

14529  $\frac{1}{2}$

No. \_\_\_\_\_

# Supreme Court of Illinois

Roberts

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vs.

Thompson

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State of Illinois

In the Supreme Court at Ottawa -  
Of the April Term A.D. 1862 -

Porteus B. Roberts  
impleaded with  
Francis T. Sherman

v.  
James Thomson &  
John Alston

Appeal from  
Superior Court  
of Chicago -

Point of Argument of  
Charles B. Bonney  
for appellant.

May it please the Court;

1. Relying upon the sufficiency of the points made, and the authorities cited in my printed Brief, I shall confine this memorandum to the mention of such matters only, as may seem to have been omitted therefrom, and which might naturally have been suggested in an argument at the bar, in addition thereto.

2. Error I. Brief p. 1, 2, 3.

This objection of the want of a sufficient copy of the instrument declared on, was made, in the first instance, not only, before

trial, but before plea - so nothing can be said to have been waived.

Sound reason, and the weight of authority requires a copy of whatever is necessary in the evidence to maintain the action. The requirement of a copy has no relation to the pleadings; but it relates exclusively to the evidence, and absolutely limits and controls the right of the plaintiff to give evidence at the trial. The defendant has the right to this disclosure of the evidence to be given, or the demand to be proved against him, before he can regularly be required to plead.

As an indorsement is essential to maintain the action, no copy of the cause of action can be deemed sufficient which omits it. Upon the indorsement, the title of the plaintiff so far depends that without proving it as alleged in his declaration, he can by no possibility maintain his action. If no copy of the indorsement be filed, none could be proved. I will not stop to argue the self-evident propositions that when the statute says "copy", it means "copy" - and that a blank

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piece of paper, with a signature at the bottom, is not a "copy" of an instrument transferring title, written above such signature.

Error II. pp. 3. 4. 5. Brief -

I submit this point upon the ~~proposi~~-  
=tions stated, and the cases cited in the printed brief, with the single remark, that the case of Sheppard v. Ozden & Scam. 260. is unanswerable authority against the alleged waiver of the plea to the jurisdiction; and that the appellants do not attempt to answer the argument that until a full disclosure of the cause of action, the defendants not only may not, but cannot plead that as to that particular cause of action, he is privileged to be sued elsewhere.

Error III. pp. 5. 6. Brief -

To this assignment of error I earnestly ask the diligent attention of the court, for I believe it to be well-founded, both in reason and on authority; and by it I hope to induce

the court, or rather to give opportunity  
to the court to suppress an evil  
which if long allowed to flourish,  
will in the end reduce the boasted  
right of trial by jury, to a melan-  
-choly side-show of courts of jus-  
-tice, exhibited for the amusement  
of the people, while judges, to every  
practical intent usurp the  
province of jurors, and determine  
both the law and the fact, in  
a manner as arbitrary and as  
summary as the most ardent  
advocate of the dispatch of both  
suits and their causes could  
desire.

In the first place, I desire to in-  
-press upon the court the fact,  
which no amount of argument  
and reference can make other-  
-wise, that the

### Question

Whether conditions and  
restrictions can be  
affixed by the legislature  
to the right to trial by  
jury? ~~in any manner~~  
~~and restrictions~~  
~~in this statement~~

is still an open and undecided ques-  
-tion in this State. I am grieved to  
say that such a question has  
arisen — I blush for the honor  
of the law to think that it has  
become necessary to argue here,  
that the right to trial by jury is  
unconditional — that it has become  
necessary to appeal to this court,  
for the preservation of the right to a  
trial of common law issues  
according to the course of the common  
law. The precise state of the  
case is this; the appellees de-  
-clared in assumpsit, the  
appellant filed his plea of non  
-assumpsit; the court below, on  
motion of appellees, struck said  
plea from the files, entered a  
default of the appellant, assessed  
the appellees damages and gave  
final judgment, for no other  
reason than that the appellant  
had not filed with his plea an  
affidavit of a good defense upon  
the merits to the action of  
the appellees. The appellant  
now insists that this action  
of the Superior Court was erroneous

that the statute requiring an affidavit  
of merits is unconstitutional &  
infringing the right to trial by jury;  
and that for this cause, the judg-  
=ment below ought to be reversed.

I know it is very common to  
assume that this court has  
held the act in question con-  
=stitutional; nor is this the first  
instance in which an unconsti-  
=tutional <sup>act</sup> has been protected by  
bringing up a case upon it, assign-  
=ing an insufficient reason for  
the support of a point of uncon-  
=stitutionality, obtaining the decision  
of the court of last resort that the  
statute was not unconstitutional  
for the reason shown, and then  
boldly and freely avowing that  
the supreme court had decided  
the act constitutional. This  
court cannot go out of the record  
and assign other points for  
the determination of causes than  
those made by the parties. The  
court must try cases as it  
finds them, and its decisions  
are authority only in parallel  
cases. There could hardly be

more rank injustice, than to allow  
a single half-prepared, unargued  
case to establish a rule for the  
regulation of the affairs of a great  
people.

