in the agreement of submission, admits that the indictment was returned to the Circuit Court of Edgar, without an order; and, on looking into the record, it does not appear how the indictment was remanded or returned. The only question then to be determined under the case made, is, whether the Circuit Court of Edgar county ever lost jurisdiction of the cause, as relates to the three defendants who did not desire a change of venue.

It must be conceded that they could not be tried in the Circuit Court of Clark, to which the venue of the cause in regard to the other defendant, without their consent, was changed; and indeed it might well be questioned whether even by consent the Circuit Court of Clark could take cognizance of the case.—The indictment, for all legal purposes, must be considered as still remaining under the control of the Circuit Court of Edgar county; and no trial could be had elsewhere. The Circuit Court of Clark should have entered an order causing the indictment to be returned to the Circuit Court of Edgar, retaining a copy on its records,—but although this was not done, it does not follow that the Court of Edgar was ever ousted of its jurisdiction, as to the three other defendants; and as the indictment was returned to the Court where it was found, it is not considered important, whether it was done in pursuance of a formal order of the Clark Circuit Court, on its records, or by the direction of the Court verbally to its clerk. It was properly returned, although the law is silent as to the manner of the return.—If this is not regular and sanctioned by legal rule, public justice might be defeated in numerous instances. No injustice is done the defendants. They are deprived of no right whatever; nor is any obstacle or inconvenience created thereby.

As the statute, allowing the change of venue, is silent as to the

future disposition of the cause, after trial of those who have sought the change of venue, it might equally be said, that the Court to which the indictment is sent, has no power to remand the indictment; and if so, there would be a complete failure of justice. No principle of decision should be adopted unless it is just and reasonable in its character; and where the contrary would manifestly be the result, it ought to be avoided, unless the grounds of inevitable necessity interpose another or a modified course. It is then inconsistent with the reason, the right, and the justice of the case, that the defendants should escape a trial for the offence charged, by the act of their co-defendant, in taking the change of venue; and we can perceive no sufficient reason for arresting the judgment rendered in this cause.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See note to the case of Clark v. The People, *Ante* 121

JOHN DUNCAN, plaintiff in error *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Clinton.

That portion of an indictment which recites the choosing, selecting, and swearing of the grand jury, according to the form prescribed in § 152 of the Criminal Code, is not a count or a portion of a count of the indictment; it is only the caption.

A motion to quash an indictment containing two counts, which is sustained as to the first, and overruled as to the second, does not affect the caption of the indictment.

Where the second count in an indictment, the first having been quashed because it did not state the presentment to be upon oath, recited that "The grand jurors aforesaid, chosen, selected, and sworn, as aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, on their oaths aforesaid, do further present:" *Held* that the count was sufficient.

THE following points were made by the counsel for the plaintiff in error:

1. Every count must be perfect in itself, or good by reference to a perfect count. Stark. 331–2; 1 Chitty Crim. Law 167, 205.

2. If the Court was right in quashing the first count, as the second count referred to the first, the whole indictment should have been quashed. 13 Johns. 484–5; 1 Chitty Crim. Law 247, 249.

3. For the same reason judgment should have been arrested.

A. COWLES, J. M. KRUM, and J. REYNOLDS, for the plaintiff in error.

Geo. W. Olney, Attorney General, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:

This was an *indictment* containing two counts; the first, for an assault with intent feloniously to kill and murder; the second, for an assault with intent to do a great bodily injury, without any considerable provocation, contrary to the statute in such cases provided. A motion, before pleading, was made by the defendant, to quash the indictment, for defects appearing on its face. The Circuit Court, on the motion, quashed the first count, and refused the application as to the second.

The defendant was tried on the second count, and convicted. He then moved in arrest of judgment, which motion the Circuit Court overruled, and rendered final judgment on the conviction. A writ of error has been prosecuted in this Court, and it is now assigned for error—First, That the Circuit Court ought to have arrested the judgment in the cause, because as the first count did not show a presentment on oath, and being bad and quashed by the Court, the second count being only good by reference to the first, the second should also have been quashed. Secondly, Because the first count being stricken out, there is no averment of the empanelling, selecting, and swearing of the grand jury; and therefore the second count is bad.

In considering the second objection, it will be well to determine what was stricken out, on the motion to quash the indictment.

That portion of the indictment which recites the choosing, selecting, and swearing of the grand jury, according to the form provided in § 152 of the Criminal Code of this State, in which it is described as the commencement of the indictment, cannot be considered as the count itself, or a portion thereof. It is but the caption prescribed by the act.

The facts narrated after this caption, or commencement of the indictment, is the count, and this alone, we consider, was stricken out by the Court, on the motion to quash; and consequently the second count would be good by reference to this caption.

Apart, however, from these considerations, the first objection cannot be sustained, because the second count is perfect in itself without reference to the first. That count recites that "The grand jurors aforesaid, chosen, selected, and sworn, as aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, on their oaths aforesaid, do further present. "If the words "aforesaid," in this recital are considered as surplusage, then the second count is, without any reference whatever, entirely sufficient in itself, and shows a presentment on the oath of the jurors, conformably to strict form. Without, however,

considering it as surplusage, the count is not vitiated by the use of the word aforesaid.

Neither of the grounds assumed, as error, being sufficient, the judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

The People of the State of Illinois, *ex relatione*, William Teale *v.* John Pearson, Judge of the Cook Circuit Court.

Application for a writ of Mandamus.

When an action is brought upon a promissory note, and a declaration is filed containing a special count on the note, and the common counts, and a copy of the note is filed with the declaration, it is unnecessary to file an *account* in order to give the note in evidence under the common money counts.

Where the Circuit Court granted a continuance because an account was not filed with a declaration upon a promissory note,—which also contained the usual common counts—although the plaintiff offered to file a stipulation that he claimed to recover only upon the note which was filed with the declaration ten days before the session of the Court,—unless the plaintiff would strike the common counts out of his declaration, the Supreme Court granted a peremptory writ of mandamus to the judge of the Circuit Court, commanding the Court to proceed with the cause without requiring the account to be filed. (a)

Semble, That where a notice of an application for a writ of mandamus to a judge of the Circuit Court, is served upon the opposite party in interest, and the judge of the Court, and the law is plain, the Supreme Court will grant a peremptory writ in the first instance.

William Teal instituted a suit against John B. F. Russell, Francis Peyton, and Josiah E. McClure, in the Cook Circuit Court, on the 9th of December, 1837, by summons, returnable to the March term, 1838. The summons was returned duly executed upon Peyton and McClure, "Russell not found."

On the 22nd day of February, more than ten days before the session of the March term of the Court, the plaintiffs filed their declaration in said cause, upon a promissory note. The declaration contained a count on the note, and usual common counts. A copy of the note was filed with the declaration, but no account was filed.

At the March term of the Court, the defendant, Peyton, "moved the Court to continue the cause because the declaration has a special count, and the common counts; there is no account filed for the money counts."

At the May term, 1838, of said Court, the Hon. John Pearson presiding, the defendant having renewed his motion, the plaintiff made a cross motion to "be permitted to file a stipulation that he claims to recover in this cause upon the promissory

(a) *Post*. 475.

note only, a copy of which was filed with the declaration in this cause on the 22d of February, 1838, and that upon the filing of the said stipulation, the said motion made by the said defendant for the continuance of the cause, be denied, and that the Court proceed with the trial of the cause in its regular order on the docket, (upon such stipulation being filed,) unless the defendant shall show some other sufficient ground for a continuance," and offered to file said stipulation. The Court thereupon ordered "that said cross motion be denied, and that the defendant's motion be allowed, and the said cause be continued at the plaintiff's costs unless the said plaintiff strike out of the declaration the said common money counts."

The said William Teal presented the record of said cause, and the following notice and certificate, to the Supreme Court, at the June term, 1838:

"*Cook Circuit Court.*
William Teal
v.
John B. F. Russell,
Francis Peyton, and
Josiah E. McClure.

The plaintiff in this cause, by Butterfield and Collins, his attorneys, hereby gives notice to this honorable Court and the defendants, that he will make an appplication to the next Supreme Court of this State, to be held at Vandalia, on the first Monday in June next, that a *mandamus* be issued, to the judge of this Circuit Court, directing him to vacate the order disallowing the cross motion made by the plaintiff in this cause, on Friday the 10th inst., and that he allow the said cross motion and proceed to the trial of the said cause as in the said cross motion prayed, and that the Court make such further or other order as justice may require, and prays that this motion be entered on the records of this Court.

BUTTERFIELD and COLLINS,
Plaintiff's att'ys.

May 19, 1838.

To the Hon. J. Pearson, Judge of said Court, and Messrs. Grant and Peyton, att'ys for defts."

"We acknowledge service of copy of the foregoing notice this 27th day of May, 1838.

GRANT and PEYTON,
Att'ys for defts."

"State of Illinois, } ss.
Cook county, }

I, Richard J. Hamilton, Clerk of the Circuit Court of said county, do certify, That on the 24th of May, 1838, this paper was filed among the papers of the case wherein W. Teal is plaintiff, and John B. F. Russell *et al.* are defendants, and was ordered to be stricken from the file by the judge of said Court. Witness my hand, at Chicago, this 28th day of May, A. D. 1838.

R. J. Hamilton, Clerk."

Points made, and authorities cited by

Justin Butterfeld and James H. Collins for the relator:

At common law, where the declaration does not disclose the particulars of the plaintiff's demand, the defendant has a right to obtain a judge's order directing the plaintiff to deliver to the defendant, a bill of particulars of his demand by a certain day. Tidd's Practice 534.

"The bill of particulars must not be made the instrument of that injustice which it is intended to prevent." *Per* Mansfield Chief Justice, in Milwood *v.* Walter, 2 Taunt. 224.

The statute of this State requiring a copy of the account where the action is brought on an account, to be filed with the declaration, was not intended to introduce any new principle into the laws of this State. It has been settled as well before as since the statute of Ann, that the holder of a promissory note may give it in evidence under the general counts for money lent, or money had and received.

The plaintiff has the same right to give the note in evidence under the money counts, as under the count upon the note. 2 Lord Raymond 775; 2 Strange 719; 3 Burr. 1516; 2 Johns. 235; 8 Johns. 81; 12 Johns. 90.

The only way in which the erroneous decision of the Circuit judge in this case can be corrected by this Court, is by the issuing of a *mandamus*.

The Supreme Court of this State have original jurisdiction in cases of *mandamus*. Article 6, § 2 of the Constitution of this State.

"A writ of *mandamus* is of a most extensively remedial nature, and issues in all cases where the party has a right to have a thing done, and has no other specific means of compelling its performance.

It issues to the judges of any inferior Court, commanding them to do justice, according to the powers of their office, whenever the same is delayed; for it is the peculiar business of the Court of King's Bench, to superintend all inferior tribunals, and therein enforce the due exercise of those judicial or ministerial powers,

with which the Crown or legislature have invested them." 3 Blac. Com. 110.

When the Superior Court of the City of New York granted a new trial, on the ground of newly discovered evidence, and it appeared that the evidence alleged to be newly discovered, was merely cumulative, the Supreme Court of the State of New York granted a peremptory *mandamus* to the judges of the Superior Court of the City of N. Y., to vacate the rule granting a new trial.

In this case, the Court say, a *mandamus* will not be awarded when the subordinate tribunal has an absolute discretion, without other control than its own judgment—as where criminal courts are authorized, in their discretion, to fix the period of imprisonment of convicts within certain periods, or to impose fines within certain amounts; but when the law has given to the parties rights as growing out of a certain state of facts, then discretion ceases; and if the tribunal charged with the matter, commit an error, its acts will be reviewed. The People *v.* The Superior Court of the City of N. Y., 10 Wend. 285.

Where a Court of Common Pleas set aside a report of referees, on the merits, the Supreme Court awarded a peremptory *mandamus* commanding them to vacate the rule. 12 Wend. 246.

The Supreme Court of New York awarded a peremptory *mandamus* to the judges of the Court of Common Pleas of the City and county of New York, commanding them to vacate a rule to set aside a *fieri facias*. Blunt *v.* Greenwood, 1 Cowen 15.

On an application for a *mandamus*, where both parties are heard, and there is no dispute about the facts, and the law is with the application, a peremptory *mandamus* will be granted in the first instance. In such a case, the Court will not put the party to the useless delay of going through with the forms of an alternative *mandamus*. *Exparte* Rogers, 6 Cowen 526.

Under this state of the facts and the law, the relator asks this Court to award a peremptory *mandamus* against the Circuit judge, commanding him to vacate the order made by him denying the relator's cross motion for leave to file a stipulation that he claimed to recover on the note only, and commanding him to allow the said motion.

A *mandamus* is the only remedy the plaintiff can have in this case. It is conceived that a writ of error will not lie. The act of the special session of 1837,(1) only gives a writ of error for "overruling a motion for a continuance"—but not for refusing to proceed and try a cause.

James Grant and F. Peyton opposed the motion.

(1) Acts of July 1837, 100; Gale's Stat. 540. See note to Wickersham *v.* The People, *Ante* 128.

Per WILSON, Chief Justice:(1)

This motion must be granted. The case is too clear to admit of doubt. I cannot conceive upon what ground the judge of the Court below refused to grant the relator's motion. It was impossible for the plaintiff to file an account, unless he manufactured one for the occasion. The statute only requires an account to be filed where the action is in reality brought upon an account. The object of the statute is to apprize the defendant of the precise nature of the claim which he is called upon to answer. The filing of an account, when the plaintiff had no claim besides the note, would not have given the defendants any additional information. Besides, the offer to file the stipulation removed all doubts, if any could possibly exist before, as to the exact nature of the plaintiff's demand. Let a peremptory writ issue.

Motion allowed.

Note. See the case of The People *ex rel.* R. C. Bristol *v.* John Pearson, and note, 2 Scam.

(1) SMITH and LOCKWOOD, Justices, not having been present at the argument of this cause at the last June term, gave no opinion.

ALFRED EDWARDS and BENJAMIN F. BOSWORTH, appellants *v.* AUGUSTUS TODD, appellee.

Appeal from Cook.

Under § 17 of the practice act, unliquidated damages arising *ex contractu*, may be set off in an action of assumpsit. The rule was different under the act of 1819.

Where the plaintiff brought an action of assumpsit to recover the amount of freight agreed to be paid by the defendants for the transportation of their goods from Buffalo to Chicago, and the defendants pleaded the general issue, and gave notice of their intention to give in evidence under that plea, that a portion of the goods agreed to be transported, exceeding in value the whole amount of the freight claimed, was, through the negligence, carelessness, and improper conduct of the plaintiff, lost and destroyed on the voyage; and on the trial offered to introduce such evidence, first, by way of set-off, and secondly, by way of reducing the damages claimed: *Held* that the evidence was admissible as well as a set-off, as in reduction of damages.(*a*)

The words "claim or demand" in the section of the statute allowing set-offs, is to be confined to such as arise from "contracts or agreements, express or implied."

THIS cause was tried at the August term, 1837, of the Cook Circuit Court, before the Hon. Jesse B. Thomas. Judgment was rendered for the plaintiff in the Court below for $354,66 and costs, from which the defendants appealed to this Court.

T. FORD, for the appellants.

(*a*) Kaskaskia B. Co. *vs.* Shannon, 1 Gil. R. 25; Streeter *vs.* Streeter. 43 Ill. R. 161, 162, 163.

JAMES GRANT, for the appellee, relied on the following authorities:

15 Vesey; 2 Cowen; 1 Chit. Plead. 569, 601; Babington on Set-Off, 11 at top, 24, 25, 26 at margin; 1 Taunton 137; 6 Term R. 488; Freeman *v.* Hyatt, 1 Blackstone R. 391; Doweland *v.* Thompson *et al.*, 2 Blackstone R. 901, exactly in point; Breese 107, Gregg *v.* James and Phillips; Hanna & Co. *v.* Pleasants and Bridges, 2 Dana 269; 5 Monroe 1.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* to recover the amount of freight agreed to be paid for the transportation and delivery of a certain quantity of merchandise, from Buffalo, in New York, to the port of Chicago, in the State of Illinois.

The declaration contains the usual counts. The defendants pleaded the general issue, and gave notice of their intention to give in evidence, under that plea, that a portion of the goods agreed to be transported, exceeding in value the whole amount of the freight claimed, was, through the negligence, carelessness, and improper conduct of the plaintiff, lost and destroyed on the voyage. On the trial, the defendants offered to introduce such evidence, first, by the way of set-off, and secondly, by way of reducing the amount sought to be recovered in the action.

The Circuit Court rejected the evidence as inadmissable, deciding that the plaintiff was entitled to recover freight as charged, on such portions of merchandise as had been safely transported and delivered to the defendants, and had been received by them; and that it was not competent, in this action, for the defendants to set-off the value of the merchandise lost, under their notice; nor could it be introduced for the purpose of reducing the amount of freight contracted to be paid, and due for such portions of the goods as had been delivered to the defendants, and received by them. This instruction of the Circuit Court, being excepted to on the trial, is now assigned among other causes for error.

The question thus presented for consideration, will necessarily involve a decision on, and a just and reasonable interpretation of, our statutes allowing set-offs. By the 17th section of the practice act, approved 29th January, 1827,(1) it is provided that "The defendant, or defendants in any action brought on a contract or agreement, either express or implied, having claims or demands against the plaintiff or plaintiffs in such action, may plead the same or give notice thereof, under the general issue, as is provided in the 12th section of the act; or under the plea of payment—and the same or such part thereof, as the defendant or defendants shall prove on trial, shall be set-off and allowed

(1) R. L. 491; Gale's Stat. 532.

against the plaintiff's demand." The 12th section, referred to in this provision, declares that "the defendant may plead the general issue, and give notice of the special matter intended to be relied on as a defence on the trial; under which notice the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon."

In the investigation to be made on this point, it is important to enquire, whether the "claim or demand" of the defendants, being of an unliquidated character, forming a distinct breach of a portion of the plaintiff's contract to transport and deliver the merchandise, and which would form a substantive cause of action in itself against him, could, under the section of the act quoted, be the subject of a set-off. The liability of the plaintiff, to account for the merchandise received by him, and agreed to be transported by his bill of lading, and alleged to be lost, must depend on the fact whether the loss was occasioned by the dangers of the navigation, which were excepted in the bill of lading, or by the negligence and unskilful conduct of the plaintiff, in the management and navigation of the vessel of which he was the master. The proof of negligence and unskilful conduct devolved on the defendants to establish; and if proved, would render the master, who is plaintiff in the action, liable to answer for the loss occasioned by his own misconduct and ignorance; and, though it is conceded, would necessarily involve a complication of facts and questions to be decided, yet, for many good reasons of policy and justice, should be enquired into, and allowed to be set-off against the plaintiff's demand, to the amount of the actual value of the merchandise proved to have been thus lost or destroyed. It cannot be denied, that in an action against the master as a common carrier, he would be liable to refund to the extent of the injury sustained, under such a state of facts; and if by a reasonable interpretation of the act allowing set-offs, and without a perversion of its obvious import, this can be done, no good reason can be shown why the defendants should be driven to seek redress in a separate action against the master of the vessel.

The language of our act in the section quoted, is, that the defendant in any action brought on any contract or agreement, either express or implied, having claims or demands against the plaintiff in the action, such claims or demands "shall, on proof, be set-off and allowed against the plaintiff's demand." This section then defines by its terms all actions arising *ex contractu;* and would seem necessarily to have given an interpretation to the nature of the claim or demand, which it is declared shall be set off against the plaintiff's claim, for the recovery of which he has brought his action. Set-offs are to be mutual, it is agreed; and in the present case the defendants ask no more than the

right of charging the plaintiff with the value of the goods which he has not delivered conformably to the terms of his contract; and which, they allege, have, by his own acts of unskilfulness and negligence, been lost.

The gist of the right to make the set-off, arises from the failure to perform that portion of the plaintiff's contract which embraced the stipulation to deliver the lost goods, as well as those not lost; and the plaintiff does not seek to recover freight for any other portion than those that were delivered and accepted by the defendants.

The performance by the master of the vessel, of his part of the contract on which the action itself is founded, and whether or not he shall be excused for the non-performance of a portion of it, by reason of the loss occasioned by the dangers of navigation, without any act of his, arising from ignorance of his profession or negligence on his part, is then the matter in controversy. The investigation, then, is confined to an ascertainment of the performance of the contract between the parties, according to its import and legal effect; and no objection is perceived to a course which involves the enquiry, whether the contract has been so performed as to entitle the plaintiff to recover the whole, or a part of the compensation agreed to be allowed for the service stipulated to be performed; or whether by his own acts of negligence and ignorance, he has, in the attempts to do such service, occasioned a loss to the defendants for which he is accountable; and which should be deducted from the compensation for such portion of the contract as has been well performed.

The section allowing set-offs, is peculiar in its phraseology, and differs most materially from the English statute concerning set-offs, as, also, from that of Kentucky, and from that of several of the other States of the Union; and is altogether different from that which was enacted in this State in 1819, and which existed until the present act repealed it.

The decision referred to by the plaintiff's counsel, in Dana's Reports,(1) was decided under the act of Kentucky, which declares, that where any suit for a debt or demand is depending, it shall be lawful for the defendant, on the trial, if the plaintiff be indebted to him, to plead the same in discount or by way of set-off; and it is decided in that case, "That this statute meant monied demand in its strictest legal sense, and rendered it of about the same signification as debt."

The act 2 George II. declares, "That where there are mutual debts between the plaintiff and defendant, one debt may be set-off against the other."

This act was amended by the act 8 George II., it having been doubted whether mutual debts of a different nature could be

(1) 2 Dana 269.

set-off against each other; and it was declared, that notwithstanding such debts were deemed in law to be of a different nature, still they were allowed to be set-off, unless in cases where a debt accrued by reason of a penalty declared in a bond, in which case a special provision is made, that the same shall be pleaded in bar, so that no more shall be allowed than is justly due.

The 10th section of the act of the 22d March, 1819,(1) provided that, "If two or more dealing together, be indebted to each other on bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court, if the defendant cannot gainsay the deed, bargain, or assumption, on which he is sued, it shall be lawful for such defendant to plead payment of all or a part of the debt or sum demanded; and give such bond, bill, receipt, account, or bargain, in evidence."

From an examination of this statute, as comprehensive as it may be, it appears, by the terms "*claim or demand*," used in the present act, to have been the intention of the legislature to place the right of set-off on a still broader foundation; and to have embraced a class of claims and demands which could not have been set-off under the act of 1819, of this State. Under the British act, that of Kentucky, and the act of our General Assembly of 1819, not a doubt could exist, that the set-off was required to be mutual, and could not be of an unliquidated character. By the common law, before the statute of set-off, where there were mutual cross demands unconnected with each other, a defendant could not in a court of law defeat the action, by establishing that the plaintiff was indebted to him, even in a larger sum than that sought to be recovered and relief could only be obtained in a court of equity. Yet, at common law, and before the enactment of the statute of set-off, a defendant was entitled to retain, or claim by way of deduction, all just allowances or demands accruing to him, or payments made by him in respect to the same transaction or account which forms the ground of action. This cannot be strictly considered a set-off, but is in the nature of a deduction.

Under this rule, the defendants might be supposed to have had the right of showing that the goods not delivered, were lost by the causes alleged, and as their value was readily ascertainable and susceptible of accurate proof, by showing their cost at the place of purchase, they were entitled to have their value deducted from the plaintiff's claim for compensation.

The claim would not partake of that uncertain character which marks cases of unliquidated damages, which are sought to be recovered in actions arising from causes purely *ex delicto;* and which, it is equally certain, were not intended to be embraced

(1) R. L. of 1819, 142, 149.

within the terms "claim or demand," and which are to be confined to such as arise from "contracts or agreements, express or implied," as specified in the section allowing set-offs; and beyond which, being the boundary, we are not to pass.

As the plaintiff would be liable for the loss of the merchandise, in an ordinary action of assumpsit; and as it is manifest that our law allowing set-offs, not only embraces cases not comprehended in the British and American statutes referred to, and has been greatly extended beyond those embraced in the act of 1819, it would be incorrect to apply the decisions made under those laws to the present act, as evidence that the interpretation of the act should be the same. Some doubts have heretofore existed as to the true construction of this act, but when we reflect on the intention of its framers, and the objects it was intended to accomplish, those doubts must be dissipated.

From a careful and attentive examination and consideration of the question submitted in this case, we were of opinion that the Circuit Court ought to have admitted the evidence proposed to be offered; and that it was admissible under the pleadings, as well in the nature of a set-off, as, also, for the purpose of reducing the amount sought to be recovered by the plaintiff.[a]

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to that Court to award a *venire facias de novo*.

Judgment reversed.

Note. Decisions in relation to set-off; Irvin *et al. v.* Wright, *Ante* 135; Morton *v.* Bailey *et al.*, *Ante* 213; Ransom *v.* Jones, *Ante* 291.

(*a*) Sergent *vs.* Kellogg, 5 Gil. R. 280, and notes.

Gurdon S. Hubbard and Henry G. Hubbard, appellants *v.* Elias Freer, appellee.

Appeal from the Municipal Court of the City of Chicago.

In appeals from justices of the peace, where an appeal bond is decided to be insufficient, the statute is imperative that the Court shall permit "a good and sufficient bond" to be filed.

Where the appeal bond was signed by one of the two appellants, as follows, "Hubbard & Co. [Seal]:" *Held* that the bond was amendable.(*a*)

This cause was tried at the November term, 1837, of the Municipal Court of the City of Chicago, before the Hon. Thomas Ford.

James Grant and F. Peyton, for the appellants, cited R. L. 395.(1)

(*a*) Bragg *vs.* Fessenden, 11 Ill. R. 544, and note. (1) Gale's Stat. 409.

Lockwood, Justice, delivered the opinion of the Court:

This action was commenced by Freer, against Gurdon S. and Henry G. Hubbard, before a justice of the peace, and judgment rendered against the defendants. An appeal was taken to the Municipal Court of the City of Chicago; and the appeal bond was executed in the name of the firm, to wit: "Hubbard and Co.," with only one seal. Freer made a motion to dismiss the appeal, on account of the defective execution of the bond, and the defendants made a cross motion, to permit them to amend the bond, or file a new one. The motion to dismiss was granted, and the cross motion overruled. This Court has frequently decided, that where an appeal bond is adjudged to be insufficient, the statute is imperative, that the Circuit Court shall permit a "good and sufficient bond" to be filed. The refusal to grant this permission, was therefore error.

The judgment of dismissal is reversed with costs, and the cause remanded, with directions to the Court below, to permit the defendants below to file a good and sufficient bond, and then proceed to try the cause on its merits.

Judgment reversed.

Note. See Dedman *v.* Barber, *Ante* 254; Swafford *v.* The People, *Ante* 289; Crain *v.* Bailey *et al.*, *Ante* 321; Yunt *v.* Brown, *Ante* 264.

James Berry, appellant *v.* William Hamby, appellee.

Appeal from Alexander.

A County Treasurer has no authority whatever to take a note payable to himself as Treasurer; nor has he any authority to assign or transfer such a note.(*a*)

A suit cannot be maintained in the name of a County Treasurer. *Sed quere.*

Quere, Whether an action in the name of the county, can be maintained upon a note payable to the County Treasurer.

This was an action instituted by the appellee against the appellant, in the Alexander Circuit Court, upon the following note:

"$100.

One day after date, I promise to the Treasurer of Alexander county, for the use and benefit of the county, one hundred dollars for value received. As witness my hand and seal. Unity, June 24th, 1837. James Berry. [L.S.]"

On which is the following assignment:

"For value rec'd I hereby assign the within note to William Hamby. Jan. 26th, 1838. Thomas Howard,
Treasurer of A. C."

(*a*) Munsel *vs.* Temple 3 Gil. R. 93.

DAVID J. BAKER, for the appellant.

L. DAVIS and F. FORMAN, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

This was an action by *petition and summons*, on a promissory note payable to the "Treasurer of Alexander county," for one hundred dollars, and assigned by the Treasurer to the plaintiff in this action.

The petition avers that at the time of the making of the note, and at the assignment, the assignor was the Treasurer of the county. The defendant craved oyer of the note and the assignment, and demurred. The Circuit Court overruled the demurrer, and gave judgment for the amount of the note.

This decision is alleged for error, and the points are now made, that the note is a void and inoperative instrument, the Treasurer of Alexander county not being a person capable in law of contracting, and having no authority to assign the note. We have no doubt on both the points made. The Treasurer of the county had no authority whatever to take a note payable to himself as Treasurer. His duties are prescribed in the revenue law creating the office; and no power is given him in the act, to take notes or securities in his official character from any person; nor is he created an artificial person in law, capable of suing as Treasurer; consequently no suit could be maintained in the name of the Treasurer. As the Treasurer could not take the note, the assignment was equally nugatory. He could not confer on the assignee a right which he did not possess himself; nor could he, by the assignment in the name of Thomas Howard, Treasurer of Alexander county, vest an interest in the plaintiff, to enable him to maintain an action in his own name on the note. Whether an action in the name of the county, could be sustained for money had and received, or money loaned and advanced, is not now before us for adjudication.

Judgment reversed with costs.

Judgment reversed.

NATHANIEL J. BROWN, impleaded with GEORGE B. FIELD, plaintiff in error *v.* JOHN KNOWER and BENJAMIN KNOWER, defendants in error.

Error to the Municipal Court of the City of Chicago.

Where there are several endorsers or assignors of a note, who endorse the same consecutively, the liability of each is several and not joint.

The liability of an assignor of a note, under the statute of this State, is contingent; and the holder is required to show due diligence to obtain payment from the maker, before he can resort to the assignor.

Brown *v.* Knower *et al.*

JUDGMENT was rendered in this cause for the defendants in error, by default, for $153,37 and costs, at the April term, 1838, of the Municipal Court of the City of Chicago.

J. BUTTERFIELD, for the plaintiff in error.

1. When the defendants endorse a note consecutively, they cannot be sued thereon jointly. 3 Peters 477.

2. Where there is judgment by default, upon a promissory note, and the money counts are in the declaration, it is error to have the damages assessed by the clerk, without entering a *nolle prosequi* to the common counts; 6 Cowen 40.

I. N. ARNOLD, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* on a promissory note, by the holder against the defendants, as assignors, who are sued jointly. The declaration shows the defendants assigned the note separately, in their individual names, and not jointly.[a]

Judgment having been entered against Brown, Field not having been served with process, the question is now made, whether the action can be sustained against Brown, in its present form. There can be no doubt that the liability of each is several, and not joint. The action, in its present form, has been misconceived.

The liability of the assignor of a note, under our statute, making promissory notes assignable, is contingent; and the holder is required to show due diligence to obtain payment from the maker, before he can resort to the endorser, or more properly, the assignor.

The judgment is erroneous as to Brown, not merely because the declaration has omitted to aver due diligence to obtain payment of the maker; but more especially so, because of a misjoinder, of defendants in the action.

The judgment is reversed with costs.

Judgment reversed.

Note. See Humphreys *v.* Collier *et al.* *Ante* 47.

(*a*) Carstens *vs.* Little, 4 Scam. R. 410.

ABEL GILBERT and wife, plaintiffs in error *v.* DAVID MAGGORD, defendant in error.

Error to Will

Where a mortgage was executed by G. and his wife, and judgment was rendered upon a *scire facias* to foreclose the same, against G. and his wife: *Held* that the wife was properly made a defendant, and that the judgment was not erroneous.

Semble, That in order to bar the wife's right of dower, she should be made a party defendant, in a *scire facias* to foreclose a mortgage.

Where there is judgment on a demurrer against the party demurring, if he wishes to avail himself in the Supreme Court, of the grounds raised by the demurrer, he must stand by his demurrer in the Court below; otherwise he will be precluded from assigning for error the judgment of the Circuit Court.

By a rule of the Supreme Court, no errors will be enquired into, but such as are assigned.

THIS cause was heard in the Will Circuit Court, before the Hon. John Pearson. Judgment was rendered for the defendant in error.

J. M. STRODE, J. GRANT, J. Y. SCAMMON, and G. SPRING, for the plaintiffs in error.

J. BUTTERFIELD, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

This was a proceeding under the statute, by *scire facias*, to foreclose a mortgage. The defendants pleaded several pleas. The plaintiff, in the Circuit Court, confessed the sixth plea of the defendants, and replied new matters in avoidance.—To this replication the defendants demurred, which demurrer being overruled by the Court, the defendants rejoined to the replication, and took issue. The several issues were tried, and verdict and judgment rendered for the plaintiff. It is now assigned for error, First, That the writ is insufficient in law to maintain the action; Secondly, That the Circuit Court erred in overruling the defendants' demurrer to the plaintiff's amended replication.

As to the first ground, it is not stated in what particular the writ of *scire facias* was defective, or insufficient; and it does not appear that any objection to it was made in the Court below, other than such as was alleged and considered in the defendant's sixth plea. There is consequently no other cause of objection before this Court. On the argument, it was said that the wife of the defendant in the Court below, had been improperly made a party. She however appears to have pleaded and raised no objection, whatever, of a personal character.

But if it had been objected formally, in the Circuit Court, we perceive no good reason why she, having signed the mortgage, should not have been made a defendant in the proceedings. On

the contrary, there appears to be irresistible reasons why she should be joined and made a co-defendant, as she was one of the mortgagors, and it was necessary to foreclose her equity of redemption and right of dower, that a judgment should pass against her. The judgment is not *in personem* but *in rem*, and is only for the sale of the mortgaged premises, to satisfy the debt, damages, and costs of suit.[a]

With regard to the second objection, it is to be remarked, that it has been frequently settled in this Court, that where there is judgment on a demurrer against the party demurring, if he wishes to avail himself of the grounds raised by the demurrer, in this Court, he must stand by his demurrer in the Court below,—otherwise he will be precluded from assigning for error the judgment of the Circuit Court. As the defendants in the Circuit Court must have asked leave to withdraw their demurrer, and rejoin to the plaintiff's replication, the correctness of the decision of the Court below on the demurrer, cannot now be enquired into.

By a standing rule of this Court, no other errors shall be enquired into, but such as are assigned. There might possibly be an exception to this rule in a case of an extreme character, where great injustice might result from a literal and rigid adherence to the rule; but we can perceive no reason for a departure from it in this case, and no other grounds can then be enquired into.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Peck *v.* Boggess, *Ante* 281: Buckmaster *v.* Grundy, *Ante* 310.
(*a*) Leonard *vs.* Admr.s of Villars, 23 Ill. R. 379.

GEORGE TOWNSEND, plaintiff in error *v.* RICHARD BRIGGS, defendant in error.

Error to Schuyler.

A promise made by a purchaser of a portion of the public lands of the U. S., subsequently to the purchase, to pay for improvements made thereon previous to the sale of the same, is without consideration and void.

TH. L. DICKEY, for the plaintiff in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action commenced before a justice of the peace, and brought by appeal into the Circuit Court of Schuyler county, On the trial of the cause in the Circuit Court, Briggs, the plaintiff below, proved that some five or six years ago, he made an improvement on the public lands; that subsequent to the making

of the improvement, Townsend, the defendant below, purchased the land of the United States, and in a conversation between the parties, Townsend promised that he would pay Briggs the value of his improvement when he was able. Evidence was also given that Townsend was able to pay. There was some other testimony in the cause, which it is unnecessary to state. Townsend objected to the legality and sufficiency of the testimony to render him liable to the action. The Circuit Court overruled the objection, and gave judgment for the plaintiff below; to which decision the defendant excepted, and brought the cause into this Court by writ of error. The only question presented in this case, is, whether a promise made by a purchaser of the public lands, to pay for improvements made on the land, previous to the purchase of the government, is binding in law?

In the case of Carson *v.* Clark, decided at December term, 1833,(1) and of Hutson *v.* Overturf, decided at December term, 1834,(2) this Court decided that the promise made by a vendee, after the purchase of the land from the government, to pay for improvements made upon the land previous to the purchase, was a promise without consideration and void. The Court in the last mentioned case, also decided, that the "*Act relative to contracts for the Sale of Improvements on public land*," approved February 15, 1831, had not made such promise binding on the party making it. The promise proved in the Court below, is, according to these decisions, without consideration and void.[a]

The judgment of the Circuit Court must be reversed with costs.

Judgment reversed.

(1) *Ante* 113. (2) *Ante* 170. See also Blair *v.* Worley, *Ante* 178.
(*a*) *Contra*. *Ante* 171 note (*a*).

The People of the State of Illinois, *ex relatione* Nathaniel J. Brown *v.* John Pearson, Judge of the Cook Circuit Court.

Application for a Writ of Mandamus.

It is unnecessary to file an account with a declaration upon a bill of exchange containing a special count on the bill, and the common money counts, in order to use the bill as evidence under the money counts.

Where the Circuit Court granted a continuance because an account was not filed with the declaration on a bill of exchange, which contained a special count and the common money counts, although the declaration and a copy of the bill declared on, was filed more than ten days previous to the session of the Court, the Supreme Court granted a writ of *mandamus* to the judge of the Circuit Court directing him to rescind the order for a continuance, and proceed with the cause upon the merits, without requiring the plaintiff to file an account under the money counts.

The People *v.* Pearson.

At this term of the Court, the relator filed a copy of the record of the cause of the relator against Harvey C. Newcomb, and the following notice, and moved the Court for a writ of *mandamus* to the judge of the Cook Circuit Court:

"Nathaniel J. Brown *v.* Harvey C. Newcomb.

Gents:—Please take notice that we shall move the Supreme Court of this State, at the term thereof to be holden at Vandalia, on the 3d Monday of December inst., upon the transcript of the record filed in this cause, that a writ of *mandamus* be issued and awarded to the judge of the Cook County Circuit, commanding him to vacate an order made by him in this cause at the last August term of the said Court, held at Chicago, denying a certain cross motion made in the said cause by the said plaintiff, for leave to proceed to the trial of the said cause, upon his abandoning all right to give in evidence under either of the counts in the declaration, any demand except the said bill of exchange set forth in the first count of the said declaration; and that the said judge grant and allow the said cross motion.

Dated December 10th, 1838.

Yours, &c.

Butterfield & Collins, Plff.'s Attys.

To Messrs. Arnold & Ogden, Esqrs. Deft.'s Attys."

"We admit due service of a copy of the above notice of motion, and waiving all other questions, consent that the Court make such order in the premises as may be deemed just.

Dated December 12th, 1838.

Arnold & Ogden, Deft.'s Attorneys."

