REPORTS

OF THE

DECISIONS OF THE SUPREME COURT

OF IOWA,

FROM THE ORGANIZATION OF THE TERRITORY IN JULY, 1838,

TO DECEMBER, 1839, INCLUSIVE.

PUBLISHED BY ORDER OF THE LEGISLATURE.

BY WM. J. A. BRADFORD,

REPORTER TO THE SUPREME COURT.

GALENA.

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1840.

Decree Reports

JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. CHARLES MASON, *Chief Justice.*
HON. JOSEPH WILLIAMS, } *Associate Judges.*
HON. THO'S. S. WILSON, }

FOREWORD

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NAMES OF CASES

CONTAINED IN THESE REPORTS.

DECISIONS OF THE SUPREME COURT

OF IOWA.

IN THE MATTER OF RALPH, (A COLORED MAN,) ON HABEAS CORPUS.

Where A. formerly a slave, goes with the consent of his master, to become a permanent resident of a Free State, he cannot be regarded as a fugative slave.

The act of 1820, for the admission of Missouri into the Union, which prohibits slavery north of 36 deg. 30 min. was not intended merely as a naked declaration, requiring legislative action in the States to carry it into effect, but must be regarded as an entire and final prohibition.

The master, who subsequently to this act, permits his slave to become a resident here, cannot afterwards exercise any acts of ownership over him within this territory.

Ralph, being within this territory, was claimed by Montgomery, a resident of the State of Missouri, as his slave, and, by virtue of a precept from a Justice of the Peace, under the Act of the Legislative Assembly of Iowa, (satisfactory proof, under the Act, having been made, to such Justice, that Ralph was the property of the claimant) the Sheriff of Du Buque county delivered the negro into the custody and possession of the claimant, who took him on board a steamboat, bound for Missouri, and delivered him to the master of the boat, to transport him to Missouri, who confined him in the vessel. July, 1839.

A Habeas Corpus having been granted, upon the petition of A. Butterworth, Ralph was brought before the District Judge of the third district, whence, by the consent of the parties, the proceedings were removed to this Court.

It was admitted, upon the hearing of the cause, that Ralph came to Du Buque, now within this Territory, with the consent of his master, in the year 1834, and that, at that time, he was the slave of the claimant: That the claimant, at that time, entered into an agreement, in writing, with Ralph, to the effect that, upon the payment, by the slave of the sum of $500, together with $50 in addition for his hire, with interest from 1st January, 1835, he was to become free; and it was to earn the purchase money for his freedom that he left Missouri, and came to Du Buque, when he commenced working in the lead mines and so remained working in the lead mines until the time of the proceedings before the Justice:—Then Ralph, having failed to comply with his contract, he was reclaimed by his former master.

RORER, for the Petitioner, contended

1st—That Ralph, being a resident of the Territory of Wisconsin, at the time

July, 1839. both of the PASSAGE AND TAKING EFFECT of the Organic Law of that Territory —and also a resident of Iowa Territory, at the time of the passage and taking effect of the organic law of Iowa Territory, he became FREE by operation of the 12th section of said Organic Laws, which expressly extend to the inhabitants of said Territories of Iowa and Wisconsin, the benefits of the Articles of Compact contained in the Ordinance for the Government of the Territory north west of the river Ohio, by which the benefit of the writ of Habeas Corpus (the remedy here sought) is guaranteed to the inhabitants of said Territories north west of Ohio—and which also declares, "No man shall be deprived of his liberty, or property, but by the judgment of his peers, or the law of the land." —(*See 2d Article of Compact, contained in the Ordinance of Congress of* 1787.) And that "There shall be neither slavery, nor involuntary servitude, in the said Territory—otherwise than in the punishment of crimes whereof the parties shall have been duly convicted."—(*See 6th article of said Compact.*)

2d—That, independent of the Articles of Compact and Organic Laws above cited, Ralph became free so soon as, by consent of his master, he became an inhabitant of what is now the Territory of Iowa, by virtue of the Act of Congress, entitled—"An Act to authorize the people of Missouri Territory to form a Constitution and State Government, and for the admission of such State into the Union, on an equal footing with the original States, and to prohibit slavery in certain Territories:"—By which it is declared, that "In all that Territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees, and thirty minutes north latitude, not included within the limits of the State contemplated by this act; slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited."—(*See 8th Section of said Act. Ing. Digest of Laws of U. S. of America*—614.)—That the present Territory, being part of the country subjected to such prohibition, the petitioner, as there is no law by which he can be removed elsewhere, is FREE in the exercise of his right to remain here.—Where a West India Slave came to England with his master, and again returned with him to the West Indies, it was held, that, although he was still subject to servitude on his return to the Indies, yet "no coercion could be exercised over him while in England."—(*2d Hagg. Adm. Rep.* 94—*2d Kent's Com. note to page* 249.) —The claimant cannot possess any natural right to remove the petitioner to where he may, by the aid of human law, be reduced again to slavery—for such a state is declared to be 'repugnant to reason and the principles of Natural Law.'—(*See Blac. Com. vol. 1st, p.* 423.)

And still stronger is the language of much earlier and higher authority;—in the divine writings of Moses it is said, "Thou shalt not deliver unto his master the servant which is escaped from his master unto thee," &c.—(*23d chapter Deut. 15th verse.*) But this is not a case of an 'escape,' but emigration by consent of the master.

3d—That he cannot be considered as either coming into, or remaining in the Territory in violation of the law prohibiting persons of colour from settling in this Territory, without evidence of freedom, &c.; for it is in evidence that he was here at the time of, and previous to, the organization of the Territorial Government, and even at the time of the first extension of civil government over the country, by the act of Congress of 1834, attaching it to the then Territory of Michigan for temporary government.

