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.

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

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

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

Judgment affirmed.

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

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