The following bill of exceptions states all of the material facts in the case:

"Nathaniel J. Brown *v.* }
Harvey C. Newcomb. }

Be it remembered that at the August term of the Cook Circuit Court, held at the Court House in the City of Chicago, on the 22d day of August, in the year one thousand eight hundred and thirty-eight, came the defendant, by Arnold and Ogden, his attorneys, and moved the Court that this cause be continued, because there is no account filed under the general counts, and thereupon the said plaintiff, by Butterfield and Collins, came and made his cross motion that he be allowed to proceed to trial in this cause, upon the written instrument set forth in the first count of the declaration, and hereby abandons all right to give in evidence under the other counts in the declaration, any demand except the said bill of exchange set forth in said first count of the said declaration, and hereby consents that the common counts in the said declaration be so far struck out of the declaration, saving only to the plaintiff the right to give the said bill of

exchange in evidence under any of the counts of the declaration applicable to the said bill of exchange. And therefore the Court decided that the motion to continue the said cause be sustained, and the cross motion be overruled, and that the cause be continued at the plaintiff's cost; to which decision the plaintiff excepted, and tendered to the said Court this bill of exceptions which the said Court has signed and sealed, according to the statute in such case made and provided.

JOHN PEARSON, [L. S.]

J. BUTTERFIELD and JAMES H. COLLINS, for the relator.

J. N. ARNOLD and M. D. OGDEN, *contra*,

Per Curiam; The facts in this case are similar to those in the case of the People, *ex relatione* Teal, against the judge of the Cook Circuit Court,(1) decided at this term of the Court; and the same disposition must be made of it.

Let a preparatory writ of *mandamus* issue to the judge of the Cook Circuit Court, directing him to rescind the order for a continuance, and to proceed with the cause upon its merits.

The costs of this application will abide the event of the trial in the Court below.

Writ of mandamus granted.

Note. See the case of the People, *ex relatione* Teal, *Ante* 458, and note.

(1) *Ante* 458.

JAMES DAY, plaintiff in error *v.* CUSHMAN, EATON & Co., defendants in error,

Error to La Salle.

Where a *scire facias* to foreclose a mortgage commanded the defendant to answer unto "Cushman, Eaton & Co.," without showing or averring what persons composed the said firm: *Held* that the omission was fatal.

A *scire facias* to foreclose a mortgage payable by instalments, must state that the last instalment has become due.

In summary proceedings under a statute, the provisions of the statute must be strictly complied with.

AT the September term, 1837, of the La Salle Circuit Court, the Hon. Jesse B. Thomas presiding, judgment was rendered by default against the plaintiff in error, upon the foreclosure of a mortgage by *scire facias*, for $1219,17 and costs of suit. The cause was brought to this Court by writ of error.

JAMES GRANT and FR. PEYTON, for the plaintiff in error.

L. DAVIS and F. FORMAN, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

This was a proceeding under the statute, on a *scire facias* to foreclose a mortgage. Amongst other errors assigned, it is proposed to notice but two:—First, The *scire facias* commands the defendant, in the Circuit Court, to answer the complaint of Cushman, Eaton & Co., without disclosing the Christian names of Cushman and Eaton, or of those embraced under the term Co.—Secondly, The *scire facias* does not aver that the last instalment of money, to secure the payment of which the mortgage was given, had fallen due.

It is too obvious to doubt, that the omission of the Christian names of the plaintiffs in the action, as, also, of the names of the persons who composed the Company, is fatal—equally so, the neglect to state, as the statute has declared, that the last payment had become due, before the suing out of the *scire facias*. As the proceedings under the statute are summary, it should be strictly complied with.

The statute of joefails does not cure the omissions; and as there has been no appearance, the errors have not been waived.

Judgment reversed with costs.

Judgment reversed.

ANTOINI GUYKOWSKI, plaintiff in error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

Error to Clinton.

In a criminal cause the accused stands on all his rights, and waives nothing which is irregular, and more especially so when life is in question.

An alien is not qualified to serve as a juror in any case.

The declaration that certain qualifications are necessary to be possessed by the individual to constitute him a juror, necessarily disqualify the person who does not possess such qualifications.

The affidavit of a prisoner, upon a motion for a new trial, is *prima facie* evidence of the truth of the statements it contains.

Semble, That the affidavit of a juror in support of the verdict, on a point entirely disconnected with his acts or the motives for his conduct, may be admitted on a motion for a new trial.

Where the precept for summoning the jury at a special term of a Circuit Court called for the trial of a prisoner charged with a capital crime, had been lost by the sheriff, and the Court directed a new one to be filed *nunc pro tunc*: *Held* that there was no error.

All mere formal objections to an indictment, should be made before pleading.

IN June, 1838, a special term of the Circuit Court was held in Fayette county, for the trial of Guykowski, the plaintiff in error, then imprisoned in the jail of said county, on the charge of having murdered Nelson Ryall.

The judge produced in Court the written notification of the sheriff of said county, requesting that a special term of said Court be held for the purpose of the said trial.

The judge certified that he had issued his precept to the said sheriff, authorizing him to summon jurrors, and the sheriff made affidavit that the said precept had been lost, or mislaid, after the jurors had been summoned.

The Court thereupon ordered a precept to be filed *nunc pro tunc*.

The defendant, by his counsel, moved to quash the array, which motion was afterwards withdrawn.

The counsel on behalf of the People, then moved to quash the array, on the ground that the precept had not been returned by the sheriff. The motion was overruled.

On the second day of the term, Josiah Fisk was appointed by the Court, to prosecute in the absence of the Attorney General.

On the third day of the term, the grand jury found an indictment for murder against Guykowski. He pleaded not guilty.

The venue was changed upon the application of the prisoner, to Clinton county, where the cause was tried at the September term, 1838, before the Hon. Sidney Breese, and a verdict of guilty found by the jury.

The defendant moved the Court for a new trial, on the following grounds:

1. That the verdict was contrary to law and evidence.

2. That John Burnside, one of the jurors in the cause, was an alien and an unnaturalized citizen, which fact was unknown to the defendant and his counsel, until after the rendering of said verdict. The last ground was supported by the affidavit of the defendant.

This motion the Court overruled, to which opinion of the Court, the defendant, by his counsel, excepted.

The defendant filed his affidavit, stating that the Attorney General had resigned previous to the trial of said cause, and that no appointment had been made by the Governor until after the same; and that one Josiah Fisk, without authority, advised the finding of said indictment; and then moved in arrest of judgment, on the following grounds:

1st. That no person was authorized by law to sign said indictment.

2d. That the Attorney General, at the time of finding said indictment, had resigned his office.

3d. That John Fisk, who signed the same, had no legal authority to do so.

4th. The authority of the grand jury to find the indictment, is not set forth in the indictment.

5th. It is no where shown in said indictment, that the Court was called for the trial of the defendant.

6th. The sheriff did not return the order of the judge, and the process by which the Court was called, and grand and petit jurors summoned.

This motion the Court overruled.

Sentence of death was then pronounced on the defendant.

A. P. Field and James Shields, for the plaintiff in error, relied upon the following points and authorities:

Aliens disqualified from being jurors R. L. 378 ;(1) 3 Coke on Littleton 516, Aliens to be challenged ; 1 Chit. Crim. Law 251, No alien can serve on grand jury ; do 408, Whenever a grand jury shall be challenged, so may a petit juror ; 3 Harr & Mc Henry, 100, A disqualified juror is cause for new trial ; Wharton's Digest.

Affidavit of disqualification of juror sufficient

9 Pirtle's Digest 112, Affidavit of party sufficient ; 1 Marsh 213, Bratton *v.* Bryant ; 3 J. J. Marsh 526, Ewing *v.* Price ; 2 Pirtle's Dig. 121, Art. 124 ; Wharton's Dig. 407, Bratton *v.* Bryant ; 1 Marsh 212, The party opposing a motion may adduce counter evidence.

In arrest of judgment.

Precept—3 Coke on Littteton 504 ; Precept defective—18 Johns. 212, People *v.* McKay.

Indictment.

Wharton's Digest 171, Caption of—1 Saunders 250, note.

Vacancy in the office of Attorney General.

Wharton's Digest 177, State *v.* Simms ; 1 Term Rep., No Attorney General, criminal may be discharged.

George W. Olney, Attorney General, for the defendants in error.

Smith, Justice, delivered the opinion of the Court :

The prisoner, Guykowski, was indicted for the *murder* of one Nelson Ryall, at a special term of the Fayette Circuit Court, held under the provisions of the ninth section (2) of "*An act regulating the times of holding the Supreme and Circuit Courts*," and for other purposes, approved 15th February, 1835, which authorizes the holding of such terms, at the request of a prisoner charged with a capital offence, when he may demand a speedy trial. At this special term, the Court ordered a precept for sum-

(1) Gale's Stat. 395. (2) Acts of 1835, 171 ; Gale's Stat. 187.

moning a grand and petit jury, to be filed *nunc pro tunc*, in consequence of the loss of the first one, by the sheriff.

The counsel for the prisoner challenged the array of the grand jury for this cause, but subsequently withdrew his objection. The Attorney General, on behalf of the prosecution, renewed it and the Court overruled the exception. The prisoner then challenged some of the grand jurors for cause. After the indictment was found, the prisoner applied for, and obtained, a change of venue, to the Circuit Court of the county of Clinton. He was there tried and convicted at a regular term of that Court. After conviction, his counsel moved for a new trial, and in arrest of judgment, both of which motions were overruled, and sentence of death pronounced. A writ of error having been sued out, and a supersedeas awarded, in pursuance of the 189th section of the "*Act relative to Criminal Jurisprudence*,"(1) and the case being before the Court for revision, it is now assigned for error,—

1. That the Circuit Court ought to have awarded a new trial, because one of the jurors, who tried the cause, was an alien at the time of the trial, and therefore not qualified to serve as a juror: such alienage being at such time unknown to the prisoner.

2. That the motion in arrest of judgment, ought to have prevailed, because the person signing the indictment, was not the Attorney General, nor authorized by law to sign the same. Also, because it is not set forth in the body of the indictment, that the grand jury had the authority to find the same; because it is not averred in the indictment that the Court was called specially for the trial of the prisoner; and because a precept for summoning the grand jury at the special term of the Fayette Circuit Court, had been filed *nunc pro tunc*.

The delicate and responsible trust which this tribunal is called on to exercise, in reviewing cases of the character under consideration, sufficiently admonishes it of the caution and prudence with which such re-examinations should be conducted; and that, where there is every reason to believe, from an inspection of the proceedings, that the intrinsic merits of the case have been fairly ascertained and determined, the adjudication of the inferior tribunal should not be disturbed, unless it satisfactorily appear that some settled and well established principle of criminal law, or rule of proceeding, has been clearly violated.

While the justice of the rule here asserted is admitted, and an adherence to its principles conceded, it is of equal importance that the rights of the accused should be protected and preserved, and the essential forms of law prescribed for the mode of conducting the ascertainment of his guilt, should be carefully observed and followed. A departure from them could not fail to produce difficulties and doubts. A recognition of a departure, in

(1) R. L. 217; Gale's Stat. 235.

one case, might lead to the adoption of another, and finally, those barriers, which are guaranties for the regular and impartial conducting of criminal cases, might be frittered away, and cause interminable perplexities and possibly eventuate in gross injustice. It is much easier to require the observance of the mandates of the law, than to determine in what cases they may safely be dispensed with.

It is therefore, more proper, and more consonant to reason and justice, to require a substantial adherence, than to suffer innovations upon the known and positive rules prescribed by law, for the regular conducting of causes. The justice of these grounds is as clear and apparent, as those which are founded on principles of humanity, and by which the administration of criminal law has been marked, declare that the accused stands on all his rights, and waives nothing which is irregular, and more especially so, when life is in question.

Testing the present case by the principles here recognised, and applying them to the facts of the case, it will be perceived that the first objection presents grounds deserving attentive and grave consideration. The bill of exceptions discloses the fact, that after the conviction of the prisoner, an application for a new trial was made, based on his deposition, which disclosed the fact that John Burnside, one of the jurors who had rendered the verdict, was an alien, as he had been then, for the first time, informed, and believed, and that such information came to his knowledge since his conviction. On this deposition the enquiry arises, 1st, Whether the juror, admitting the fact of alienship to be true, was an unqualified juror, and if so, whether the verdict was not void for that cause. 2d, Whether the deposition of the prisoner was sufficient evidence of the fact of alienship, and was admissible as evidence of the fact. To determine the first enquiry, as to the competency of the juror, we must recur to the act prescribing the mode of summoning grand and petit jurors, and defining their qualifications and duties, in force 1st June, 1827.(1) By that act it is declared, that "All free white male taxable inhabitants, in any county in this State, being natural born citizens of the United States, or naturalized according to the Constitution and laws of the United States, and of this State, between the ages of twenty-one and sixty years, not disabled, by the commission of crime, or bodily infirmity, and being of sound mind and discretion, shall be deemed and considered competent persons to serve on grand and petit juries."

From this section there can be no doubt whatever, that an alien is not qualified to serve as a juror in any case. The declaration that certain qualifications are necessary to be possessed by the individual, to constitute him a juror, necessarily disqualify

(1) R. L. 373; Gale's Stat. 395.

the person who does not possess such qualifications, from being one. It is not a mere personal exemption, from service, which the individual may claim, but an entire exclusion from such service. The persons who are entitled to personal exemption, from service, are enumerated in the act. An alien is not capable in law to discharge the functions of a juror. In a cause where an alien serves as a juror, he cannot be considered the lawful juror whom the sheriff is called on to summon for the trial of the cause. He is not, in the language of the common law, free from all exception, but is prohibited from sitting as a juror; and although he is not challenged, and the accused may be considered as tacitly consenting by not objecting to his serving on the jury, still he cannot be rendered competent to serve by the presumed assent of the accused, because the law has not admitted him to act in such capacity.[a]

It may, also, be fairly presumed, that it was incumbent on the prosecution, to take care that the jurors were competent and legally qualified according to the provisions of the law, under which they were chosen and selected.

The verdict cannot be considered as the unanimous opinion of twelve persons capable in law of determining the law and the facts submitted to their consideration and decision; but as the opinion of eleven only; the other being disqualified from being one of their number. The verdict is a nullity, not having been obtained as the law has required.

The second branch of the question under consideration, whether the deposition of the prisoner was sufficient evidence of the facts of alienage, and was admissible to prove such fact, can be determined only from the circumstances which appear in the case, and the reasons which may be drawn from the admission of such depositions in other cases. In civil cases, the deposition of the defendant of the existence of particular facts, before unknown, and of newly discovered evidence, for the purpose of moving for a new trial, is frequently received, and the admissibility thereof has not, we believe, been questioned; and numerous new trials have been granted on facts disclosed by such depositions. If this rule obtains, in civil cases, we do not perceive any objection to it in criminal ones, subject to the right on the part of the prosecution, to disprove by counter evidence, the truth of the facts alleged by the accused.

It may be urged that a party, after conviction of a flagrant crime, for the purpose of obtaining another trial, or the procrastination of the judgment of the law, would not hesitate to resort to these means, as an expedient for the accomplishment of an object so desirable to him; and that perjury might readily be

(a) Limited to capital cases, Greenup *vs.* Stoker 3 Gil. R. 202; Chase *vs.* People, 40 Ill. R. 356.

conceived to be the consequence of the adoption of such a rule, This reasoning is not just, because although the party may make his application founded on his own deposition, it does not follow, by any means, that this deposition is to be conclusive. The facts alleged, as the grounds of the application, being open to be contradicted by the prosecution, if false, might be shown to be so, and hence it is not rational to suppose, that the application would be made on an alleged state of facts, easily disproved, or rendered doubtful by counter evidence, because of the certainty of failure in all such cases.

In the case before us, how easily could the prosecution have produced the juror, Burnside, or his deposition, and proven his non-alienship, if such was the fact; and, in case of his absence, the evidence of his neighbors to the same fact. This, we presume, would have readily occured to the prosecution, as the most efficient means of removing the alleged objection to the verdict. Not having done so, is it not the fair inference therefrom that the deposition of the prisoner is true? This deposition was, doubtless, only *prima facie* evidence of the fact: but does not the failure or omission to produce the proof so entirely within the ability of the prosecution to adduce, (if the deposition of the prisoner was untrue in point of fact,) render it almost conclusive? We must presume, then, under this state of facts, that the alienship of the juror would have been confirmed by the juror himself; otherwise it seems to us, that an attempt would have been made to disprove it, by some of the means suggested.

This deposition of the juror in support of his verdict, on a point entirely disconnected with his acts, or the motives for his conduct, as a juror, would not have been objectionable, on the grounds on which it has been decided that a juror's testimony cannot be received to impeach his verdict.[a]

It may also be urged, that the exception to the juror, is technical, and that, as no objection appears on the merits the conviction should be sustained.

We cannot think that an objection to a trial and conviction produced by the agency of one whom the law has positively prohibited from sitting as a juror in a cause, can be considered technical. It is a matter of substance, and may be considered an enquiry whether one who is excluded, has taken on himself to pronounce on the law and the facts of the case, without, not only, the authority of law, but against such authority.

The presumed assent of the accused to the juror's being one of his triors, cannot surely invest the juror with the exercise of a power which the law has declared him incapable of exercising. Suppose the case of a female imposed on the Court and parties without their privity, or even with it: Could such a person be a competent juror? Would not all deny the affirmative, in such a

(a) Spurk *vs.* Crook, 19 Ill. R. 426.

case? And although such an opinion would be rendered without hesitation, the disqualification in this case is not less conclusive.

It is a false supposition, to conclude, that the silence of the accused could confer a power on the person sworn as the juror, to sit and determine the cause, when his inability to legally act is so apparent. Suppose that the alienage of the juror had been developed to the Court, when the juror was called, and about to be sworn, can it be imagined that the Court would have hesitated to have instantly set him aside, and declared him incompetent? We think not. Does then the time of the discovery of the juror's incompetency, alter the principle, or the reason of the decision? In Massachusetts it has been decided, that a person who was a member of the grand jury, and sat and found the bill of indictment, in a criminal case, was an incompetent juror on the trial by the petit jury, on the same indictment, and a new trial was granted for such a cause. There are, also, many cases where partial jurors, who had formed and expressed opinions on the guilt of the accused, before trial, having rendered verdict against him, have been set aside, the knowledge of the cause of objection not having been known or discovered until after conviction.

In the case of the Indian Nomaque, decided at the December term of this Court in 1825,(1) we have said that "The prisoner, in a capital cause, must be considered as standing on all his rights. He cannot be considered as waiving anything, nor could his counsel do it for him;" and the case of the People *v.* McRay,(2) is cited, as conclusive authority to sustain such position. In this case, which was a criminal one, the venire was without a seal, and although the prisoner had challenged many of the jury who were summoned under it, still the Court held, in that case, that it was a nullity, and granted a new trial. The principles on which these cases were decided, are applicable to the present, and apply with full force.[a]

The argument of inconvenince which might result from granting a new trial, ought not to be addressed to those whose duty compels them to declare the very law of the case, and more especially should its influence be unfelt where no discretion is reposed.

Much as this Court may regret the necessity which imposes on it the duty of reversing a decision, where the trial on all the facts may be presumed to have been not only deliberately and impartially had, but freely investigated, still it is bound to declare the law as it is conscientiously believed to exist, without regard to the possible inconvenience which may result from a new trial.

The objections in arrest of judgment are considered not tenable: and if as formal ones, they possessed grounds of considera-

(1) Breese 109. (2) 18 Johns. 212. (*a*) Modified. People *vs.* Scates, 3 Scam. R. 351

tion, a part of them should have been raised before pleading to the indictment, as the 153d section of the criminal code requires. That portion of them which were made before pleading, which include the objection to the precept, are considered inconclusive. The precept for the grand jury, which was filed *nunc pro tunc*, was for the benefit of the prisoner, at whose instance the Court had been assembled, and as he challenged the array, and afterwards withdrew it, he must be considered as regarding the objection without force. It was but to render more certain and perfect the proceedings instituted for his benefit, and which had been adopted for the speedy trial which he had sought.

For the reasons assigned, we are of opinion that the judgment of the Circuit Court of Clinton county should be reversed, a supersedeas to the execution of the sentence of death awarded, and a new trial be had in the Clinton Circuit Court, and that a *venire facias de novo* be awarded by that Court, for such purpose.

Judgment reversed.

Note. See the case of John Stone *v.* The People, decided at June term, 1840, where it is held, that irregularities in summoning a grand jury, must be taken advantage of by a challenge of the array, or a motion to quash the indictment found by the jurors.

Objections to jurors, if known, must be made before trial. Wickersham *v.* The People, *Ante* 128.

Bliss, Williams & Co., plaintiffs in error *v.* William Perryman, defendant in error.

Error to White.

Where the plaintiff brought an action before a justice of the peace, upon a bond made by the defendant while an infant, and upon the trial the defendant pleaded and proved his infancy in bar; and thereupon the plaintiff made oath that he knew of no witness by whom he could prove the defendant's agreement since he became of age, to pay him $18 in full of the bond, except by his own oath, or that of the defendant, and prayed that the defendant might be sworn, which the Court refused to allow: *Held* that the Court decided correctly, because the proof, if admitted, would have proved a different cause of action from that upon which suit was brought.

Semble, That an infant cannot bind himself by bond (*a*)

Where a plaintiff relies upon a new promise made after the defendant became of age—the original contract having been made during infancy—he should declare on the new contract.

This action was originally instituted before a justice of the peace of White County, who rendered judgment for the plaintiffs in error, for the amount of the note sued on. The defendant appealed to the Circuit Court, where the cause was tried at the

(*a*) Cole *vs.* Pennoyer 14 Ill. R. 160.

October term, 1837, before the Hon. Justin Harlan, and judgment rendered for the defendant for costs. On the trial in the Court below, the following bill of exceptions was taken:

"Be it remembered that on the trial of this case, which was brought upon the following note, viz—"Township, White county, Ill., 1835. By the first day of January next, 1836, for value received I promise to pay Bliss, Williams & Co. or their order, twenty-eight dollars with use. If one half of the above note is paid when due, then a credit is to be given on the other half for one year longer, 1837—This note was given for a windmill; if the signer is not suited with this mill, he is to return the same by the first day of March next, at Bliss, Williams & Co.'s factory in New Haven, and they are to furnish him a new mill at that place, provided the signer takes good care of the mill and keeps the same in his own barn. The above note is to be paid at P. Slater's store in New Haven. Witness my hand and seal this 9th day of February, 1835.

WILLIAM PERRYMAN, [L. S.]

Attest, THOMAS WOODS."

The defendant pleaded infancy, and proved that at the time of executing the note sued on, he was under 21 years of age. Whereupon the plaintiff introduced Elisha Smith, a witness, who proved that after the said defendant came of full age, he told him (the witness) that he had had a conversation with Williams, one of the plaintiffs, who had proposed to receive $18 in full of the note, and that he, Perryman, believed he would pay it to plaintiffs if he could procure the money, and if he could get the money, he believed he would go and see Williams, and pay it to him, but the witness did not understand from defendant that he had agreed with Williams, when they were together, to pay said sum of $18 in full of said note. Whereupon the plaintiff, Williams, offered himself to be sworn, and was sworn, that he had no witness, and knew of no witness, by whom he could prove the defendant's agreement with him to pay him $18 in full of said note, after he came of full age, except by his own oath or that of said Perryman, and prayed that said Perryman might be sworn, which the Court refused to allow, on the ground that such evidence could not be considered as proving any demand, discount, or set-off in the sense of the statute in such case made and provided. To which opinion of the Court in refusing to hear the testimony of said Perryman, or the plaintiff, Williams, the plaintiff by his counsel, excepts, and prays this his bill of exceptions may be sealed and allowed, and it is done accordingly.

J. HARLAN, [L. S.]"

H. EDDY, for the plaintiffs in error, contended that a con-

ditional promise was good. 4 Am. Dig. 325. Part payment, or promise to pay part, will bind the defendant to that extent, but no further. 2 Stark. Ev. 725.

The Court should have required the defendant to be sworn as a witness, or else admitted the oath of the plaintiff, Williams. R. L. 409.(1)

E. Webb, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This case originated before a justice of the peace. The bill of exceptions taken on the trial, contains all the proceedings, from which it appears that the plaintiff sued the defendant on a bond given by him for $28. The defendant pleaded infancy, and sustained his plea by proof. The plaintiff then set up a promise made by the defendant after he came of age, to pay the plaintiff $18 in lieu of the bond, but having failed in establishing this promise by disinterested testimony, he applied to the Court (under the statute making the oath of the party evidence in certain cases) to have the defendant sworn to prove his subsequent promise. The Court decided the evidence to be inadmissible, and refused to allow the party to be sworn. To reverse which opinion, this writ of error is prosecuted. It is clear that the plaintiff has mistaken the contract upon which he ought to have brought his action, and that the evidence which he offered was properly rejected. This evidence went to establish a different and distinct cause of action, from that upon which suit was brought. The action was instituted upon a contract under seal, for the payment of a specific sum or money, while that sought to be established on the trial, by the testimony which was rejected, was a parol agreement, entered into at a different time, and for the payment of a different amount. The admission of such testimony would not only have changed the character of the action, and the nature of the defence, but would have been a surprise upon the defendant. The plaintiff should have brought his action upon the subsequent parol promise. and not upon the bond.[a] An infant cannot bind himself by bond, even for necessaries, and when the plaintiff relies upon a new promise made after full age, it is always necessary that he should declare upon the simple contract, which the new promise was meant to establish; and the infant will then be bound to the extent of his promise, even if the consideration of the original contract, (for which the latter is substituted,) was not for necessaries.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. See Carver *v.* Crocker, *Ante* 265.

(1) Gale's Stat. 420. (*a*) But see Ayres *vs.* Richards, 12 Ill. R. 149; Keener *vs.* Crull, 19 Ill. R. 191; Livingley *vs.* Haynes, 22 Ill. R. 216; Brewster *vs.* Grover, 29 Ill. R. 246.

JAMES E. WALDO and DANIEL WALDO, appellants, *v.* NATHAN AVERETT, appellee.

Appeal from Morgan.

It is not necessary that the bond given on an appeal from the judgment of a justice of the peace to the Circuit Court, should be entered into before the clerk of said Court, or in his office. It is sufficient if it be duly executed and filed in the clerk's office.
The issuing of a summons and supersedeas, on appeal from a judgment of a justice of the peace, is evidence that the appeal bond is approved by the clerk.
On an appeal from the judgment of a justice of the peace to the Circuit Court, if the bond be ever so defective, the Court nevertheless should allow a good and sufficient bond to be filed.

AVERETT recovered a judgment against the appellants, before a justice of the peace of Morgan county, from which they appealed to the Circuit Court. At the first term of the Circuit Court after the appeal was taken, the appellee moved to dismiss the appeal because it did not appear from the appeal bond, that it was entered into in the office of the clerk, or that the bond had been approved by the clerk, as required by law. The appellants entered a cross motion that the clerk have leave to attach his official certificate to the bond, showing the manner of its execution; which motion the Court sustained, provided the facts would warrant the clerk in making the certificate. The deputy clerk, who received and filed the bond, being called and sworn, stated that the bond was not entered into before him, nor the security therein approved by him; but that the bond was filled up by him, and given to the appellants to be executed by the parties, he telling them it must be executed in the presence of a witness. The bond was afterwards handed to him by the appellants, with the names of the obligors subscribed thereto, and by him received and filed. The sureties did not appear before him, nor did they execute, or acknowledge the execution of the said bond before him.

Upon this statement, the Court decided that the appeal bond was insufficient, and that the clerk would not be authorized to annex his official certificate to the bond, showing that it was taken and approved by him, and dismissed the appeal. The appellant excepted to this opinion of the Court.

The cause was dismissed at the November term, 1837.

WM. THOMAS, for the appellants, cited Dedman *v.* Barber, *Ante* 254.

M. MCCONNELL, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This was an appeal from the judgment of a justice of the

peace to the Circuit Court, and by that Court dismissed, because of the supposed insufficiency of the appeal bond. It appears by the bill of exceptions, that the bond was written by the clerk, and handed to the appellants to be signed by them and their sureties, which was accordingly done, (though not in the office,) and the bond lodged in the office with the clerk, upon which he issued a supersedeas to the justice.

This, we are of opinion, was a substantial compliance with the provisions of the statute that requires the appeal bond to be entered into in the office of the clerk, and the security to be approved by him. Although the bond was not signed in the clerk's office, it was lodged there, as the law requires, and must have been approved by the clerk; otherwise he had no authority to allow an appeal, and to issue a supersedeas enjoining the justice from proceeding in the cause. But if it is admitted that the bond was ever so defective, the Court nevertheless erred in dismissing the appeal; it ought to have allowed the motion of the appellants to file a good bond. The statute expressly provides for a case like this, by declaring that the appellant shall in nowise be prejudiced by reason of any informality or insufficiency in the appeal bond, provided he will, in a reasonable time, to be fixed by the Court, execute and file in the office of the clerk, a good and sufficient one. This provision is exclusive as to the right of the appellant to file a new bond, when the first is adjudged by the Court to be insufficient.

The decision of the Court below is therefore reversed with costs, and the cause remanded.

Judgment reversed.

Note. See Swafford *v.* The People, *Ante* 289; Crain *v.* Bailey *et al.*, *Ante* 321; Yunt *v.* Brown, *Ante* 264; Hubbard *et al. v.* Freer, *Ante* 467, and note.

William W. Gordon, appellant, *v.* Knapp and Pogue, appellees.

Appeal from Morgan.

The appointment of a constable *pro tem.* by a justice of the peace to execute process, under § 51 of the "*Act concerning Justices of the Peace and Constables*" must be made by endorsement upon the back of the process. An appointment upon a separate piece of paper, is not a compliance with the act.

The statute specifies but two cases in which a justice of the peace is authorized to appoint a constable *pro tem.* The one is to execute criminal process, where the accused is likely to escape; and the other is to execute civil process, where goods and chattels are about to be removed before an application can be made to a qualified constable. In the latter case, as a pre-requisite to the power of appointment, it must be shown that goods and chattels are about to be removed.

A justice of the peace cannot appoint a constable *pro tem.* to serve a summons or other

personal notice, in a civil suit. The statute refers to an execution or attachment. *Semble*, That where a justice of the peace or other inferior officer, acts in a case where he is not authorized to act, the proceedings are not only irregular, but void.

WM. THOMAS, for the appellant.

M. MCCONNELL, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This was a suit brought before a justice of the peace upon an open account. Judgment was rendered by default against the appellant, for $95, on the 6th of May 1837, from which he appealed to the Circuit Court, and that Court dismissed the appeal for want of jurisdiction. From this decision an appeal was taken to this Court, and it is assigned for error, that the Court dismissed the appeal, and also that it did not reverse the judgment of the justice Upon what view of the case the Court came to the conclusion that it had no jurisdiction, is left to conjecture, as no reason for such opinion is assigned. It is clear that the opinion of the Court upon this point, is not warranted by the facts in the case. The suit is for a debt claimed to be due upon an open account, not exceeding one hundred dollars, being one of a class of cases over which the statute expressly confers jurisdiction upon justices of the peace. The sufficiency of the next error assigned, which is the refusal of the Circuit Court to reverse the judgment of the justice, depends upon the legality of the manner in which the constable was appointed, and also upon the authority of the justice to appoint a constable in any manner in this case. It appears that the process was a summons, which was served by the constable *pro tem.* appointed by the justice, under authority of the "*Act concerning Justices of the Peace and Constables.*" This act authorizes a justice to appoint a constable *pro tem.* in a criminal case,(1) where there is a probability that a person charged with an indictable offence, will escape, and in a civil case, where goods and chattels are likely to be removed before application can be made to a qualified constable. It also provides that the appointment, in such cases, shall be made by a written endorsement on the back of the process under the seal of the justice. This endorsement may be regarded as the commission of the special constable, without which his execution of the process entrusted to him, would be illegal and void. In this case, no endorsement deputing any one to act as constable, was made upon the process; but the temporary appointment was made upon a separate and distinct paper. This, it would seem, was not a compliance with the statute. The object of the law in requiring the appointment to be upon the process, was probably to apprize those whose obedience it commands, of the authority

(1) R. L. 399, § 51; Gale's Stat. 412, § 51.

under which the officer acts. This is in accordance, too, with the general principle, which requires one acting under a special appointment, to show his authority.

The want of authority in the justice to appoint a constable to serve a summons, presents a stronger objection to the legality of the notice to the defendant below, than the mode of making it in this case. The statute specifies but two cases in which a justice is authorized to appoint a constable *pro tem.* The one is to execute criminal process, where the accused is likely to escape; and the other is to execute civil process, where goods and chattels are about to be removed before application can be made to a qualified constable; and in the latter case, as a pre-requisite to the power of appointment, it must be shown that goods and chattels are about to be removed.[a] In the present case, it does not appear that any evidence of a probability of the removal of property, was adduced. It is also manifest from this provision, that the process contemplated by the statute, and which the justice is authorized to depute an individual to execute, is not a summons to the individual, or other personal notice; for that would not prevent the removal of property beyond the jurisdiction of the Court, but it is an execution or attachment against the personal property about to be removed, in order to secure to a creditor the means of satisfying his demand. And, 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. In this case, the constable was not appointed as the law requires, nor was the process such as he could be created to execute; and no cause having been shown, which could justify the appointment and the issuing of the process, the whole proceeding of the justice was irregular and void, and ought to have been reversed by the Circuit Court.

It is therefore ordered that the judgment of the Circuit Court be reversed with costs, and also that of the justice, for irregularity.

Judgment reversed.

(a) Gross Stat. 227 Sec. 274, p. 401, Sec. 96. Flack *vs.* Ankeny, Beecher's Breese R. 187, and notes.

JAMES SMITH, plaintiff in error *v.* JOHN SHULTZ, defendant in error.

Error to Vermilion.

Since the statute of 1837, an appeal will lie from the decision of a Circuit Court refusing an application for a new trial.

Smith *v.* Shultz.

A court will not grant a new trial, when, in its opinion, substantial justice has been done between the parties, though the law arising on the evidence, would have justified a different result; nor will it upon the application of the defendant, afford him an opportunity of introducing newly discovered testimony, which is not conclusive in its character, or is merely cumulative.

Every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention.(*a*)

This cause was tried at the September term, 1837, of the Vermilion Circuit Court. A verdict of $400 was rendered for the defendant in error.

S. McRoberts and A. C. French, for the plaintiff in error.

Brown and I. P. Walker, for the defendant in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This was an action on the *case* for slander. The plaintiff in the Court below sued the defendant for charging him with having stolen his corn and oats. The defendant pleaded not guilty, and gave notice under the statute, that on the trial of the cause he would prove that the plaintiff did take his corn and oats without his knowledge or consent, in the night time, and fed it to his hogs and horses.

Upon this plea and notice, the parties went to trial, and a verdict was found for the plaintiff. The defendant then moved the Court for a new trial, upon the ground of newly discovered evidence. The affidavit, which was made by the defendant, sets out that he believes that since the trial of the cause, he has discovered that he can prove by Joshua Law and one other witness, that the plaintiff told one or both of them, that he did take the corn of the defendant, without his knowledge or consent. The Court overruled the motion for a new trial, from which decision the defendant has taken this appeal. At common law, the decision of a court upon an application addressed to its discretion, cannot be assigned for error, and such has been the uniform decision of this Court. But by an act of the legislature, this principle of the law has been changed, and an appeal will now lie from the decision of a Court refusing an application for a new trial. The question then is, has the Court erred in the exercise of its legal discretion, in overruling the motion made in this case. This should be clearly made out, to warrant a reversal of its opinion, upon a point, in relation to which, it has the best opportunity of forming a correct opinion. A court will not grant a new trial, when, in its opinion, substantial justice has been done between the parties, though the law arising on the evidence, would have justified a different result; nor will it, upon the application of the defendant, afford him an opportunity of introducing newly

(*a*) Lane *vs.* People, 5 Gil. R. 305.

discovered testimony, which is not conclusive in its character, or is merely cumulative.[a] The evidence alleged by the defendant to have been discovered subsequently to the trial, would not, unaided by other circumstances, constitute a defence. The allegation in the declaration is that the defendant charged the plaintiff with larceny with stealing his corn and oats. The admissions of the plaintiff, expected to be proved, are, that he did take the corn of the defendant without his knowledge or consent. This is certainly good evidence as far as it goes; but it does not go far enough to establish upon the plaintiff the guilt of larceny. Every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention. No evidence of such intention is alleged to have been discovered, and the property may have been taken under a claim of title, or under other circumstances which would rebut all presumption of felonious intention. The bill of exceptions does not contain the testimony given on the trial; we cannot therefore know what evidence, or whether any, was given by the defendant under his notice of justification. If none was given tending to justify, the court very properly overruled the motion for a new trial, because the newly discovered evidence, does not, of itself, amount to a justification; and if on the other hand, any testimony tending to make out this defence, was given on the trial which was had, then that subsequently discovered is merely cumulative, and would not have justified the Court in awarding a new trial, in order to re-adjudicate upon a cause, with the result of which it is satisfied.

The decision of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. See Harmison *v.* Clarke, *Ante* 131; Garner *et al. v.* Crenshaw, *Ante* 143; Wickersham *v.* The People, *Ante* 128, and note.

(*a*) Crozier *v.* Cooper, 14 Ill. R. 141, and notes.

William Pickering, appellant *v.* Daniel Orange, appellee.

Appeal from Edwards.

The law is well settled, that where a person negligently keeps a dog or other animal, which is known to him to be of a savage and ferocious disposition, he is accountable for all the injury it may do to other animals.

This cause was tried at the April term, 1838, of the Edwards Circuit Court, before the Hon. Justin Harlan and a jury. A verdict was rendered for the defendant in the Court below, the appellee.

W. J. Gatewood, for the appellant, cited Lord Raymond's Reports; 1 Pirtle 95; 2 do. 105–10; 1 Bibb 265; Wendell 249.

A. Cowles, for the appellee.

Browne, Justice, delivered the opinion of the Court:

This was an action on the *case* for keeping dogs which had been used to bite mankind, and to chase, worry, and kill other animals besides sheep, and which had killed divers sheep of the plaintiff. On the trial of the cause, the judge of the Circuit Court of Edwards county, gave the following instruction: "That if defendant's dogs had been used to kill or worry sheep, and the defendant had notice thereof, then it was a question of law, and he was liable for all the damages they might do to the sheep of another, after such notice; but if they had been used to kill or to chase, bite, and worry other animals, the property of another, or to bite mankind, and the defendant knew it, it was a question of fact for the jury; and if, therefore, they found the ferocity of the dogs to be such, as to put a reasonable man upon his guard, and the defendant suffered, after notice, his dogs to go at large, then the defendant should be liable to the plaintiff for the amount of injury done." The jury found for the defendant below.

These instructions were clearly wrong. The law is well settled, that where a person negligently keeps dogs or other animals, which are known to him to be of a savage and ferocious disposition, the owner of the animals is accountable for all the injury they may do to others; and it is the duty of the owner of such animals to secure them, to keep them from doing mischief.

The judgment of the Circuit Court is reversed with costs, and the cause remanded, and a new trial awarded.

Judgment reversed.

Note. See Pickering *v.* Orange, *Ante* 338.