4th—That he cannot be reclaimed and delivered over to his former owner, under our statute, nor under the laws, ordinance, or constitution of the Unit-

ed States, providing for the re-taking of fugitive slaves who have escaped from service; for it is in evidence that he came to, and remained in the Territory, not as a fugitive from service, to which he was then legally holden in some State of the Union, but by the voluntary consent and agreement of his former owner, the present claimant. July, 1839.

5th—That the claimant, Montgomery, by permitting his slave to come to that portion of the Territory of the United States in which slavery was then, and still is, prohibited, for the purpose of remaining indefinitely, virtually manumitted such slave—that the very fact of his contracting with, presupposes a state of freedom on the part of the slave—that if Montgomery has any relief, it is on that contract, for the money agreed to be paid, which is neither conceded here, nor deemed in any manner essential to the adjudication of this question, which is a question entirely of freedom.

Lee *versus* Lee, 8 Peter's Rep. 44.—Fanny *versus* Montgomery and Others, Breese's Reps. 188.—Act of Virginia for Cession of Northwest Territory, 5th vol. Laws U. S. A. 473.—John Merry *versus* Tiffin and Menard, 1 vol. Misso. Rep. 725.—Winny *versus* Whitesides, *ib.* 472.—Ralph *versus* Duncan, 3d Misso. Rep. 194.—Julia *versus* Samuel McKinney, *ib.* 270.—1st Blac. Com. 127, *ib.* 423, 424, 425.—2d of Kent's Com. 247, 248, 249.—Case of Sommerset, 11 vol. State Trials, p. 339.—Lofts' Reps. 1.—Case of Knight, a Negro Slave, in 1778.—Kame's Principles of Equity, vol. 2d, 134.

J. D. LEARNED, for Montgomery, contended—That "the Act of 1820, for admitting Missouri into the Union, which contained a prohibition of slavery, north of latitude 36 deg. 30 min. except within the limits of Missouri, was not intended to have effect on the rights of individuals, without further legislative enactment—But that it was intended merely to direct the local Legislatures in passing laws to prohibit slavery within the described limits—that the Act of Congress contained no sanction, and, consequently, had no binding force."

BY THE COURT.

This case does not come before us in any of the ordinary methods of application to an appellate Court, so that it is, perhaps, not strictly regular for us to entertain jurisdiction of it at all. As, however, it involves an important question, which may, ere long, if unsettled, become an exciting one, and as it is by the mutual assent and request of all the parties interested, we concluded to listen to the argument, and make a decision in the case without intending it as a precedent for the future practice of this Court.

The petitioner, a colored man, who was claimed as a slave before the Justice of the Peace, and who was about to have been delivered up accordingly, asserts that he is free. If this be actually the case, the writ of *Habeas Corpus* was properly brought, being the only means by which the Judge of the District Court could exercise a remedial control over the illegal acts of Justices of the Peace, in cases like this. The proceedings having been transferred to this Court, it will be proper for us to make such a disposition of the matter as might have been made by the District Judge while the subject was before him.

The claimant asks that the petitioner be restored to him as a slave, and principally for the following reasons:—In the first place, that, by the Act of Congress of 1820, which authorized the people of Missouri to form a Constitution and State Government, and which prohibited slavery in all that portion of the old Louisiana Territory lying north of thirty-six dgrees and thirty minutes of north latitude, not included within the then contemplated State, it is provided "That any person escaping into the Territory thus set apart, from whom labor or

July, 1839. service is lawfully claimed, in any State or Territory of the United States, such fugitive may lawfully be reclaimed and conveyed to the person claiming his said labour or services."—Under this provision, we are called upon to decide that the petitioner is a fugitive slave, because, although the master consented that he should come to this territory, and, for aught that appears, remain here for four or five years, still there was an express stipulation that he should, at some future time, pay, to his former master, the sum of five hundred dollars, with interest—that, not having complied with this agreement, he is to be regarded as being here without permission, and, consequently, as having escaped into the Territory.

Such a construction would introduce almost unqualified slavery into all the Free States. The Constitution of the United States contains a provision in relation to fugitive slaves substantially the same as that embraced in the Act of Congress above referred to; so that, in this particular, all the Free States of the Union are in the same predicament as this Territory.—Suppose, then, the Southern Master should permit his slave to emigrate to some of the Free States, upon the express condition that he should remain for ever the slave, or (which is the same thing) the submissive servant of some particular individual, his heirs and assigns. While he fulfils this agreement, he is a slave to his new master in the North, and, as soon as he violates it, he becomes again the slave of his old one at the South, who may, forthwith, reclaim him as a fugitive. We cannot countenance such a doctrine.

From the facts agreed upon in this case, it seems that the claimant permitted his slave to come to this Territory. The permission seems to have been absolute; but there was also an understanding that the latter was to pay the former a certain amount, as the price of his freedom. How the failure to comply with this understanding could render a removal, undertaken with the master's consent, an escape, we are unable to comprehend. The petitioner is under the same obligation to fulfil this engagement as though, instead of its being the price of his freedom, the debt had been incurred for the purchase of any other species of property. It is a debt which he ought to pay, but for the non-payment of which no man in this territory can be reduced to slavery.

We do not say there can be no escape where the slave goes to a Free State by the consent of the master: If, sent upon an errand, or travelling in company of his master, he should refuse to return, he might probably be regarded as a fugitive. But this certainly cannot be the case where the journey was undertaken with the understanding of all parties that the slave was going to become a permanent resident of the Free State or Territory.

