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

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

Judgment affirmed.

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

ERROR TO MADISON.

It is not required to make *profert* of writings not under seal.
The statute makes it necessary for plaintiff to give oyer of all writings as the maker is bound to deny their execution under oath.
In a case on an assigned note between maker and assignee, a consideration need not be averred.

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

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

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

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

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

Judgment affirmed.

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

APPEAL FROM RANDOLPH

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

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

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

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

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

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

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

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