Joseph L. Wilson and Thomas S. Hinde, appellants *v.* John C. Campbell, John Brown, and John Gardner, appellees.

Appeal from Edwards.

Where at the bottom of a bond made by a principal and his surety, a memorandum was annexed, "This bond is executed by Mr. H. as security for Mr. W., the principal:" *Held* that the fact contained in said memorandum, could not be pleaded to an action on the bond against the surety. *Held*, also, that it was unnecessary to notice the memorandum in the declaration.

Where two persons execute a bond, one as principal and the other as surety, one is equally as much bound to the obligee as the other,

Semble, That the signing as surety, is only evidence between the obigors, of the character of the obligation of each.

THIS was an action of *covenant* commenced by the appellees against the appellants, in the Edwards Circuit Court, upon the following bond:

"On or before the twenty-first day of March, eighteen hundred and thirty-seven, we bind ourselves and our heirs, jointly and severally, to pay to John C. Campbell, John Brown, and John Gardner, or to either of them, the sum of five hundred and twenty dollars, with interest from the date hereof. Witness our hands and seals, this twenty-first day of March, 1836.

JOSEPH L. WILSON, [L.S.]
TH. S. HINDE, [L.S.]

Memorandum that this bond is executed by
Mr. Hinde, as security for Mr. Wilson,
the principal. C. E. DODDRIDGE, for the obligees."

This cause was tried at the April term, 1838, of the Court below, before the Hon. Justin Harlan. Judgment was rendered against the appellants for $585.

H. EDDY, for the appellants, contended that the demurrer should have been sustained to the declaration.

E. B. WEBB, for the appellants, cited the following authorities:

2 Am. Dig. 80 and 535, Hunt *v.* Adams, 5 Mass. 358, showing that signing as surety makes no distinction; 2 Tuck. Com. 126; 1 Chit. Plead. 353, As to the manner a deed should be pleaded; 1 Chit. Plead. 662–3; 2 Tuck. Com. 267, Demurrer only reaches error in substance; 5 Bac. Abr. 322; 2 Tuck. Com. 270, Pleading over aids some defects of substance and all of form; 2 Con. Rep. 550, Ferguson *v.* Harwood, What variance material, and what parts of a contract necessary to be set forth. Variance immaterial if it do not change the legal effect of a contract; 3 Stark. Ev. 1590 in note, 1550 note 1, 1558–9 note 3; 13 Johns. 449; 19 Johns. 421.

BROWNE, Justice, delivered the opinion of the Court:

This was an action of *covenant* brought in the Circuit Court by John C. Campbell and others, against Joseph L. Wilson and Thomas S. Hinde, on a bond for the payment of money. The bond was signed and sealed by the said Wilson and Hinde. At the foot of the covenant, was this memorandum, "That this bond is executed by Mr. Hinde as security for Mr. Wilson, the principal." The declaration contained no reference whatever to this memorandum. Defendant below craved *oyer*, and pleaded the fact that Hinde signed as security only, and plaintiffs below

knew it, and accepted it as such. Demurrer to the plea sustained, and thereupon damages assessed, and judgment. To reverse the judgment of the Court below, an appeal is brought to this Court, by Hinde. The Court did right in sustaining the demurrer to the plea. It may be that Hinde was only security to Wilson, still Hinde is bound with Wilson, to Campbell and others. Whether Hinde is security or principal, he is equally bound with Wilson to discharge the obligation to John C. Campbell and others.

The judgment of the Court below is affirmed with costs.

Judgment affirmed.

Note. Where sureties bind themselves jointly and severally as principals in a bond, there is no difference as to their liability in equity for the debt between them and the principal debtor, for whom they are sureties. U. S. *v.* Cushman, 2 Summer's C. C. R. 426.

Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the rent of the whole period of actual occupancy, was brought against both: It was held that the other lessee was not estopped to show that he signed the lease only in the character of surety, for the term specified, without having in fact occupied the premises at any time, and that he was not liable for rent after the time mentioned in the writing, the holding over, being, as to him, no continuance of the lease. Kennebec Bank *v.* Turner *et al.*, 2 Greenleaf 42.

Hail Mason, plaintiff in error *v.* Joel Finch, defendant in error.

Error to Madison.

The statute of the State of Illinois, in relation to forcible entry and detainer, is more comprehensive than the English act. It authorizes the action to be maintained against a lessee who holds over, after the determination of his lease, whether he holds by force or not, provided the lessor has given him notice to quit.

One joint tenant, or tenant in common, may maintain an action for forcible entry and detainer against his co-tenant.

This cause was tried at the August term, 1838, of the Madison Circuit Court, before the Hon. Sidney Breese.

A. Cowles and J. M. Krum, for the plaintiff in error, relied upon the following points and authorities:

1. That the facts set forth in the affidavit were not sufficient to authorize the justices of the peace to issue their writ and entertain cognizance of the cause. R. L. 311.(1)

2. One tenant in common cannot maintain an action of forcible entry and detainer against his co-tenant. The possession of one being the possession of both. 2 Blac. Com. 48, 180, 183;

(1) Gale's Stat. 313.

Cruise's Digest 446 ; Bigelow's Digest 447, 453 ; 1 Chit. Plead. 170 ; 4 Pick. 127.

3. The defendant in error should have brought trespass. The statute gives that remedy upon a state of facts shown by the affidavit. R. L. 474, § 3.(1)

William Martin, for the defendant in error, cited 3 Bac. Abr. 708, 710 ; R. L. 313.(2)

Lockwood, Justice, delivered the opinion of the Court:

Finch made complaint on oath before two justices of the peace, that he and Mason were joint tenants of a dwelling-house in the county of Madison, and that Mason, with force and arms, forcibly entered into the whole of the dwelling-house, and turned Finch out of the possession of his moiety of the house, and keeps him out ; and prays of the justices, that he may be restored to the possession of the undivided half of the house.

On the trial of this complaint, before the justices, a verdict was found in favor of the defendant below, and the cause was removed into the Circuit Court by appeal.

In the Circuit Court, Mason moved the Court, that the appeal be dismissed, because it appeared from the complaint of the plaintiff below, that the parties were joint tenants, and as the possession of one, is the possession of both in law, neither can maintain an action for forcible entry and detainer, against the other. The motion to dismiss was overruled by the Court. On the trial of the cause in the Circuit Court, a verdict of guilty was found against the defendant below, and judgment rendered that the plaintiff be put in possession of the undivided moiety, or one half of the whole dwelling-house described in the complaint. To reverse this judgment, a writ of error has been brought to this Court, and the only point made in the case, is, that one joint tenant cannot maintain an action of forcible entry and detainer against his co-tenant.

The act concerning forcible entry and detainer, was passed to restrain persons from violently taking and keeping possession of lands and tenements, although they may have title, and gives to the party thus ejected, a summary remedy to restore him to his former possession.

In England, proceedings under their acts against forcible entries and detainers, are either by indictment, or by complaint to a justice of the peace, and in either case it is a criminal proceeding, and the defendant is liable to fine and imprisonment, and the injured party to a restoration of his possession. Our act furnishes a civil remedy, and the judgment of the justices only restores the party to the possession of the premises from which he has been forcibly ejected. The scope and design of our act, is the same

(1) Gale's Stat. 514. (2) Gale's Stat. 313.

with those of England, and consequently where a party may be indicted there for a forcible entry or detainer, a civil action may be maintained here. Our act is more comprehensive than the English, as it authorizes the action to be maintained against a lessee who holds over, after the determination of his lease, whether he holds by force or not, provided the lessor has given written notice to quit.

Can then a joint tenant in England, who has actually been ousted by his co-tenant, be proceeded against under their statutes?

Russell, a late English writer on crimes and indictable misdemeanors, lays down the law in relation to forcible entry and detainer, as follows, "A joint tenant, or tenant in common, may offend against them (the English acts on that subject) either by forcibly ejecting, or forcibly holding out, his companion, for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c., is good."(1) Russell quotes Hawkins' Pleas of the Crown, a work of high authority, for this doctrine. If we consult the reason of the case, we can readily perceive good grounds why a joint tenant should be entitled to the benefit of this act. At common law, as before stated, one joint tenant cannot maintain trespass, *quare clausum fregit*, because the possession of one joint tenant is the possession of both. A party, as much injured as if he held in severalty, is denied a remedy for an injury, upon a presumption in law which the facts of the case contradict. This is clearly a defect in the common law, which it may well be presumed that the act against forcible entry and detainer was intended to remedy. Although at common law one joint tenant cannot maintain trespass against his co-tenant, yet he may maintain ejectment if he can prove an actual ouster, which rebuts the presumption, that the possession of one is the possession of the other; and we can see no reason, if the ejected co-tenant may maintain ejectment, why he may not avail himself of the summary remedy furnished by this statute. In Kentucky, the Court of Appeals(2) decided that one joint tenant may maintain a warrant against his co-tenant for a forcible detainer, provided that the party prove that he is kept out by actual force, and the judgment would be for "an undivided interest" according to the proof.

Whether in the case under consideration such proof was given, is not made a point in the case, and it is therefore unnecessary to enquire. Both reason and adjudged cases being in favor of sus-

(1) Russell on Crimes 236. (2) 2 Dana 111.

taining this form of proceeding, the judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.

THOMAS PHILLIPS, appellant *v.* GILES C. DANA, appellee.

Appeal from Peoria.

Applications to amend the pleadings in a cause, are addressed to the sound discretion of the Court, and the allowance of such applications cannot be assigned for error.
Where a demurrer was interposed to the replication of the plaintiff to one of the defendant's pleas, issue to the country having been taken on the other pleas, and the parties agreed that both matters of law and fact arising in the cause, might be tried by the Court, and after hearing the evidence, the Court gave judgment for the plaintiff for damages, without expressly overruling the demurrer: *Held* that as the replication was sufficient, there was no error in the proceedings.

THIS cause was tried at the September term, 1838, of the Peoria Circuit Court, judgment was rendered for the plaintiff in the Court below, from which the defendant apppealed to this Court.

N. H. PURPLE, for the appellant, contended that

If a verdict do not find the issue joined, it will be reversed on error. Bigelow's Dig. 298, No. 8.

Judgment must be reversed when it does not show how an issue was disposed of. Pirtle's Dig. 360, No. 24; 1 or 2 Missouri Rep. 260.

H. P. JOHNSON, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court;

The first error relied on in this case, is, that the Circuit Court permitted the plaintiff to amend his declaration after issue joined upon the plea of non assumpsit, by adding to the description of the note described in the declaration, the words "with six per cent. interest." Applications to amend the pleadings are addressed to the sound discretion of the Court, and the granting of leave to amend cannot be assigned for error.

The other error assigned is, that the Court gave no judgment upon the demurrer to the replication to defendant's sixth plea, but gave a general judgment for damages against the defendant, without deciding the issue at law. It appears from the record, that there were several pleas upon which issue to the country was taken, and that the sixth plea, mentioned in this assignment, was a plea of release of the action mentioned in the plaintiff's declaration. To this plea the plaintiff below replied that the release mentioned in the plea was not his deed, and tendered an

issue to the country. After filing the demurrer, the record states, that the parties then agreed that both matters of law and fact arising in this cause, may be tried by the Court, and after hearing the evidence and arguments of counsel, the Court gave judgment for the plaintiff below, for his damages, without expressly overruling the dumurrer. Was this omission error? The replication was clearly a sufficient answer to the defendant's plea, and the demurrer was improperly interposed. The Circuit Court, doubtless, so considered it, and treated it as a nullity. By so doing, the defendant has sustained no possible injury, and the only effect of reversing the judgment below and remanding the cause, would be to require the Circuit Court to decide a demurrer which this Court perceives must be overruled. To reverse a judgment for such trifling informalities, where no possible injury can result to the party, would be a perversion of judicial proceedings.[a]

The judgment below is affirmed with costs.

Judgment affirmed.

Note. See Clemson *et al. v.* The State Bank of Illinois, *Ante* 45; Droullard *v.* Baxter *et al.*, *Ante* 191: Ross *et al. v.* Reddick, *Ante* 73.

(*a*) Granger *vs.* Warrington, 3 Gil. R. 306.

ALEXANDER B. MILLER, appellant *v.* CHARLES HOWELL, appellee.

Appeal from Macoupin.

In an action for a promissory note given for a town lot, and assigned after it became due, the maker, to show that the consideration had failed, offered to prove that the payees of the note, as proprietors of the town in which the lot was situated, publicly proclaimed, on the day of the sale of the lot, that they would build a store-house in the town, two stories high, forty by twenty-four feet, by the 1st of August following the day of sale; and that they would construct a bridge across the Big Macoupin, in the said town; but that they had failed so to do; *Held* that it would be no defence to the note, and that such proof would not be evidence of fraud, unless it was also shown that the proprietors of said town made such declarations deceitfully.

Fraud cannot exist without an intention to deceive.

THIS action was originally instituted before a justice of the peace of Macoupin county, and was brought by appeal into the Circuit Court, where the cause was tried at the April term, 1838, before the Hon. Jesse B. Thomas. Judgment was rendered for the plaintiff for $73 and costs of suit, from which the defendant appealed to this Court.

U. F. LINDER and JOHN H. GREATHOUSE, for the appellant.

STEPHEN A. DOUGLASS, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced on a promissory note assigned to Howell, the plaintiff below, after it became due. After the note was read in evidence, Miller, the defendant below, proved that the note was given as the consideration of the sale of a town lot, which was bid off by him at a public sale of lots held by the assignors of the note, and that the defendant received from them a bond to convey the lot upon the payment of the note. The defendant to show that the consideration of the note had failed, offered to prove that the payees of the note, as proprietors of the town in which the lot was situated, publicly proclaimed, on the day of the sale of the lot, that they would build a storehouse in the town, two stories high, forty by twenty-four feet, by the 1st of August following the day of sale; and that they would construct a bridge across the Big Macoupin, in the said town. Defendant further offered to prove that the payees of the note had failed to build the house and bridge. To the reception of this testimony, the plaintiff objected, and it was rejected by the Court. The rejection of this testimony is assigned for error. This testimony was properly rejected. It did not tend to show a failure of consideration. The consideration of the note was the sale of the lot for the conveyance of which Miller holds a bond. If the payees of the note should fail to convey the lot at the time stipulated in the bond, or if they had no title to the lot when it became their duty to convey—either of these facts would constitute a failure of consideration of the note. The declaration of the payees of the note, of their intention to build a house and a bridge in the town, can in nowise be said to form the consideration of the note. Nor did the evidence offered amount to a fraud, because the defendant did not also offer to prove, that when the proprietors made the declarations of their intention to build in the town, they did it deceitfully.[a] It does not appear from any thing the defendant offered to prove, but that the proprietors made the declarations in good faith. Fraud cannot exist without an intention to deceive. As the evidence offered did not tend to prove either failure of consideration or fraud, it is properly overruled.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See McConnell *v.* Wilcox, *Ante* 344.—Every false affirmation does not amount to a fraud. Breese 234.

(*a*) Stookey *vs.* Hughes 18 Ill. R. 56.

ALEXANDER B. MILLER, plaintiff in error *v.* ROSS HOUCKE, JACOB C. GAUTERMAN, and JEFFERSON WEATHERFORD, defendants in error.

Error to Macoupin.

It does not follow as a necessary consequence to the asking of a question of a witness on the trial of a cause, that the answer will be in the affirmative; and unless the answer constitutes illegal testimony for the party calling the witness, it is no ground of exception.

Where an exception is taken to a question asked a witness on the trial of a cause, if the answer of the witness is not given in the bill of exceptions, the Supreme Court cannot know that the Circuit Court received improper testimony.

The province of a bill of exceptions taken in the progress of a trial, is to show that improper testimony has been received, or proper testimony rejected.

THIS cause was tried at the April term, 1838, of the Macoupin Circuit Court, before the Hon Jesse B. Thomas. Judgment was rendered for the defendants in error for $71 and costs.

U. F. LINDER and JOHN S. GREATHOUSE, for the plaintiff in error.

STEPHEN A. DOUGLASS, for the defendants in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

It appears from the bill of exceptions taken on the trial of this cause, that the plaintiffs asked the witness a question, which the defendant objected to, but the Court overruled the objection and permitted the question to be answered. Whether the question, however, was answered in the affirmative or negative, is not stated. The error relied on to reverse the judgment below, is the permission to answer the question.

It does not follow, as a necessary consequence to the asking of a question, that the answer will be in the affirmative; and unless the answer constitutes illegal testimony for the party calling a witness, it is no ground of exception. The province of a bill of exceptions, taken in the progress of a trial, is to show that improper testimony has been received, or proper testimony rejected. The answer of the witness not being given, this Court cannot know that the Circuit Court received improper evidence.

The judgment must therefore be affirmed with costs.

Judgment affirmed.

Note. See Swafford *v.* Dovenor, *Ante* 165; Gilmore *v.* Ballard, *Ante* 252; Kitchell *v.* Bratton, *Ante* 300; Ballingall *v.* Spraggins, *Ante* 330.

ROBERT R. WILLIAMS, appellant *v.* JOHN DOE, *ex dem.* GEORGE CLAYTOR, MASON C. FITCH, HARVEY SCRIBNER, and HENRY RENCKIN, appellee.

Appeal from Adams

Before the passage of the act of 1835, County Commissioners had no authority to convey the real estate of their county.

The act of 1835 makes valid conveyances made before that time by County Commissioners; and a deed of the real estate of the county, executed by the County Commissioners, in their individual names, and "under their private seals," "as County Commissioners in behalf of the county," is made valid and effectual to pass the estate therein conveyed.

In an action of ejectment, the plaintiff, to support his title, read in evidence a deed from one Wheelock and wife, to one Claytor, from whom the lessors of the plaintiff derived title to the premises described in his declaration, and the defendant read in evidence a decree of the Adams Circuit Court sitting as a court of Chancery, made in a case wherein Archibald Williams, administrator, &c., was complainant, which rescinded and set aside the deed to said Claytor, and the deed to the lessors of the plaintiff, and directed that a special execution issue to the sheriff of Adams county, against said Wheelock, as the trustee of one Hynes, to sell the premises described in the plaintiff's declaration, for the satisfaction of the judgment and costs in favor of said Williams, administrator, mentioned in the bill of chancery, upon which the decree was rendered, and offered to read in evidence the special writ of execution with the return thereon, which return stated that said premises were sold to the defendant, and also the sheriff's certificate of the sale of said premises, and his deed to the defendant, under an execution in favor of one Wesley Williams, which were excluded from the jury; and the plaintiff then offered to prove that Claytor had redeemed said premises from said sheriff's sale, which was not allowed, and the Court excluded said decree from the jury. The defendant then offered in evidence the bill, process, &c., in the chancery suit in which the decree was rendered in favor of Archibald Williams, administrator, &c., which were rejected by the Court, to all of which decisions against him, the defendant excepted: *Held* that the decree was properly excluded from the jury, inasmuch as the defendant had failed to produce a deed from the sheriff under the special writ of execution. *Held*, also, that the bill was properly excluded. *Held*, also, that the deed from the sheriff was not admissible in evidence, as it recited an entirely different writ of execution from that described in the decree. *Held*, also, that there was no error in the proceedings.

The practice of excluding evidence, after it has been received, where some one important link in the chain, necessary to establish the right claimed, is wanting, seems to have been adopted in many of the courts of the Western States, as an equivalent for instructing the jury that for want of such proof, the party has not made out the point sought to be established.

Semble, That fraud cannot be given in evidence to impeach a deed, in an action of ejectment.(*a*)

Semble, That where in an action of ejectment, the verdict of the jury was rendered in favor of the lessors of the plaintiff, no objection can be raised on that account, in the Supreme Court.

THIS cause was tried at the September term, 1836, of the Adams Circuit Court, before the Hon. Richard M. Young and a jury. A verdict was rendered in favor of the *lessors of the plaintiff*, from which the defendant appealed to this Court. The material facts in the case appear in the opinion of the Court. The offer of the defendant to prove that the deeds to the lessors

(*a*) Jamison *vs.* Doe, 3 Scam. R. 113; Rogers *vs.* Brent, 5 Gil. R. 573.

of the plaintiff, were void for actual and intentional fraud, which was rejected, is not stated in the opinion of the Court, though it was necessarily decided in the case.

The following errors are assigned in this Court:

1. The Court erred in allowing the said deeds of the said plaintiff's lessors to be read as evidence to the jury.
2. The Court erred in excluding the said decree from the jury.
3. The Court erred in not allowing the said bill, and papers, and process, in the said chancery suit, to be read as evidence to the jury.
4. The Court erred in not admitting the said defendant in the Court below, to read as evidence, his said deed and certificate of purchase; and in refusing to allow his proof that the deeds of the said plaintiff's lessors were void for actual and intentional fraud.
5. There is a variance in the declaration in this, that in its commencement it is against Richard Roe, and in its conclusion, it is against Robert R Williams.
6. The verdict is defective in this, that it is in favor of Fitch, Scribner, and Renckin.

A. Williams, S. T. Logan, and E. D. Baker, for the appellant.

O. H. Browning and J. H. Ralston, for the appellee.

Smith, Justice, delivered the opinion of the Court:

This was an action of *ejectment* to recover the South half of Lot No. 3, in Block No. 5, in the town of Quincy. The declaration contained two demises—one from George Claytor, and one from Mason C. Fitch, Harvey Scribner, and Henry Renckin.

The plaintiff in the Circuit Court, during the progress of the trial, offered to give in evidence a patent from the United States, for the land on which the half lot in question is laid out, to the county of Adams; next, a deed from the County Commissioners of Adams county, for the same lot, to E. L. R. Wheelock, assignee of Jeremiah Rose, duly acknowledged and recorded; next, a deed from Wheelock and his wife, duly executed and recorded, to George Claytor, and from Claytor and his wife, to Fitch, Scribner, and Renckin, the lessors of the plaintiff, which was objected to by the defendant, but the deeds and patent were admitted as evidence. The possession of the premises by Williams, at the commencement of the suit, was also proven.

The defendant, on the trial, offered in evidence a decree obtained in a suit in chancery in the Circuit Court of Adams county, in November, 1834, in which Archibald Williams, administrator of one Broady, deceased, was complainant, and Peter Hynes, E.

L. R. Wheelock, George Claytor, R. G. Ormsby, Mason C. Fitch, Harvey Scribner, and Henry Renckin were defendants, by which, among other things, the conveyances from Wheelock to Claytor, and from Claytor to Fitch, Scribner, and Renckin, for the half lot described in the plaintiff's declaration, were declared fraudulent and void, and were set aside, and rescinded, and cancelled, and the premises decreed to be sold under a special execution against Wheelock, as the trustee of one Peter Hynes, to satisfy the judgment in the complainant's bill of complaint set forth. The defendant then offered to produce in evidence, the special execution for the sale of the Lot 3, in Block 5, named in the decree in the case in chancery, with the endorsements and certificate of the sheriff of the county of Adams, that the lot in question had been duly sold to the defendant, Williams, and that he would be entitled to a deed after the period for redemption had expired; and, also, a deed for the premises, executed by the said sheriff, by virtue of a writ of *fieri facias*, issued on the 6th day of October, 1832, on a judgment obtained by one Wesley Williams, against one Peter Hynes, for the sum of sixty-two dollars and sixty-two cents, to Robert R. Williams, the defendant, duly acknowledged, and certified, reciting that the period of redemption had expired. This evidence the Circuit Court excluded.

The plaintiff then moved to exclude the decree from the jury, which had been previously offered and read in evidence, which was done. The defendant here closed his evidence, but subsequently applied to the Court to admit in evidence a bill in chancery, filed in the Circuit Court in Adams county, on the 22d November, 1833, by Archibald Williams against said Wheelock and others, being the bill on which the decree, which had been excluded from the jury, was founded. The Circuit Court rejected the bill, and the cause being submitted to the jury, a verdict was rendered against the defendant, with nominal damages. To reverse the judgment on this verdict, a writ of error has been prosecuted, and it is now assigned for error,—

1. That the Court erred in allowing the deeds offered by the lessors of the plaintiff to be read in evidence.

2. In excluding the decree from the jury, and not permitting the deed made to the defendant by the sheriff, under the execution against Hynes, in favor of Williams, to be read in evidence.

3. In not admitting the bill in chancery to be read in evidence.

In considering the grounds relied on as errors in this cause, the only question which we conceive can arise out of the facts adduced in evidence on the part of the lessors of the plaintiff, is, as the mode of execution, and character of the deed from the County Commissioners of Adams County to Wheelock.

There can be no doubt, that at the time of the execution of the deed to Wheelock, the Commissioners could not legally convey the real estate of which the county of Adams was possessed; and had not the "*Act concerning conveyances by County Commissioners*,"(1) approved 7th of January, 1835, been passed, the deed would have been void and inoperative.

This act has declared that such conveyances, made in good faith, before the passage of the act, shall be valid and as operative as if the Commissioners had been duly authorized to execute them, at the time of the execution of the same. It has further provided for the execution of deeds for the conveyance of real estate owned by counties, for the future. The character of the deed is, perhaps, more equivocal, and admits of some doubt as to its force and effect, because the Commissioners are named as the grantors in the deed, personally, though described as Commissioners. The patent from the United States, conveys the land to the county of Adams, by such name, and it is necessarily thereby vested in such name. It would certainly have been more regular, and appropriate, to have made the county of Adams the grantor in the deed to Wheelock, and not the County commissioners by their names, although they are described as such Commissioners in the deed.[a]

The act declaring that the conveyances heretofore executed by the Commissioners, shall be valid, might be supposed to be confined to the signing of the deeds of conveyance. Yet, when the object and spirit of the law is considered, it will be recollected, that it was the intention of its framers to confirm and render valid all such defective conveyances, whether for want of power to execute them, or on account of the character of the deeds, and the modes of execution.

In the case before us, the deed, also, recites that the conveyance is made for and in behalf of the county; and we are, therefore, when the causes which doubtless produced the act, are considered, led to the conclusion that the deed is sufficient to convey the title to the estate granted. The Circuit Court, we conceive, decided, in effect, if not in mode, correctly, in excluding the decree from the jury, after the defendant had failed to produce a deed in conformity to the sale made under the special writ of *fieri facias*. It will be perceived that the deed recites a sale on an execution made in an entirely different cause, between different parties, in an action at law, and therefore there could be no relevancy between a title acquired under *fieri facias* set out in the deed, and the one offered in evidence under the decree. The point can admit of no doubt.[a] The objection, that, as the decree was evidence conducive to prove the issue, it should have been left to the jury to act on, is inconclusive. The practice of

(1) Acts of 1835, 46; Gale's Stat. 156. (*a*) Bestor *vs.* Powell, 2 Gil. R. 126. (*b*) Johnson *vs.* Adleman, 35 Ill. R. 281.

excluding evidence, after it has been receiveed, where some one important link in the chain, necessary to establish the right claimed, is wanting, seems to have been adopted in many of the courts of the Western States as an equivalent for instructing the jury, that for want of such proof, the party has not made out the point sought to be established, and that, therefore, they must disregard the other portion of the evidence with reference to that point, and consider it not proven, which latter mode is preferable, being more consistent with the regular mode of proceeding.[a] But the fact that this course was not taken, as the result, had it been, would have been the same, cannot be a sufficient reason for disturbing the judgment. The defendant has suffered no injury from the course adopted.

The exclusion of the bill in chancery was correct. It related directly to the excluded decree, and was the bill on which that decree was founded.

The minor causes referred to, of defects in the declaration and verdict, have not been considered objectionable. They are entirely cured by the statute of joefails.

The judgment of the Court is affirmed with costs.

Judgment affirmed.

The following motion for a re-hearing, was filed:

"Robert R. Williams *v.* Claytor and others. } Motion for a re-hearing.

And the said Robert R. Williams sets down the following causes for a re-hearing, to wit,—

1st. The deed offered in evidence was made by the sheriff of Adams county, in pursuance of a sale made by him under a writ of *fi. fa.*, in favor of Wesley Williams, against Peter Hynes, who, as appeared by the bill in chancery excluded from the jury as evidence, was the owner of the estate in the said declaration mentioned, and held a bond for a deed to the same, at the time of the said sheriff's sale; and Wheelock held the same by deed from the County Commissioners of said county, made in pursuance of an assignment of said bond by the said Hynes to said Wheelock, which assignment was made after the said sale, all which appears by the said bill.

2d. The decree offered in evidence, and excluded by the Court, annulled and set aside the deeds under which the lessors of the plaintiff below claimed, and was relied on, not so much to show title in the defendant, as to destroy and defeat the title set up by the plaintiff, the rule being, that whatever rebuts the evidence or title of the plaintiff, is admissible in evidence. This view of the case seems to have been overlooked by the Court, as

(*a*) Tefft *vs* Ashbaugh 13 Ill. R. 602, and notes.

no opinion is expressed as to the effect of the decree upon the lessors' titles.

3d. The Court takes no notice of a certificate of purchase made by the sheriff, in pursuance of a sale by him under a special *fieri facias*, issued in pursuance of said decree, which was offered in evidence, and rejected by the Court.

WILLIAMS, Atty. for Plff."

This motion was denied at a subsequent term of the Court.

HIRAM PEARSONS and RICHARD J. HAMILTON, appellants *v.* AMOS BAILEY, appellee.

Appeal from the Municipal Court of the City of Chicago.

A county surveyor is entitled to receive twenty-five cents and no more, for each lot contained in any town plat which he lays out, surveys, and plats.

If to lay out, survey, and plat a town, it is necessary to employ chainmen, it is then as much the duty of the surveyor to employ and pay them, as it is to furnish a chain or compass, or to draw the map.

The provision of § 5 of the act of Jan. 14, 1829, that "All chainmen necessary, shall be employed by the person wanting surveying done," does not apply to surveyors of town plats.

Where the bill of exceptions enables the Court to ascertain the sum that would have been recovered, if instructions asked for had been given, it is unnecessary to send the case back for a new trial; judgment will be rendered for that amount in the Supreme Court.(*a*)

THIS was an action of *assumpsit* instituted in the Municipal Court of the City of Chicago, by the appellee against the appellants, upon the following accounts:

"Hiram Pearsons and Richard J. Hamilton
To Amos Bailey, Dr.

1836. July 27th, To cash paid for 16½ days' service as chainmen in laying out Hamilton and Pearsons' Addition to the Town of Canal Port, at $2	$33	00
1837. May 6th, To cash paid for 39½ days' service as chainmen, in subdividing the original lots in the Town of Canal Port, at $2	79	00
	$112	00

AMOS BAILEY, Surveyor for the County of Cook."

'Hiram Pearsons and Richard J. Hamilton
To Amos Bailey, Dr.

1836. July 27th, To laying out and platting Hamilton and Pearsons' Addition to the Town of Canal Port, into 581 lots at 25 cents per lot,	145	25

(*a*) See Guild *vs.* Johnson, *Ante* 405 and note.

1837. May 6th, Subdividing and platting seventy-five out lots in the original Town of Canal Port into 1099 lots, at 25 cents per lot, 274 75

Amount total, $532 00

Amos Bailey, Surveyor for the County of Cook."

The declaration contained besides a count for services as surveyor, counts for the services of the chainmen, and for money paid them, and money paid, laid out and expended for the defendants. Plea non assumpsit.

The bill of exceptions shows that evidence was produced by the plaintiff, to show that he paid the money to the chainmen, and that he and his deputies surveyed the town of Canal Port, and the addition thereto, and that he was the county surveyor of Cook county, where the lands lie. It was also proved that the account was presented to Pearsons, who refused to pay it;—that the account was presented to Hamilton, who said he would pay his part of it, if the plaintiff would execute a release to him, which the plaintiff refused to do.

There was evidence to prove that Pearsons was interested in the town and addition; that other persons were interested in the land; and the only evidence of Hamilton's interest, was the above acknowledgment of the account.

It was in evidence before the jury, that the pay of the chainmen was for services in surveying the town of Canal Port and addition, for which the charge of twenty-five cents per lot was made in the account: that the charges in the bill were usual and customary, and such as are charged in the country. There was evidence conducing to prove that Pearsons made the contract for the surveying, and that Hamilton recognized it by promising to pay his part on receiving a release.

The defendants' counsel moved the court to instruct the jury,—First, "That under a count in the declaration by the plaintiff, as surveyor of the county, he could recover no other fees than such as are allowed to such an officer by the Statute."

Secondly, "That the plaintiff could not recover for money paid to chainmen for surveying and subdividing lots for which he had charged twenty-five cents each; but that his right of recovery for such services, must be limited to the fees allowed by the statute."

Thirdly, "That if there were other owners of the land, the plaintiffs could not recover from the defendants without making the other owners parties." The Court refused to give these instructions, and the defendants excepted.

The cause was tried before the Hon. Thomas Ford and a jury,

and a verdict rendered for the plaintiff in the Court below, for $532, from which the defendants appealed to this Court.

The cause was tried at July term, 1837.

James Grant, for the appellants, contended that the compensation of county surveyors, for surveying and planting town lots, is limited to twenty-five cents per lot for all services ; and that the Court should have given the instructions asked. He cited R. L. 296, 601 ; 2 Stark. Ev. 101.

J. Young Scammon, for the appellee:

There was no claim of more than the legal fees prescribed by statute, in the count as surveyor of Cook county, and consequently there was no occasion to instruct the jury that the plaintiff could not recover what he did not claim.

There were other counts in the declaration, under which the services of the chainmen, or the money paid the chainmen, could be recovered.

The refusal of the Court to give the instructions asked, could not have misled the jury.

It must appear that the facts existed which required the instructions asked ; else the refusal to give them cannot be assigned for error. Law *v.* Merrill, 6 Wendell 268 ; Wendell's Dig. 247.

The act of Jan. 14, 1829, expressly provides that " All chainmen necessary shall be employed by the person wanting the surveying done." R. L. 592 § 5.(1)

Lockwood, Justice, delivered the opinion of the Court:

It appears from the bill of exceptions taken in this cause, that this was an action of *assumpsit* commenced by Bailey, the plaintiff below, to recover of Pearsons and Hamilton, the defendants, the sum of $112,00 for money paid to chainmen, and $420 for the surveying, laying out, and platting town lots in the town of Canal Port and the addition thereto, making together the sum of $532,00 ; for which Bailey obtained judgment. On the trial of the cause, the defendants asked the Court to instruct the jury, that under a count for services as surveyor, the plaintiff could recover no other fees than such as are allowed by statute, and that the plaintiff could not recover for money paid to chainmen, where the surveyor had charged twenty-five cents for each lot laid out, and that his right of recovery must be limited to the fees allowed by statute.

This instruction the Court refused to give, and the defendants excepted.

By the 10th section of the "*Act to provide for the recording of town plats*," passed 27th February, 1833, it is provided " That the county surveyor, who shall lay out, survey, and plat

(1) Gale's Stat. 669.

any town or addition, shall be entitled to receive twenty-five cents for each and every in and out-lot, and the recorder of the county, recording the same, shall receive the sum of four cents, for each and every lot the same may contain."(1) Under this section of the act, it is clear that the charge of twenty-five cents for each lot, embraces all the compensation the surveyor is entitled to demand.

If to lay out, survey, and plat a town, it is necessary to employ chainmen, it is then as much the duty of the surveyor to employ and pay them, as it is to furnish a compass and chain, or to draw the map. The chainmen are a part of the means by which the surveyor is enabled to perform the service. No one doubts that if a person employs a mechanic for a stipulated sum to build a house, that he cannot, in addition, charge for the persons employed in making mortar, or for other laborers employed in the construction of the house, and yet they are as necessary to the completion of the job, as the chainmen employed by a surveyor. In neither case can the work be done without the employment of assistants and servants, and the wages paid them comes out of the sum stipulated in the one case, and the fees allowed in the other.

It was however contended in the argument, that the 5th section of the "*Act regulating the appointment and duties of County Surveyors*," passed 14th January, 1829,(2) by which it is provided, that "All chainmen necessary shall be employed by the person wanting surveying done," made it incumbent on the defendants to employ the chainmen, and if they neglected to do so, the surveyor might employ and pay them, and then the law would raise an implied promise on the part of the defendants, to refund the money. A careful examination of this act, however, satisfies the Court that the requisition contained in the section quoted, does not apply to the surveyors of town plats. The next section of the same act, requires that before any surveys under the act, shall be performed, the surveyors shall furnish themselves with field notes of the original surveys, and the act also gives specific directions as to the manner in which the survey shall be made, and the lines and corners marked. These directions can have no application to the survey of town plats; and they are only intended to apply to the establishing of lines and corners of sections of public lands, as surveyed by the United States, and to such subdivisions thereof, as convenience may require. The fee allowed for this service in the fee bill, is so small, that if the surveyor had to furnish and pay the chainmen, he would frequently have to expend more than his whole fee. There is, therefore, a great propriety under the act for the appointment of surveyors, in compelling the persons wanting surveying done,

(1) R. L. 601; Gale's Stat. 678. (2) R. L. 592; Gale's Stat. 669-70.

to employ the chainmen. The same reason does not exist under the act directing the mode of laying out towns. The compensation allowed under this act, it is believed, is sufficiently liberal, to require a surveyor to pay the chainmen out of his fees. It is also to be observed, that the act requiring the county surveyor to be employed to survey town plats, was passed subsequent to the act regulating the appointment of county surveyors; and it is fairly to be presumed that when the legislature directed that the proprietors of towns should employ the county surveyor to lay out, survey, and plat towns, and affixed a compensation for the surveyor's services, that they meant to include in that compensation, not only a sufficient remuneration for the surveyor's time, but all the expenses that he would be under the necessity of incurring, in order to perform the duty.

If, then, chainmen were necessary, as we have no doubt they were, and there was no express promise on the part of the defendants to pay them, we are of opinion, it was the duty of the surveyor to provide them at his own expense.

From this construction of these statutes, it results, that the Court below decided erroneously, in refusing the instructions asked; and for this reason, the judgment below is reversed with costs. But as the bill of exceptions enables this Court to ascertain the sum that would have been recovered, if the instructions had been given, it is unnecessary to send this case back for a new trial. Judgment is accordingly rendered in this Court for $420: for which sum and the costs of the Court below, Bailey is entitled to an execution.

Judgment reversed, and judgment rendered in this Court.

The Schooner Constitution, appellant *v.* Nelson Woodworth, appellee.

Appeal from the Municipal Court of the City of Chicago.

Appeals for the removal of causes from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by the statute.(*a*)

In order to enable the owner or consignee of a vessel attached under the "*Act authorizing the seizure of boats and other vessels by attachment*," to take an appeal from the judgment of a justice of the peace in such case, he should make himself a party defendant to the suit before the justice.

Sed quere, Whether an appeal can be taken from the judgment of a justice of the peace, under that act.(*b*)

Judgment was rendered in this cause by F. A. Howe, a justice of the peace of Cook county, residing within the city of Chi-

(*a*) Edwards *v.* Vandemark, 13 Ill. R. 634.