But it is contended, on the part of the claimant, that slavery is not prohibited in this Territory—that the Act of 1820, above-mentioned, is a mere naked declaration, requiring further legislation to render it operative—that it merely imposes a duty on the States and Territories to be formed within the prescribed limits, but that, without further action on the subject, the law has no sanction, and, consequently, no force. This position, we think, cannot be maintained. Congress possesses the supreme power of legislation in relation to the Territories, and its right to prohibit slavery—at least in relation to slaves subsequently introduced—is doubtless legitimate. Has that right been exercised in relation to this Territory? The language of the Act of 1820, in relation to the district of country in which this Territory is embraced, is, that slavery therein "shall be, and IS HEREBY, for ever prohibited-"—This seems to us an entire and final prohibition, not looking to future legislative action to render it effectual.

But it is said that, although the act may prohibit slavery, it does not declare

a forfeiture of slave property, and that the most which the law will authorize July, 1839.
will be, to require the master to remove that property out of the Territory. It is true that the Act, thus mentioned, does not, in express terms, declare a forfeiture of slave property, but it does, in effect, declare that such property shall not exist.

The master who, subsequently to that Act, permits his slave to become a resident here, cannot, afterwards, exercise any acts of ownership over him within this Territory. The law does not take away his property in express terms, but declares it no longer to be property at all. Of course those legal remedies, which can only be resorted to upon the presumption of a still subsisting ownership in the master, become altogether annihilated.

A wide difference exists between the present case and that supposed in the argument, of an act of the Legislature prohibiting private banking. In the latter case the property invested in that traffic, in violation of the law, would not, in general, become forfeited. But suppose that, instead of prohibiting the investment of property in private banks, the Act should declare that property, so invested, should cease to be the subject of property at all, (and suppose a physical capability in the law to carry out that declaration) could the former owner, after such investment, invoke the aid of the laws to restore him what had once been his, but which was now, like the air, rendered incapable of being appropriated by any one? Such is, precisely, the state of things in the case now before us. Property, in the Slave, cannot exist without the existence of Slavery: The prohibition of the latter annihilates the former, and, this being destroyed, he becomes free.

Could the claimant, in this case, retain the custody and control of the petitioner, without invoking the aid of our laws, and without their violation, we certainly should not interfere to prevent him. But when he applies to our tribunals for the purpose of controlling, as property, that which our laws have declared shall not be property, it is incumbent on them to refuse their co-operation. When, in seeking to accomplish his object, he illegaly restrains a human being of his liberty, it is proper that the laws, which should extend equal protection to men of all colors and conditions, should exert their remedial interposition. We think, therefore, that the petitioner should be discharged from all custody and constraint, and be permitted to go free while he remains under the protection of our laws.

JOHN AIKEN & AL. VERSUS JOHN APPLEBY.

Upon the agreement to leave premises on receiving ten days notice, ten full days must elapse, exclusive of that on which notice is given, before action can be instituted to expel the tenant from the premises.

BY THE COURT.

From the bill of exceptions in this case, it appears that the defendant was Dec. 1839.
tenant of the plaintiffs, under a condition that he should at any time leave the premises upon receiving ten days notice. That such notice was served

Dec. 1839. upon him on the last day of April, 1838, and that suit was commenced against him of the tenth of May following. The Judge of the District Court charged the Jury, that ten full days must elapse, exclusive of the day on which notice was given, before an action could be legally instituted against him, to expel him from the premises; and that, consequently, the action was prematurely commenced. This is the error complained of.

Suppose a notice of only one day had been requisite. Could the suit have been legally commenced on the first day of May? We think not. The law disregards fractions of a day. It matters not what hour of the day, therefore, the notice was served, if under such circumstances, the action might have been commenced on the first day of May. The rule of law must be general. Notice might, therefore, be given on the evening of the last day of April, and suit commeneed early on the following morning. This is clearly unreasonable; for when the tenant stipulates for one day's notice, he should have at least one full day. Where one day's notice is necessary; and that notice was given on the last day of April, if suit could not be commenced until the second day of May, then if ten days' notice had been requisite, under like circumstances, the action could not legally be brought until the eleventh day of May. The Judge of the District Court, therefore, charged the Jury correctly, and the judgment must be affirmed.

Judgment affirmed accordingly.

GEORGE TEMPLE VERSUS HAYS & HENDERSHOTT.

A statute may have effect prior to its promulgation.

A promissory note, under seal, is negotiable in the same way as other notes not under seal; and the actual holder of such note, endorsed in blank, may bring his action against maker.

The provision in the Statutes of Iowa, page, 383, that fraud may be set up against a note, even in the hands of an innocent assignee, can only apply to contracts formed subsequently to the taking effect of that Statute.

Fraud in the inception of a note cannot be set up against an innocent assignee, (in the stat. of 383.) Where a chose in action is not negotiable, it may still be transferred and a suit may be brought for the use of the beneficial holder, in the name of the original payee.

Dec. 1839. This was an action of debt brought by assinee of plaintiff in error, against defendants in error, on a bond. Plea, *Non est factum.*

There were three errors assigned in this case.

1st. That the note on which the action was brought, was permitted to go to the Jury without the execution of the same having been proved.

2d. That the instrument on which the action was brought did not appear to have been endorsed to the beneficial holder mentioned in the plaintiff's declaration.

3d. That the defendant in the Court below offered to prove fraud in obtaining the note originally, to which the plaintiff objected, and the objection was sustained by the Court. Dec. 1839.

These assignments of error were now argued by GRIMES. for the plaintiff, and RORER & STARR, for defendants.