(*b*) This act is void, Steamboat &c., *vs.* Moran, 18 Ill. R. 501. note (*c*).

cago, against the schooner Constitution, for $49,50 and costs. On the appeal to the Municipal Court, at the April term, 1838, the Hon. Thomas Ford presiding, the appeal was dismissed.

J. Grant and F. Peyton, for the appellant, cited R. L. 95, 395.(1)

L. Davis and F. Forman, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was an attachment issued by a justice of the peace, in favour of Woodworth, against the schooner Constitution, for the services of Woodworth on board the schooner. On the trial before the justice of the peace, a judgment was given in favor of the plaintiff, against the schooner, for $49,50. Subsequently to the judgment, Gurdon S. Hubbard and Henry G. Hubbard, for and in behalf of the schooner, filed an appeal bond in the office of the clerk of the Municipal court of the City of Chicago, and the cause was docketed in said Court for trial. On the hearing of the cause in the Municipal Court, that Court, on motion of Woodworth, dismissed the suit from the docket, and gave judgment for costs in favor of the plaintiff below, against the defendant. To reverse this judgment, an appeal has been brought to this Court by Gurdon S. and Henry G. Hubbard, for and in behalf of said schooner, and the only error assigned is, that the Court erred in dismissing the appeal.

The attachment issued by the justice, was in pursuance of "*An Act authorizing the seizure of boats and other vessels by attachment in certain cases,*"(2) passed 13th February, 1833. The proceedings before the justice were regular, and the only question we are called upon to decide, is, whether an appeal lies from the decision of the justice in this case. The act expressly gives a justice of the peace jurisdiction to issue an attachment, but is silent on the subject of appeals, or any other mode of reviewing the decision of the justice. Appeals for the removal of causes from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by statute. It was contended on the argument, that the right to appeal was found in the 30th section of the "*Act concerning Justices of the Peace and Constables,*"(3) passed 3d February, 1827. But admitting that the authority to take an appeal under this section extends to proceedings and judgments had before justices of the peace under other statutes, on which point we give no opinion, still, in order to entitle a party to take an appeal under that act, the appellant must execute a bond with security to the opposite

(1) Gale's Stat. 409.
(2) R. L. 95; Gale's Stat. 73.
(3) R. L. 395; Gale's Stat. 409.

party. The attachment and judgment is against the schooner, consequently this requisition of the act, cannot, in a case so situated, be complied with. If the Hubbards were either owners or consignees of the vessel, they should have made themselves defendants under the 5th section of the act authorizing the justice to issue the attachment. They would then have been parties to the suit, and in a situation to take an appeal, if an appeal is allowed by law. The appeal being irregularly taken, was correctly dismissed by the Court.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See note to Waldo *et al. v.* Averett, *Ante* 487.

WILLIAM KING, appellant *v.* JOHN DALE, appellee.

Appeal from Hamilton.

On the trial of a suit for a *crim. con.* between the defendant and the wife of the plaintiff, a juror was proposed, who, being examined, stated that he had heard the testimony against the wife of the plaintiff, who was indicted for adultery with the defendant, and from that testimony he had formed and expressed an opinion, but had not formed any opinion in this case, not knowing that there was a civil suit then: *Held* that he was a competent juror, it not appearing that the crime for which the wife was indicted, was committed before or after the commencement of the suit for *crim. con.*

In a suit for *crim. con.*, a marriage license issued in the State of Tennessee, with a certificate endorsed thereon by a justice of the peace, that he had solemnized the marriage, was admitted in evidence, the official character of the officer granting the license, and also that of the justice of the peace, being certified by the clerk, the keeper of the records, under his official seal, and the presiding justice having certified to the authority and official character of the clerk: *Held* that the license and certificates were properly admitted.

It is a valid objection to a deposition, that it was dictated or written by an attorney in the cause; but the objection must be supported by proof of the fact.

Where a deposition is read in evidence which proves nothing for either party, the Court will not enquire whether it was properly admitted.

WILSON, Chief Justice, delivered the opinion of the Court:

This was an action for a *crim. con.* Dale, the plaintiff below, obtained a verdict and judgment against the defendant, King, from which he appealed to this Court, and assigned for error,

1. That the Court permitted an individual to be sworn as a juror, who had formed and expressed an opinion as to the merits of the case.

2. That the Court permitted to be read in evidence, a certificate of the marriage in Tennessee, between Dale and his wife, without its being properly authenticated, and,

3. That the Court allowed depositions to be read in evidence, which were objected to.

One of the facts assumed in the first assignment of error is contradicted by the record. Hardy, the individual objected to as a juror, was not sworn upon the jury, but the objection to him was overruled by the Court, after he had been sworn and interrogated as to his having formed and expressed an opinion upon the merits of the case. In his examination on that point, he stated, "That he had heard the testimony against Cinthia Dale, who was indicted for adultery with the defendant, King, and from that testimony he had formed and expressed an opinion; but had not formed any opinion in this case, not knowing that there was a civil suit then." This statement is very indefinite as to the connection between the cause in which the proposed juror had formed an opinion, and the one before the Court; and it does not appear with any degree of certainty, that the criminal intercourse between Mrs. Dale and King, which was the foundation of the criminal proseeution against her, did not take place subsequently to the institution of the suit then before the Court. If such was the fact, (and nothing to the contrary is shown,) then there was no objection to the individual as a juror, because the plaintiff's right to recover, decended upon the proof of circumstances anterior to those which may have been the foundation of the proposed juror's opinion.

The second assignment of error, which questions the sufficiency of the authentication of the certificate of marriage, is not supported by the facts in the case. An inspection of the record will show it to contain an exemplified copy of a license issued in the State of Tennessee, for the marriage of John Dale to Cinthia Smith. On the back of this license is endorsed a certificate of a justice of the peace, that he had solemnized the marriage. The official character of the officer granting the marriage license, and also that of the one performing the ceremony, is authenticated by the certificate of the clerk, the keeper of the records, under his seal of office. The presiding justice then certifies to the authority and official character of the clerk, whose attestation, in turn, verifies that of the justice. These several authentications are by the accredited officers of the law, and in the form and order prescribed by the act of Congress, to entitle records and public acts to the same faith and credit in the courts of the several States, that they have by law in the courts of the State from whence they are taken. The certificate of marriage was therefore properly received in evidence.[a]

The third assignment of error applies only to the depositions of Freeman and Vaught. The reading in evidence of Vaught's deposition was objected to on the ground that it was in the hand writing of McClernand, one of the attorneys for the plaintiff. It is certainly a valid objection to a deposition, that it has been dictated or drawn by an attorney in the cause; but the objection

(a) Giles *vs.* Shaw, Beecher's Breese, R. 125, and note.

must be supported by proof of the fact. This was not done in this case. There is no evidence whatever, that the deposition was written by McClernand, nor is it even satisfactorily proved that he was an attorney in the cause. All the testimony in relation to that point, is, that Scates, the attorney who conducted the cause for the plaintiff, told McClernand that he wished him to assist him in the suit; but it does not appear that he consented to do so, or that he ever did appear in the case as attorney, or in any other capacity.

With respect to Freemen's deposition, it is unnecessary to enquire into the sufficiency of the objections to its being received in evidence, because it proves nothing for or against either party, and could not therefore have influenced the decision of the jury; for this reason, its having been read in evidence cannot be assigned for error.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See La Fayette Bank *v.* Stone, and note at the end of the case, *Ante* 424-7; Wickerham *v.* The People, *Ante* 128, and *post* 560.

JAMES HOLLIDAY, appellant *v.* THOMAS SWAILES, appellee.

Appeal from Morgan.

In proceedings under the "*Act regulating Inclosures*," it is necessary that the justices of the peace before whom proceedings are had, should notify the defendant of the same.

An appeal lies from the decision of two justices of the peace, under the "*Act regulating Inclosures.*".

ON the 27th day of June, 1837, the following transcript was filed in the office of the clerk of the Morgan Circuit Court:

"Thomas Swailes
v.
James Holliday.

This day came Thomas Swailes and filed his bill against James Holliday, for making a partition fence upon the line dividing the land of the said Swailes and Holliday, the fence aforesaid having been made agreeable to an order from us to the said Swailes, dated the 12th day of May, A. D. 1837—and witnesses having been heard on oath touching the equity of said demand, and it being further proved that said partition fence dividing the lands of the aforesaid Swailes and Holliday, is in Township fifteen North, Range eleven West, in Morgan county: It is considered that the demand of said Swailes is just, and is hereby allowed,

and that judgment be rendered against said Holliday for fifty-eight dollars and eighty cents, and that warrant issue against said Holliday's personal estate, agreeably to the statute in such case made and provided.

Given under our hands and seals this 14th day of June, 1837.

SAMUEL S. BROOKS, J. P. [L.S.]
MATTHEW STACY, J. P. [L.S.]

State of Illinois, } ss.
Morgan County. }

I hereby certify the foregoing to be a true copy of the order or judgment on my docket in the case of Thomas Swailes *v.* James Holliday.

SAMUEL S. BROOKS, J. P."

On the same day Holliday filed in the office of the clerk of said Court, an appeal bond.

At the October term, 1837, of said Court, Swailes moved to dismiss the appeal. Whereupon Holliday entered a cross motion to vacate and annul the proceedings of the justices, which was overruled, and the motion of Swailes sustained. Holliday appealed to this Court.

WILLIAM THOMAS, for the appellant.

MURRAY MCCONNELL, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

The record shows this to have been a proceeding under the "*Act regulating Inclosures*,"(1) and that upon the application of Swailes to two justices, they rendered a judgment in his favor against Holliday for $58,80, being a moiety of the estimated cost of a division fence. From this judgment Holliday appealed to the Circuit Court, and moved the Court to reverse the judgment upon the ground that he had not appeared before the justices, or been notified to do so, which also appears from the record. The Court overruled this motion, and, upon the application of Swailes, dismissed the appeal. In support of this decision, it is argued, that inasmuch as the act authorizing this proceeding, does not require the defendant to be notified, nor provide for an appeal from the justices' judgment, that therefore no notice is necessary, and that the judgment is final. The correctness of this inference cannot be admitted.[a] If it is even conceded that the act conferring general jurisdiction on justices, which requires "all suits before them to be commenced by summons," is to be construed to apply only to cases arising under that act, it was nevertheless necessary that the justices should have notified the defendant of the prosecution against him. It would be a violation of one of the first principles of justice and of judicial pro-

(1) R. L. 261; Gale's Stat. 277. (*a*) See L. of 1839, p. 291 Sec. 4. Swingley *vs.* Haynes, 22 Ill. R. 214; O. & M. R. R. Co., *vs.* McCutcheon, 27 Ill. R. 9, *contra.*

ceedings, to try and decide upon the rights of an individual either civilly or criminally, without notice; and consequently without affording him an opportunity of defending himself. The question of appeal is settled by the act allowing appeals in certain cases.(1) That act authorizes appeals in *qui tam*, and other actions for forfeitures and penalties. This case is of the latter denomination. The warrant against Holliday was for a claim in the nature of a penalty charged to have been incurred by him in neglecting to make and keep in repair a division fence between him and the plaintiff agreeably to the act regulating enclosures.

The judgment of the Circuit Court is therefore reversed, and also that of the justices, for irregularity.

Judgment reversed.

Note. See Hubbard *et al. v.* Freer, *Ante* 467, and note; Waldo *et al. v.* Averett, *Ante* 487.

(1) Acts of 1835, 153; Gale's Stat. 182.

Thomas Elliot, appellant *v.* William Sneed, appellee.

Appeal from Clay.

A constable who has collected an execution issued upon a judgment recovered in a suit by attachment, and paid the money over upon the order of the plaintiff in the attachment, is not liable to an action by the attachment debtor—after the reversal of such judgment on appeal—for the money so collected and paid over. Nor is he liable to a garnishee of whom he has collected money on such execution.

Where a constable collected money upon a judgment obtained by W. against R., before a justice of the peace, and paid the same to G., upon the order of E., to whom the judgment was assigned; and afterwards the judgment was reversed on appeal, and the constable paid the money back which he had collected of R.: *Held* that E., the assignee of the judgment, was not liable to refund the money to the constable: W. alone being liable.

Semble, That where a judgment is assigned, execution should issue in the name of the assignor. The assignment does not change the form of the execution, or the parties to it.

Where a constable collected money on an execution issued upon a judgment which was afterwards reversed, and paid the same over, upon the order of the plaintiff; and after the reversal of the judgment, the constable paid back the money to the defendant; *Held* that the constable might maintain an action against the plaintiff, for money paid to his use.

This cause was tried at the August term, 1837, of the Clay Circuit Court, before the Hon. Justin Harlan. Judgment was rendered for the appellee, for $25 and costs, from which an appeal was taken to this Court.

O. B. Ficklin, for the appellant.

A. C. French, for the appellee.

WILSON, Chief Justice, delivered the opinion of the Court:

This cause is submitted upon the following facts:—Hugh Ronalds commenced a suit against Thomas Elliot, before James L. Wickersham, a justice of the peace of Clay county, and recovered judgment against said Elliot. Wickersham being indebted to Elliot, entered up satisfaction of the judgment. Ronalds sued out of the Circuit Court a *writ of mandamus* to compel the said justice, Wickersham, to issue an execution against said Elliot. Wickersham thereupon issued an execution against Elliot, and put the same into the hands of Nathaniel Duff, constable of said county, who collected the money thereon. Wickersham then sued out an attachment against Ronalds, and garnisheed said constable, Duff. The writ of attachment went into the hands of said plaintff, Sneed, who also was an acting constable, and who was surety for Wickersham in the attachment bond. On the trial of the attachment, judgment went against Ronalds, and also against said constable, Duff, as garnishee, for the amount of money in his hands, which he had collected from Elliot, for Ronalds. An execution followed this attachment, and went into the hands of Sneed, the plaintiff in this suit, who collected the money from Duff, garnishee as aforesaid. Wickersham assigned the judgment on which this execution issued, to Elliot, and Elliot gave an order on said Sneed, and in favor of Peter Green, for twenty-five dollars, which Sneed paid accordingly to Green, in current bank paper. Afterwards Ronalds removed the judgment against himself and Duff upon said attachment, into the Circuit Court by *certiorari*, and reversed the judgment. Ronalds then brought his suit against Duff, constable as aforesaid, and recovered judgment for the money which Duff had paid over to Sneed, on the attachment execution, and collected the same. Duff then sued Sneed for the money that he had paid Sneed on the attachment execution, as garnishee of Ronalds, and recovered and collected the same. Whereupon Sneed now brings this suit to recover the money which he paid to Peter Green upon Elliot's order, as above stated, he, the said Sneed, having been compelled to pay the same back to Duff, constable and garnishee, as aforesaid.

From the above statement, which is submitted by the parties, as containing all the facts in the case, it is clear that Sneed, the plaintiff below, has mistaken the person against whom he has recourse. Wickersham received the fruits of the judgment on the attachment, and applied it to the extinguishment of a debt due from him to Elliot. The judgment being assigned to Elliot, did not create any more liability upon him, than was imposed upon Green, by the order given by Elliot to him, to receive the amount of the judgment from the constable. The benefit to Wickersham, and his liability is the same, as if the amount of

the judgment had been paid by the officer directly to him, and he had retained it, or had paid it to a third person in the ordinary course of business. In the latter case, it could not be contended that the individual receiving the money would be bound to see that the judgment was correct, or to enquire into the source from whence Wickersham obtained it. It may be proper to observe, that the execution upon Wickersham's judgment, should have been issued in his name, and not in the name of Elliot; and also that the judgments against the constables were erroneous, but as Sneed has paid the money that Wickersham was liable for in the first instance, to Ronalds, he is entitled to recover it, as money paid to the use of Wickersham.

The Judgment of the Circuit Court is reversed with costs.

Judgment reversed.

David Sheldon, plaintiff in error *v.* William Reihle and Joseph Bains, defendants in error.

Error to Madison.

A motion to dismiss an appeal from the verdict of a jury on the trial of the right of property before a sheriff, is addressed to the discretion of the Court, and the decision of the Circuit Court on such motion, cannot be assigned for error.

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.

A bond, on appeal from the decision of a sheriff's jury on the trial of the right of property, may be executed by an attorney in fact.

On the trial of the right of property levied on by attachment, the writ of attachment and return thereon, are admissible in evidence

The verdict of a jury in the Circuit Court, on the trial of the right of property, found the title in the defendant in the attachment: *Held* that the finding was sufficiently formal and explicit, as it negatived the title set up by the claimant.

On the 27th of September, 1832, Reihle and Bains sued out of the Morgan Circuit Court, a writ of attachment against the estate of one Samuel P. Judson, which was levied by the sheriff of Morgan county, upon certain personal property which was claimed by David Sheldon. The sheriff thereupon summoned a jury to try the right of property, and a verdict was rendered for the claimant. Reihle and Bains appealed to the Circuit Court of Morgan county, and delivered to the sheriff a bond executed as follows:

"William Reihle,
Joseph Bains, [L.S.]
By their attorney in fact,
Stephen B. Seyton.
Thomas Poyne, [L.S.]
Joseph Coddington, [L.S.]"

The bond was duly returned by the sheriff with the writ of attachment, and filed in Court.

A change of venue was had to the Madison Circuit Court; and at the October term, 1833, the Hon. Theo. W. Smith presiding, Sheldon moved to dismiss the appeal for the following reasons;

"1. No appeal bond has been executed and given by Reihle and Bains, the appellants in this case, as required by law.

2. No appeal bond has been given in this case by any person properly and legally authorized by the appellants.

3. The appeal bond given in this case is not executed by the proper parties, and is not such as the law requires."

The Court overruled this motion, and an exception was taken to the decision.

On the trial in the Circuit Court, the defendants in error, Reihle and Bains, offered to read in evidence the writ of attachment and return thereon, showing a levy upon the property claimed by the plaintiff in error, which was objected to by Sheldon, but admitted by the Court. An exception to this decision was noted, and a bill of exceptions taken.

The jury found the title of the property to be in the defendant, Judson. Judgment was rendered for the plaintiffs in the Court below, Reihle and Bains, upon this verdict.

Jesse B. Thomas and David Prickett, for the plaintiff in error.

Wm. Thomas, for the defendants in error.

Wilson, Chief Justice, delivered the opinion of the Court:

Several errors are assigned for the reversal of this judgment, —none of which are considered sufficient. The motion to dismiss the appeal from the verdict of the sheriff's jury for the trial of the right of property, was addressed to the discretion of the Court, and the decision upon that motion, therefore, cannot be assigned for error. The appeal bond executed by an attorney in fact, is sufficient; and as nothing to the contrary appears, we must presume that the Court below was satisfied that the attorney was properly constituted such.

The attachment was properly received as evidence, for the purpose of showing the plaintiff's right to take the property, and, for that purpose, was the only evidence that could be adduced.

The finding of the jury was sufficiently formal and explicit; their deciding the goods to belong to Judson, the debtor in the attachment, negatives the title to them set up by the claimant.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Campbell *et al. v.* The State Bank of Illinois, *Ante* 423; Pearce *et al. v.* Swan, *Ante* 266, and note; Arenz *v.* Reihle *et al.*, *Ante* 340.

THE BOARD OF COMMISSIONERS OF THE ILLINOIS AND MICHIGAN CANAL, plaintiff in error *v.* JOHN CALHOUN, defendant in error.

Error to Cook.

In a sale of canal lots or lands, under the act of January 9th, 1836, a special notice of the terms of sale was read, which among other things declared, "That in case any bidder shall fail to comply with the terms of sale, during the days of sale, on which the sale of the lot is made, his bid will be forfeited, and the lot resold,—the first purchaser being held accountable to the commissioners for any loss that may accrue from the sale; but entitled to no profit therefrom:" *Held* that the condition was unauthorized by law and void.

In the sales of canal lots and lands under the act of January 9th, 1836, the Canal Commissioners had no authority to annex any other conditions or terms than those provided in said act, and the act of Congress in relation to the duties of Registers and Receivers upon the sale of the public lands of the U. S.

A count in a declaration against a purchaser of canal lands or lots, for failure to complete the purchase, under the act of January 9th 1836, must contain an averment that the defendant purchased the lot at the public sale, and that he was the highest bidder therefor.

THIS cause was heard in the Court below at the May term, 1837, before the Hon. John Pearson. Judgment was rendered for the defendant in error.

JAMES GRANT, for the plaintiffs in error.

T. FORD, for the defendant in error.

SMITH, Justice, delivered the opinion of the Court:

The question presented for consideration in this case, involves the regular execution of the powers of the Board of Canal Commissioners, relative to the sale of lots in the town of Chicago. The declaration of the plaintiffs contains five counts, each of which was demurred to separately. The first and third set forth a public sale of a lot in the town of Chicago, to the defendant, for $20,000 as the highest bidder, at the sale made by an auctioneer, as the agent of the Board.

That at that sale a special notice of the terms of sale was read, which among other things declared, "That in case any bidder shall fail to comply with the terms of sale, during the days of sale, on which the sale of the lot is made, his bid will be forfeited, and the lot resold,—the first purchaser being held accountable to the Commissioners for any loss that may accrue from the sale; but entitled to no profit therefrom." The plaintiffs aver a refusal by the defendant to complete the purchase, and make payment of the amount required to be paid, according to the terms of the sale; and that in pursuance of the conditions annexed to the sale, and in consequence of such refusal, they resold the lot at a subsequent public sale, for a much less sum than the amount bid by

the defendant. To recover this difference, the present action is brought. The second, fourth, and fifth counts are for a sale by the plaintiffs, and an agreement by the defendant, to purchase and take the lot, without reference to the special conditions, and do not aver that the sale was a public one. The Circuit Court sustained each of the demurrers; and this is the cause of error now assigned.

To understand correctly the decision of the Circuit Court, it will be necessary to examine the act creating the Board of Canal Commissioners, and more particularly such portions of it as prescribe their duties with reference to the disposition of the lots of which the one in question formed a part; and, also, an act of Congress in connexion therewith. By the 33d section (1) of the "*Act for the construction of the Illinois and Michigan Canal*," approved 9th January, 1836, it is provided, that the Commissioners shall, on the twentieth day of June then next, proceed to sell the lots in the town of Chicago, as in their judgment will best promote the interest of the canal fund; and before making such sale, public notice shall be given thereof in five newspapers, at least eight weeks prior to any sale. It is further provided, that if no sale be made on the day named, such sale may be made at any time thereafter, on giving a similar notice, and upon the terms in the act specified.

The 34th section provides for the affixing a value to each lot, and forbids its being sold for less than such value; and that all lots not sold on the day of offering, shall be again advertised for sale; and shall continue to be advertised for sale, until the whole are sold. It further declares, that no lot shall be sold otherwise than at public sale, to the highest bidder. The 36th section declares, that "In all sales of canal lots, the Secretary and Treasurer of the Board, shall act as Register and Receiver; and shall be governed by the same rules that now govern Registers and Receivers in the United States' Land Offices in this State, except as in the act is provided." The act of Congress of the 24th April, 1820, section 2d, provides, that "If any person, being the highest bidder at public sale for a tract of land, shall fail to make payment therefor, on the day on which it was purchased, it shall be again offered at public sale, on the next day of sale, and such person shall not be the purchaser of that or any other tract offered at such sale."

By the provisions of the act referred to, creating the Canal Board, it will be obvious that the Commissioners were not authorized to annex to the conditions of the sale, the terms imposed by the notice given. The 2d section of the act of Congress, having been the mode adopted by the 36th section of the act quoted, for the government of the sales, they were not at liberty to impose

(1) Acts of 1836, 150; Gale's Stat. 120.

others, or substitute those that would impose conditions of the character described. The refusal by the purchaser to pay for the lot in the manner provided by law, on the day of sale, required them to put up the lot again for a re-sale, and to prohibit such purchaser refusing to pay for the lot previously purchased, from being a bidder for any other lot on the day of sale.

It will be perceived that unless this rule was adopted, under the provisions of the section of the act of Congress referred to, there was no power whatever vested in the Commissioners, to sell the lot on a subsequent day, without considering it as an unsold lot; and again advertising it, as in the case of the original offering of lots for sale.

The 33d section of the act creating the Board, declaring that the sale of lots should be made on the 20th day of June, and not providing for a continuance of the sales from day to day, would not have authorized the sale from day to day, unless another portion of the act of Congress, providing for the sales of the public lands, be also adopted, which authorizes the continuance for two weeks. The acts of Congress relative to the duties of the Registers and Receivers, in regard to the sales of public lands, having been made applieable to the sales by the Board of Commissioners, it was probably considered necessary to declare that the sales might be continued for a specified length of time. If this reasoning be correct, it follows as a consequence, that by the adoption of the penalty of forfeiture of the bid of the delinquent purchaser, and the prohibition to become a purchaser of any other lot at the sales, are the only terms which the Commissioners could legally impose and enforce. They had no discretion to exercise any other powers than such as are conferred by the act; and those adopted are not among those granted. The law has specially prescribed the extent and character of the consequences which should result from a failure to make payment for the lot purchased; and thus necessarily inhibited the substitution of others. The demurrer was therefore correctly sustained.

The second, fourth, and fifth counts are radically defective in not averring that the sale and purchase of the lot were at a public sale, agreeably to the provisions of the law, prescribing the mode; and that the defendant was the highest bidder therefor. The counts only show a private sale, and that is expressly prohibited by law. As there was no plea of the statute of frauds, the question whether the sale was only a parol one, and not, therefore, binding, cannot arise in this case.

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

JOHN S. WALLACE, plaintiff in error *v.* ORIN JEROME, defendant in error.

Error to Will.

An application to set aside a default. is addressed to the sound discretion of the Court, and the manner of the exercise of that discretion, cannot be assigned for error.
A motion to set aside a default, does not come within the provisions of the act of July, 1837.

The motion to set aside the default in this case, was made and decided at the September term, 1838, of the Will Circuit Court, the Hon. John Pearson presiding. The affidavit of the plaintiff in error, the defendant in the Court below, stated that when the summons was served upon him, the sheriff informed him that it was a summons for him as a witness, to appear at the April term, 1838; and that he had never been summoned in this cause, and had a full defence to the action.

G. A. O. BEAUMONT, M. SKINNER, and G. SPRING, for the plaintiff in error.

J. BUTTERFIELD, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *trover* commenced by Jerome against Wallace. At the return term of the summons, (April term, 1838,) a default was entered for want of a plea, and at the next term a writ of Inquiry was executed, and judgment given for the plaintiff. On the day after the judgment was rendered, the defendant below filed an affidavit made by himself, and moved the Court that the judgment be opened, reversed, and set aside. This motion was overruled.

The proceedings in the Court below are regular on their face; and the application to set aside the judgment below was addressed to the sound discretion of the Court. Where discretion exists, this Court has frequently decided, that error cannot be assigned.[a]

The overruling of the motion does not come within the statute passed 21st July, 1837,(1) authorizing exceptions to be taken to opinions and decisions of the Circuit Courts, overruling motions in arrest of judgment, for new trials, and for continuances of causes. It is consequently unnecessary to express an opinion whether the defendant produced sufficient grounds to authorize the Circuit Court to have set aside the judgment.

(*a*) Cox *vs.* Brackett, 41 Ill. R. 225.
(1) Acts of July 1837, 109; Gale's Stat. 540.

The judgment below is affirmed with costs.
Judgment affirmed.

Note. See Ditch *v.* Edwards, *Ante* 127; Harmison *v.* Clark *et al.*, *Ante* 131; Garner *et al. v.* Crenshaw, *Ante* 143.

Merritt L. Covell, Ortogrul Covell, and Jesse W. Fell, appellants *v.* Jacob Marks, appellee.

Appeal from McLean.

Where an amendment to a declaration is of a matter of substance, it entitles the defendant to a continuance of the cause.

Judgment was rendered in this cause, in the Circuit Court of McLean county, in the year 1838, the Hon. Jesse B. Thomas presiding.

Stephen A. Douglass, for the appellants.

L. Davis and F. Forman, for the appellee.

Wilson, Chief Justice, delivered the opinion of the Court:

The plaintiff in this action declared upon a promissory note for four hundred dollars. Upon the calling of the cause, the plaintiff asked and obtained leave to amend his declaration, which he did *instanter* by adding to the description of the note, the words "with twelve per cent. interest from the date until paid." The defendants thereupon moved the Court for a continuance of the cause, which was refused, and judgment rendered against the defendants. The refusal of the Court to continue the cause, and the rendition of the judgment are assigned for error. The rule is, that where the amendment to the declaration is a substantive one, it entitles the defendant to a continuance. The amendment in this case is clearly of this character. It made the note a different one from that at first declared on, by increasing the defendants' liability to the extent of the interest that might be due on the note. This in effect made the amended declaration a new one, which the defendants could not be called on to answer without ten days' notice preceding the commencement of the term of the Court.[a]

The copy of the note upon the back of the declaration, was no notice to the defendants of the one declared on. They were different not only in terms, but in their legal effect; and the one copied could not be given in evidence under the declaration.

(*a*) Hawks *vs.* Lands, 3 Gil. R. 227; O. & M. R. R. Co., *vs.* Roberts, 18 Ill. R. 22; Eames *vs.* Morgan 37 Ill. R. 272.

The judgment of the Court below is reversed with costs, and the cause remanded.

Judgment reversed.

Note. See Vickers *v.* Hill *et al.*, *Ante* 307; The People *v.* Pearson, *Ante* 473.

ICHABOD MITCHELL and GEORGE MAYBERRY, appellants *v.* THE PRESIDENT and DIRECTORS OF THE STATE BANK OF ILLINOIS, appellees.

Appeal from Hamilton.

In an action by the old State Bank of Illinois, upon a promissory note given in satisfaction of two judgments recovered upon promissory notes executed to said Bank in consideration of bills of said Bank which had been declared by the Supreme Court, to be *bills of credit* emitted by the State, in contravention of the Constitution of the U. S., the defendants offered to show the consideration of the judgments in bar of the action: *Held* that the evidence was inadmissible, and that the validity of the judgments could not be impeached in such action.

A judgment cannot be impeached in an action upon a note given in satisfaction of such judgment. A judgment implies verity in itself.

THIS was an action originally instituted by the appellees against the appellants, before a justice of the peace of Hamilton county, upon the following note:

"On or before the first day of January next, we or either of us promise to pay The President and Directors of the State Bank of Illinois, the sum of eighty-six dollars and ten cents, for value received, being the amount due on two judgments in favor of the Bank against N. Janny and others, on Lockwood's Docket, and one judgment against Ichabod Mitchell, in the Circuit Court, on a note given by said Janny, together with interest on the above sum from the 24th of August, 1829, till paid: Provided if this note shall be paid punctually, the above interest and ten per cent. of the principal to be remitted, if both do not exceed twenty-four per cent. on the whole.

Witness our hands and seals, this 19th day of September, 1833.

GEORGE MAYBERRY. [L.S.]
ICHABOD MITCHELL. [L.S.]"

The cause was removed by appeal to the Circuit Court, where judgment was rendered for the appellees for $128,24, at the September term, 1837, the Hon. Walter B. Scates presiding. The defendants in the Court below appealed to this Court.

On the trial in the Circuit Court the following bill of exceptions was taken:

"Be it remembered, that on the trial of this cause, the defend-

ants by their attorney, offered to produce in evidence to the Court, the two several judgments referred to in the note on which this suit was brought, and also the several notes on which those two judgments were rendered; and to prove that said two last mentioned notes were executed to the said plaintiffs for and in respect of bills of credit issued by the State of Illinois, by means of the machinery of what was called a State Bank, created in and by the act of the year 1821, entitled "*An act to establish*," &c.; and that bills of credit issued by the authority of said State in violation of the Constitution of the United States, formed the whole consideration of the said last mentioned notes: which evidence except said judgments, the Court refused to hear, and to allow to be produced; to which opinion of the Court in overruling this evidence, the defendants, by their counsel, except, and pray this their bill of exceptions may be sealed and allowed, &c.

WALTER B. SCATES. [L.S.]"

HENRY EDDY, for the appellants.

G. W. OLNEY, Attorney General, for the appellees.

SMITH, Justice, delivered the opinion of the Court:

The appellants, being the sureties of other persons, were sued on certain notes which they had signed with their principal, against whom judgments had been rendered. To obtain time for payment, and to liquidate these judgments, the plaintiffs gave other notes in extinguishment of the judgments; and in the Circuit Court they attempted to show that the notes on which the judgments had been rendered were void—having been given for notes of the State Bank, the notes of the Bank being bills of credit issued contrary to the provisions of the Constitution of the United States. The decision of the Circuit Court, in refusing to admit the testimony offered, was correct.

The judgments were a good and valid consideration for the notes. The original notes were extinguished by the judgments; and the debt of record created by the judgments, were, until reversed, a sufficient and legal consideration. Until their reversal, they were of course, binding; and the consideration upon which they were rendered, could not be enquired into collaterally. It was not, in this action, competent for the Court to admit evidence to impeach the judgments, because they implied verity in themselves, and could not be contradicted; and being the consideration upon which the note now sued, was founded, the decision of the Circuit Court in excluding the evidence offered, was justified by the well settled principles of law applicable to evidence.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Linn *v.* The State Bank of Illinois, *Ante* 87—95, and note; State Bank of Illinois *v.* Brown *et al.*, *Ante* 106; Wood *v.* Haynes, *Ante* 109; Carson *v.* Clark, *Ante* 113; Hall *et al. v.* Byrne *et al.*, *Ante* 140; Stacker *et al.* *v.* Watson, *Ante* 207; Buckmaster *v.* Grundy, *Ante* 310.

Harvey Lee and Lemuel Lee, appellants *v.* Michæl Bates, appellee.

Appeal from Fayette.

In an action upon a note of hand, the defendant pleaded no consideration, and that the note was given in consideration of a certain amount of work, which the payee, the plaintiff, alleged he had performed for Waterman and Rogers, contractors on the Cumberland Road, and of an agreement by the payee to deliver to the defendants an order or transfer, to enable them to draw from W. and R. the pay for the work—W. and R. being contractors upon the Cumberland Road—and that the payee never performed the work, nor delivered the order or transfer, whereby the defendants lost the benefit of the same.

The defendants then moved for a continuance of the cause, upon an affidavit of one of the defendants, stating that he believed that he could prove by G., who resided in the county where the suit was commenced, that G. had in his possession the contract for work done by the said plaintiff for W. and R., and that the plaintiff had failed to transfer it to the defendants. That he expected to prove by W. and R., that the plaintiff wholly failed to preform his contract with them, and that they owed him nothing, and that they wholly refused to pay to the said defendants any money on account of the said plaintiff for the said work; and that the affiant knew of no other witness by whom he could prove the same facts. That G. was absent from the county when the writ was served upon the defendants, and had not since returned. That Waterman resided in St. Louis, in the State of Missouri, and Rogers in Greene county, in the State of Illinois; and that from the shortness of the time between the commencement of the suit, and the session of the Court, they had not been able either to procure W.'s deposition, or the attendance of R. as a witness: *Held* that the affidavit was sufficient, and the defendants were entitled to a continuance.

This was an action of *assumpsit* commenced by the appellee against the appellants, in the Circuit Court of Fayette county, upon a promissory note. The defendants in the Court below pleaded, first, that there was no consideration for the note, and, secondly, that the "note in the said plaintiff's declaration mentioned, was made and executed and delivered by them to the said plaintiff, in consideration of a certain amount of work, to wit, to the amount of one hundred dollars, which he, the said plaintiff, alleged that he had done and performed for one David B. Waterman and Jesse H. Rogers, who were contractors upon the National or Cumberland Road in the State of Illinois; and which contract for work alleged to have been done by him as aforesaid, and for which said note was given, the said plaintiff, in consideration that the said defendants would sign and deliver said note to him, would transfer and deliver over to the said defendants, an order or transfer of said sum, to enable and authorize them to

draw the money from the said Waterman and Rogers: and the said defendants aver, that the said plaintiff did not perform any work for said Rogers and Waterman, nor did he transfer and authorize the said defendants to draw the money on said contract as aforesaid, or any authority or order whatsoever to authorize them to draw the amount of said contract for the work aforesaid from the said Waterman and Rogers, but wholly failed and refused so to do, by reason of which the said defendants lost the benefit of the same; and the said defendants further aver, that the consideration of said note, in the said declaration mentioned, has wholly failed, and this they are ready to verify, wherefore, &c."

These pleas were traversed by the plaintiff, and issue taken thereon.

The defendants then filed the following affidavit, and moved the Court for a continuance to the next term of the Court:

"Lemuel & Harvey Lee,
ats.
Michael Bates.

Lemuel Lee, one of the defendants in the above cause being duly sworn, deposes and says, that William C. Greenup, of the county of Fayette, and David B. Waterman, of the city of St. Louis, Missouri, and Jesse Rogers, of the county of Greene, Illinois, are material witnesses for him in the trial of the above cause. He expects and believes that he will be able to prove by William C. Greenup, that the contract for work done by the said plaintiff for Rogers and Waterman, was in his possession, and the said plaintiff failed to transfer it to the said defendants, as he had agreed to do, and for which said note was given; he also expects to prove by said Waterman and Rogers, that the said plaintiff wholly failed to perform his contract with them for work, and that they owed him nothing, and that they refused wholly to pay to the said defendants any money on account of the said plaintiff, for the said work alleged to have been done by him for the said Rogers and Waterman, and for which said note was given.

This affiant further states, that he knows of no other witness or witnesses by whom he can prove the same facts. When the writ was served on this affiant, Wm. C. Greenup was absent from the county of Fayette, and has not since returned; and Waterman's testimony, who resides in St. Louis, could not be taken before the meeting of the Court. They also state that from the shortness of the time they were unable to procure the attendance of the witness, Rogers, to this term of the Court. He expects to be able to procure their testimony by next Court.

LEMUEL LEE.

Sworn to and subscribed in open Court, Oct. 10, 1838.

JAS. W. BERRY, Clk.

The motion for a continuance was overruled, and the defendants excepted to the opinion of the Court, and embodied the facts in a bill of exceptions, which was signed and sealed by the Court.

The cause was tried before the Hon. Sidney Breese and a jury, at the October term, 1838. Verdict and judgment were rendered for the plaintiff in the Court below. The defendant appealed to this Court.

A. P. Fields, for the appellants.

L. Davis and F. Forman, for the appellee.

Smith, Justice, delivered the opinion of the Court:

An application was made to the Circuit Court, in this cause, for a continuance to the next term, founded on a deposition of one of the defendants, showing the absence of a witness, whose testimony appears to be material on the trial of the cause, residing in Missouri; and of another residing in a distant county.

The facts which the deposition discloses, and which it is alleged the witness could prove, would be material for the defendant in his defence; and as the declaration was filed only twelve days before the sitting of the Court, it was not within the power of the defendants to have obtained the testimony of the absent witnesses under a *Dedimus*, conformably to the statute, in time for a hearing of the cause—ten days' notice of the intention to take the testimony, being required to be given to the opposite party. There was consequently no *laches* on the part of the defendants.

The judgment is reversed with costs—a new trial granted—and a *venire de novo* awarded.

Judgment reversed.

Note. See Vickers *v.* Hill *et al.* *Ante* 307, and note; The People *v.* Pearson, *Ante* 473; Covell *et al. v.* Marks, *Ante* 525.

Andrew Miller, plaintiff in error *v.* Moses O. Bledsoe and B. F. Turpin, defendants in error.

Error to the Municipal Court of the City of Alton.

At law, a moiety, or any other portion of a promissory note, cannot be so assigned as to enable the assignee to bring an action in his own name, for his portion of the note.

In order to enable an endorsee or assignee of a note to bring an action in his own name, the whole interest in the note must be assigned to him.

Where a note was made payable to B. and T., and T. endorsed and assigned his interest in the note to B., and an action was instituted on the note in the name of B. and T., for the use of B.: *Held* that the action was correctly brought; and that B. and T. were the legal holders of the note, though the interest of the assignee of the moiety, would be protected in a court of law; and that the endorsement of T. upon the note, could be regarded only as a private memorandum between the payees.

A. Cowles and J. Krum, for the plaintiff in error.

J. Russell Bullock and Edward Keating, for the defendants in error.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* brought in the Court below, by Bledsoe and Turpin against Miller, on a promissory note. On the trial of the cause, the plaintiff below produced and offered to read a note in evidence to the jury, in the following words, to wit:

"Lower Alton, Ill., April 18, 1836.

Two years after date, I promise to pay to the order of M. O. Bledsoe and B. F. Turpin, two hundred and eighty dollars, value received, negotiable and payable at the Branch of the Illinois State Bank at Alton. Andrew Miller."

Upon the back of which note, there is in writing the following endorsement:

"I assign my interest in the within, to M. O. Bledsoe, without recourse in any event. B. F. Turpin."

A witness was sworn, who testified that the signature to said endorsement was in the hand writing of B. F. Turpin, one of the plaintiffs. To the reading of which note in evidence, the defendant objected, but the Court overruled the objection and admitted the note. Other testimony was offered by the defendant, and rejected, but it is unnecessary to state it, as it only tended to prove the fact, which was sufficiently established, that Turpin had parted with his interest in the note, to Bledsoe.

It is only necessary for this Court to decide whether the note was admissible in evidence. At law, a moiety, or any other portion of a promissory note, cannot be so assigned as to enable the assignee to bring an action in his own name, for his portion of the note. Had Turpin assigned his half of the note to a third person, that third person could not have united with Bledsoe, in bringing the action, for they would have to sue in different capacities, Bledsoe as payee, and the third person as endorsee. The same result would follow, if Bledsoe had brought the action in his own name; he would have had to declare for a moiety of the note as payee, and for the remainder as endorsee. This would lead to much confusion and complexity in pleading. In order, therefore, to enable an endorsee of a note to bring an action in his own name as endorsee, the whole interest in the note must be assigned to him. The interests of an assignee of part of a note, would doubtless be protected in a court of law, but the action must be brought in the name of the payee or payees, who

continue to be the legal holders of the note for the purpose of collection. The endorsement on the note, can only be regarded as a private memorandum between the payees, and only vested in Bledsoe an equitable title to the money when collected. The Court consequently decided correctly in receiving the note in evidence, and in rejecting the parol evidence.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Ransom *v.* Jones, *Ante* 291-2, and notes.

Where a note is made payable to two persons, one of them may by his endorsement convey his interest in it to the other, so as to give the latter a right to sue on it in his own name alone. Bayley on Bills 115, citing Sneed *v.* Mitchell, 1 Hayw. N. C. R. 289.

A partnership may by endorsement transfer the title to a bill or note to one partner, even where the partner claiming as endorsee of the partnership, was the person who made the endorsement. Russell *v.* Swan, 16 Mass. 314; Kirby *v.* Cogswell, 1 Caines 505.

On a bill or note payable to A., for the use of B., the right to transfer is in A. Evans *v.* Cramlington, Carth. 5; 2 Vent. 307; Skinn. 264.

On a bill or note payable to several persons, not in partnership, the right to transfer it is in all collectively, not in any individually. Carvick *v.* Vickery, Dougl. 2d ed. 653, n. 134.

Where a note is payable to two joint executors, one of them cannot transfer the note by his separate endorsement. Smith *v.* Whiting, 9 Mass. 334. See also Bank of Chenango *v.* Root, 4 Cowen 126; Ballou *v.* Spencer, 4 Cowen 163; Lowell *v.* Reding, 9 Greenl. 85.

After the death of one partner, the surviving partner may transfer by endorsement a bill or note payable to the partnership. Jones *v.* Thorn, 14 Martin 463.

But after the dissolution of a co-partnership, one partner cannot by his endorsement in the partnership name, vest in the endorsee the title to a bill or note payable to the partnership. Sanford *v.* Mickles, 4 Johns. 224.

A partnership may make a note payable to one partner, and an endorsement by him will vest a good title in the endorsee, who may sue the partnership upon the note. Smith *v.* Lusher, 5 Cowen 688; Blake *v.* Wheadon, 2 Hayw. N. C. R. 109. See Bayley on Bills 49, 50, 115, 116.

Abraham Johnson, appellant *v.* Thomas Moulton, appellee.

Appeal from Warren.

It is a well settled rule of law, that in trials by jury, the weight of testimony is a question to be decided by the jury exclusively. The decision, consequently, cannot be assigned for error.

Semble, That on an application to a Circuit Court to set aside a verdict of a jury because it is against the weight of testimony, the case must be a flagrant one to justify the Court in disturbing the verdict.(*a*)

Where a witness for the defendant, on the trial of a cause, stated that he carried a message from the defendant to the plaintiff, and the counsel for the plaintiff thereupon asked the witness "What was his reply?" and the defendant objected to the witness' answering the question, and the Court overruled the objection: *Held* that the decision of the Court was correct.

In order to sustain an action to recover pay for improvements made upon the public lands, all that it is necessary for the plaintiff to prove, is, that the defendant promised expressly to pay for the improvements. If the price to be paid be not agreed on, the contract is binding, and the value of the improvements must be ascertained by proof.

(*a*) Duffield *vs.* Cross, 13 Ill. R. 699, and notes.

Johnson *v.* Moulton.

THIS cause was tried at the October term, 1836, of the Warren Circuit Court, before the Hon. Richard M. Young and a jury. Verdict and judgment were rendered for the appellee, for $21,65.

L. DAVIS and F. FORMAN, for the appellants, cited Printed Opinions, 79, 117, 294.(1)

O. H. BROWNING, for the appellee, cited 1 Stark. Ev. 48; 2 do. 42-3.

LOCKWOOD, Justice, delivered the opinion of the Court:

This action was originally commenced before a justice of the peace, by Moulton against Johnson, and brought into the Circuit Court of Warren county by appeal. The cause was tried by a jury in the Circuit Court, and a verdict and judgment given in favor of Moulton. The errors assigned are, 1st, The judgment in the Circuit Court was given against the weight of testimony. 2d, The Court erred in permitting the conversation of the plaintiff below to be received in evidence. And, 3d, The Court instructed the jury that they must find for the plaintiff, if they believed that a contract, either express or implied, was entered into between the parties, in relation to the improvements upon the land referred to in the record. In relation to the first error assigned, it is a well settled rule of law in trials by jury, that the weight of testimony is a question to be decided by the jury exclusively. The decision, consequently, cannot be assigned for error. Had there been an application to the Court below for a new trial on this ground, the case ought to have been a flagrant one, to have justified the Court in disturbing the verdict. In reference to the second error, the bill of exceptions discloses the following state of facts: Johnson called a witness and asked him if he had delivered a message to Moulton, in relation to the controversy between them; and upon the question being answered in the affirmative by the witness, with a statement of the nature of the communication sent by the defendant to the plaintiff, the latter asked the witness "What was his reply?" The answer to this question is the conversation referred to in the assignment.

When the defendant gave in evidence a message from himself to the plaintiff, having relation to the merits of the dispute between them, if the plaintiff had remained silent, an inference might have been drawn by the jury, that the plaintiff acquiesced. The answer of the plaintiff was therefore relevant, to rebut any such presumption, and was therefore correctly received in evidence for this purpose. The third error assigned, does not cor-

(1 *Ante* 113, 169, 178.

rectly state the charge of the judge. The charge was, that if the jury believed there was a promise to pay for the improvements, although there was no express contract as to the amount to be paid, that the law raised an implied agreement to pay their worth or value. The "*Act to provide for the collection of demands growing out of contracts for sales of improvements on public lands*,"(1) passed February 13th, 1831, makes all contracts, promises, or undertakings, for the sale, purchase, or payment of improvements made on the public lands, valid in law or equity, and they may be sued for and recovered, as in other contracts. In order to sustain an action under this act, all that it is necessary for the plaintiff to prove, is, that the defendant promised expressly to pay for the improvements. If the price to be paid be not agreed on, the contract is binding, and the value of the improvements must be ascertained, by proof. The law in such cases raises an implied *assumpsit* to pay the worth or value of the property sold.(*a*) The charge of the Court was consequently correct.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Smith *v.* Shultz, *Ante* 490-2, and note.
(1) R. L. 420; Gale's Stat. 434. (*a*) Taylor *vs.* Davis, 11 Ill. R. 10.

JAMES MCKINNEY, appellant *v.* WILLIAM L. MAY, appellee.

Appeal from Morgan.

It is error to take judgment by default, where a demurrer is filed to the declaration or petition.

M. MCCONNELL, for the appellant.

E. D. BAKER, for the appellee.

BROWN, Justice, delivered the opinion of the Court:

This was an action of *debt* brought by Wm. L. May against James McKinney, in the Circuit Court of Morgan county, by petition and summons. Judgment by default was taken against the defendant, for the amount claimed in the petition, although a demurrer to the petition had been filed. To reverse this judgment, an appeal is brought to this Court. This practice is under a particular statute of this State, which authorizes any person holding a bond or note for the direct payment of property or money, to put the same in suit, by filing with the clerk of any Circuit Court having jurisdiction thereof, together with a petition, &c.

The fifth section of the act says, "The petition shall stand in the place of a declaration; the defendant or defendants may appear and plead, and then an issue may be joined, as in actions of debt, on such bond or note."(1) It seems from the statute regulating this kind of practice, that the petition is substituted for the declaration. It would be error to take judgment by default, when a plea is put in to the declaration. In this case judgment was taken without first disposing of the demurrer, for which decision the judgment of the Circuit Court must be reversed with costs, and the cause remanded for a new trial.

Judgment reversed.

Note. See Manlove *et al. v.* Bruner, *Ante* 390, and note.
(1) R. L. 498; Gale's Stat. 538.

ISHMAEL DAZEY, plaintiff in error *v.* GEORGE ORR and JOHN H. FORBUSH, defendants in error.

Eror to Adams.

A party intending to move to quash an execution, should give the opposite party notice of his intended motion. Where an execution was quashed without such notice, the Supreme Court reversed the decision, and remanded the cause.*(a)*

O. H. BROWNING, for the plaintiff in error.

L. DAVIS and F. FORMAN, for the defendants in error.

BROWNE, Justice, delivered the opinion of the Court:

Dazey recovered a judgment at the Spring term, 1837, of the Adams Circuit Court, against Orr and Forbush, upon which a *fieri facias* issued and was placed in the hands of Earl Pierce, then sheriff of said county, for collection. Orr and Forbush paid Pierce, the sheriff, $30 on said execution, which he endorsed upon the back thereof, without returning the execution to the clerk's office whence it had issued. Robert R. Williams, Esq., attorney for Dazey, got possession of the execution with the credit of $30 endorsed on the back thereof, and returned it to the clerk's office, and caused the *alias fieri facias* in the bill of exceptions mentioned, to be issued.

At the July term, 1838, of the Adams Circuit Court, Orr and Forbush, by their attorney, produced said *alias fieri facias* in Court, and without having given notice to Dazey of their intention to make such motion, moved the Court to quash and set aside the same.

This motion the Court sustained, and rendered judgment for costs against Dazey; to reverse which, this appeal is brought. It

(a) Bonnell *vs.* Neely, 43 Ill. R. 289.

does seem to us, that in this case it was necessary for the party to have given notice of his intention to quash the execution, previous to the making of the motion.

The judgment of the Circuit Court is therefore reversed with costs, and the cause remanded.

Judgment reversed.

JOHN AYRES *et al.* appellants *v.* EDWARD LUSK and MARY LUSK, his wife, appellees.

Appeal from Morgan.

It is not necessary in a suit in chancery, that there should be an order of publication, before notice to parties who are not served with process can be given by advertisement in a public newspaper.

Where a part of the defendants in chancery suit were non-residents, and affidavit was made of this fact, and filed in the clerk's office, and the clerk published a notice for four weeks successively in a public newspaper printed in this State, of the pendency of the suit, and requiring such defendants to appear and answer the bill, or that the same would be taken as confessed against them: *Held* that the defendants were duly notified under the statute.

W. A. MINSHALL and C. WALKER, for the appellants.

WM. THOMAS and WM. BROWN, for the appellees.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was a bill filed in the Morgan Circuit Court, on the chancery side thereof. The only particular error assigned is, that the Circuit Court should not have tried the cause before an order of publication was made against the defendants on whom the process was not served, and who did not appear. The record states that an affidavit was filed, showing satisfactorily that a part of the defendants below were non-residents, and that the clerk published a notice for four weeks successively in a public newspaper printed in this State, of the pendency of the suit, and requiring such defendants to appear and answer the bill, or that the same would be taken as against them, for confessed.

The fifth section of the "*Act prescribing the mode of proceeding in Chancery*,"(1) expressly authorizes the practice pursued in this case.

The decision is consequently affirmed.

Judgment affirmed.

(1) R. L. 119; Gale's Stat. 140. R. S. 94, Sec. 8.

The People of the State of Illinois, *ex relatione* Benjamin S. Enloe, *v* The Auditor of Public Accounts.

Motion for a Writ of Mandamus.

It is competent for the legislature to repeal a law creating an office, before the expiration of the term of office of the incumbent; and after such repeal the officer is entitled to no further compensation, though his term of office, according to the provisions of the law under which he was appointed, has not expired.(*a*)

At this term of the Court, the relator filed the following affidavit, and moved that a rule be made upon the Auditor of Public Accounts, to show cause why a writ of *mandamus* should not issue to compel him to issue his warrant on the Treasurer, for $1237,82, the balance claimed to be due the relator, for his salary as Warden of the Penitentiary.

"Benjamin S. Enloe, being first duly sworn, deposes and says, that he was duly elected by the tenth General Assembly of the State of Illinois, and on the tenth day of February, 1837, was commissioned by the Governor of said State, as Warden of the Penitentiary, and was authorized and empowered by law, to hold and continue in the office of Warden of the Penitentiary of said State, for and during the term of two years, and until his successor should be appointed and qualified. This deponent further says, that having complied with the law in all respects, on the 6th day of March, 1837, he entered on the duties of said office, and continued in the discharge of the same, and that, as such Warden of the Penitentiary of the State aforesaid, he was entitled to the sum of sixteen hundred dollars, which was appropriated to him by law, and of which sum the Auditor paid to this deponent the sum of three hundred and sixty-two dollars and eighteen cents; and there is now due to this deponent, as Warden aforesaid, the sum of twelve hundred and thirty-seven dollars and eighty-two cents. He also deposes that he made application to the Auditor of the said State, to issue to him his warrant for the same, which the Auditor refused, and still refuses to pay to this deponent, the same or any part thereof, or to issue his warrant therefor. And the deponent prays this Honorable Court to afford him such redress as justice may require.

Ben. S. Enloe."

"State of Illinois, }
Fayette county. }

I, Allen McPhail, an acting justice of the peace for said county, do hereby certify, that Benjamin S. Enloe, appeared before me and made oath to the within affidavit.

Given under my hand and seal, this 20th day of December, 1838. Allen McPhail, J. P., F. C."

(*a*) People *vs.* Dubois, 23 Ill. R. 547: People *vs.* Banks, 24 Ill. R. 185; Exparte Herman, 13 Peters U. S. R. 230.

The rule was granted, and the Auditor, by the Attorney General, filed the following answer:

"Benjamin S. Enloe v. The Auditor of Public Accounts. } Rule to show cause why a Writ of *Mandamus* should not issue.

The said Auditor, by the Attorney General, comes and shows for cause why the said writ of *mandamus* should not issue. That in the year of our Lord, 1836, Jacob C. Bruner was appointed by the Governor of the State of Illinois, to supply the vacancy occasioned by the resignation of Stinson H. Anderson, Warden of the Penitentiary of said State, and in accordance with the tenor of such appointment, continued to hold such office until the 6th day of March, 1837, at which time the said Benjamin S. Enloe entered upon the duties of said office; that from the first day of January, in the year of our Lord 1837, to the 6th day of March, 1837, the said Jacob C. Bruner was entitled to, and drew from the Treasury of the said State of Illinois, the sum of one hundred and forty-five dollars and twenty-one cents, said sum being a part of the sixteen hundred dollars appropriated by the legislature for the salary of the Warden of the Penitentiary, for the years 1837 and 1838, and which is claimed by the applicant here.

And the said Auditor for further cause, shows to the Court here, that the said Enloe was a member of the 10th General Assembly of the State of Illinois, at which he was elected to the office of Warden of the Penitentiary, and at which, by the terms of the appropriation before referred to, the salary attached to the office of Warden of the Penitentiary, was raised from the sum of $600 per annum, to the sum of $800 per annum, and that the said Enloe continued to sit as a member of the 10th General Assembly, as aforesaid, to the end of the session thereof.

And the said Auditor further shows, that on the 21st day of July, in the year 1837, the legislature of the State of Illinois abolished the said office of Warden of the Penitentiary aforesaid; which office the said Benjamin S. Enloe then claimed to hold. By which act the said Enloe is entitled to no compensation more than, nor as much as, he has received, being the sum of $362,18, the salary attached to said office, by the said 10th General Assembly, from the said 6th day of March, 1837, to the said 21st day of July, 1837.

GEORGE W. OLNEY, Atty. General."

A demurrer was filed to the answer.

JOHN REYNOLDS, J. SHIELDS, and A. P. FIELD, for the relator, contended that,

An appointment to office is a grant, and cannot be revoked;

that the appointee has a vested right. 6 Cranch 87 ; 3 Peters' Cond. R. 309.

The appointment to office is a contract. Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518 ; 4 Peters' Cond. R. 529.

An office is a right to exercise an employment.

The Auditor has no right to set up a constitutional objection to the appointment of Enloe to the office. The Attorney General can test this question by *Quo Warranto*, but in no other way.

The appointing power has no authority to remove. They cited Laws of 1831, 103 ; of 1833, R. L. 474-5 ;(1) of 1835, 52;(2) of 1836, 238 ; of 1836-7,(3) 4 ; 1837, July, 47.(4)

George W. Olney, Attorney General, for the respondent.

Lockwood, Justice, delivered the opinion of the Court verbally, and concluded by saying, that the motion for a writ of mandamus must be denied, and the rule discharged.[a]

Rule discharged.

(1) Gale's Stat. 516. (2) Gale's Stat. 520. (3) Gale's Stat. 521.
(4) Gale's Stat 531. (*a*) *Ante* 215, and note ; People *vs.* Field, 2 Scam. R. 79.

Bezaleel Gillet and William Gordon, plaintiffs in error *v.* Caleb Stone, William Manning, and John B. Glover, defendants in error.

Error to Madison.

The exercise of the power to grant or refuse an application to set aside a default and permit the defendant to plead,—as also, the granting or refusing of a motion for a new hearing, is a matter of sound legal discretion; and the Supreme Court cannot interfere with the exercise of that discretion by the Circuit Court.

Instructions to a jury upon an inquest of damages, are mere interlocutory matters, and the Supreme Court has no right to re-examine them.

The statute of July, 1837, does not extend to motions to set aside defaults.

The averment at the end of a declaration containing several counts, in a suit where process was sent to a foreign county, that the cause of action accrued in the county where the suit was brought, and within the jurisdiction of the Court, and that the plaintiffs reside in said county, is sufficient to give the Court jurisdiction.

Several counts in case can be joined in one declaration.

Semble, That where the verdict of a jury is for a greater sum than the *ad damnum* laid in the declaration, the plaintiff may remit the excess, and take judgment for the sum and

This was an action brought by the defendants in error, in the Madison Circuit Court, against the plaintiffs in error. The summons was directed to the sheriff of Morgan county, and by him executed upon the defendants in the Court below. Previous to

the issuing of the summons, the attorney of the plaintiffs in the Court below, filed an affidavit of the indebtedness of the defendants to the plaintiffs, and "that the cause of action accrued in Alton, Madison County."

The declaration contained three counts in case, for deceit in the sale and delivery of a quantity of pork. At the end of the declaration there was an averment "that the cause of action accrued at Alton, in the county of Madison, and within the jurisdiction of this Court, and that they, the said plaintiffs, reside at Alton aforesaid, in said county of Madison aforesaid."

The first count averred that the defendants contracted and endeavored to sell a large quantity of bulk pork, to wit, 140,000 pounds at $4 per 100 pounds, and that defendants fraudulently &c. delivered 86,814 pounds as and for 140,000 pounds—and that the quantity delivered was less than 140,000 pounds, to wit, less by 53,186 pounds.

The second count averred that the plaintiffs agreed to buy from the defendants 140,000 pounds of bulk pork, at $4 per 100 pounds, and that the defendants having a knowledge of there being a less quantity than 140,000 pounds, to wit, that there was but 86,814 pounds, sold the last mentioned quantity to the plaintiffs as and for 140,000 pounds, and thereby fraudulently deceived and defrauded the plaintiffs.

The third count alleges that the plaintiffs agreed to buy of the defendants, 140,000 pounds of bulk pork at $4 per 100 pounds, to be delivered to the plaintiffs, in flat boats, at Alton,—that plaintiffs have always been ready to receive the same &c., and that a reasonable time had elapsed &c., and the pork had not been delivered,—but that the defendants fraudulently intending to deceive &c., offered and endeavored to deliver to the plaintiffs, a much less quantity than 140,000 pounds, to wit: 86,814 pounds as and for the same quantity bargained for.

The plaintiffs' damages were laid at $2,000.

At the February term, 1836, of the Madison Circuit Court, the Hon. Sidney Breese presiding, the default of the defendants was entered, and a writ of inquiry awarded. The jury returned a verdict for $2302,44 for the plaintiffs.

The bills of exceptions state that on the day that judgment by default was entered in this cause, the defendants, by their attorney, moved the Court to set aside the default entered in this cause upon the following grounds, first, "That the Court has no jurisdiction of the cause; second, That the affidavit upon which the writ issued, is not sufficient to authorize the issuing the same to the county of Morgan."

"The Court overruled the motion to set aside the default. The defendants' attorney then proposed to make and present an affi-

davit of merits, for the purpose of setting aside the judgment by default, but the Court refused to permit the defendants at this stage of the proceedings, the writ of inquiry being about to be executed, to prepare an affidavit on which to make a motion to set aside the default, the said defendants' counsel having had twenty-four hours in which to make such affidavit. And that after the testimony had been closed in this cause, the Court instructed the jury, at the instance of the plaintiffs, that by the judgment of default in this case, the defendants admitted the contract as set out in the declaration, and that the plaintiffs had a right to recover for the deficiency in the quantity of pork delivered, as stated in the declaration; that the plaintiffs were not bound to prove upon the inquiry of damages, the deficiency in the quantity of pork, but the extent of deficiency as to quantity, was admitted by permitting judgment by default."

"And that upon the execution of the writ of inquiry in this case, the plaintiffs produced to the Court several bills of exchange made and drawn by defendants upon plaintiffs for money, and proved the hand writing of defendants, and offered to read those bills of exchange to the jury upon the proof of the hand writing of the defendants, as above stated; defendants objected to the admission of said bills of exchange as evidence, but the Court overruled the objection, and permitted the said bills of exchange to be read as evidence to the jury."

The defendants in the Court below excepted to each of the said several opinions and decisions of the Court.

The cause was continued to the April term, 1836, when the plaintiffs remitted $302,44 of the damages rendered by the verdict of the jury, and judgment was rendered for the plaintiffs for $2,000.

The cause was argued in writing by WILLIAM THOMAS, for the plaintiffs in error, who relied upon the following points and authorities:

The Court will vacate the assessment of damages when there is an evident mistake of the Clerk. Burr *v.* Reeve, 1 Johns. 507.

If it appears that injustice has been done by the admission of improper testimony, the Court will set aside an inquisition. Ward *v.* Haight, 3 Johns. C. 80.

Proceedings after default will be set aside for irregularity. Griswold *v.* Stoughton, 1 Caines 506; Spencer *v.* Webb, 1 Caines 118.

If it appear that important questions of law will arise on the execution of a writ of inquiry, it will be executed before a judge. Tillotson *v.* Chatham, 2 Johns. 106.

To prove that the Court may assess damages. 2 Saund. 107, note 2; McCullum *v*. Barker, 3 Johns. 153.

Where the sheriff or jury mistake a point of law, the Court will set aside the inquisition. 1 Tidd's Practice 630 ; 2 Salkeld 647 ; 1 Strange 425 ; Woodford *v*. Eadis do.; 2 Strange 1259, Markham *v*. Middleton. In this case the inquisition was set aside for the erroneous decision of the sheriff, and to prove his decision erroneous upon a question of adjournment or continuance see 2 Strange 853, Coleman *v*. Mawly. If the sheriff admits improper evidence, the Court will set aside the inquisition. 1 Crompton's Practice 290, referring to Barns 448 ; 10 Petersdorf 462.

In executing writs of inquiry, the judge at *nisi prius* is only assistant to the sheriff, and has no judicial power. Buller on Trials 58.

Where improper testimony has been admitted by the sheriff, the Court will set aside the inquisition. 1 Bos. and Pul. 368 ; 1 Paine and Duer's Practice 637.

Upon inquiry of damages all that the defendant will be allowed to dispute, is the amount of damages. Saund. on Plead. and Ev. 103.

Upon writ of inquiry the plaintiff must prove the *quantum* of damages. 10 Petersdorf 458.

An able argument was filed on the part of the defendants in error, by Geo. T. M. Davis and J. Martin Krum. They cited the following authorities :

3 Stark. Ev. 1772 ; Paine and Duer's Pract. 635 ; 3 Term R. 302 ; 1 Phillip's Ev. 149 ; 3 Johns. 56 ; 3 Blac. Com. 396 ; 2 Saund. 586, 307 ; 2 Term R. 4 ; 7 Mass. 205 ; R. L. 145.(1)

Smith, Justice, delivered the opinion of the Court :

In this case a judgment by default and assessment of damages was had, no plea being interposed, though the defendants in the Circuit Court applied for leave to plead, and to set aside the default, which the Court refused. On the inquest, the defendants took exceptions to the instructions of the judge to the jury — the inquest being had in the Court before the judge. Subsequently, and before judgment on the inquest, the defendants moved to set aside the inquest, and grant a new trial. The Circuit Court refused to allow the motion.

It is now urged for error, that the Circuit Court ought to have set aside the default, and permitted the defendants to plead. That the instructions of the judge to the jury of inquest, on the nature and extent of the evidence required, was erroneous ; and that improper evidence was admitted.

(1) Gale's Stat. 166.

It is also assigned for error that there is a misjoinder of counts; and that the Court had no jurisdiction.

To the causes urged as error, it is sufficient to reply, that the exercise of the power to grant or refuse the application to set aside the default and permit the party to plead,—as also, the granting of a new hearing, was a matter of sound legal discretion; and this Court cannot interfere with that power. So in the case of the instructions to the jury of inquest,—this Court has no legal right to re-examine the instructions, these being merely interlocutory matters.[a] The present statute in relation to granting new trials, does not extend to cases of the present character. The exception to jurisdiction is not well taken—it sufficiently appears on the face of the pleadings—being specially set forth; and the counts are all in case and there is no misjoinder.

The judgment is affirmed with costs.

Judgment affirmed.

Note. Jurisdiction: See Clark *v.* Harkness, *Ante* 56; Key *v.* Collins, *Ante* 403; Gillet *et al. v.* Stone *et al.*, *Post.*

Default: See Harmison *v.* Clark, *Ante* 131; Garner *et al. v.* Crenshaw, *Ante* 143; Morton *v.* Bailey *et al.*, 213; Wallace *v.* Jerome, *Ante* 524.

(*a*) But see C. & R. R. Co., *vs.* Ward, 16 Ill. R. 527; Harrington *vs.* Stevens, 26 Ill. R. 298.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

JULY TERM, 1839, AT SPRINGFIELD.

CLARK HOLLENBACK, appellant *v.* SHADRACH WILLIAMS and HENRY LANDER, appellee.

Appeal from La Salle.

At common law, in an action by S. W. and H. L., on a promissory note made payable to W. and L., without mentioning their Christian names, the presumption would be that the plaintiffs, being holders of the note, were the persons to whom the promise was made, until the contrary was shown.

Under the statute of March 2, 1839, in a suit on a promissory note, it is not necessary for the holders to show that they are the persons described in the note as payees, by their sur-names, where the general issue is pleaded.

Semble, That the rule is the same, whether the action was commenced and plea filed before or since the passage of the act.

THIS was an action of *assumpsit* commenced in the La Salle Circuit Court, on the 7th day of March, 1838, by the appellees against the appellants. The declaration was filed April 5th, 1838. It was in the usual form, upon the following promissory nate:

"June 14th, 1837. By the 1st of September next, I promise to pay Williams & Lander, the sum of two hundred and forty dollars, seven cents, it being for value received of them. As witness my hand.

CLARK HOLLENBACK."

At the April term, 1838, the defendant pleaded the general issue. The cause was tried at the May term, 1839, before the Hon. Thomas Ford, without the intervention of a jury. The

note was the only evidence produced. The defendants objected to the admission of the note in evidence, because the partnership of the plaintiffs was not proved, and because the identity of the plaintiffs with the persons described in the note as payees, was not shown. The Court overruled the objection, and rendered judgment for the plaintiff for $219,16. The defendant excepted to the decision of the Court, and tendered a bill of exceptions, which was signed and sealed.

J. M. Strode and J. Y. Scammon, for the appellant.

G. Spring, for the appellees.

Smith, Justice, delivered the opinion of the Court:

The only question presented for decision in this case, is whether there is a variance between the note produced in evidence, and the one described in the declaration.

The declaration described the note as payable to the plaintiffs, who are Shadrach Williams and Henry Lander. The note produced in evidence, is payable to "Williams and Lander." It is contended that this does not show that the promise is to pay to the plaintiffs, and that the identity of the persons to whom the payment is to be made, is not proven by the bare production of the note; and that it was incumbent on the plaintiffs to show, by proof, that they are the persons to whom the note was given. The statute of the 2d March, 1839,(1) "*regulating evidence in certain cases*," provides "That in trials of actions upon contracts express or implied, when the action is brought by partners, or by joint payees or obligees, it shall not be necessary for the plaintiffs, in order to maintain any such action to prove the names of the co-partners, or the Christian names of such joint payees or obligees, but the names of such co-partners, joint payees or obligees, shall be presumed to be truly set forth in the declaration or petition." Under this provision, we think it was not necessary for the plaintiffs to have shown by proof, that they were the same persons to whom the note was payable, under the names of Williams and Lander. The proof of identity, in such cases, is dispensed with. At common law the presumption would be, that being the possessors of the note, they were the owners and persons to whom the promise was made, until the contrary was shown.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Linn *v.* Buckingham *et al.*, *Ante* 451, note. See, also, Acts of 1840—1.

(1) Acts of 1838-9, 266.

William E. Armstrong, plaintiff in error *v.* William Caldwell, defendant in error.

Error to La Salle.

In an action by an endorsee or payee against the maker, upon a promissory note, payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, a presentment of the note for payment.(*a*)

This was an action of *assumpsit* on the following note:

"Phila. Nov. 15, 1834.

Four months after date, I promise to pay to the order of William Cook, one hundred and eighty dollars, at the Bank of Northumberland, for value received.

$180,00 William Caldwell."

Assignment on the back—"Pay William E. Armstrong, or order."

This cause was tried at the April term, 1838, of the La Salle Circuit Court, before the Hon. John Pearson. The judge nonsuited the plaintiff, who excepted to the opinion of the Court, and took the following bill of exceptions:

"Be it remembered that on the 25th day of April, A. D. 1838, this cause was called for trial, when the said plaintiff called Edward Cook, as a witness, who satisfactorily proved the endorsement of the said note in the declaration described, and rested his cause; upon which the defendant, by his counsel, moved the Court for a non-suit, for that the said plaintiff had not proved that the said note had ever been presented at the place mentioned in said note for payment; which said motion was resisted by plaintiff's attorney. But the Court sustained the said motion, and ordered the said plaintiff to be non-suited, which was accordingly done; to the sustaining of which said motion by the Court, and order for said nonsuit, the said plaintiff, by his attorney, excepts, and prays this, his bill of exceptions, may be signed and sealed by the Court, and made a part of the record herein, which is accordingly done.

John Pearson. [L.S.]"

The declaration contained no averment of the presentment of the note for payment.

J. Y. Scammon, for the plaintiff in error.

G. Spring, for the defendant in error.

(*a*) *Ante* 145, and notes.

Per Curiam:

The principles decided in the case of Butterfield *v.* Kenzie,(1) in this Court at the June term, 1838, are applicable to this case. There is no doubt that in an action against the maker by the payee or endorsee of a promissory note payable at a time and place specified in the note, it is not necessary either to aver in the declaration, or prove on the trial, that a demand was made in order to maintain the action.

The judgment of the Court below is reversed, and judgment rendered in this Court for the amount of the note and interest.

The clerk will compute the damages.

Judgment reversed, and judgment rendered in this Court.

BEZALEEL GILLET and WILLIAM W. GORDON, plaintiffs in error *v.* CALEB STONE, WILLIAM MANNING, and JOHN B. GLOVER, defendants in error.

Error to Madison.

An averment in a declaration, where process is sent to a foreign county, that the cause of action accrued in the county where the suit was brought, without at the same time averring that the plaintiffs reside in the same county, is not sufficient to give a Circuit Court jurisdiction.(*a*)

WM. THOMAS, for the plaintiffs in error.

COWLES and KRUM, for the defendants in error.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* in the Madison Circuit Court, on the common counts. The summons was directed to Morgan county, where it was served on Gillet and Gordon, the defendants below. The declaration avers that the cause of action accrued in Madison county, but contains no averment that Madison county is the place of residence of the plaintiffs.

Judgment was entered by default against Gillet and Gordon, and the cause is brought into this Court by writ of error.

According to the decision of this Court in the case of Key *v.* Collins,(2) the Circuit Court of Madison county had no jurisdiction over the persons of the defendants.

The judgment is therefore reversed with costs.

Judgment reversed.

Note. See Gillet and Gordon *v.* Stone *et al.*, *Ante* 539; See, also, note to the case of Beaubien *v.* Brinckerhoff, and note, 2 Scam.

(*a*) *Ante* 403, and note.

JOHN W. EVANS, plaintiff in error *v.* SIMON CROSIER, defendant in error.

Error to La Salle.

In order to authorize the Circuit Court to issue a summons to another county, it must appear that the cause of action accrued in the county where the plaintiff resides and where the suit is brought, or that the contract sued on was made specifically payable in the county in which the action is commenced.(*a*)

WM. THOMAS, for the plaintiff in error.

J. Y. SCAMMON, for the defendant in error.

LOCKWOOD, Justice, delivered the opinion of the Court;

This was an action of *debt* commenced in the La Salle Circuit Court on a promissory note payable at the Bank at Galena. The summons was directed to the sheriff of Morgan county, where it was served on Evans, the defendant below. The declaration contains no averment that the plaintiff, Crosier, resided in the county of La Salle, and that the cause of action arose in that county, or that the money was made payable there. Judgment was entered by default, and the cause is brought into this Court by writ of error.

This Court decided in the case of Key *v.* Collins,(1) that in order to authorize the Circuit Court to issue a summons to another county, it must appear that the cause of action accrued in the county where the plaintiff resides, or that the contract sued on was made specifically payable in the county in which the action is commenced.

Neither of these facts appearing from the declaration, the judgment below is reversed with costs.

Judgment reversed.

Note. See note at the end of the last case.
(*a*) *Ante.* 403 and note.
(1) *Ante* 403.

MOSES WHITESIDES, impleaded with JOHN C. SMITH, appellant *v.* JOHN LEE, JESSE G. LINDELL, and ELLIOT LEE, appellees.

Appeal from Jo Daviess.

In an action against the makers, upon a promissory note executed in a co-partnership name, one of the defendants—the general issue being pleaded—offered to read in evidence, on the trial, a notice of the dissolution of the co-partnership, published in the

Galena Gazette, a public newspaper, long before the execution of the note. He afterwards offered to prove by a witness, that long before the making of the note in question, there was no co-partnership existing between the defendants, and that the plaintiffs had notice thereof before and at the time of the making of the promissory note declared on, which the Court rejected: *Held* that the evidence was admissible.

Quere, Whether this would be the decision, if the suit had been commenced and the plea filed subsequently to the passage of the act of March 2, 1839, "*regulating evidence in certain cases.*"(*a*)

THIS was an action of *assumpsit* commenced by the appellees against the appellant and John C. Smith, in the Jo Daviess Circuit Court, on the 26th day of March, 1838. The declaration was in the usual form, on a promissory note. At the April term, 1838, the appellant pleaded the general issue.

The cause was tried at the May term, 1839, before the Hon. Dan Stone. Judgment was rendered for the appellees, for $3805, 34 damages, and costs of suit. The cause was brought to this Court by appeal.

On the trial, the following bill of exceptions was taken:

"Be it remembered that whereas this cause was set on the docket for the first day of the term, and was called on that day, that afterwards, to wit, on the second day of the term, and before the cause was again called for trial, the defendant, Whitesides, by his counsel, moved the Court for leave to file an additional plea, to wit, a plea of *non est factum*, denying the execution of the note sued on, under oath, which motion was overruled by the Court, and to the decision of the Court, the defendant, by his counsel, excepts.

On the calling of the cause for trial, and while the officers of the Court were calling the jury, the defendant filed the proper affidavit, and thereupon, at the same time, applied for a change of venue, which application was denied by the Court, as being too late. To which decision of the Court, the defendant by his counsel excepts.

On the trial, the plaintiffs offered to read in evidence to the Court and jury, a certain promissory note in the following words and figures:

"Saint Louis, April 1, 1837.

$3128,88–100.