Grimes, for the plaintiff, contended, that where the beneficial holder institutes a suit in the name of the original obligee, the obligor has a right to the same defence as though the bond were not endorsed. The defendant can, under the plea of *non est factum*, introduce evidence of fraud in the inception of the contract, and in obtaining the bond—4 Esp. C. 9, Basten vs. Butler; 7 East. R. 479; Farnsworth vs. Carrard, 1 Camp. 48, Ib. 190; 2 Tannt. R. 2; 2 Str. 79; Ib. 264; Hatton vs. Morse, 1 Salk. 394; 8 T. R. 147; 2 B. & A. 96; 1 Ch. Pl. 479-80; Iowa Stat. p. 383, 6th sec.

BY THE COURT.

This case comes up on a bill of exceptions, and the first exception taken in that bill, to the decision of the Court below, is that the note upon which the action was brought, was permitted to go to the Jury without the execution of the same having been proved.

It is admitted that we have a Statute dispensing with the necessity of proving the signature in a case like this, unless the defendant, his agent or attorney, will deny the same under oath; but it is contended that this Statute was not in force at the time of the trial below. The act was approved January 4th, 1839, and by one of its provisions, it is declared that it shall take effect and be in force from and after the first day of March (then) next. The trial took place in May, more than two months subsequent.

But it is said that the law in question had not been published at the time of the trial in May, and therefore it was not in the power of the Legislature to give it force and effect. It is a settled rule, that where no time is fixed, a statute takes effect from and after its passage, (Matthews vs. Zane, 7 Wheaton 104; and the case of the Brig Ann, 1 Gallison 62.) This must, of necessity, be previous to the promulgation of the law. For a stronger reason, a Statute will take effect at the time fixed by the Legislature, where such time is not antecedent to its passage. The mode and time of publishing the law does not determine its validity, how unjust soever it may seem that men should be bound by Statutes of which they know not the existence.

The second exception taken in the trial below, was that the instrument on which the action was brought did not appear to have been endorsed to the beneficial holder mentioned in the plaintiff's declaration. There is hardly a rule of law better established, than that the actual holder of a promissory note endorsed in blank, may bring his action against the maker thereof. But it seems to be supposed, that this is not to be treated in this respect as an ordinary promissory note, because it is under seal. The Statute declares "that all notes in writing made and signed by any person, or by a factor or agent of any merchant or trader, usually entrusted therewith, whereby such person, or any merchant or trader, by such factor or agent, shall promise to pay to any other person, body politic or corporate, his or their order, or unto bearer, any sum of money therein mentioned, shall by virtue thereof, be taken and construed to be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants; and that the payees or endorsees of every such note payable to them or their order, shall and may maintain their action for such sum of money

Dec. 1839. against the makers and endorsers of the same, respectively, in like manner as, in cases of inland bills of exchange, andnot otherwise"—(Laws of Michigan 344.) All notes in writing, made payable to order, are here mentioned as possessing the attributes of negotiability. The instrument declared on in the present case seems to fall within that predicament. The Statute does not confine itself to unsealed instruments. We see no good reason, therefore, why its operation should be suspended by a mere seal attached to an ordinary promissory note, so far at least, as regards any question involved in the present case. There is another reason for coming to this conclusion drawn from expediency. Notes of this kind are almost as common with us as those not under seal. Very few people think of or know the difference, and would be likely to become frequently entrapped were a distinction to be preserved. The Legislature, by allowing the consideration of sealed instruments to be inquired into, has obliterated one of the lines of separation. We think the Statute above quoted was intended to erase another.

The third point contained in the bill of exceptions is, that the defendant in the Court below, offered to prove fraud in obtaining the note originally, to which the plaintiff objected, and the objection was sustained by the Court. For the purpose of sustaining his exception, the plaintiff in error has referred to the laws of Iowa, page 383, by which it is provided that fraud may be set up against a note, even in the hands of an innocent assignee. We do not think this Statute will support his position.

It appears that the note in question came into the hands of the beneficial holder previous to the passage of that Statute. The Ordinance of 1787, (the benefits of which have been extended to us) declares that "no law ought ever to be made or have force in the said Territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, *bona fide* and without fraud, previously formed." This is similar in spirit to the provision in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts. Under this clause of the Constitution, the rule appears to be well settled, that a State is not prohibited from changing the remedy, or the rules of evidence that shall be brought to bear upon an antecedent contract; but are only restrained from intermeddling with those contracts themselves, and with the vested rights of the parties thereto—(Fletcher vs. Peck, 6 Cranch 87; the State of New Jersey vs. Wilson, 7 Cranch 164; Sturges vs. Crowninshield, 4 Wheaton 122.) If at the time the note in question came into the hands of the present beneficial holder, the law rendered him secure against the effects of fraud in the inception of the note, can the Legislature without contravening the provision of the Ordinance of 1787, above referred to, subsequently pass an enactment that shall divest him of his right. Upon obtaining possession of the note, regularly endorsed, he became, by the operation of law, a party to an implied contract with the maker of the note. A contract which, at the time it was made, was valid and binding. The Legislature cannot subsequently come in and nullify that contract, for an act which at the time the present holder obtained possession of the note, was not as against him fraudulent. We think, therefore, that the provision in the Laws of Iowa, which we have now been considering, can only apply to contracts formed subsequently to the taking effect of that Statute.

Independently of that Statute then, what was the law of the case. We find some authorities declaring, in a general way, that fraud renders all contracts void. After a pretty thorough examination of the question, however, we are led to the conclusion that this rule cannot operate to the prejudice of the in-

nocent assignee—(1 Maddock's Chancery 154; 4th Petersdorff 330; Chitty on Bills 90; 3 Kent's Commentaries 51, 1st edition; and Brown vs. Mott, 7 Johnson's Reports 360)—and that as against him, fraud in the inception of the note cannot be set up. Dec. 1839.