One day after date, we promise to pay to the order of John Lee & Co., three thousand one hundred and twenty-eight 88–100 dollars, for value received, without defalcation, bearing interest of ten per cent. per annum, from date until paid. J. C. SMITH, for

SMITH & WHITESIDES."

as the note declared on, to the reading of which the defendant by his counsel objected, that the note declared on was described

(*a*) Woodworth *vs.* Fuller, 21 Ill. R. 109; Robinson *vs.* Maginity, 28 Ill. R. 426; Heintz *vs.* Cahn, 29 Ill. R. 308.

in the declaration as a note made by Smith & Whitesides, as co-partners, whereas the note offered in evidence purported to be made by John C. Smith for Smith & Whitesides. The objection of the defendant was overruled by the Court, and the note permitted to be read in evidence. To which decision of the Court, the defendant by his counsel excepts.

On the trial, the defendant offered to read to the Court and jury, a certain notice in the Galena Gazette, a public newspaper, purporting to be a notice of the dissolution of co-partnership of the said Smith & Whitesides, long before the execution of the note declared on; and the plaintiffs by their counsel, objected to such testimony being given, and the Court sustained the objection, and to the decision of the Court, the defendant by his counsel excepts.

On the trial, the defendant also offered to prove by a witness then in Court, that at, and long before the making of the promissory note declared on, there was no co-parnership existing between the said John C. Smith and Moses Whitesides, and that the said plaintiffs had notice thereof, before and at the time of making of the said promissory note declared on. The said plaintiffs, by their counsel, objected to such testimony being given; and the Court sustained the objection of the said plaintiffs, and ruled that the co-partnership of said defendants need not be proved by said plaintiffs. To all which the defendant, by his counsel excepts.

And the said defendant prays that this, his bill of exceptions, may be allowed, and made a part of the record.

DAN STONE. [L.S.]"

The several decisions of the Court mentioned in the bill of exceptions, were assigned for error.

S. A. DOUGLASS and JOHN D. URQUHART, for the appellant.

L. DAVIS and F. FORMAN, for the appellee.

SMITH, Justice, delivered the opinion of the Court:

Several grounds of error have been taken in this case. It will, however, be unnecessary to decide more than two, which relate to the evidence offered at the trial, by the defendants. By the bill of exceptions, it appears, that the defendant, Whitesides, offered to read in evidence a notice published in the Galena Gazette, purporting to be a notice of a dissolution of the co-partnership of the defendants, long before the making of the note declared on, and, also, to prove by a witness that long before the making of the note in question, there was no co-partnership existing between the defendants, and that the plaintiffs had notice thereof before, and at the time of the making of the promissory note declared on, which the Court refused to admit. This refusal is

now assigned for error. That the refusal to admit this testimony, was erroneous, there can be no possible doubt. It went directly to the point in issue, and if established, would have entitled the defendants to judgment. The notice tended to prove the issue, though it could be only presumptive evidence; and a knowledge of the dissolution before the receipt of the note by plaintiffs, would be required to be shown.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to the Circuit Court to award a *venire de novo*. The defendant recovers his costs.

Judgment reversed.

Note. See Hollenback *v.* Williams and Lander, *Ante* 544.

Charles W. Hunter, plaintiff in error *v.* Amos Ladd, defendant in error.

Error to the Municipal Court of the City of Alton.

Where an attachment bond was signed by the principal, Hunter, and surety, but no seals were affixed to the bond, and the defendant moved to dismiss the suit for want of a sufficient bond; and thereupon the plaintiff moved that Hunter be allowed to amend the bond by affixing a seal, which motion the Court overruled and dismissed the suit: *Held* that the decision was correct, as the motion to amend did not extend to both obligors.

The proceedings were had in this cause, at the October term, 1838, of the Municipal Court of the City of Alton, before the Hon. William Martin.

A. Cowles and J. M. Krum, for the plaintiff in error.

G. T. M. Davis, for the defendant in error.

Smith, Justice, delivered the opinion of the Court:

The attachment bond in this case was without seals to the names of the principal and surety. The Court below dismissed the cause for want of seals to the signatures of the obligors to the bond, although the plaintiff interposed an application that Hunter be allowed to amend the bond by attaching a seal or scrawl to the instrument on file, which purported to be the attachment bond. This refusal to permit such amendment, it is now contended, was erroneous, and that leave should have been given to make the amendment. It will be pereeived that the application is for Hunter, the plaintiff, to make the scrawl, to his own signature only, which, by our laws, is a seal.

It was competent for Hunter to be allowed to attach the seal to his own signature, and so far the application might have been granted, under our statute, admitting of such amendments; but

surely the Court could not confer a power on, or permit, Hunter to make or attach a seal to the signature of the surety to the bond. Such a seal would not be the seal of the co-obligor. The decision refusing to permit the amendment, was not erroneous, although so far as it regards Hunter, it might have been granted. Yet, if amended, it would not render the bond valid, because of the want of a seal to the signature of the co-obligor. As the application did not extend to the perfection of the bond in relation to the signature and seal of the co-obligor, the Municipal Court could not do otherwise than dismiss the suit.

The judgment is affirmed with costs.

Judgment affirmed.

ISAAC RUSSELL, JOSEPH DOUGHTY, and NEWELL BIRCH, impleaded with JOHN DOUGHTY, plaintiffs in error *v.* JOHN HOGAN and HENRY H. WEST, defendants in error.

Error to Coles.

Where an action of assumpsit is commenced against several, only one of whom pleads to the action, and the default of the others is entered, it is erroneous to take final judgment against them until the issue as to the defendant who pleads, is disposed of.(*a*)

In an action *ex contractu* against several defendants, the judgment is a unit, it must be rendered against all or none. The cause cannot be continued as to one who has pleaded, and final judgment rendered against the others.

THIS was an action of *assumpsit* upon a promissory note. The proceedings in this cause were had at the March term, 1839, of the Coles Circuit Court, before the Hon. Justin Harlan. After the cause had been continued as to John Doughty, judgment by default was rendered against the other defendants, and the damages assessed by the clerk at $736,32.

U. F. LINDER, for the plaintiffs in error, cited 1 Saund. Plead. and Ev. 169, and authorities there cited; 1 Chit. Plead. 31-4; Story's Plead. ch. 13, title, *Of Pleas by Several Defendants;* Rochester *v.* Fratters, 4 Bibb 444.

O. B. FICKLIN, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

The defendants in error declared as plaintiffs in the Circuit Court, against the defendants and John Doughty, as the joint makers of a promissory note, under the firm of Isaac Russell & Co. John Doughty filed his plea of non-assumpsit, and an affidavit of the non-execution of the note by himself, or any person authorized for such purpose, and that he had never been a

(*a*) Fuller *vs.* Robb, 26 Ill. R. 246.

co-partner of the firm, as charged in the declaration to exist. The other defendants, on whom process had been served, made no defence, and judgment by default was taken, an assessment of damages had, and a final judgment rendered against them, without a trial of the issue presented by the plea of John Doughty. This is the ground of error assigned. The objection is well taken. It is certainly erroneous to proceed to final judgment against a part of several joint defendants, without a final disposition of the cause as to the others. The plaintiffs should have tried the issue made up by the plea of non-assumpsit, before a rendition of final judgment against the others. The judgment, in a case like the present, is a unit; judgment must be rendered against all, or none. The plaintiffs could not enter a *nolle prosequi* or discontinuance as to any one or more of the defendants, and proceed to final judgment against the others. This doctrine was laid down in this Court, in December term, 1826, in the case of Ladd and Taylor *v.* Edwards.(1)

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, conformably to this opinion. The plaintiffs in error recover costs.

Judgment reversed.

(1) Breese 139.

James M. Archer, appellant *v.* James H. Spillman and Edmund D. F. Reed, appellees.

Appeal from Edgar.

Where the record of a cause stated that "the defendant filed his plea, and the plaintiff joined thereto," but the plea and joinder were not on file, and copies of the same were not given in the record: *Held* that the inference was, that the issue was an issue to the country.

Where an issue of fact is joined in an action, the cause must be tried by a jury, unless the parties expressly agree that it shall be tried by the Court; and in such case the agreement should be stated on the record.

Where the pleadings in a cause are lost, the Court should permit the parties to plead *de novo*.(*a*)

This cause was heard at the March term, 1839, of the Edgar Circuit Court, before the Hon. Justin Harlan.

E. B. Webb, for the appellant.

O. B. Ficklin, for the appellees.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *debt* brought in the Edgar Circuit Court, by Spillman and Reed, on a sealed note, against Archer.

(*a*) Frink *vs.* McClung, 4 Gil. R. 571, and notes.

The declaration is in the usual form. It appears from the record, that at the March term, 1839, of the Circuit Court, the parties appeared by their attorneys, and the defendant filed his plea herein, and plaintiffs joined thereto.

The record further states that the plea of the defendant, and joinder of the plaintiffs, are not on file in the clerk's office, and copies of the plea and joinder are not given in the record. It further appears from the record, that the Court consider and adjudge that the plaintiffs recover of the defendant their debt and damages; but does not show in what manner the Court disposed of the issue, as no jury was called to try it; and no order is entered that the parties agreed that the issue should be tried by the Court. Several errors have been assigned, but it is only necessary to notice the following, to wit, The Court erred in not calling a jury to try the issue joined. This was clearly erroneous, although the nature of the issue is not stated in the record, yet the clear inference is, that an issue of fact was joined between the parties, which could only be tried by a jury. The parties might, under the statute, have authorized the Court to try the issue; but had they done so, it ought to have appeared on the record. For the irregularity in the proceedings, the judgment is reversed with costs, and the cause remanded for trial on the issue joined between the parties. To remedy the difficulty that may exist, in consequence of the loss of the plea, this Court is of opinion that the defendant below should be permitted to file a plea *de novo*.

Judgment reversed.

William Greer, appellant *v.* Harrison Wheeler, appellee.

Appeal from Jasper.

Infancy is not a dilatory plea.

O. B. Ficklin, for the appellant cited the following authorities:

Chit. on Cont. 31. 33, 260; 5 Johns. 160; 1 Pick. 500; 2 Randolph 478; 10 Johns. 33; 1 Campbell 552–3; 3 East. 330; Chit. on Bills 20; 1 Term R. 40; Comyn on Cont. 627; 1 Chit. Plead. 516; 2 Kent's Com. 235; 1 Bibb's R. 519.

Browne, Justice, delivered the opinion of the Caurt;

This is a suit originally instituted before a justice of the peace of Jasper county, in the name of Harrison Wheeler *v.* William

Greer, upon a note of hand. Upon the trial in the Circuit Court, the counsel for Wheeler relied for his defence, upon the fact that the note sued upon was executed and given during the minority of Greer, which said defence the court overruled, on the ground that it was in the nature of a dilatory plea, and should have been pleaded before the justice of the peace. The general rule, is, in the case of dilatory pleas, that the party must avail himself of them at the first opportunity, or he waives his right to take advantage of them ; and it has been so ruled in the case of Conley *v.* Good.(1) The plea of infancy is not a dilatory plea, but goes to the foundation of the action. The Court below, in overruling the plea of infancy, erred ; for which error, the judgment of the Circuit Court is reversed with costs, and the cause is remanded for trial *de novo*.

Judgment reversed.

(1) Breese 96.

(*a*) Minard *vs.* Lawler, 26 Ill. R. 302.

LEWIS B. GOODSELL, and GEORGE L. CAMPBELL, appellants *v.* RAY BOYNTON and HARRY HYDE, appellees.

Appeal from Cook.

It has been decided by all American courts, that statutes take effect from their passage, where no time is fixed; and this is now the settled rule of law.(*a*)

The spring term of the Cook Circuit Court was changed from March to April, by an act of the 2d of March, and the judge being ignorant of the change, held the Court in March. Issue was joined in a cause, and the same, by agreement of parties, was submitted to the Court for trial. Judgment was rendered for the plaintiffs: *Held* that the proceedings were *coram non judice*, and that the judgment was illegal and void.

THIS was an action of *assumpsit* commenced by Boynton and Hyde against Goodsell and Campbell upon a promissory note. The declaration was in the usual form. The defendants pleaded the general issue, and the cause was submitted to the Court for trial at the March term, 1839, the Hon. John Pearson presiding. Judgment was rendered for the plaintiffs for $326,78 and costs. The defendants appealed to this Court.

The spring term of the Cook Circuit Court was changed from March to April, by an act of the General Assembly, approved March 2d, 1839. The Court commenced its session March 4th.

J. YOUNG SCAMMON, for the appellants.

G. SPRING and J. BUTTERFIELD, for the appellees.

BROWNE, Justice, delivered the opinion of the Court:

This was an action of *trespass on the case* brought in the

(*a*) State Constitution, Art. 3 Sec. 23.

Cook Circuit Court. The judgment in that Court was rendered in favor of the plaintiffs below, and is now brought to this Court by appeal. The only objection raised by the appellants in this cause, is, that the judgment rendered in this cause, was rendered by a tribunal acting without the authority of law. The statute fixing the time and place for holding Courts, passed 2d March, 1839, changed the term of the Cook Circuit Court, from the first Monday in March, to April. It has been decided by all American courts, that statutes take effect from their passage, when no time is fixed, and this is now the settled rule.(1) It was so decided in the Circuit Court of the United States for the district of Massachusetts, in the case of the brig Ann ; (2) and it cannot be admitted in this country, that a statute shall by any fiction or relation, have any effect before it was actually passed. As the law fixing the first Monday in March for the Cook Circuit Court, was repealed, the proceedings were *coram non judice*.

The judgment of the Circuit Court is reversed with costs, and the cause remanded to be tried over again.

Judgment reversed.

(1) 7 Wheat. 104. (2) Gallison 62.

JACOB C. BRUNER, plaintiff in error *v.* JAMES M. INGRAHAM, defendant in error.

Error to the Municipal Court of the City of Alton.

Where B. instituted a suit against I. by capias, and held the defendant to bail; and the Court, on motion, discharged the bail, but rendered judgment for the plaintiff for the amount of his demand: *Held*, that the plaintiff could not bring a writ of error to reverse the decision of the Court discharging the bail. *Held*, also, that the defendant in error should have demurred to the assignment of error ; yet, that notwithstanding he had joined in error, the Court would not, by affirming the judgment, subject the defendant to the costs of the Supreme Court ; but would dismiss the writ of error.

A motion to discharge bail, is addressed to the sound discretion of the Court ; and its decision upon such a motion, cannot be assigned for error.

THIS cause was heard in the Court below, at the April term, 1838, before the Hon. Wm. Martin

G. T. M. DAVIS, for the plaintiff in error.

A. W. JONES, for the defendant in error.

WILSON, Chief Justice, delivered the opinion of the Court :

The plaintiff sued the defendant in the Municipal Court of the City of Alton, and held him to bail on the ground of his being a non-resident. On the trial of the cause, the Court discharged

the bail on motion of the defendant's counsel, and rendered judgment for the plaintiff for the full amount of his demand. The plaintiff is satisfied with the judgment of the Court upon the merits, but seeks to reverse the decision upon the motion to discharge the bail. It is unnecessary to enquire into the propriety of this decision, as it is one over which this Court has no supervision. The motion to discharge the bail was addressed to the discretion of the Court.[a] The decision, therefore, upon that motion, cannot be assigned for error. Some embarrassment, however, is produced in the disposition of this case, in consequence of the defendant's having joined the assignment of error, in place of demurring to it, as would have been the correct practice. We cannot, in justice to the defendant, who does not come voluntarily into Court, affirm the judgment, and thereby subject him to costs. The only course, therefore, which we can adopt to avoid such a result, is to dismiss the cause, because error will not lie from the decision complained of. It was upon a point collateral to, and in no way growing out of, or connected with, the merits of the subject matter of the suit, that the decision was made.

The cause is dismissed at the costs of the plaintiff.

Writ of error dismissed.

(*a*) Newlan *vs.* President &c., 14 Ill. R. 364.

The People of the State of Illinois, plaintiffs in error *v.* Peggy Royal, defendant in error.

Error to Madison.

The State cannot prosecute a writ of error in a criminal case.
A joinder in error will not give the Supreme Court jurisdiction in a case where the Constitution has not conferred it.
The provision in Article 8, § 11, of the Constitution of the State of Illinois, "That no person shall for the same offence be twice put in jeopardy of his life or limb," prohibit the State from bringing a writ of error, where a person accused of a crime is acquitted in the Court below.

This was originally a suit before a justice of the peace, for an assault and battery, and taken into the Circuit Court of Madison county by appeal. The Circuit Court, at the October term, 1832, the Hon. Theophilus W. Smith, presiding, reversed the proceedings before the justice, on the ground that the justice had no jurisdiction, the act under which the case was tried, being repugnant to § 11, Article 8, of the State Constitution.

James Semple, Attorney General, for the plaintiffs in error.

J. B. Thomas and D. Pricket, for the defendant in error.

SMITH, JUSTICE, delivered the opinion of the Court:

The only question presented in this case, and requisite to be determined, is, whether a writ of error can be prosecuted by the State, in a criminal case, where the judgment has been in favor of the defendant in the Court below.

The case seems to us to admit of but little argument.

It is true the defendant has joined in error, and thereby presented the points made by the errors assigned, for the consideration of the Court; but this cannot confer jurisdiction on this Court, in its appellate character, to determine these questions thus made. The Constitution of this State in the 11th Section of the 8th Article, has emphatically declared, "That no person shall for the same offence, be twice put in jeopardy of life or limb," or in other words, that he shall not be again tried for the same offence, after an acquital.[a] In the present case, it appears the Circuit Court reversed the judgment of the justice of the peace, and discharged the defendant from custody. It is manifest that in such a case this Court has no jurisdiction over the cause, and that even a reversal of the judgment of the Circuit Court, could not be of practicable utility. We can perceive no useful object to be gained, even in such an event. In the case of The People against Reynolds, reported in 4th Hayward 110, this point was expressly settled; and we think correctly. We are of opinion that the State could not prosecute the writ of error, and consequently that it is compulsory on this Court to dismiss the writ, without a motion for such purpose.

The writ of error is dismissed accordingly.

Writ of error dismissed.

Note. See The People *v.* Dill, *Ante* 257: Bruner *v.* Ingraham, *Ante* 556.
(*a*) Geudel *vs.* People, 43 Ill. R. 229.

MOSES S. TRADER and TEGAL TRADER, appellants *v.* MOSES MCKEE, appellee.

Appeal from Cook.

The law is well settled, that in order to justify courts not of record in taking cognizance of a cause, their jurisdiction must affirmatively appear.

In order to entitle a transcript of a judgment of a justice of the peace of another State, to be received in evidence in this State, it must be shown that by the laws of the State where the judgment was rendered, the justice had jurisdiction over the subject matter upon which he attempted to adjudicate.

A transcript of a judgment of a justice of the peace of Wayne county, in Indiana, purported to be certified by his successor in office, and the clerk of the Circuit Court of Wayne county certified as to the capacity of said successor in office, and the judge of the sixth Judicial Circuit in Indiana certified as to the capacity of the said clerk: *Held* that in the absence of proof that the statute of Indiana authorized the clerk to give such certificate, he could not give a certificate in such a case, that would be evidence in a court of justice.

Trader *et al. v.* McKee.

On the trial of this cause in the Cook Circuit Court, at the March term, 1838, before the Hon. John Pearson, the plaintiff below, McKee, offered in evidence papers purporting to be copies from a justice's docket, of the county of Wayne, in the State of Indiana, of three judgments in favor of McKee, assignee of Josiah and David Reynolds, against said Traders. The judgments were not certified by the justice before whom they were rendered; but one Thos. S. Doughty, as justice of the peace of the county of Wayne, and State of Indiana, certified that the said transcripts were true copies from the docket of William Dunham, Esq., which docket had legally come into his possession, as the successor of said Dunham in office. The clerk of the Wayne county Circuit Court certified as to the capacity of Doughty, and the judge of the sixth Judicial Circuit in Indiana, certified as to the capacity of the said clerk. But there was nothing to show that Dunham was a justice of the peace at the time of the rendition of said judgments, or that he had jurisdiction of the person, or subject matter of the suit. The defendants objected to the admission of the said justice's judgments in evidence; the Court overruled the objection, and admitted the same to be read in evidence; to which decision the said Traders' counsel excepted. Judgment was rendered for the appellee, and the cause was removed into this Court by appeal.

J. Butterfield and J. H. Collins, for the appellants, cited 1 Story's Laws U. S. 93, 947; 4 Cowen 527; 5 Wend. 268; 1 Johns. Cases 228; 1 Caines 191, note a; 3 Caines 152; 8 Cowen 311; 19 Johns. 33, 162; 15 Johns. 140.

G. A. O. Beaumont and G. Spring, cited 1 Stark. Ev. 232.

Lockwood, Justice, delivered the opinion of the Court:

This was originally an action commenced before a justice of the peace, and was brought by appeal into the Circuit Court of Cook county. It appears from the bill of exceptions taken in the cause, that the action was founded on several judgments obtained before a justice of the peace in the State of Indiana, by McKee, against Moses S. and Tegal Trader. The defendants below objected to the transcripts of the judgments rendered by the justice of the peace, as evidence in the cause; which objection the Court overruled, and received the transcripts in evidence, and gave judgment for the plaintiff below. Among other errors relied on, is the following, to-vit, That it does not appear from the evidence offered, that the justice before whom the judgments purport to have been rendered, had any jurisdiction over the persons of the defendants, or over the subject matter of said actions. The

law is well settled, that in courts not of record, in order to justify their taking cognizance of a cause, their jurisdiction must affirmatively appear. In order to have received these transcripts in evidence, it was incumbent on the plaintiff to have shown, that by the laws of Indiana, the justice of the peace had jurisdiction over the subject matter upon which he attempted to adjudicate. The laws of Indiana, giving jurisdiction to justices of the peace, not having been produced on the trial below, the reception of the transcripts in evidence, was illegal. The correctness of the mode of certifying these transcripts by the clerk of the Circuit Court, was also questioned on the argument. No statute of Indiana was shown, authorizing the clerk of the Circuit Court to give certificates in relation to proceedings before justices; and in the absence of such statutory authority, the clerk of the Circuit Court could not give a certificate that would be evidence in a court of justice.[a]

The judgment below is reversed with costs.

Judgment reversed.

(*a*) Buntain *vs.* Bailey 27 Ill. R. 410. 8 Ind. R. 453., and *Ante* 513.

Note. From the numerous conflicting decisions of the courts of the several States, it is extremely difficult to determine the mode of authenticating judgment of justices of the peace, or proving them in evidence, where actions are brought upon them in a different State from that in which they were rendered. The force and effect of these judgments, when proved, has also been a subject of much contradictory adjudication. In New Hampshire it is held that they cannot be authenticated under the act of Congress, and they are therefore regarded as foreign judgments, leaving the whole matter open to re-investigation. Robinson v. Prescott, 4 N. H. Rep. 450; Mahurin v. Bickford, 6 N. H. Rep. 567. The same doctrine prevails in Massachusetts, New York, and Ohio. Warren v. Flagg, 2 Pick. 448; Silver Lake Bank v. Harding, 5 Hammond 545-6; 1 Wright 127, 430; Thomas v. Robinson, 3 Wend. 263, 269; Sheldon v Hopkins, 7 Wend. 435.

In Connecticut and Vermont, a different rule seems to prevail. Bissell v. Edwards, 5 Day 363; Starkweather v. Loomis, 2 Vermt. R. 573-4. In Indiana, the question seems not to have been fully settled. Cole v. Driskell, note, 1 Blackf. 16; Collins v. Modisett, 1 Blackf. 60; Cone v. Colton, 2 Blackf. 84 and note; Holt v. Alloway, 2 Blackf. 111 and note.

Foreign judgments are proved, 1. By an exemplification under the Great Seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated, 2 Cranch. 187, 238; 6 N. H. Rep. 567, 570; 2 Caines 155 *et seq.* Other modes of authentication, inferior in their character, will be allowed, if these be beyond the reach of a party. 2 Munf. 53: 3 Call 446; 3 Wash. C. C. R. 201-3.

In New Hampshire, where a copy of a justice's judgment rendered in Vermont, was sought to be introduced in evidence, certified by the county clerk, it was held that it could not be admitted; but if it had been shown that by the laws of Vermont, the records of the justice had been deposited in the office of the county clerk, and that he was the proper officer to certify the same, perhaps it would have been sufficient. 6 N. H. 567-70.

Where the machinery of a court is resorted to for the purpose of authenticating its record, if such court have no seal by which the copy can be clothed with an exemplification, that fact should be proved, or the copy cannot be admitted. Talcott v. The Deleware Ins. Co., 2 Wash. C. C. R. 449; See 7 Cowen 434; 2 Wend. 411; 5 Wend. 375, 387, 391; 8 Mass. 273.

In Pennsylvania it has been decided that if a court of another State, whose doings are sought to be proved, is so constituted that it cannot comply with the requisitions of the act of Congress, for want of a clerk, its proceedings may be proved as if such court were *strictly a foreign court*; and accordingly, a proceeding of justices of the peace of New Jersey, condemning a vessel, &c., for gathering clams and oysters in contravention of a statute of New Jersey, was proved by the

production of a copy of the original record, signed by the justices, and by proving by a witness its identity with the original, and the signature of the justices, and that they were at the time justices of the peace, and that the court had no seal. Kean v. Rice, 12 Serg. & Rawle, 203, 4–8.

In Kentucky, the record of a Territorial court not provable under the act of Congress, was held to be sufficiently authenticated by the certificate of the clerk under the seal of the court, and the attestation of the Governor under the seal of the Territory. Haggin v. Squires, 2 Bibb 334–5. It has also been held in that State, that a judgment of a justice of the peace of another State, may be proved under the act of Congress. Scott v. Cleaveland, 5 Monroe 62.

In Connecticut and Vermont, it seems that where a justice of the peace has no clerk, he may certify that he is the presiding magistrate and clerk of the court, &c. Bissell v. Edwards, 5 Day 363; Starkweather v. Loomis, 2 Vermt. R. 573–4; Blodget v. Jordan, 6 Vermt. R. 580.

In Ohio, the most usual mode of proving a judgment of a justice of the peace of another State, is by a transcript certified by the justice, and the certificate of the clerk of the county, where the judgment was rendered. Silver Lake Bank v. Harding, 5 Hammond 546; but a transcript certified by the justice, without the certificate of the county clerk, is not sufficient, though accompanied by a deposition of the magistrate, that he was such justice, and that he rendered the judgment on the day of the date thereof, and that he had no clerk and no seal, but acted as his own clerk; yet it seems an examined copy is sufficient. 1 Wright 430. In this case the deposition of the justice did not state that the transcript was an examined copy.

The transcript of a judgment of a justice in another State, certified by him, and attested by the prothonotary, is a competent authentication. Kuhn v. Miller's Admrs., 1 Wright 127. The presiding judge of a Court of Common Pleas, has no authority to attest a justice's judgment. *Idem.*

The force and effect to be given to the judgment of a justice of the peace of another State, is also held differently in different States.

In Ohio, the doctrine seems to be settled, that where the judgment of a justice of the peace is duly proved, it is entitled to as full faith and credit as any judgment of a court, authenticated under the act of Congress, and not subject to re-examination. See the authorities cited from Hammond and Wright's Reports, before referred to. The same doctrine seems to be held in New York, with this qualification, that before transcript of the justice can be admitted in evidence, the statute of the State where the judgment was rendered, conferring jurisdiction, must be shown. Thomas v. Robinson, 3 Wend. 267; Sheldon v. Hopkins, 7 Wend. 435.

In New Hampshire and Massachusetts, these judgments seem to be treated in all respects as foreign judgments, and consequently subject to re-investigation. Betts v. Bailey 12 Pick. 572, 581; 6 N. H. R. 569.

In Kentucky, where the judgment or decree of a sister State is produced, the court will presume the tribunal rendering it, possessed competent jurisdiction and authority, and that the act done in pursuance of it, binds and concludes the parties. To impair its full force and credit, the *onus* lies upon the party who resists it. 5 Littell 349–50. Is not this the reasonable doctrine?

In Curtiss v. Gibbs, 1 Pennington 399, it was held that the court would take judicial notice of the constitution, if not of the *laws* of a State. See 3 Phillips' Ev. Cowan and Hill's Notes, 902, and authorities there cited.

In respect to courts of limited and special jurisdiction, nothing is presumed in their favor as to jurisdiction; and the party seeking to avail himself of their judgments, must show affirmatively that they had jurisdiction. *Idem.* 906; Mills v. Martin, 19 Johns. 33; 9 Mod. 95; 2 Wilson 16; Peacock v. Bell, 1 Saund. 73–4; Kempe's Lessee v. Kennedy, 5 Cranch 173; 1 Peters' C. C. R. 30; Wheeler v. Raymond, 8 Cowan 311; McFadin v. Gill, 1 Blackf. 309; Bowers v. Green, *Ante* 42.

In New York, it has been held, that where an action is brought on a justice's judgment of another State, it is necessary to produce and prove the statute creating the justice's court, to see whether he had jurisdiction. Thomas v. Robinson, 3 Wend. 267; Sheldon v. Hopkins, 7 Wend. 435.

In Indiana, where an action was brought upon a judgment rendered in Ohio, upon the return of two writs of *scire facies* "not found," it was held that the return of two *nihils* would not, at common law, authorize a judgment; and if there was a statute in Ohio,

authorizing a judgment upon such a return, it must be shown by the party setting up the judgment. Cone v. Colton, 2 Blackf. 82, and note.

The authorities upon this subject are collected in 3 Phillipps' Ev., Cowen and Hill's notes, 898-907, 1121, 1150, a work of much learning, but of little perspicuity of arrangement. See also 4 Cowen, note, 526-7; 1 Starkie, Nicklin & Johnson's Ed. of 1837, 190, and authorities there cited; Mills v. Duryee, 7 Cranch 481; 2 Peters' Cond. R. 578, where the court say that the common law gives to judgments of the State courts, the effect of *prima facie* evidence.

JOHN B. F. RUSSELL, plaintiff in error *v.* DANIEL HUGUNIN and HIRAM PEARSONS, defendants in error.

Error to the Municipal Court of the City of Chicago.

The Court from which an execution issues, after the satisfaction of a judgment, should, on motion, set aside the execution and sale under it.

Where a judgment was recovered by H. against R. and P., on a note, and H. gave an order to B., on H's attorneys, for the proceeds of the note when collected, and P. afterwards arranged the matter by depositing the amount of the judgment with B., and P. brought a memorandum to that effect from B. to one of H.'s attorneys, who was also the general attorney of B., and P. stated to the attorney that he did not wish the judgment satisfied, but wished to use the judgment so as to protect himself, as the judgment was a lien on R's real estate, to which the attorney assented, and directed execution to issue, which was issued, and the property of R. sold under it, by the sheriff, who received his instructions from P., who purchased the property; and after the sale the sheriff paid over to the attorney P.'s check on B. for the amount of the judgment, and the attorney receipted the execution, and paid the check to B., which was credited to H. on the books of B.; *Held* that the judgment was satisfied by the arrangement made with B. before the sale, it appearing that B. so understood it: and it being proved that P. had declared that he had paid it and represented to a person of whom he obtained a loan of money on mortgage, that the judgment was satisfied. *Held*, also, that it was competent for H. or P. to have shown that the payment to B. was not in extinguishment of the judgment.

DANIEL Hugunin recovered a judgment in the Municipal Court of the City of Chicago, against John B. F. Russell and Hiram Pearsons, who were impleaded with J. M. Faulkner, upon a promissory note made by Faulkner, as principal, and Russell and Pearsons, as sureties; and being indebted to the Chicago Branch of the State Bank of Illinois, gave the Cashier of said Branch, an order on Morris and Scammon, his attorneys, for the proceeds of the note when collected. Pearsons deposited in said Branch the amount of the judgment, and brought to Scammon, one of Hugunin's attorneys, a memorandum from the Cashier, that he had made a special deposit of that amount, or something to that effect, and stated to him that he did not wish the judgment satisfied, but wished to use the judgment in order to protect himself, as the judgment was a lien on his co-defendant's real estate.

Scammon assented, and directed an alias writ of execution to

issue, but took no other concern in the matter. After the sale of Russell's lands upon the *alias* execution, the deputy sheriff brought to Scammon, the check of Pearsons for the amount of the judgment, which he received, and receipted the execution as the attorney of Hugunin, and paid the check over to the Cashier of the Chicago Branch Bank, who credited Hugunin with the amount.

Russell, having given notice to Hugunin and Pearsons of his intention so to do, made a motion in the Municipal Court of the City of Chicago, at the April term, 1838, the Hon. Thomas Ford presiding, to quash the execution and set aside the sale under it. The motion was resisted; and on the hearing, numerous affidavits were read, in relation to the declarations of Pearsons at the time he made the arrangement with the Bank and subsequently.

The Cashier of the Bank testified that the amount arranged with him by Pearsons, was included at the time of the arrangement, in a note and mortgage executed by Pearsons to the Bank, to secure his indebtedness to the same, and that he understood the arrangement to be a payment of the judgment. Much other testimony was introduced, the substance of the material parts of which is stated in the opinion of the Court.

Jesse B. Thomas, for the plaintiff in error.

Giles Spring, for the defendants in error.

Smith, Justice, delivered the opinion of the Court:(1)

The plaintiff in error prosecuted a motion to set aside an *alias writ of fieri facias* and the sale under the same, of certain real estate of the plaintiff in error, and to compel the plaintiff, in the original action, to enter satisfaction of record, on the ground that the judgment had been fully paid and satisfied by Pearsons, who was a co-defendant with Russell, before the suing out of the *alias* writ of *fieri facias*, and before sale had under the same. The Municipal Court overruled and dismissed the motion; to which opinion and order of the Municipal Court, the plaintiff in error excepted; and the facts on which the application was based and resisted, appear in the bill of exceptions.

From an attentive consideration of the evidence contained in the depositions, we have concluded that this evidence establishes,

1. The payment of the full amount of the judgment by Pearsons, one of the co-defendants, to the agent of the plaintiff in the original judgment, under a written authority from Hugunin, the plaintiff, to receive the same; and that the agent applied this amount so received on the judgment to the payment of a bill of exchange due by Hugunin to the Branch of the State Bank of

(1) Lockwood, Justice, gave no opinion in this case.

Illinois at Chicago, of which Hugunin's agent was then the Cashier, the Bank being the holder of the bill.

2. That after this payment the *alias* writ of *fieri facias* was issued, and placed in the hands of the deputy sheriff, Smith, who swears that Pearsons, the co-defendant of Russell, had the entire control of the writ of execution. That he, Smith, acted under his orders, and not the plaintiff, Hugunin's, (who declared he had no longer any interest in the cause), and sold the real estate named in his return, by the directions of Pearsons, who also became the purchaser.

There are other facts attending the transaction, showing clearly that Pearsons, after the payment, represented the judgment as discharged, and that it was no longer a lien on his real estate, and that he did actually effect loans on mortgage of his real estate, under such representations. We cannot doubt, then, that the payment extinguished this judgment, and that the parties so intended the payment should be applied. It does not appear that Pearsons owed to Hugunin any money on any other account, and if the money so paid, was not intended to be so applied, to what possible object was it to be carried? Pearsons would not surely make it a gratuity; and the only rational inference to be drawn from the facts, is, that as it was paid on the order to Brown, the Cashier of the Bank, and corresponded with the amount of the judgment and interest thereon up to the day of payment, it was paid in extinguishment thereof. Brown so considered it, and all the parties at the time. The subsequent application of Pearsons to Brown, to alter the entries on the books of the Bank, shows that it was an after-thought of Pearsons, to change the application for the purposes of using the execution to enforce the payment of the judgment by Russell; and it appears that the real estate of Russell was sold to the amount of the whole judgment, not for a moiety, which in equity each party might be liable only to pay, as between them. There is one circumstance which it seems to us is conclusive in this question. It was competent for Pearsons or Hugunin to have shown, on the hearing, that the payment to Brown was not in extinguishment of the judgment; not having done so, the conclusion is irresistible, that the payment was made on the judgment, and if so, then it was in satisfaction thereof. Considering that the judgment was fully satisfied by the payment to Brown, we are of opinion that the judgment of the Municipal Court was erroneous, and should be reversed.[a]

It is therefore ordered that the judgment of that Court overruling the motion, and dismissing the same, be reversed; and this Court proceeding to render such judgment as the Municipal Court ought to have done, do order and adjudge, that the said writ of *alias fieri facias*, and the sale, and all other proceedings founded thereon, be set aside and annulled, and for nothing

(*a*) 1 Story's Eq. J. Sec. 493, 499 &c; 17 Mass. R. 153. Gillett *vs.* Sweat, 1 Gil. R. 488.

esteemed, and that the plaintiff, Hugunin, enter satisfaction of record on said judgment in the Circuit Court of the county of Cook, and that the plaintiff in error recovers his costs in this Court and the Court below. And it is further ordered, that the clerk of this Court certify this judgment to the clerk of the Circuit Court of the county of Cook, where the records and proceedings of the said Municipal Court have been transferred by the law abolishing the said Municipal Court, in order that the said Circuit Court shall do what of right ought to be done in the premises, to give effect to this judgment, and cause satisfaction of record to be entered on said judgment.

Judgment reversed.

CALVIN CUSHMAN, plaintiff in error *v.* E. J. RICE and FITCH E. DOOLITTLE, defendants in error.

Error to Fayette.

The statute allowing causes to be taken to the Circuit Court by *certiorari*, requires the petition for that purpose to set forth that the judgment complained of, was not the result of negligence on the part of the petitioner, and that in his opinion it is unjust,—setting forth wherein the injustice consists. It must also allege that it was not in the power of the party to take an appeal in the ordinary way; and set forth particularly the circumstances that prevented him from so doing.

Absence from the county, and ignorance of the rendition of a judgment by a justice of the peace, against a plaintiff, upon a note lodged with the justice for collection, are not a sufficient excuse for not taking an appeal in the ordinary way, and do not authorize the allowance of a writ of *certiorari*.

Semble, That where a writ of *certiorari* to remove a cause from a justice of the peace to the Circuit Court, is improvidently allowed, the Circuit Court should quash the writ and dismiss the appeal.

THE proceedings in this cause in the Fayette Circuit Court, were had at the April term, 1839, before the Hon. Sidney Breese. That Court quashed the writ of *certiorari*, and dismissed the appeal. The plaintiff excepted, and brought the cause to this Court by writ of error.

The petition of the plaintiff to the Probate Justice, for a writ of *certiorari*, states "That some time in the month of July last, he placed in the hands of one Allen McPhail, Esq., a justice of the peace of said county of Fayette, a note of hand for collection, on E. J. Rice and F. E. Doolittle, on which suit was commenced by summons, and the trial was had on the 27th day of August, 1838, in the absence of your petitioner, and the said justice, after hearing the matter and receiving various testimony wholly inadmissible and irrevelant, determined and gave judgment

against your petitioner for the costs of suit. At the time said judgment was rendered against your petitioner, he was absent from the county, and was not informed, nor did he know, that said judgment was given against him, until after the expiration of the twenty days allowed by law for taking appeals; and he was wholly and entirely prevented from taking an appeal, in consequence of his absence from the county, and his inability to get to Vandalia. He further states that said suit was commenced on a promissory note for the payment of money, for a good and valuable consideration, and the said justice should, and of right, according to law, ought to have given judgment for your petitioner, when, in fact, he erroneously gave judgment against him. and in favor of the defendant in said suit."

A. P. Field, for the plaintiff in error.

L. Davis and F. Forman, for the defendants in error.

Wilson, Chief Justice, delivered the opinion of the Court:

This case was taken from the judgment of a justice of the peace, to the Circuit Court, by writ of *certiorari*, as allowed by statute; and by that Court the cause was dismissed. From this decision the plaintiff below has appealed to this Court. The statute allowing causes to be taken to the Circuit Court in certain cases, requires the petition for that purpose to set forth that the judgment complained of, was not the result of negligence on the part of the petitioner, and that in his opinion it is unjust,—setting forth wherein the injustice consists. It must also allege that it was not in the power of the party to take an appeal in the ordinary way; and set forth particularly the circumstances that prevented him from so doing. This last requisition of the statute has not been complied with in this case. The petition alleges no other reason for not taking an appeal within the time limited by law, than absence from the county, and ignorance of the judgment rendered by the magistrate. This is not a sufficient excuse to except the case from the ordinary mode of appeal. When a party brings an action, he is bound to attend to it through all its stages, either by himself or agent, and if he omits to do so, he must abide by the consequences of his inattention, unless he set out with precision, such facts and circumstances as show that it was not in his power to take an appeal in the ordinary way, by the exercise of every reasonable degree of attention and care. This has not been dene by the appellant in this case.[a]

The Circuit Court decided correctly, therefore, in dismissing the cause; and the decision must be affirmed with costs.

Judgment affirmed.

Note. See Yunt *v.* Brown, *Ante* 264.

(*a*) White *vs.* Fry, 2 Gil. R. 67; Lord *vs.* Burke, 4 Gil. R. 363; Cook *vs.* Hoyt, 13 Ill. R. 146; Murray *vs.* Murphy, 16 Ill. R. 275.

Palmer Holmes, appellant *v.* George B. Parker and Samuel H. McCrory, appellees.

Appeal from Peoria.

Where papers which are lodged in the clerk's office, but are *not marked filed*, are incorporated into a record from the Court below, a writ of *certiorari* may be issued to the clerk, to send up a true record.

Where a bill of exceptions signed and sealed by the judge, and an appeal bond were lodged in the clerk's office but *not marked filed: Held* that they were not part of the record in the cause, and that the appeal must be dismissed.

At the December term, 1838, of this Court, the attorney for the appellee, made affidavit that so much of the record in this cause, as stated that an appeal was prayed and granted, and a bill of exceptions tendered, allowed, signed, and sealed, and ordered to be made a part of the record, which was done, &c. (although a correct statement of what transpired in Court,) was an interpolation of the person who transcribed the record, and obtained a writ of *certiorari* to the Court below, to send up a true record.

The clerk, in obedience to the writ, certified that among the papers in the case, were the bill of exceptions signed and sealed by the judge, and the appeal bond mentioned in the exemplification of the record before sent up, but the same were *not marked filed.*

At the present term of this Court, the counsel for the appellees moved to dismiss the appeal, because the record show no order granting the appeal. Thereupon the counsel for the appellant moved to quash the writ of *certiorari* and return thereto, on the ground that such a writ can only be issued upon an allegation of a diminution of the record.

W. Frisby and G. T. Metcalf, for the appellees.

S. T. Logan, for the appellant.

Per Curiam:

The *certiorari* was properly granted. If, in a case like the present, the writ could not issue, there might be no remedy for an interpolation of a record.

The appeal must be dismissed.

Appeal dismissed.

Note. See Mitcheltree *v.* Sparks, *Ante* 122; Vanlandingham *v.* Fellows *et al.*, *Ante* 233.

SAMUEL BROOKS and MURRAY MCCONNELL appellants *v.* THE PRESIDENT and TRUSTEES OF THE TOWN OF JACKSONVILLE, appellees.

Appeal from Morgan.

On appeal from the Circuit to the Supreme Court, a variance between the amount of the judgment appealed from, and the amount recited in the bond, is fatal, though the variance occured through the mistake or inadvertence of the clerk of the Circuit Court. Where an appeal is dismissed, the Court will not premit the transcript of the record to be withdrawn for the purpose of bringing a writ of error.

IN this case judgment was rendered in the Morgan Circuit Court for $50 debt and $11,55 damages. In the condition of the bond, the judgment was recited as for $61 and $50. The deputy clerk who transcribed the record, made affidavit that he filled up the bond, and that the variance happened through his mistake and inadvertence.

The appellees moved to dismiss the appeal on account of the variance.

WM. BROWN, for the appellees.

M. MCCONNELL, for the appellant.

Per SMITH, Justice:

This cause must be decided upon first principles. If suit should be brought on this bond, the allegations could not be supported by proof.

This is not like the case of a variance between a judgment and an execution.

The appeal must be dismissed.[a]

Appeal dismissed.

McConnell thereupon moved the Court for leave to withdraw the transcript of the record, for the purpose of bringing a writ of error.

Per SMITH, Justice:

This motion must be denied. The transcript has become a part of the records of this Court, and cannot be withdrawn.[b]

Motion denied.

Variances: Pearsons *v.* Lee, *Ante* 193; Felt *v.* Williams, *Ante* 306; Leidig *v.* Rawson, *Ante* 272; Hull *v.* Blaisdell *et al.*, *Ante* 332; Peyton *et al. v.* Tappan, *Ante* 388; Linn *v.* Buckingham, *Ante* 451.

(*a*) Bond may be amended. Willenborg *vs.* Murphy, 40 Ill. R. 46.

(*b*) See Carson *vs.* Merle, 3 Scam. R. 169; Lee *vs.* Hicks, 3 Scam R. 169.

James Herrington, appellant *v.* Gurdon S. Hubbard, appellee.

Appeal from Cook.

Where A entered into a contract with B, for the purchase of real estate, the consideration of which was to be paid in instalments, the first on some particular day, and the residue at stated periods thereafter, the deed to be executed and delivered on payment of the first instalment; and B refused to execute the deed in pursuance of the agreement, and A thereupon instituted proceedings at law for the recovery of the money paid on the contract; *Held* that the institution of a suit for the recovery of the money paid, is, in legal contemplation, a virtual rescission of the contract; and A cannot afterwards compel the specific execution thereof in a court of equity.

Under such circumstances, B is at perfect liberty to treat the agreement as rescinded, and a contract afterwards made by him for the sale of the same premises to a third person, for a valuable consideration, is valid. The proceeding is to be considered as a disaffirmance of the contract, and is, in legal contemplation, notice to every person of such fact.

The bringing of a suit to recover back the consideration money, after a breach of the contract, is equivalent to an express disaffirmance of the contract, and to be regarded as sufficient evidence of the determination of the party to treat it as rescinded, as the consideration can only be recovered back on the ground of a disaffirmance of the contract.

A specific performance of a contract will not be decreed where a party has treated it as rescinded by suing to recover back the consideration paid upon the contract.

A party cannot proceed to recover in an action at law the consideration paid on a contract, and proceed concurrently in a Court of Equity for a specific performance of the same contract: because a recovery at law is based on an actual or constructive disaffirmance of the contract; and a party cannot obtain a decree for the specific execution of a contract, by a judgment at law, pronounced disaffirmed.

Semble, That an action of covenant to recover damages for the non-performance of a contract may be proceeded in concurrently, with proceedings in chancery to compel a specific performance.

If the answer to a bill in chancery discloses an interest in a third person, in the subject matter of the suit, he should be made a defendant in the bill, that he may have an opportunity of defending his interests, which might otherwise be taken away from him without a hearing.

The rule is almost inflexible, certainly so where it can be done without extraordinary difficulty, or where the defendants are not very numerous, and do not reside in remote and distant countries, that all parties in interest shall be made defendants, so that no decree may be made which would affect their interests without their being heard.

Courts will take notice of the omission of proper defendants in the bill, though no demurrer be interposed, when it is manifest that the decree will have the effect of depriving them of their legal rights.

This cause was tried before the Hon. Thomas Ford, at the May term, 1836, of the Cook Circuit Court, on the chancery side thereof.

The facts in the case, as disclosed by the pleadings, show, that some time in February, 1835, the complainant, Hubbard entered into an agreement with Herrington, the defendant, for the purchase of a tract of land containing fifty acres, upon the following terms; to wit: "Five hundred dollars to be paid by the said Hubbard to the said Herrington on the delivery of the deed of

the same, on or before the first day of April next; Thirteen hundred and seventy-five dollars to be paid within eighteen months from this date without interest: Thirteen hundred and seventy-five dollars to be paid within eighteen months from this date, with interest at six per cent., and five hundred dollars within the month of May next without interest. The said Herrington to make a good and sufficient warranty deed, in fee simple, released from the right of dower; and the said Hubbard to make the payments as aforesaid."

The bill avers, "That the complainant paid the said sum of five hundred dollars, on or before the first day of April aforesaid, and that he has always been ready and willing to perform his part of said agreement; and, on having a good deed from Herrington for the premises, is willing to pay the residue of the purchase money according to the agreement." It also avers, "That Herrington refuses to perform on his part."

On the 2nd of May, the complainant prosecuted an action of covenant against Herrington, to recover damages for the non-performance of his agreement. On the 7th of same month, the complainant instituted other proceedings against the said Herrington, to wit, an action of *assumpsit*, for the recovery of the money which he had paid upon the first instalment. Afterwards, to wit, on the 30th May, and before the filing of this bill, Herrington, regarding the contract as rescinded by the prosecution of the action of *assumpsit*, entered into a negociation with one Truman G. Wright, for the sale of the said land, which resulted in a written contract to sell on the 3d of June following, upon which day, the defendant Herrington, in good faith, and for a valid consideration, executed a deed in fee of said premises to the said Wright. On the 5th day of June, two days after the execution and delivery of the deed to Wright, Hubbard made a tender of $478,11, to Herrington, with a mortgage ready executed and notes to secure the residue of the purchase money, which he refused on the ground, That said Hubbard had waived all right to a conveyance by prosecuting the defendant, Herrington, for a recovery of the money paid on the contract. After the refusal of the tender, and on the same day, the complainant filed this bill for a specific performance of the agreement, and abandoned his suits at law.

The cause came on to a hearing, and the Court decreed that Herrington should convey the lands set forth in the bill by metes and bounds, to the complainant. Herrington appealed to this Court.

J. H. Collins and Giles Spring, for the appellant, assigned causes of error, and relied upon the following points and authorities:

1st. That the said complainant had not shown a performance of the agreement set forth in the bill, in respect to the first payment of $500, therein agreed to be paid on the delivery of the deed, on or before the first day of April, 1835. Breese 273; *Id.* 28.

2d. That the said Hubbard has not performed his part of the said agreement, as it regards the second payment, which was to have been made in the month of May.

3d. That the said Hubbard, by his neglect to make the first and second payments, and by prosecuting his actions at law for a supposed breach of a contract, and to recover back the money advanced, abandoned the contract, at least so far as to forfeit all right to the aid of a court of equity, to enforce a specific performance.

4th. That the said Herrington has sold the said premises to an innocent purchaser prior to the filing of the said bill, and could not therefore be decreed specifically to perform said contract. Sugden's Vendors 158; R. L. 587, § 5; Gale's Stat. 663.

5th. That said bill is defective for want of proper parties defendants. The rule in regard to bills for relief, is, that every person who is at all interested in the event of a suit, or necessary to the relief, must be a party, in order to enable the Court to settle the rights of all, and make a complete and definite decree upon the matter. Edwards' Treatise on parties in Equity; 2 Cooper's Equity Reports 33.

6th. Time is an essential part of this contract, and the complainant was bound if he intended to insist on having the land so to regard it. 1 Johns. Ch. 370; Sugden on Ven. 265; 4 Johns. Ch. 559.

Walter B. Scates and James Grant, for the appellee, relied upon the following points and authorities:

Time is not to be considered in Equity as of the essence of a contract. 3 Vesey, Jr. 692; Hov. Sup. to *Ibid.* 318; 7 Vesey, Jr. 202; 7 *Ibid.* 264; 12 *Ibid.* 326; 12 *Ibid.* 373; 13 *Ibid.* 289; 14 *Ibid.* 432; 18 *Ibid.* 335; 19 *Ibid.* 219; 1 Simmons and Stewart 190; 5 Serg. and Rawle 323.

Smith, Justice, delivered the opinion of the Court:

Hubbard filed his bill against Herrington in the Cook Circuit Court, to compel the specific performance of a written contract to convey fifty acres of land, for the consideration of $3,750, payable by instalments, at different periods of time. It is deemed unimportant to the decision of the cause, to state with precision the terms of the contract, or the facts attendant on the first payment, and the subsequent overture and negotiations between the parties, to carry out the objects of the agreement, as they appear from the evidence, because it is supposed that there are three highly important points developed by other evidence, on

which the decision of the case must of necessity rest, independent of these.

It appears that Hubbard previous to the filing of his bill in equity, commenced in the Cook Circuit Court two actions at law, against Herrington, on this same contract: the first on the 2d of May, 1835, in covenant, to recover damages from Herrington for the non-performance of the contract on his part; and the second on the 9th of May, of the same year, in assumpsit, to recover back the amount of the consideration money paid by him. Both of these suits were subsequently dismissed, and the cause in equity instituted.

On the 3d of June, 1835, and before the filing of the bill in equity, Herrington entered into a written contract with one Truman G. Wright, to sell and convey the same lands to him, for the consideration of $7,440; and on the 23d of the same month actually executed and delivered to Wright a full and absolute conveyance of these lands, which was placed for record in the office of the Recorder of the county of Cook, on the 1st of July following. From these facts, which are incontrovertible, three questions arise: First, was not the institution of the action of assumpsit, a virtual rescinding of the contract between Hubbard and Herrington, and in legal contemplation must it not be so considered? Secondly, was not Herrington and Wright justified in so considering it; and is not the contract and sale between them for these lands valid, Wright being a purchaser for a valuable consideration? Thirdly, ought not Wright to have been made a party in the suit; and if so, is not the decree erroneous for the omission to name him in the bill?

Whatever may have been the state of facts between the parties, as it regards the payment of the first instalment, and the readiness of Hubbard to complete the others after the time for the second payment had expired, there would seem to be no rational doubt that Hubbard had determined to treat the contract as rescinded, by the acts of the parties, in their non-compliance to carry it into execution at the precise time stipulated.

He first institutes his action of covenant to recover damages for the non-performance by Herrington of his portion of the agreement; and afterwards brings his action to recover back the consideration money paid. We think this is sufficient evidence of his determination to treat the contract as rescinded; and that it is equivalent to an express disaffirmance of it. Such must be the legal intendment of his act; for he certainly could not recover back the consideration money paid, but on the ground of a disaffirmance.

Herrington, then, had a right so to consider it; and was at liberty to treat, and enter into a contract, with Wright for a sale to him of the lands. Wright finding this suit pending, must have

considered it a disaffirmance; (and we are justified in presuming that Wright had notice, because the proceeding in legal contemplation is notice to every person) and felt that he might legally enter into a contract with Herrington for the sale and purchase without the existence of any obstacle; and accordingly did so, and consummated the purchase on the 23d of June, 1835.

It will be perceived that the agreement between Wright and Herrington is entered into on the 3d of June 1835, two days previous to the filing of the bill. Wright, therefore, purchased without any knowledge that Hubbard had any intention of insisting on a specific performance of the original contract between him and Herrington.

There is no dispute that Wright is a purchaser for a valuable consideration; and we think from the facts, as they appear, that he acquired a legal title to the lands. Herrington being at perfect liberty to treat the contract as disaffirmed by the prosecution of Hubbard, to recover back the consideration money. It was urged at bar, that Hubbard had concurrent remedies, that he might proceed at law and equity at the same time; though he could not obtain damages and enforce a specific performance, he might elect which remedy he would pursue, and which to abandon, after their institution. The doctrine of concurrent remedies is not disputed; but he surely could not proceed to recover back in an action at law, the consideration money paid, which must be based on an actual or constructive disaffirmance of the contract; and also obtain a decree for the specific execution of a contract, pronounced by a judgment at law disaffirmed. The action for damages for the non-performance of the contract in covenant, and his remedy in equity, might probably have been proceeded in at the same time; and he might have elected which he would prosecute to final judgment; but most certainly the action in *assumpsit*, for the consideration money, cannot be ranked under the class of those termed elective.[a]

For these reasons we think the decree is erroneous, and that on the first two points it should be reversed.

With reference to the third, upon the supposition that our views on the first and second are not justified, the interest which Wright had acquired in the lands, required that he should on the coming in of the defendant's answer, which disclosed that interest, have been made a defendant to the bill. The rule is almost inflexible—certainly so, where it can be done without extraordinary difficulty, or where the defendants are not very numerous, and do not reside in remote and distant countries, that all parties in interest shall be made defendants, so that no decree shall be made which can affect their interest, without their being heard. Courts will take notice of the omission, though no demurrer be

(a) See Dalton *vs.* Bentley, 15 Ill. R. 422, and notes

interposed for want of proper parties, when it is manifest that the decree will have such an effect. As then the decree in this case manifestly adjudges Wright's title to the land void, it is, we think, for this reason, erroneous,—Wright having had no opportunity to defend his interests, which have been taken away without a hearing.

For the reasons assigned, and a conviction that there is not sufficient equity in the bill, and that Hubbard has voluntarily abandoned those he may have acquired under the contract, we are of the opinion that the judgment of the Circuit Court should be reversed, and the bill dismissed with costs.

Judgment reversed.

DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF ILLINOIS,

DELIVERED

DECEMBER TERM, 1839, AT SPRINGFIELD.

HIRAM HUGUNIN, plaintiff in error *v.* EDWARD NICHOLSON, defendant in error.

Error to Cook.

A justice of the peace has jurisdiction in a case where the original indebtedness exceeds one hundred dollars, but has been reduced below that sum by fair credits, although the account may not have been liquidated between the parties.(*a*)

The Court will presume that a credit allowed on an account by the plaintiff, in a suit before a justice of the peace, is a fair one, until the contrary is shown.

HUGUNIN brought an action against Nicholson, before a justice of the peace of Cook county, upon an account amounting to $909, upon which a credit was entered of $822,19—leaving a balance due of $86,81. It did not appear from the account whether any settlement had been had between the parties.

The summons to the defendant commanded him to answer to the plaintiff for a failure to pay a demand not exceeding $100. On the return of the summons, the parties appeared, and by agreement the cause was continued for a few days, at the expiration of which the justice rendered judgment for the plaintiff for $86,81 and costs. The defendant appealed to the Circuit Court, and at the April term, 1839, the Hon. John Pearson, presiding, the defendant moved the Court to dismiss the suit and reverse the judgment of the justice of the peace, for want of jurisdiction in the justice. The motion was resisted by the plaintiff, but sustained by the Court, and the cause dismissed, and a judgment for

(*a*) *Ante* 29, and notes.

costs rendered against the plaintiff, who excepted to the opinion of the Court, and tendered his bill of exceptions, which was signed and sealed by the Court. The cause was brought to this Court by writ of error.

J. Y. Scammon, for the plaintiff in error, relied on the statute of March 2, 1833; R. L. 415; Gale's Stat. 425.

I. N. Arnold, for the defendant in error, cited Breese 21, 153, 263, 293; Sands *v.* Delap, Printed Opinions 116;(1) Leigh *v.* Mason, do. 199,(2) and contended that the statute of 1833 did not intend to give a justice jurisdiction to investigate an account exceeding $100. It only gave the justice jurisdiction where the demand had been reduced by fair credits, the accounts liquidated, and a balance struck by the parties.

Browne, Justice, delivered the opinion of the Court:

This was an action commenced originally by the plaintiff against the defendant, before a justice of the peace of Cook county, and judgment rendered for the plaintiff for $86,81 and costs, from which decision of the justice of the peace, the defendant appealed to the Cook Circuit Court.

The defendant moved the Circuit Court to dismiss the suit for want of jurisdiction, and said motion was sustained, and the suit dismissed. The plaintiff, Hugunin, excepted to the opinion of the Court in dismissing the suit, and assigns for error the dismission of the suit, and giving judgment for costs for the defendant. The summons issued by the justice, was to answer for a failure to pay the plaintiff a demand not exceeding one hundred dollars. The transcript of the justice shows an account of debits amounting to $909,00, and credits to the amount of $822,19, and a balance of $86,81 struck in favor of the plaintiff. The words of the statute of 2d March, 1833,(3) are "although said debt or demand may have been originally over one hundred dollars and reduced below that sum by *fair* credits" &c. It appears, in this case that the demand far exceeded one hundred dollars, but was reduced by credits appearing on the account, to a sum within the jurisdiction of the magistrate. No evidence was adduced showing that the credit was given solely for the purpose of conferring jurisdiction, as appears by the bill of exceptions. We are to presume the credits were fair, until the contrary is shown, which has not been. The judgment of the Circuit Court of Cook County is reversed with costs, and the cause remanded to the Circuit Court to be tried *de novo*.

Judgment reversed.

Note. See Simpson *v.* Rawlins. *Ante* 28; Bowers *v.* Green, *Ante* 42; Tindall *v.* Meeker, *Ante* 137; Sands *v.* Delap, *Ante* 168; Mitcheltree *v.* Sparks, *Ante* 198; note to Trader *et al.* *v.* McKee, *Ante* 560. See, also, Newland *v.* Nees, 3 Blackf. 460.

(1) *Ante* 168. (2) *Ante* 249. (3) R. L. 415; Gale's Stat. 425.

JAMES H. LURTON, plaintiff in error *v.* WILLIAM GILLIAM and JAMES C. CHALLEN, delendants in error.

Error to Morgan.

Where a contract is joiat, and only one of the makers is sued, the non-joinder of the other parties can be taken advantage of only by plea in abatement.

Where B. and L. purchased a piece of cloth at a store on credit, and at the time of the purchase a menorandum was made as follows; "If Mr Douglass is elected to Congress, Brown is to pay for the cloth; if Mr. Stuart is elected, James Lurton has it to pay:" *Held* that the contract was in severalty. *Held*, also, that the contract for the sale of the cloth, was valid: and was not tainted by the bet of B. and L.

The State Register, being made by law the public paper in which the official acts of the Governor required to be made public, are published, is correctly admitted in evidence to prove the existence of facts stated in the Governor's proclamation.

The Proclamation of the Governor declaring who is elected to Congress, is *prima facie* evidence of the facts therein stated.

Interest is recoverable upon an account for goods sold, from the time the amount is ascertained by the parties; and when a demand is sued before a justice of the peace and appealed to the Circuit Court, that Court may give judgment for more thau the amount claimed before the justice, if the excess accrued by way of interest.(*a*)

THIS was an action originally instituted before a justice of the peace of Morgan county. Judgment was rendered by the justice in favor of the plaintiffs, the defendants in this Court. The defendant appealed to the Circuit Court, where the cause was tried, and the judgment affirmed, at the June term, 1839, for $35,26 and costs, the Hon. Samuel H. Treat presiding. The cause was brought to this Court by writ of error.

Upon the trial in the Court below, the following bill of exceptions was taken:

"Be it remembered, that on the trial of this cause, the plaintiffs produced a witness who testified that when the goods were bought, a memorandum of the transaction was made upon the plaintiffs' books, and the clerk of the plaintiffs then produced a copy of the memorandum, which was filed, and is herewith made a part of the record in this cause:

'P. M. Brown & James Lurton

To 2⅓ yards Fine Cloth, $12,	$28 00
Trimmings for Coat,	6 00
	$34 00

If Mr. Douglass is elected to Congress, P. M. Brown is to pay for the cloth; if Mr. Stuart is elected, James Lurton has it to pay.'

(*a*) *Ante* 137.

Whereupon the plaintiffs offered in evidence the State paper, and read therefrom the Proclamation of the Governor of Illinois, declaring the election of Stuart to Congress, which was objected to by the defendant, but admitted by the Court. The defendants then moved the Court to dismiss the suit, and reverse the judgment below, because the contract appeared to have been made between the defendant in connection with P. M. Brown, and the credit was given to the two, and not to either one of them, and because the plaintiffs appeared to be a party to the original bet or contract; all of which motions were overruled by the Court, and the Court proceeded to render judgment for the plaintiffs for the amount of the judgment below: To all of which opinions of the Court, the defendant, by his attorney, excepts, and prays that this, his bill of exceptions, may be signed, sealed, and made part of the record in this cause, and which is ordered to be done.

SAML. H. TREAT. [L.S.]

The following errors were assigned:

"1st. The Court erred in refusing to dismiss the suit and reverse the judgment of the Court below, upon the motion of the defendant Lurton.

2d. The Court erred in deciding that the plaintiff could sustain a suit against Lurton upon the contract proven, without joining Brown as co-defendant.

3d. The Court erred in rendering judgment upon the contract proven, the same being against good policy, unlawful and void, being a bet to which both plaintiff and defendant were parties.

4th. The Court erred in admitting the newspaper, called the State Register, to be read in evidence in this cause.

5th. The Court erred in rendering judgment for *thirty-five dollars* and *twenty-six cents*, when the plaintiff's account, filed and sued on, and his claim proven, only amounted to *thirty-four dollars*.

6th. The Court erred in rendering judgment for the plaintff, against the defendant, upon the testimony adduced."

M. MCCONNELL, and J. A. MCDOUGALL, for the plaintiff in error.

WM. BROWN, for the defendants in error.

SMITH, Justice, delivered the opinion of the Court:

In this case the grounds of error assigned and relied on, are,

1st. That Brown and Lurton should have been joined in the action, the credit being joint.

2d. That the defendants in error were parties to an illegal contract.

3d. That the evidence offered to prove the result of the election, being the State paper, was inadmissible as evidence.

4th. That the addition of interest to the principal, ought not to have been allowed.

The first objection is not good. If the parties were only jointly liable, the plaintiff in error should have pleaded that matter in abatement. But the contract was manifestly in severalty.[a]

From the facts disclosed by the bill of exceptions, it appears that the contract for the cloth, although a contingent one as to the ultimate liability of the one or the other of the parties, was to be absolute, as to the party who should lose the bet. The purchase was made and the credit given, after the consummation of the bet.

It does not appear that the defendants in error were in any way parties to the bet, or encouraged it; and we do not perceive that their contract for the sale and delivery of the cloth, was tainted with a participation in the original agreement between the parties. Their mere knowledge of it could not certainly connect them with it; and having parted with their property under the arrangement, common honesty surely requires that the party at whose instance it was delivered, conformably to his agreement, should be held answerable for the value of the merchandise delivered. Money loaned to be used in gaming, could heretofore have been recovered back at common law, but it is now prohibited by the statute against gaming.(1)

It is not now necessary to go into the various reasons given for the decisions which have prevailed in courts, relative to gaming contracts, because this contract cannot be considered *contra bonos mores*, or against sound policy. The case in 4th Johnson, of Bum *v.* Rucker, has no affinity to the present action. The State Register, being made by law the public paper in which the official acts of the Governor required to be made public, are to be published, was evidence of the existence of the Proclamation, and the facts stated in it, until the contrary was shown. On the question of interest, we are of opinion that it was properly allowed. The statute giving interest on all liquidated accounts, embraces the case directly.

The judgment is affirmed with costs.

Judgment affirmed.

Note. See Tindall *v.* Meeker, *Ante* 137.
(*a*) Conley *vs.* Good, Beecher's Breese R. 135.
(1) R. L. 230; Gale's Stat. 320.

THE PRESIDENT, DIRECTORS, and COMPANY OF THE STATE BANK OF ILLINOIS, plaintiffs in error *v.* HEZEKIAH HAWLEY, defendant in error.

Error to the Municipal Court of the City of Alton.

Under the statute of Illinois in relation to promissory notes, it is unnecessary to give notice of the non-payment of a note, in order to charge the assignor or endorser.

THIS cause was tried in the Municipal Court of the City of Alton, at the January term, 1839, before the Hon. William Martin. Judgment was rendered for the defendant in error.

GEO. T. M. DAVIS, for the plaintiffs in error, cited R. L. 483 ;(1) Humphreys *v.* Collier *et al.* *Ante* 47 ; Mason *v.* Wash, Breese 16.

A. W. JONES, for the defendant in error.

WILSON, Chief Justice, delivered the opinion of the Court:

THIS action was instituted by the Bank, against the defendant, Hawley, upon the following note, to wit,

"$500. One hundred days after date, for value received, I promise to pay H. Hawley, Esq., or order, the sum of five hundred dollars; negotiable and payable at the Branch of the Bank of Illinois at Alton. J. CHEEVER, Jr."

This note was assigned to the Bank on the same day it was made. The declaration is in the usual form, with an averment that Cheever, the maker of the note, was, before the note became due, and ever since has continued to be, a non-resident of the State of Illinois, and beyond the jurisdiction of the Court. The case was submitted to the court to be decided according to the law applicable to it; and it decided against the plaintiffs' right to recover, upon the ground that the Bank had failed to give notice to the defendant, the assignor, that payment of the note had been demanded and refused at the Bank. This decision is erroneous. No such notice is necessary in order to charge the assignor of a note ;—the rule is different from that applicable to bills of exchange.

The judgment must be reversed with costs, and the cause remanded.

Judgment reversed.

Note. See Butterfield *v.* Kinzie, *Ante* 445; Brown *v.* Knower, *Ante* 469; Armstrong *v.* Caldwell, *Ante* 546.

(1) Gale's Stat. 526.

JOHN DEAN CATON, appellant *v.* ISAAC HARMON, who sues for the use of Lemuel C. P. Freer, appellee.

Appeal from the Municipal Court of the City of Chicago.

Where an action is brought by a non-resident, for the use of a resident, no security for costs is required.(a)

THIS cause was heard in the Court below, at the April term, 1838, before the Hon. Thomas Ford. Judgment was rendered for the plaintiff, and the defendant appealed to this Court.

G. SPRING and GRANT GOODRICH, for the appellant.

J. GRANT and J. Y. SCAMMON, for the appellee.

BROWN, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* brought in the Municipal Court of the City of Chicago, by Isaac Harmon, for the use of Lemuel C. P. Freer, against John D. Caton. The defendant below moved the Court to dismiss the cause, predicated upon the following affidavit:

"John Dean Caton, being duly sworn, doth depose and say, That the said plaintiff, Isaac Harmon, removed from the State to the Territory of Wiskonsin, about one year since, where he hath resided with his family ever since, as deponent hath been informed, and verily believes. That he was informed by said plaintiff, a short time before the commencement of this suit, that he, the said plaintiff, was then residing in Wiskonsin, with his family, that he was cultivating a farm there, and that he liked the place, and intended to reside there permanently. And deponent further saith, that he has not seen the said plaintiff in this State since, nor has he heard of his being here since, and further deponent saith not."

The suit was brought for the use of Freer, and he was the person beneficially interested. Nothing in the affidavit showing that Freer was a non-resident, it is to be strongly inferred that he was a resident. In all cases in law or equity, where the plaintiff or person for whose use an action is to be commenced, shall not be a resident of this State, the plaintiff or person for whose use the action is commenced, shall, before he institute such suit, file, or cause to be filed, with the clerk of the Circuit or Supreme Court in which the action is to be commenced, an instrument in writing of some responsible person, being a resident of this State, to be approved of by the clerk, whereby such person shall acknowledge himself bound to pay or cause to be paid, all costs, &c. See Scammon's Revision, Stat. Ill., p. 195, sec. 1.(1)

(a) Smith *vs.* Robinson, 11 Ill. R. 119. (1) Gale's Stat.; R. L. 165.

The judgment of the Municipal Court is affirmed with costs.
Judgment affirmed.

Note. See Seward *et al. v.* Wilson, *Ante* 192; Warnock *v.* Russell, *Ante* 383; Linn *v.* Buckingham *et al*, *Ante* 451.

Murray McConnell, plaintiff in error *v.* James Shields, defendants in error.

Where the Court have reason to believe that a cause is fictitious, they will require proof that the action is not feigned.(*a*)

This Court having reason to believe that this is a feigned case, it is therefore ordered that each of the parties present to this Court, at the next June term, their respective title papers, or the cause will be dismissed; and that the clerk of this Court forward by mail to each of the parties a copy of this order.

(*a*) Spraggins *vs.* Houghton, 2 Scam. R. 211; People *vs.* Leland, 40 Ill. R. 118.

Richard J. Hamilton, Commissioner of School Lands for Cook county, Illinois, plaintiff in error *v.* Truman G. Wright, impleaded with Norman Clark, defendant in error.

Error to Cook.

In an action upon a note given to the Commissioner of School Lands of a county, for money loaned of the school fund, in order to entitle the plaintiff to recover the twenty per centum penalty given by the statute of 1835, it must be claimed in the declaration. The twenty per centum interest which borrowers of the school fund are compelled to pay, upon a failure to pay the principal and interest punctually, is given as a penalty.

This cause was heard in the Court below, at the August term, 1837, the Hon. Jesse B. Thomas presiding. Judgment was rendered for the plaintiff in error.

F. Peyton, for the plaintiff in error, cited acts of 1835, 27.(1)

G. Spring, for the defendant in error, cited 1 Cranch 194; 1 Peters' Cond. R. 291.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *debt* brought by Hamilton, a commis-

(1) Gale's Stat. 633.

sioner of school lands, against Wright and Clark. The summons was only served on Wright who suffered the judgment to go by default. The defendants in the note sued on, stipulated to pay ten per cent. interest. On the assessment of damages by the clerk, the plaintiff moved the Court to instruct the clerk that the plaintiff was entitled to recover twenty per cent. on the principal, and on the interest due—which instruction the Court refused to give,—and which refusal is assigned by Hamilton as error.

The declaration is in the usual form of debt, and contains no claim for twenty per cent. damages, in case of failure to pay either principal or interest. The instructions were properly refused. The twenty per cent. is given as a penalty, and it cannot be recovered unless the plaintiff claims it in his declaration.[a]

The judgment is therefore affirmed,—and the defendant in error is entitled to the costs of this Court.

Judgment affirmed.

Note. See Pearsons *v.* Hamilton, *Ante* 415.
(a) Russel *vs.* Hamilton, 2 Scam. R. 56; Bradley *vs.* Snyder, 14 Ill. R. 268; Seaton *vs.* School Com. 19 Ill. R. 52.

JAMES H. MULFORD, who sues for the use of Alexander N. Fullerton, plaintiff in error *v.* ALBERT SHEPARD, defendant in error.

Error to Will.

The fraud which will vitiat a negotiable instrument in the hands of an assignee who has no notice of the fraud, must be in obtaining the making or executing of the note. Fraud in relation to the consideration, is not sufficient.

Before the consideration of a negotiable note can be impeached in the hands of a *bona fide* endorsee, the defendant must show that the note was endorsed after it became due, or that the endorsee had notice of the want of consideration at the time he received it, or that there was fraud in obaining the making of the note.

Semble, That a motion for a new trial may be made even after the entry by the clerk of final judgment, if it be made at the term of the Court at which the first trial was had.

A misrepresentation, on the sale of a tract of land, of the quantity of prairie broken, and a failure on the part of the seller, to inform the purchaser that there was an unexpired lease of a portion of the premises to a tenant, does not constitute a fraud so as to bar a recovery on a note given for the purchase of the same. Such facts might, perhaps, be matter of defence to the note in the hands of the original payee, to the extent of the depreciation, on those acounts, in the value of the property sold.

Semble, That in an action on a promissory note by the endorsee against the maker, the presumption of law is that the note was assigned before it became due, until the contrary is shown.

Semble, That the Court will resume that an affidavit made upon a motion for a new trial, and refered to in the bill of exceptions taken upon the overruling of the motion, is true, unless the same is disputed in the record.

THIS was an action commenced by the plaintiff in error, in the

Circuit Court of Will county, against the defendant in error, upon a promissory note for $250, bearing date January 26, 1837, made by the defendant, and payable to Abel Gilbert or order, six months from date, with interest, and by said Gilbert endorsed and assigned to the plaintiff. The declaration alleges that the note was endorsed to the plaintiff before it became due.

The defendant pleaded the general issue, and by agreement of parties, had permission "to give any special matter in evidenee on the trial, which by the law and rules of pleading, could be specially pleaded in bar."

The cause was tried by a jury, and a verdict rendered for the defendant, at the September term, 1838, of the Court below, the Hon. John Pearson presiding. The record states that a judgment for costs was rendered upon the verdict against the plaintiff, and thereupon he moved the Court for a new trial. The motion for a new trial was made upon the same day that the trial was had. The motion for a new trial was overruled, and the plaintiff excepted to the opinion of the Court in overruling the motion. The bill of exceptions states, that "after trial and verdict for the defendant, the plaintiff gave notice of a motion he was about to offer for a new trial, and made the motion on file, accompanied by the affidavit on file with the records of said cause, which motion was overruled by the Court, and the plaintiff excepted." The affidavit sets forth the evidence given to the jury, and after stating that the note and endorsement to the plaintiff were fully proved, further states, "that there was no evidence offered or given, showing, or tending to show, that thesaid plaintiff had, at the time of the endorsement and delivery of said note to him, any notice of the consideration for which said note was given, or of the circumstances under which it was given," and that "there was no evidence given to prove that any fraud or circumvention was used in obtaining the making or executing of said note, otherwise than that said Gilbert represented that there were forty acres of prairie broken on the farm, for the purchase of which the note was given, and the evidence for the defendant showed that there was only about fifteen acres of the same broken, and the garden containing what number of acres the affiant did not recollect; and that at the time of the making of the sale of the Maggord farm, (the consideration for which the note mentioned in the declaration was given) there was snow on the ground to the depth of several inches, so that witnes could not tell how much of said land was broken; and that there was a lease to one Davis, and that one Davis was on a part of the land at the time said note was given, of which Gilbert did not inform Shepard, and that Shepard gave said Davis $75 to remove from said land; and that it was worth from $3,50 to $4,0 per acre to break said prairie, and that Gibert, after the makin said sale to said She-

pard, acknowledged that he knew of said lease to said Davis, but that he thought at the time that he could procure the removal of said Davis, and that was the reason that he did not tell Shepard of said lease to said Davis." The affidavit contained other immaterial evidence.

The plaintiff prosecuted a writ of error to this Court, and assigned for error the refusal of the Court below to grant a new trial, and the overruling of the motion therefor.

J. Young Scammon and G. A. O. Beaumont, for the plaintiff in error, relied upon the following points and authorities:

1. That the presumption of law is, that a note is endorsed before maturity, until the contrary is shown.

2. That the maker of a note cannot avail himself of a failure of consideration, or want of consideration, for the note, in an action by an endorsee against him, unless he first show that the note was endorsed after maturity, or that the endorsee had notice of the fact at the time he received the note.