But there is another very material feature in this case, which is that the suit was brought in the name of Hays & Hendershott, the very persons against whom the defendant offered the proof of fraud, and for the rejection of which evidence, the exception we are now considering was taken. The question here arises whether, if the beneficial plaintiff chooses to bring his action in the name of the payee, the maker cannot avail himself of any defence which would have been valid, had the payee sued for his own benefit. Where a *chose in action* is not negotiable it may still be transferred, and a suit may be brought for the use of the beneficial holder, in name of the original payee. But in that case the defendant may resort to any defence which would have been available had there been no transfer—(Chitty on Bills 90.) The principle in the present case is nearly the same. The only direct authority which we have been able to find on the subject is that of Hartwell *vs.* McBeth, 1 Harrington's Rep. 363. In thatcase the Superior Court of the State of Delaware decided that on a promissory note, endorsed in blank, suit might be brought in the name of the payee, for the use of the beneficial holder, but that in such a case, want of consideration would be a valid defence. We see no reason for a contrary course, sufficient to induce us to decide in opposition to this authority. We are, therefore, of opinion that the Judge of the District Court erred in rejecting the evidence offered, as stated in the bill of exceptions, and that the judgment below should be reversed.

Judgment reversed accordingly.

GORDON & AL. VERSUS HIGLEY.

It is proper for the District Court to direct such a change in the language of the jury as to make their verdict correspond to the usual forms, wherever such change cannot alter the evident meaning of their verdict.

This may be done without consent of the jury, and is therefore proper after their separation.

This was an action brought up from a Justice's Court by Appeal. According to the usual mode of doing business in the Justice's Courts, in some of the counties in this Territory, there are no pleadings: and the nature of the action is only determined by the subject matter. Dec. 1839.

The case comes into this Court, from the District Court, by a Writ of Error, and the error relied on is, that the Court below directed an alteration in the verdict after the separation of the jury.

Dec. 1839. RORER, STARR, AND MITCHELL, FOR PLAINTIFFS IN ERROR—GRIMES FOR DEFENDANT IN ERROR.

RORER, &c. for Plaintiff, cited 2 Wheat. 225 Patterson *vs.* U. States.—GRIMES for the Defendant. The verdict of the Jury can be amended from the Judge's Notes, 2 Str. 1197—1 Wils. 33—3 Term Rep. 749—2 Doug. 730—and that, too, even after final judgment, 3 T. R. 749.

The defect in the verdict can be remedied by by the Judge's Notes, or by entering a Remittitur, Cornwall *vs.* Gould, 4 Pick. R. 446—White *vs.* Snell, 9 Pick. R. 16—Grant on New Trials, 85—Usher *vs.* Dansey, 4 M. & S. 94—Rex *vs.* Hayes, 2 Str. 842—Clarke *vs.* Lamb, 6 Pick. R. 512—and 8 Pick. R. 415.

The case of Patterson *vs.* United States, 2 Wheat. 225, is not analogous. There the verdict was defective in matter of substance, and the jury omitted to find the issue.

BY THE COURT.

The only question presented, in this case, is, whether the Court below was right in directing the alteration of the verdict. It is contended by the Counsel for the Plaintiff in Error, first, that the Record does not show the nature of the original action—so that the District Court had no legitimate guide in assimilating the verdict to any of the approved technical forms, and, in the next place, that though the District Court has authority to correct mere clerical errors in entering the verdict of the Jury, it has none to change that verdict itself, even in matter of form.

In the return of the Justice this action is styled an Action of ASSUMPSIT. The proce dings in the Justice's Court are not fully set out in the transcript. Enough, however, appears there to prevent all doubt as to the nature of the action. Any formal defect, in this particular, should have been remedied (if at all) in the District Court. The Statute in relation to appeals declares, "that, upon the return of the Justice being filed in the clerk's office, the court shall be possesed of the cause, and shall proceed to hear, try, and determine the same anew, without regarding any error, defect, or other imperfection in the proceedings of the Justice.—[*Laws of* 1837, 8 *p.* 176.) This Court cannot countenance objections founded on defects which might have been corrected in the Court below, and of which, even without such correction, no advantage could there have been taken. We must, therefore, regard this case as though it had been an action of assumpsit, regularly brought and conducted.

We think, also, that the Court below was right in directing the alteration of the verdict. No form of expression could have more explicitly revealed the intention of the jury than that by them adopted. We are not now called upon to decide whether any precise form of words is necessary in a case like this; but, at all events, we think it perfectly proper for the District Court to direct such a change in the language of the Jury, as to make their verdict correspond to the usual forms, whenever such change cannot, by possibility, alter the evident meaning of their verdict. This may be done without the consent of the jury, or even should they positively object, and is therefore perfectly proper after their separation.

In coming to this conclusion, we are not unsupported by authority. The Supreme Court of the State of New York (7 Cow. 29) have decided, that, in an Action of Replevin, where the jury merely found "for the plaintiff," it was proper for the Court to allow "SIX CENTS COSTS," and "SIX CENTS DAMAGES," to be added to the verdict by the clerk, "it being a mere matter of form and incident to the finding of the jury. This was not the correction of a mere clerical

error, but the actual finding of the jury was changed by the direction of the Court. We are, therefore, of opinion that the decision of the Court below be sustained. Dec. 1839.

Judgment affirmed.

SAMUEL BRASELTON VERSUS WARREN L. JENKINS.

This Court has no power to examine into errors in fact in the court below not appearing on record.

An erroneous decision of the Court below on an application for a new trial may be brought here for review and correction.

BY THE COURT.

The first and principal question to be decided in this case is, whether we can, on writ of error, examine into any errors in fact, in the Court below, which do not appear upon the Record. The cases cited show, that the Supreme Court of the State of New York correct errors of this nature. Those cases, however, also show that this power results from the broad extent of jurisdiction, conferred upon the Court by Statute. The practice in England seems, in this respect, similar to that in New York, and for a like reason. Dec. 1839.

Our powers, in this particular, seem rather more narrow and limited. The Statute seems to confine our remedial control, over the District Courts, by Writs of Error to matters of law.—(Laws of 1836, p. 23.)

But the principal reason why errors in fact cannot be corrected in this Court, is, that we have not the power to try any issue that might be joined thereon. The Supreme Court of the State of New York can issue a *Venire* to try questions of fact of this nature, which can only be tried by a jury.—(Arnold *vs.* Sanford, 14 Johnson's Reports 422.) This seems one of the chief arguments relied upon, in that case, for deciding that errors in fact might be corrected in that Court. It would seem, from the English books, that error in fact in an inferior Court cannot be corrected in the House of Lords, or in the Exchequer Chamber, because, in neither of those Courts, can there be a Trial by Jury. Such is the case with us. The Act of Congress organizing this Territory (Section 9) declares, that, in no case removed here from the District Court, shall a trial by jury take place in this Court. And the law makes no provision for sending an issue down for trial to the District Court. Upon the principles acted on by the Courts of other countries, therefore, it would seem impossible for us to correct the error in fact, complained of in this case. That cases of this nature may arise, involving the greatest degree of hardship and injustice, and which will be altogether remediless in a Court of Law, may readily be imagined. But the remedy must be applied by the wisdom of the Legislature, rather than by the discretion of the Court.

But it is said that the pleadings in this case are such as to dispense with the

Dec. 1839. necessity of a trial by jury. That the plea of the Defendant in Error is tantamount to a Demurrer, and confesses every error in fact which is well assigned. This may all be true, but still, if, as a general rule, we are not authorized to take cognizance of, and to correct errors in fact, we cannot found so important a branch of jurisdiction upon a particular, and perhaps accidental, state of pleading.

Besides, by the authorities on this subject it seems to be settled that the plea of the Defendant in Error in this case, only confesses those errors in fact, WHICH ARE WELL ASSIGNED. If we cannot entertain questions of that nature, can any errors in fact ever be WELL ASSIGNED?

Another error assigned is, the refusal of the Court below to grant a new trial. There is no doubt but that an erroneous decision of the Court below, on an application for a new trial, may be brought up here for review and correction, for such a power appears to be conferred by Statute.—(Laws of 1836, p. 23.) But as this is a question principally addressed to the discretion of the Court below, a strong case must be presented to authorize the interposition of this Court. The present case does not seem to us one of that nature. The grounds upon which the application for a new trial was founded, are, first, That the damages were excessive: second, That the Defendant was misled by an observation of the Attorney for the Plaintiff below, by reason of which he was absent from the trial.—There is nothing before us from which we can infer either that the damages were excessive, or that the Defendant below had any sufficient reason for neglecting to prepare for the trial. We, therefore, think that the Judge of the District Court, in over-ruling the motion for a new trial, did not transgress the limits of a sound legal discretion.—The Judgment of the Court below is, therefore, affirmed.

EDWARD POWELL VERSUS THE UNITED STATES.

Omission of an arraignment will be a sufficient ground for reversing a judgment.

BY THE COURT.

Dec. 1839. The first error assigned in this case is, that there was no plea pleaded by the defendant below, previous to the trial. It is not absolutely necessary in all cases, that the defendant should actually plead. He will be presumed to plead not guilty, even if he should stand mute, especially in capital cases. But it is a general rule that the total want or omission of an arraignment will be a sufficient ground for reversing a judgment—(1 Chitty's Criminal Law, p. 418.) Had the record stated that the defendant had regularly appeared and pleaded, an arraignment would have been implied by that act. As, however, there is no evidence, from the record, that the defendant pleaded—that he was arraigned—or that he even personally appeared, the judgment in this case must be reversed. There are other essential errors, but the one already examined being sufficient, the others need not be considered.

Judgment reversed.

HARRELL VERSUS STRINGFIELD.

Dec. 1839.

The technical phraseology of the verdict of a jury is not essential. And may be changed by the Court.

The statute does not require the jury to assess damages in replevin, except when the plaintiff fails to prosecute his suit.

This was an Action of Replevin, brought by the Defendant in Error *vs.* the Plaintiff in Error, and Verdict was for the Plaintiff in Replevin,—upon which the Defendant in Replevin moved for a new trial, on the ground that verdict was contrary to evidence.

For the Plaintiff in Error RORER and STARR.

For the Defendant in Error GRIMES cited Cornwall *vs.* Gould, 4 Pick. R. 446—White *vs.* Snell, 9 Pick. R. 16—Grant on New Trials, 85—Usher *vs.* Dansey, 4 M. & S. 94—Rex *vs.* Hayes, 2 Str. 842—Clarke *vs.* Lamb, 8 Pick. R. 512—8 Pick. R. 415.

BY THE COURT.

The errors relied upon for reversing the Judgment in this case, are, first, That the Verdict of the Jury does not dispose of the issue; and, second, That the Verdict is not found in accordance with the Statute, which requires the Jury to assess the damages.