3. That the fraud which vitiates a note in the hands of an endorsee without notice, must be in the making of the note, not in the consideration; that if the maker intended to have made such a note as is held by the endorsee, he cannot impeach it in his hands; the rule of law being that where one of two innocent persons must suffer through the fraud of a third, he who put it into the power of the fraudulent individual to commit the wrong, must suffer. R. L. 483; Gale's Stat. 527; Chitty on Bills; 3 Mass. 334; 3 Day 311; Cowen's Treaties 97; Forman, 319, 77.(1)

Uri Osgood, for the defendant in error, contended,

1. That the motion for a new trial was not made in season; that it was not made until after judgment was rendered upon the verdict of the jury. R. L. 491–2, § 20(2); Forman 77.(1)

2. That the fraud proved was such as is contemplated by the statute.

Smith, Justice, delivered the opinion of the Court:

This was an action by the endorsee of a promissory note, endorsed before the day of payment, against the maker. The declaration is in the usual form. The defendant pleaded the general issue, and by agreement had leave to give any special matter in evidence, under the plea, which would amount to a bar to the action. It appears that a judgment was rendered on a general verdict for the defendant.

From the bill of exceptions (which makes by reference to it, an affidavit of the plaintiff's counsel, a part thereof,) it appears that it was proved on the trial, that the note was given as a part

(1) *Ante* 103, 536. (2) Gale's Stat. 539.

consideration for the payment of a tract of land purchased of the endorser of the note, by the maker; and that a false statement had been made by the endorser to the maker of the note, (who is defendant here) as to the quantity of ploughed land contained in the tract; and that he had also suppressed the knowledge from the maker, that a tenant on the land had a lease of a part thereof; and the defendant had to pay the tenant seventy-five dollars to leave the premises. That no evidence was adduced on the trial tending to show that the plaintiff had at the time of the endorsement and tranfer of the note, any knowledge of the consideration for which the note was given, or the circumstances under which it was made. Other facts, of minor importance, are stated, which it is not necessary to recapitulate. The plaintiff moved for a new trial, which the Circuit Court refused.

The assignment of errors questions the correctness of the decision of the Circuit Court in refusing to grant the new trial, and in admitting the evidence to impeach the consideration of the note in the hands of the holder, without showing notice to him of the failure, or part failure of the consideration thereof, before the assignment, or showing the transfer of the note after it became due.

We think the evidence was improperly admitted to the jury, or, in other words, that the evidence formed no defence to the action.

It could be no ground of defence against the innocent holder of a negotiable note assigned before it became due; nor can the evidence be applied as matter of defence under the 6th section of the act relative to promissory notes, and other instruments in writing, made assignable by the act of the 3d January, 1827, which admit of a defence against the assignee, as well as the payee of an assignable note or instrument in writing, where fraud or circumvention is used in the obtaining the making or executing of such instrument.

This case falls directly within the principles of the rule laid down in the case of Woods against Hynes, decided in this Court at the December term, 1833.(1) In that case the defendant pleaded specially that the note was obtained by fraud and circumvention, the goods for which it was given being less in quantity, and deficient in quality, from what they were represented to be by Wilkin, the payee of the note. In that case, we said "It would be apparent that the plea would have been no bar to the action on the note in the hands of an innocent endorsee or assignee, as has been repeatedly adjudged; nor would the 6th section of the act above referred to, give the right to interpose such a defence, where there is a mere deficiency in the quality or quantity of the article sold, as between the maker and the

(1) *Ante* 103.

assignee. The section declares that if any fraud or circumvention be used in obtaining the making or executing of any of the instruments described, it shall be void, not only between the maker and payee, but every subsequent holder. We further held that that case did not come within this provision.

The fraud charged consisted in the contract itself, not in the obtaining the making of the note. If a person represent a note to contain a particular sum, when in truth the amount is much greater, and obtain an execution of it, there would be a case contemplated by the statute, and the note would be void, not only between the maker and payee, but between him and every subsequent holder. That, however, was not the case under consideration, for the plea admitted a valuable consideration, but denied one to the extent of the face of the note, because of the deficiency in quantity and quality of the articles sold, which were alleged to be of full value. It would not be denied but that the plaintiff was entitled to recover the value of the goods, even if he had stood in the place of the original payee, but being an innocent holder before the note became due, it is most clear that the matters of the plea would be no legal defence to the action.

The facts in this case are of precisely similar character. The false suggestion as to the value and improvement of the land, with the suppression of the fact of occupancy and lease of a part of the premises to the tenant, could only operate to proportionately reduce the value of the tract of land, but would not, we apprehend, render the note void even between the original parties. As between them, in an action on the note, it might perhaps be matter of defence to the extent of the depreciation; but this could not render the note void between the maker and assignee. It will be thus seen that the facts disclosed, do not amount to the nature of the defence contemplated by the statute; and the misapplication of the facts to the law, is, we think, very apparent.[a]

The verdict for the defendant was, then, certainly not right or just under the law, and its correction is demanded by every consideration of justice. We are accordingly of opinion that the judgment should be reversed with costs, and a new trial granted.

The cause is therefore to be remanded to the Circuit Court of Will county, with instructions to award a *venire de novo*, and to proceed in the same in conformity to this opinion.

Judgment reversed.

(*a*) Grimes *vs.* Williams, 16 Ill. R. 47.

Note. See Woods *v.* Hynes, *Ante* 103; Miller *v.* Howell, *Ante* 499; Miller *v.* Houck *et al.* 501; Vanlandingham *v.* Fellows *et al.*, *Ante* 233.

To an action on a promissory note, the defendant pleaded in bar as to part of the amount, that the consideration of that part was goods sold and delivered at a sound price, as goods and saleable goods, which goods were damaged and of little or no value. *Held* that the plea—containing no averment either of fraud or warranty—was insufficient. Phillips *et al. v.* Bradbury *et al.*, 3 Blackf. 388.

It seems that a note given for a pretended title, is not void in the hands of an endorsee. Baker *v.* Arnold, 3 Caines 279.

In an action by the endorsee of a note, not void in its creation, and endorsed before it became due, against the maker, the consideration cannot be enquired into. Baker *v.* Arnold, 3 Caines 279; Braman *v.* Hess, 13 Johns. 52.

The want or illegality of consideration of a note tranferred before due, cannot be shown in an action by a *bona fide* holder without notice, except where the note is declared void by statute; and it was held, in an action by such holder, that a defence could not be set up that the note was delivered as an *escrow*. Vallet *v.* Parker, 6 Wend 615.

A note given on the purchase of real estate held adversely, is not void by statute *Ibid.*

Where a note is adjudged void by a court for the want, failure, or illegality of the consideration, it is void only in the hands of the original owner, or of those who are chargeable with, or have had notice of the consideration. *Ibid.*

The endorsement of a note, in presumption of law, is cotemporaneous with the making of it, or at all events, antecedent to its becoming due; if the defendant, in a suit by the endorsee, wishes to avail himself of payment to the original holder, it is incumbent upon him to show the endorsement to have been subsequent to the payment. Pinckerton *v.* Bailey, 8 Wend. 600. See, also, Tyler *v.* Young, *et al*, 2 Scam. 444.

Rufus P. Burlingame, John B. Burlingame, and Aquilla Wren, appellants *v.* James Turner, appellee.

Appeal from Peoria.

Where a motion is made in the Court below, to set aside an issue as immaterial, the fact should be stated in a bill of exceptions.

It is not the duty of the Court to order a continuance on an affidavit filed, unless a motion is made for such continuance.

It is not the duty of the Circuit Court, of its own motion, to set aside an immaterial issue.

A motion to set aside an immaterial issue, must be made in the Court where the verdict is rendered, if the party wishes to raise the question in the Supreme Court.(*a*)

Where matters of law and fact are both submitted to the Court for trial, and a jury waived, it is competent for the Court, after having found the issues for the plaintiff, to direct the clerk to assess the damages on a promissory note.

This cause was heard in the Court below, at the April term, 1839, the Hon. Daniel Stone presiding.

C. Balance and C. Walker, for the appellants, cited the following authorities:

1 Com. Dig. 40, and authorities there cited; 1 Chit. Plead. 547, 548, and authorities there cited; R. L. 349, 483; Gale's Stat. 343, 526.

Wm. Frisby and Geo. T. Metcalf, for the appellee.

Lockwood, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced in the Peoria Circuit Court, in favor of Turner, against Burlingame, Burlin-

(*a*) Hitchcock *vs.* Haight, 2 Gil. R. 604.

game, and Wren. The declaration is in the usual form, on a promissory note made by the defendants below to one Isaac Cushman, and by him, before the note became due, endorsed to Turner. The defendants pleaded *non-assumpsit*, on which issue was joined. They also pleaded usury. To the plea of usury the plaintiff below demurred, and the demurrer was sustained by the Court. The defendants then obtained leave to amend their second plea, which being done, issue was thereupon joined by the plaintiff below. It then appears from the record, that an affidavit was filed in the cause, as if to found an application to the Court for a continuance of the case, to enable the defendants to procure testimony to support the issue of usury. But it no where appears that any motion was made for a continuance, and of course no such motion was overruled.

The record then states that on the day of filing said affidavit, the parties agreed that both matters of law and fact arising in the cause, should be tried by the Court, and after hearing the evidence of both parties respectively, and arguments of counsel, and the Court being fully advised therein, found the issues for the plaintiff, and ordered the clerk to assess the plaintiff's damages, which were accordingly assessed; and thereupon judgment was rendered for the amount so assessed.

The following errors are assigned to reverse this judgment, to wit, 1. The issue joined was immaterial; 2. The Court erred in not granting a continuance; 3. The Court erred in referring the assessment of damages to the clerk.

It does not appear from the record, that any question was ever raised in the Circuit Court, as to the point whether the issue joined on the defendants' amended plea of usury, was immaterial. Had such a point been made on the trial, it ought to have appeared by the bill of exceptions. For any thing that appears on the record, the Circuit Court may have treated the issue as immaterial. It however was not the duty of the Circuit Court of its own motion, to have set aside the issue.

The second assignment of error is also without foundation. The Court could not, without motion, have granted a continuance.

It was clearly competent for the Court, after having decided the issues in favor of the plaintiff, to require the clerk to assess the damages. The action being on a note for money, the only duty required of the clerk was to calculate the interest—a matter merely of computation.(1)

The judgment of the Circuit Court is affirmed with costs.

Judgment affirmed.

Note. See Clemson *et al. v.* The State Bank of Illinois, *Ante* 45.

(1) Rust *v.* Frothingham *et al.*, Breese 258.

ALBERT G. MAXCY, plaintiff in error *v.* WILLIAM PADFIELD, defendant in error.

Error to Clinton.

A justice of the peace has no authority to render a judgment against any defendant who is not served with process, although one of the defendants is regularly served.
The Circuit Court cannot amend the papers on appeal from the judgment of a justice of the peace, by striking out the name of one of the defendants in the Court below.(*a*)

THIS was an action originally commenced by William Padfield against Samuel McCullough and A. G. Maxcy, before William Johnson, a justice of the peace of Clinton county, upon a promissory note made by Samuel McCullough to Anderson W. Petty, and by said Petty endorsed to Samuel G. Smith, and by said Smith endorsed to A. G. Maxcy, and by said Maxcy endorsed to the defendant in error.

The summons was issued against McCullough and Maxcy, and returned executed upon Maxcy only.

On the day set for the trial of the action, neither of the defendants appeared, and judgment was rendered against them by default. From this judgment Maxcy appealed to the Circuit Court of Clinton county.

At the next term of the Circuit Court, the Hon. Sidney Breese presiding, Maxcy, by Cowles, his attorney, moved the Court to dismiss the cause and reverse the judgment of the justice. The Circuit Court overruled said motion, and on motion of the plaintiff, by Reynolds his attorney, leave was granted to amend the papers by striking out the name of Samuel McCullough.

Thereupon a jury was called and a verdict rendered for the plaintiff, and judgment entered upon said verdict. From this judgment Maxcy prosecuted a writ of error to this Court.

A. COWLES and BENJAMIN BOND, for the plaintiff in error, relied upon the following points and authorities:

"The Court below had no power to amend the papers,—

1. Because it in effect created a new action, which was not authorized by the statute allowing amendments. 5 Johns. 160; Kimmel *v* Shultz *et al.*, Breese 128; Gale's Stat. § 7 404, § 35 410; R. L. 389, 396.

2. The judgment before the justice being by default, and the defence not of a dilatory character, it was competent for the appellant to interpose the defence in the Circuit Court. Breese 96; 5 Johns. 160; Forman 85, 199.(1)

(*a*) Lake *vs.* Morse, 11 Ill. R. 587.

(1) *Ante* 249.

3. The cause, by appeal of one of the defendants into the Circuit Court, will be held as bringing both defendants into the Circuit Court, no motion being made to dismiss the appeal for that reason. The plaintiff below so considered it by moving to strike out one of the defendants.

LYMAN TRUMBULL and JOSEPH GILLESPIE for the defendant in error, relied upon the following points and authorities:

1. Appeals from justices of the peace being taken up *de novo* in the Circuit Court, and McCullough not having joined in taking the appeal, he was no party to the suit in the Circuit Court. Mitcheltree *v.* Sparks, Forman 166;(1) Tindall *v.* Meeker, Forman 97;(2) Dedman *v.* Barber, Forman 202.(3)

2. If McCullough was a party, it was competent for the Circuit Court under the statute allowing such amendments to be made as are necessary to a fair trial of the cause upon its merits, to permit the name of McCullough to be stricken out. Conley *v.* Good, Breese 96; R. L. 396,(4) § 35; Acts of 1839, 291.

3. To warrant the reversal of the opinion of the inferior Court in refusing to grant a continuance, and upon a point in relation to which it has the best opportunity of forming a correct opinion, the cause of error should be clearly made out. Smith *et al. v.* Shultz, *Ante* 490.

SMITH, Justice, delivered the opinion of the Court:

The assignment of errors questions the regularity and power of the Court to strike out the name of one of the defendants in the action before the justice of the peace. The original summons was the foundation of the action. The plaintiff in that action elected to misjoin parties who, upon no legal principles, could be joined in the same action, and the judgment was manifestly erroneous, as well for the misjoinder, as for rendering judgment against McCullough, who had not been served with process. We cannot doubt that the Court had no power to abate the suit as to one of the defendants, at common law, on the plaintiff's motion, and we do not conceive that the statutes allowing of amendments relative to proceedings before justices of the peace, confer the power. The effect of the amendment is to change the character of the action, as to parties, and virtually to constitute a new action. This surely could never have been the intention of the legislature, in the several acts allowing amendments in the Circuit Courts, to proceedings had before justices of the peace.

The defendants might avail themselves of this misjoinder, but surely the plaintiff in the action before the justice, could not discontinue his cause as to one of them, and hold the other liable. The cases cited to support the power to thus amend process, we

(1) *Ante* 198. (2) *Ante* 137. (3) *Ante* 254.
(4) Gale's Stat. 410.

conceive, having no bearing on the point before the Court, and do not countenance the amendment.

The judgment is reversed, as well in regard to the proceedings and judgment before the justice, as in the Circuit Court, with costs.

Judgment reversed.

CHARLES KETTELLE, appellant, *v.* ROBERT WARDELL, appellee.

Appeal from Peoria.

The security for costs required of non-residents, need not be in the precise words or form given in the statute.
A security for costs may be signed in the name of a firm.

THIS was an action of *assumpsit* commenced by the appellee in the Circuit Court of Peoria county, against the appellant. A motion was made in the Court below, at the May term, 1838, the Hon. Dan. Stone presiding, to dismiss the cause for want of a security for costs. The motion was overruled, and the cause submitted to the Court, and judgment rendered against the appellant for $202,16 damages, together with costs. From this judgment an appeal was taken to this Court.

The form of the instrument filed as a security for costs, as also so much of the case as is necessary to be stated in order to understand the points raised, appear in the opinion of the Court.

The errors assigned, are the following:

"1. There is no legal bond for costs, the plaintiff being a non-resident.

2. The instrument filed and purporting to be a bond for costs, is not in the form prescribed by statute.

3. The instrument filed does not set forth the title of the Court, nor the parties in the cause.

4. The instrument is in the plural and not in the singular number, as prescribed by statute.

5. The instrument purports to be signed by Davis & DeWolf, the name assumed by a firm, and not by a single responsible person, as required by statute.

6. The obligors do not enter themselves security, &c., but only as security, &c.

7. The obligors do not acknowledge themselves bound to pay or cause to be paid, all costs, &c. at prescribed by statute."

H. P. JOHNSON, for the appellant, cites R. L. title *Costs* 165–6; Gales Stat. 195; Warnock *v.* Russell, Printed Opinions 292.(1)

G. T. M. DAVIS, for the appellee.

LOCKWOOD, Justice, delivered the opinion of the Court:

This was an action of *assumpsit* commenced by Wardell against Kettelle, in the Peoria Circuit Court. Previous to the issuing the summons from the Court below, the plaintiff in that Court filed in the clerk's office, a precipe and instrument of writing to secure the costs, as follows, to wit:

"State of Illinois, Peoria county, sc.

Robert Wardell } Action, Trespass on the
v. . } case on promises.
Charles Kettelle. } Damages, $500.

The Clerk of the Circuit Court in and for the county of Peoria, will please issue a summons in this entitled cause, directed to the sheriff of said county of Peoria, and returnable at the next term of said Court. Dated Alton, October 11th, 1837.

DAVIS & DE WOLF,
Att'ys for Pl'ff.

Same *v.* Same.

We do hereby enter ourselves as security for costs in this entitled cause, and acknowledge ourselves bound to pay all costs that may accrue either to the opposite party, or to any of the officers of this Court, in pursuance of the laws of this State.

DAVIS & DE WOLF."

At the next term after the commencement of the suit, the defendant below moved the Court to dismiss the cause for want of bond for costs, which motion was overruled. The assignment of errors questions the correctness of this decision.

The objections made here, are the same that were made to the security filed in the case of Linn *v.* Buckingham and Huntington, decided in December term, 1838.(2) This Court then decided that an instrument entirely similar to the one filed in this case, was a sufficient compliance with the statute requiring non-resident plaintiffs to file security for costs before commencing suit. The Circuit Court consequently decided correctly in refusing to dismiss the suit.

The judgment is affirmed with costs.

Judgment affirmed.

(1) *Ante* 383. (2) *Ante* 451.

FRANCIS W. SIMPSON, plaintiff in error *v.* JOSEPH P. UPDEGRAFF and WILLIAM H. RANDOLPH, defendants in error.

Error to McDonough.

A justice of the peace has jurisdiction of a suit upon a note for $100, where the plaintiff does not claim interest.

THIS was an action instituted before a justice of the peace of McDonough county, on the 22d day of October, 1838, upon the following promissory note:

"$100,00. On or before the twentieth day of October, we or either of us promise to pay John D. Walker, or bearer, one hundred dollars, for value received. Macomb, April 23d, 1838.

J. P. UPDEGRAFF. [L.S.]
WM. H. RANDOLPH. [L.S.]"

On the back of which note was written,

"For value received I assign the within note to F. W. Simpson, this 4th October, 1838.

JOHN D. WALKER."

The justice rendered judgment for the plaintiff, and the defendants appealed to the Circuit Court. At the October term, 1839, the Hon. Peter Lott presiding, the cause was called for trial, and the plaintiff read in evidence the note and endorsement, and thereupon the defendants moved to dismiss the suit for want of jurisdiction in the justice of the peace, which motion was sustained by the Court, the cause dismissed, and a judgment for costs rendered against the plaintiff. The plaintiff excepted to the opinion of the Court, and embodied the facts in a bill of exceptions, which was signed and sealed by the judge, and the cause brought to this Court by a writ of error.

A. WILLIAMS and S. H. LITTLE, for the plaintiff in error.

O. H. BROWNING, for the defendants in error.

BROWNE, Justice, delivered the opinion of the Court:

This was a suit by the plaintiff against the defendants, before a justice of the peace of McDonough county, on a promissory note for the payment of one hundred dollars. The justice of the peace who tried the cause, gave judgment for the plaintiffs for the sum of one hundred dollars and costs. Updegraff and Randolph appealed from the decision of the justice to the Circuit Court of McDonough county. When the cause come on to be tried, the defendants, Updegraff and Randolph, by their attorneys, moved

the Court to dismiss the appeal, because the justice of the peace had no jurisdiction of the cause. The motion was sustained by the Court, and the cause dismissed. To reverse the decision of the Circuit Court, this writ of error is brought. The statute giving jurisdiction to justices, page 402, sec. 1, Scammon's Revised Laws,(1) provides "That justices of the peace in this State shall have jurisdiction within their respective counties, to hear and determine all civil suits for any debts or demands of the following description, viz: for any debt claimed to be due on a promissory note, &c., where the whole amount, &c., shall not exceed one hundred dollars. It seems clear that the justice of the peace had jurisdiction. It comes within the letter and spirit of the law conferring jurisdiction on justices of the peace.[a] For these reasons, the judgment of the Circuit Court of McDonough county must be reversed with costs; and as the sum claimed by the plaintiff, is certain, judgment is rendered here for one hundred dollars with costs.

Judgment reversed, and judgment rendered in this Court.

(1) Gale's Stat. (*a*) *Ante* 29, and note. Bates *vs.* Bulkley, 2 Gil. R. 392.

Charles Balance, appellant *v.* William Frisby and George T. Metcalf, appellees.

Appeal from Peoria.

The prayer for an appeal from the Circuit to the Supreme Court, may be made at any time during the term in which the judgment is rendered.

The appellees moved the Court to dismiss this appeal, for the reason that "the appeal was not prayed at the time of rendering the judgment in the Court below, but several days afterwards."

The record shows that the judgment of the Court below, was rendered on the 16th day of October, 1839; that the appellant moved for a new trial on the 23d of the same month, which was overruled on the same day; and that on the 26th of the same month, the appeal was prayed and granted. All these proceedings were had at the October term of the Court below.

W. Frisby, for the appellees.

C. Walker, for the appellant.

Per Curiam.

The appeal was prayed in due season. The practice has been uniformly to permit appeals to be prayed for at any time during the term of the Court in which the judgment is rendered.[a]

The motion is overruled.

Motion overruled.

(*a*) Miller *vs.* Berthold, 40 Ill. R. 34; C. R. *vs.* Johnson, 40 Ill. R. 35

Joseph Emerson, appellant *v.* George W. Clark, appellee.

Appeal from Scott.

An appeal from the Circuit to the Supreme Court, where the judgment is final, and amounts to $20 exclusive of costs, or relates to a franchise or freehold, is a matter of right.(*a*)

This was a motion to dismiss the appeal because the same was granted upon condition that the defendant should verify by his own affidavit, within twenty days, two papers produced on the trial by the parties, but which were not in Court when the bill of exceptions was made up. Upon such verifications, said papers were to be included in the bill of exceptions.

Wm. Brown, for the appellee.

Josiah Lamborn, for the appellant.

Per Curiam.

The statute gives an appeal in all cases where the judgment appealed from is final, and amounts to the sum of twenty dollars, exclusive of costs, or relates to a franchise or freehold. The party had a right to his appeal upon giving bond and security, without any other conditions. The Court, upon this motion, will not investigate the propriety of the Circuit Court's permitting the papers to be verified by the affidavit of the party.

This motion is overruled.

Motion overruled

(*a*) In all civil cases whatever, L. 1865, p. 3.

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ASSIGNMENT AND ASSIGNEES.

1. Deeds or obligations containing mutual covenants, are not assignable. *Beezley* v. *Jones*, 34

2. One covenant in an obligation or contract containing several covenants, cannot be assigned without the other. *Ibid.*

3. *Semble*, That instruments in writing for the conveyance of land, or for the performance of personal duties, are not assignable. *Ibid.*

See EVIDENCE, 47; PROMISSORY NOTES.

ATTACHMENT.

1. In order to enable the owner or consignee of a vessel attached under the "*Act authorizing the seizure of boats and other vessels by attachment*," to take an appeal from the judgment of a justice of the peace in such case, he should make himself a party defendant to the suit, before the justice. *The Schooner Constitution* v. *Nelson Woodworth*, 511

2. *Sed quere*, Whether an appeal can be taken from the judgment of a justice of the peace, under that act. *Ibid.*

3. On the trial of the right of property levied on by attachment, the writ of attachment and return thereon, are admissible in evidence. *Sheldon* v. *Reible et al.* 519

4. Where an attachment bond was signed by the principal, Hunter, and surety, but no seals were affixed to the bond, and the defendant moved to dismiss the suit for want of a sufficient bond; and thereupon the plaintiff moved that Hunter be allowed to amend the bond by affixing a seal, which motion the Court overruled and dismissed the suit: *Held* that the decision was correct, as the motion to amend did not extend to both obligors. *Hunter* v. *Ladd*, 551

See CONSTABLE, 8, 9, 10; CONTEMPT OF COURT; EVIDENCE, 7, 8, 34, 56; RIGHT OF PROPERTY, 7, 13, 14.

ATTORNEY.

1. A lawyer employed to defend a suit, is not authorized to consent to the entry of a judgment against his client, without his assent. His doing so is a violation of the confidence reposed in him, and if done with a corrupt intent, involves such a degree of moral turpitude, as would authorize the Court to strike his name from the Roll of Attorneys. *The People* v. *Lamborn*, 123

2. In general, where the complainant is not the person injured, application for a rule against an attorney, to show cause why his name should not be stricken from the Roll, should be based upon the affidavit of some person who shall affirmatively allege the truth of the charges preferred against the attorney, and not merely his belief in the truth from the information of others. *Ibid.*

3. When an attorney commences an action in the name of another, or appears for another, the Court will presume that he has authority to do so, until the contrary appear. *Ransom* v. *Jones*, 291

4. Where a *supersedeas* bond purported to be executed by a person as attorney in fact, in the name of his principal, and the authority of the attorney did not appear: *Held* that the Court would presume that the attorney had authority to execute the bond, unless his authority

AUTHENTICATION.

AVERMENT.

BAIL.

BANK AND BANK NOTES.

BETTING ON ELECTIONS.

BILL.

BILLS OF CREDIT.

BILL OF EXCEPTIONS.

BILLS OF EXCHANGE.

See PROMISSORY NOTES.

BILL OF SALE.

See FRAUD.

BOATS.

See ATTACHMENT, 1, 2.

BOND.

BURGLARY.

CANAL LANDS.

CA. SA.

CASES OVERRULED.

CERTAINTY.

CERTIFICATE.

CERTIORARI.

CHANCERY AND CHANCERY PRACTICE.

CHOSES IN ACTION.

See ASSIGNMENT; PROMISSORY NOTES.

CITY OF CHICAGO.

CLERKS OF COURTS.

CONDITION.

See ADMINISTRATOR; CANAL LANDS; CONTRACT; ESTATES.

CONFESSION OF JUDGMENT.

See JUDGMENT BY CONFESSION.

CONSIDERATION.

CONSTABLE.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF THE STATE.

See CLERK; CRIMINAL LAW, 16; NEGROES AND MULATTOES.

CONTEMPT OF COURT.

See ADMINISTRATOR, 10.

CONSTRUCTION OF STATUTES.

1. Statute penalties are in the nature of punishments; and no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute, unless jurisdiction be given to it in express terms. *Bowers* v *Green*, 42

2. Statutes which treat of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. *Hall et al.* v. *Byrne et al.* 140

3. In the enactments of legislative bodies, where persons are spoken of, no other than natural persons will be 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 to carry into effect the objects contemplated in their grant or charter. *Blair* v. *Worley*, 178

4. A purchaser of land, from the government of the United States, or of this state, acquires the right to all the improvements made upon it anterior to his purchase. The act of February 23d, 1819, giving the right to remove fences made by mistake upon the lands of other persons, applies only to natural persons; it has no relation to a case where a fence is erected by mistake upon the lands of the United States, or of this State. *Ibid.*

5. A proviso in a statute, is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it. The proviso of § 3, Article 6, of the Constitution of the State of Illinois, does not render the persons therein named, subject to servitude. *Boon* v. *Juliet*, 258

6. The act of 1807, of the Territory of Indiana, in relation to the indenturing and registering of negroes and mulattoes, is clearly in violation of the Ordinance of 1787, and therefore void. *Choisser* v. *Hargrave*, 317

7. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and should so appear on the face of the proceedings. *Smith et al.* v. *Hileman*, 323

8. Courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the constitution, unless the intention of the legislature be clearly expressed in favor of such retrospective operation. *Garrett* v. *Wiggins*, 335

9. Where land was sold for taxes under the law of 1827, and a deed was made to the purchaser in pursuance of such sale in 1829, after the repeal of the law under which the sale was had, and after the passage of a new act upon the same subject: *Held* that the law of 1827 must govern as to the effect of the deed. *Ibid.*

10. It is a settled principle of the common law, that a party claiming title under a summary or extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale which the law has prescribed, have been complied with. *Ibid.*

11. A party claiming under a deed given upon a sale of lands for taxes by the Auditor, must show that all the requirements of the law in relation to the sale of lands for taxes, have been complied with. *Ibid.*

12. In summary proceedings under a statute, the provisions of the statute must be strictly complied with. *Day* v. *Cushman et al.* 475

13. The declaration that certain qualifications are necessary to be possessed by the individual, to constitute him a juror, necessarily disqualifies the person who does not possess such qualifications. *Guykowski* v. *the People*, 476

14. It has been decided by all American courts, that statutes take effect from their passage, where no time is fixed; and this is now the settled rule of law. *Goodsell et al.* v. *Boynton et al.* 555

15. The spring term of the Cook Circuit Court was changed from March to April, by an act of the 2d of March and the Judge being ignorant of the change, held the Court in March. Issue was joined in a cause, and the same by agreement of parties was submitted to the court for trial. Judgment was rendered for the plaintiffs: *Held* that the proceedings were *coram non judice*, and that the judgment was illegal and void. *Ibid.*

16. At common law, in an action by S. W. and H. L., on a promissory note made payable to W. and L., without mentioning their christian names the presumption would be that the plaintiffs, being holders of the note, were

CONTINUANCE OF A CAUSE.

The defendants then moved for a continuance of the cause, upon the affidavit of one of the defendants, stating that he believed he could prove by G., who resided in the county where the suit was commenced, that G. had in his possession the contract for work done by the said plaintiff for W. and R., and that the plaintiff had failed to transfer it to the defendants. That he expected to prove by W. and R., that the plaintiff wholly failed to perform his contract with them, and that they owed him nothing, and that they wholly refused to pay to the said defendants any money on account of the said plaintiff, for the said work; and that the affiant knew of no other witnesses by whom he could prove the same facts. That G. was absent from the county when the writ was served upon the defendants, and had not since returned. That Waterman resided in St. Louis, in the State of Missouri, and Rogers in Greene county, in the State of Illinois; and that from the short-

CONTRACT.

CONVEYANCE.

CORPORATIONS.

COSTS.

COURTS OF PROBATE.

COURTS.

COUNTY.

COUNTY ORDERS.

See COUNTY, 1, 2.

COUNTY SURVEYOR.

See SURVEYOR.

COUNTY TREASURER.

See COUNTY.

COUNTY COMMISSIONERS.

COVENANT.

See ACTION, 11; ASSIGNMENT, 1, 2; VENDOR.

CREDITOR.

CRIMINAL LAW.

DAMAGES.

DEBT.

DEEDS.

DEFAULT.

DEMURRER TO EVIDENCE.

DEPOSITIONS.

DESCENT.

See ESTATES.

DETINUE.

DEVASTAVIT.

See ADMINISTATOR AND EXECUTOR, 5, 6.

DEVISE.

See ESTATES.

DISCRETION.

DIVORCE.

DOCKETING CAUSES.

DOWER.

EJECTMENT.

ELECTION.

ENCLOSURES.

EQUITY.

ERROR AND WRIT OF ERROR.

ESCAPE.

ESTATES.

ESTOPPEL.

EVIDENCE.

EXECUTION.

EXECUTOR.

See ADMINISTRATOR.

EXEMPLIFICTION OF RECORDS.

See RECORDS 4, 8, 9, 10.

FEES.

See GRAND JURY 1; SURVEYOR.

FENCES.

FICTITIOUS CAUSES.

FILING PAPERS.

See FOREIGN LAWS; RECORDS, 488.

FORCIBLE ENTRY AND DETAINER.

FORECLOSURE.

See SCIRE FACIAS.

FORTS.

FORTHCOMING BOND.

See EVIDENCE, 7, 8.

FRAUD AND FRAUDULENT CONVEYANCES.

See CONTRACT; PROMISE.

INCIDENTAL POWERS.

See ADMINISTRATOR, 3.

INCLOSURES.

See FENCES.

INDENTURES.

See NEGROES AND MULATTOES.

INDICTMENT.

JOINT TENANTS

JUDGMENTS AND DECREES.

JUDGMENT BY CONFESSION.

JURISDICTION.

JURY AND JURORS.

JUSTICES OF THE PEACE.

Jurisdiction.

General Powers, &c.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MANDAMUS.

1. Where the Circuit Court granted a continuance because an account was not filed with a declaration upon a promissory note,—which also contained the usual common counts—although the plaintiff offered to file a stipulation that he claimed to recover only upon the note which was filed with the declaration ten days before the session of the Court,—unless the plaintiff would strike the common counts out of his declaration, the Supreme Court granted a peremptory writ of *mandamus* to the judge of the Circuit Court, commanding that Court to proceed with the cause without requiring the account to be filed. *The People* v. *Pearson*, 458

2. *Semble*, That where a notice of an application for a writ of *mandamus* to a judge of the Circuit Court, is served upon the opposite party in interest, and the judge of the Court, and the law is plain, the Court will grant a peremptory writ in the first instance. *Ibid.*

3. Where the Circuit Court granted a continuance because an account was not filed with the declaration on a bill of exchange, which contained a special count and the common money counts, although the declaration and a copy of the bill declared on, were filed more than ten days previous to the session of the Court, the Supreme Court granted a writ of *mandamus* to the judge of the Circuit Court, directing him to rescind the order for a continuance, and proceed with the cause upon the merits, without requiring the plaintiff to file an account under the money counts. *The People* v. *Pearson*, 473

4. It is competent for the legislature to repeal a law creating an office, before the expiration of the term of office of the incumbent; and after such repeal the officer is entitled to no further compensation, though his term of office, according to the provisions of the law under which he was appointed, has not expired. *The People* v. *The Auditor*, 537

MALICIOUS PROSECUTION

1. The doctrine is well settled, that an action for malicious prosecution cannot be brought before the first suit has been legally determined, and it must be averred that the former suit terminated in the present plaintiff's favor. A legal conclusion of the suit must be shown. If the suit be proved not to have been determined in the manner alleged, it is a good ground of nonsuit. *Feazle* v. *Simpson et al.* 30

2. In actions for malicious prosecutions, it is a rule of law that there must be both malice and a want of probable cause, to justify a recovery. *Leidig* v. *Rawson*, 272

3. In an action for malicious prosecution, the defendant may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted in good faith on the ground of suspicion. *Ibid.*

4. The gist of the action for malicious prosecution, is, that the prosecutor acted maliciously, and without probable cause. If there is no malice, or if there is probable cause, the action will not lie. *Ibid.*

5. In an action for the malicious prosecution of the plaintiff on a charge of perjury in making a complaint before a justice of the peace, that the defendant had committed a larceny, the defendant asked the following question of a witness, who was his counsel before the justice; "Did the defendant understand, on the trial before the justice, that he was answering to a prosecution for stealing?" *Held* that the question was improper. *Ibid.*

MARRIAGE LICENSE.

See EVIDENCE, 55.

MASTER AND SERVANT.

See NEGROES AND MULATTOES.

MILITIA.

1. No appeal or writ of *certiorari* can be taken from the judgment of a justice of the peace, in a suit brought to recover an assessment upon a member of a class, made under § 45 of the Militia Law. *Yunt* v. *Brown*, 264

MILLS.

1. In an action by C. against L., for erecting a dam across a navigable stream, which obstructed its navigation, and by means of which C.'s boat and boat load of corn were lost, the defendant asked a witness "Whether there was not another mill-dam across said river below the defendant's mill-dam, erected in violation of law, which was higher than the defendant's mill-dam; and whether said lower dam would not

NEW TRIAL.

See CRIMINAL LAW, 14; DEFAULT.

NON-RESIDENT.

See SECURITY FOR COSTS; STATUTE OF LIMITATIONS, 2.

NOTE.

See PROMISSORY NOTES.

NOTICE.

See CHANCERY, 9, 10 MANDAMUS, 2; PROMISSORY NOTES, 34, 36, 38; RIGHT OF PROPERTY, 2; VENUE, 2, 3.

OBSTRUCTION.

OFFICE AND OFFICER.

POSSESSION.

POWERS.

POWER OF ATTORNEY.

PRACTICE IN THE CIRCUIT AND MUNICIPAL COURTS.

PRE-EMPTION.

PUBLIC ACTS.

PUBLIC LANDS.

QUO WARRANTO.

REAL ESTATE.

RECEIPT.

RECITALS.

RECOGNISANCE.

RECORDS.

RECORDING OF DEEDS.

REFEREES

REGISTER AND RECEIVER.

REMEDY.

REMOVAL FROM OFFICE.

RENT.

REPEAL OF STATUES.

RES ADJUDICATA

RESERVATION.

RETURN.

RIVERS.

RIGHT OF PROPERTY.

SALE.

See FRAUDS.

SALE OF LANDS.

See ADMINISTRATOR AND EXECUTOR, 13. 14, 15, 16; CHANCERY; CANAL LANDS; COUNTY COMMISSIONERS; COVENANT; DEED.

SALE OF LAND FOR TAXES.

See CONSTRUCTION OF STATUTES.

SCHOOL FUND.

SCIRE FACIAS.

SEAL.

SECURITY FOR COSTS.

SET-OFF.

SERVICE OF PROCESS.

SETTLERS.

SHERIFF.

SHERIFF'S SALE.

SLANDER.

SPECIFIC PERFORMANCE.

STATUTES.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

SUIT.

USE AND OCCUPATION.

USURY.

VARIANCE.

VENDOR AND VENDEE.

See CHANCERY; CONTRACT, 16, 17; IMPROVEMENTS; PROMISSORY NOTES; PUBLIC LANDS.

VENIRE.

VENUE.

VERDICT.

See CRIMINAL LAW, 9, 10, 11; NEW TRIAL, 6, 8.

VESSELS.

See ATTACHMENT, 12,

WAIVER.

See JURISDICTION; PLEADING; PRACTICE; PROCESS.

WIDOW.

See DOWER.

WILLS AND TESTAMENTS.

See ESTATES.

WITNESS.

See EVIDENCE.

WORK AND LABOR.

See CONTRACT.

WRIT OF ERROR.

See ERROR.

WRIT OF INQUIRY.

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