The action was originally commenced before a Justice of the Peace. In his transcript, sent up to the District Court, on appeal, he states that issue was joined, without declaring what that issue was. Upon that issue the verdict of the jury in the District Court was, "We, the Jurors, find a verdict for the defendant, (Stringfield) and award to him legal damages."

This is, certainly, a very informal verdict; but the case comes nearly within the principle decided at the present Term, in the case of Gordon and Washburn *vs.* Higley, except that the verdict was not rectified in form in the Court below. Whatever might have been the issue, there can be no doubt as to the intention of the jury, It would have been proper for the District Court to have changed the phraseology of the verdict, so as to have given it a correct technical form—but we do not deem it essential. As to the second point, the Counsel for the plaintiff seems to have mistaken the Statute. The assessment of damages referred to is only directed in case the plaintiff fails to prosecute his suit with effect, and without delay. This does not appear to have been the case in the present instance.

But the verdict of the jury, in "awarding legal damages," is doubtless very uncertain: this would have been fatal had it not been cured by subsequent action in the Court below. Something was said, in the argument, of a Remittitur having been entered there. This does not appear upon the Record. But, in entering up the Judgment, no notice is taken of those "damages." The Judgment is, that the defendant go thence without day, and recover of the plaintiff eighty-eight dollars forty-five cents, for his costs and charges, &c. These costs and charges are incidental to the finding of the jury "for the defendant"—so that the residue of the verdict was either regarded as surplusage in the Court below, or a Remittitur must have been there entered by the defendant. In either case no injury has resulted to the plaintiff. It will not, therefore, form a sufficient basis for the reversal of the judgment.

We take this opportunity of recommending to the Members of the Bar greater care in relation to the entries in the Records of the District Courts. While we are determined not to disturb proceedings, in those Courts, for technical er-

Dec. 1839. rors, which can work no possible harm, we shall not hesitate to do so whenever there are plausible grounds for supposing that such errors may create an injury to the party asking a reversal.

The Judgment of the Court below is affirmed.

WM. RIGGLESWORTH VERSUS ISAAC REED.

BY THE COURT.

Dec. 1839 The proceedings in this case have been so irregular, and the record is so imperfect, that the judgment cannot be allowed to stand. The defects pointed out under the fifth and sixth head, in the assignment of errors, are fatal. The name of the garnishee against whom judgment was rendered was left blank in that judgment. The amount of the costs and damages was also left blank. For these and many other errors, we think that the judgment below should be reversed.

Judgment reversed.

LESTER WALLIS, PLF. IN ERROR, VERSUS WILLIAM SPARKS.

Writ of error will only lie where there has been a final judgment in the Court below.

Dec. 1839. In this case the verdict was for the Defendant in errror in the court below, and judgment thereon was never rendered, having been arrested, on the motion of plaintiff in error. In this stage of the proceedings the plaintiff Wallis, brings his writ of error to the Supreme Court. And now the defendant moves to dismiss the case from the docket, on the ground that a writ of error does not lie till after final judgment.

BY THE COURT.

The motion in this case must be sustained. Strictly speaking perhaps the motion should have been to quash the writ of error, but the difference is not very material.

Writs of error will only lie where there has been a final judgment in the Court below. This in general only embraces those decisions and determinations of the Court which would be a bar to another action for the same cause. The arrest of judgment is in no case such a bar. The parties must wait till there is a final judgment of some kind, when the whole proceedings below may be brought before the appellate Court by a writ of error. Dec. 1839.

The plaintiff in this case might have moved for judgment against himself in the District Court, which would have been ordered as a matter of course, (Fish *versus* Featherwax, 2 Johnson's cases, 215, and Horne *vs.* Barney, 19 Johnson's Reports, 247), or he might have retraced his steps and accommodated his proceedings, to suit the views of the Court until he had obtained final judgment. After which, in either case, if he had felt himself aggrieved, he might have brought the whole matter here for review.

LAUNCELOT G. BELL VERSUS JAMES ACHISON & AL.

By appearance and pleading the defendant waives all defects in the process as well as in the service thereof.

On a plea of illegality of contract, and issue joined, the only question presented was whether the notes were given for the consideration stated, and not whether that consideration were legal or not. Had the plaintiff below wished to present the latter issue, they should in their replication have confessed and avoided the plea.

This Court cannot regulate its decisions on extrinsic evidence. The record is its only guide.

This was an action of debt brought by the defendants in error to recover the amount of certain notes of hand given by the plaintiff in error. The plea was that the contract which formed the consideration for the notes was illegal, being given in furtherance of a sale of public lands belonging to the U. States, The Court below charged the jury that if the plaintiff had improved the premises being public lands, such sale was legal. And to this the defendent excepts, and judgment being against him, brings his writ of error. Dec. 1839.

BY THE COURT

The two first points contained in the assignment of errors are readily answered. By appearance and pleading the defendant waives all defects in the process as well as in the service thereof. It is not therefore necessary for us to consider the sufficiency of such objections under different circumstances.

The consideration of the third point has been attended with greater difficulty. This difficulty has arisen principally from the fact that the record does not present the case which either party has seemed to contemplate. On the one hand the legality of the sales of public lands is attempted to be proved. This can have no relevancy to the case before us. The parties went to trial

Dec. 1839. in the court below upon an intirely different issue. The defendant pleaded "illegality of contract," inasmuch as the notes were given in furtherance of a sale of public lands belonging to the United States, &c. upon which issue was joined. The only question presented to the jury by this state of pleadings was whether the notes were given for the consideration stated? and not whether that consideration were legal or not. Had the plaintiffs below wished to present this latter issue, they should in their replication have confessed and avoided the plea of the defendant.

But on the other hand the counsel for the plaintiff in error seems equally to have overlooked the actual state of the record. His argument seems to suppose that the actual question presented to the jury on the trial in the District Court was whether the traffic in public lands was or was not legal. We find nothing in the record to warrant such a conclusion. A distant inference of that kind may be drawn from the charge of the court: but this inference is not sufficiently irresistible to authorise a conclusion by this court.

What is there upon the record to show that the verdict of the jury was predicated upon this charge? What evidence do we find there to prove that this charge was not a mere gratuitous dictum, a random observation, or speculative opinion, wholly irrelevant to the real question then about to be submitted to the jury. If this were the case it would now be altogether improper to disturb the judgment on account of that charge even although it were ever so erroneous.

But from various circumstances we are led to believe that the real question intended by both parties to be presented to the court and jury on the trial was whether or not the sale of public lands was illegal. If this had been the case the charge of the court was pertinent to the question. We think also that it was correct.

But we cannot regulate our decisions here upon extrinsic evidence. The Record is our only guide. According to that it would seem that the only inquiry was, whether the notes were given for the sale of public lands, as set forth in the plea, and denied by the replication. By rendering a verdict for the plaintiffs below, the legitimate inference is, that they found the notes were not given for the alleged consideration. The charge of the Court, therefore, was irrelevant to the question submitted to the jnry, and could have had no influence upon the verdict. It would, consequently, furnish no ground for a reversal of the judgment below.

Had the Court below instructed the jury to render a verdict for the plaintiff, in case they found that the plaintiff, Pierson, had improved the premises, &c. or had it, when properly requested, refused to instruct the jury that the circumstance of the land having been improved was wholly irrelevant under the existing state of the pleadings, and that the only question for them to try was as to the truth of the defendant's plea—in either case it would have been error. Nothing of this kind, however, appears upon the Record. We are, therefore, of the opinion that the judgment in this case be affirmed.

Judgment affirmed accordingly.

CHAPMAN & AL. VERSUS ALLEN.

The provision of the stat. rendering it necessary to furnish the defendant with a copy of the summons was doubtless intended for his own benefit, and may be waived by him.

The District Courts have a discretionary power to modify or reverse any order for arrest of judgment or of like nature during the term at which it was made.

BY THE COURT.

There are two principal questions to be considered in the disposition of this case; 1st, whether the service of the summons was so defective, that to have denied a motion in arrest of judgment would have been erroneous: 2d, whether, after having once sustained such a motion, and arrested the judgment, the District Court, at the same Term, can re-consider the matter, reverse the former order, and direct final judgment to be entered. If the course pursued by the District Court, in both these particulars, be correct, the judgment below must be affirmed. The authorities cited by Counsel do not bear directly upon either of these points, and our limited means have not supplied us with others more applicable. We shall, therefore, endeavour to apply the general principles of law and reason to the examination before us. Dec 1839

The sufficiency of the service upon two of the defendants, seems to be admitted in the assignment of errors. But it is contended, that the service upon the defendant Delashmutt was incurably defective. The Statute declares, that a summons shall be served by delivering a copy thereof to the defendant, if found, &c. and it is contended that no other mode of service will be sufficient.

The return of the Sheriff states, that the summons was served on this defendant by reading, he waiving the right of having a copy. This agreement of waiving the receipt of a copy, say the Counsel for the plaintiffs in error, was merely verbal, and such as the Courts do not recognize.

The rule, we think, is stated too broadly. It is true that Courts do not, generally, enforce the out-of-door agreements of parties, or their Counsel, which are not reduced to writing, but the case before us seems to belong to a different class. The Sheriff is an officer of the Court, and his returns, in writing, frequently furnish the sole basis for further judicial proceedings. If he makes a false return, he is liable to an action. Had the return on the summons, in the present case, been "served," the requisition of the Statute would have been complied with, and the propriety of the proceedings unquestioned. Did he intend to make a false return, he would doubtless adopt the latter method.

It seems to us, therefore, that there is no impropriety in our receiving and acting upon the return of the Sheriff in this case, as the truth. The provision of the Statute rendering it necessary to furnish the defendant with a copy of the summons, was doubtless intended for his own benefit. When the Court is satisfied, by legitimate evidence, that he has waived this right, will it allow him to lie still during all the preliminary stages of the cause, and then afterwards come in to arrest the judgment, and overturn all the proceedings? To establish such a rule would, we think, be countenancing bad faith, and subverting the ends of justice. We are, therefore, of the opinion that judgment in the Court below ought not to have been arrested for defective service.

With regard to the second question above proposed, it appears from the record, that judgment in the Court below was at first arrested; and that subsequently, that order was reversed and judgment entered. It does not appear, as the counsel for the plaintiffs in error seem to suppose, that after the arrest of judgment, a second default was entered, upon which judgment was finally ren-

Dec. 1839. dered. For some cause, the order of Court arresting the judgment seems to have been rescinded, which left the proceedings precisely where they were previous to the judgment being arrested. At that point they were taken up and judgment rendered upon the verdict of the jury. We see no impropriety in all this. It seems highly expedient that the District Courts should have a discretionary power to modify or reverse any order of this nature during the term at which it was made. Such a power, in most cases, will tend to the more speedy administration of justice by enabling that court frequently to correct some manifest error which had perhaps temporarily escaped detection.

As to the objection that time should have been given to the defendants to come in and plead after the arrest of judgment it is answered by the fact that we cannot regard the judgment as ever having been arrested, the order therefor having been reversed in the court below. We are therefore of the opinion that the judgment in this case should be affirmed.

Judgment affirmed accordingly.

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