This court has decided, in one of  
the cases on affidavits of merits  
that it is not unconstitutional  
for the legislature to make Regula-  
-tions of practice for particular  
courts, not applicable to other  
courts of the same rank through-  
-out the state.

"Only this and nothing more".

Whether the act in controver-  
-sy infringed the right to trial by  
jury, is a question which does not  
appear to have been alluded to in  
that or any other reported case.

And I feel confident that if the  
Court will reject all idea that the  
question has been determined, and  
will receive and consider it with  
a perfect willingness to sustain  
the point made, if the law  
so require, I shall not fail to  
obtain the judgment I so earnestly  
ask.

The Constitution, A. 13. S. 6. declares that the right of trial by jury —

1. shall remain inviolable;
2. and shall extend to all cases at law;
3. without regard to the amount in controversy.

The plain meaning and import of this provision is, —

that there shall be no interference with the right to trial by jury;

that it shall remain as it was at the adoption of the constitution;

that neither the courts nor the legislature should have power to impose any new limitation, condition, or restriction;

that the phrase all cases at law, means all cases triable on the law side of the court, all cases except cases in equity.

that the words, "without regard to the amount in controversy", were added to preclude the idea that the legislature could make any exception to the rule laid down.

Attempts have been made from time to time to fitter away the meaning of the constitutional

safeguard — to induce the courts to declare that it was merely a "glittering generality", and that notwithstanding the provision, the legislature had ample power, under the specious guise of regulating matters of practice, to make limitations, impose conditions, and attach restrictions of, on, and to the right to trial by jury.

The question is, not whether the condition imposed on the appellants in this case, was a hard and unreasonable one, the question is, whether the legislature is permitted to be the judge of what is or is not expedient in that behalf — in simple terms whether the legislature has any power to impose any condition at all.

This act prohibits a trial by jury in all cases ex contractu, in Cook County, except upon the condition that the defendants file an affidavit denying the right of the plaintiff to recover upon the merits. But the plaintiff may concede

to waive this condition, and resort  
to a trial by jury as at common  
law. Such is the discrimination  
between plaintiffs and defendants  
such are the advantages given  
to the former in every case.

The rule once was that the  
plaintiff must have his proper  
form of action, his regular  
pleadings, his sufficient proofs,  
his formal finding and lawful  
judgment. The presumption  
of law was against the plaintiff  
till he had established his case  
by the evidence. In what  
conceivable way can the defen-  
-dant know before plea or  
trial, whether the plaintiffs  
evidence may not disclose  
something which in the law,  
may be a complete bar to his  
recovery?

Under this statute, the right  
of the defendant to take the  
opinion, not of one judge,  
but of twelve jurors upon  
the evidence against him  
— to argue the credibility of  
witnesses, the sufficiency of

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the proofs, the substantial  
justice of the case, are all  
denied. And what is the  
meaning of this specious  
provision for a denial upon  
the merits? In legal language,  
and in common parlance,  
these words mean the very  
right and equity of the case,  
supposing proper action, hearings,  
proofs and proceedings. Is  
it intended by this bold and  
reckless innovation to transform  
courts of justice into mere  
collection shops, and to put  
the clumsy ignorance and  
the blundering stupidity of  
common speculative collec-  
-ting agents on a par with  
the learning, the genius, the  
skill and the honor of the  
great profession? If so,  
then well may we hang our  
heads in shame, exclaiming,  
"To what base uses have we come at last!"  
And how notorious is the fact,  
that this statute was passed  
for the very purpose of facilitating  
collections in the Chicago Courts!

But it is sometimes insisted  
that the pressure of business  
was so great, that this statute  
became necessary, to facilitate  
its disposition, and relieve  
the docket. That is to say;  
at Peoria or Rock Island,  
there is time to indulge  
defendants in the exercise  
of a general right to put them-  
selves upon the country for  
trial, - but in Chicago the  
people must forego this little  
luxury, that their judges  
may go home at 3 o'clock  
to dinner! If the rights, priv-  
ileges and liberties of the people  
are to be cut down and abridged,  
in proportion to the prosperity  
of the section where they reside,  
then can be no end to the  
course of the government, but  
ultimate anarchy and ruin.  
If the business is heavy, in-  
crease the courts - if the  
cases are too numerous  
create additional judges -  
but let not the citizen who is  
summoned to the bar of a

court of justice be told that the court is really too busy to indulge him with a jury trial on a common law issue, unless he will swear that "honor bright" he ought not to pay the money for which the plaintiff sues. After all, what is this statute, but an attempt to reduce the highest courts of a great commercial city to the general course of procedure before that wonderful public functionary, a justice of the peace? Let the legislature go one step further and abolish pleadings in writing, and the work commenced by this act will be pretty nearly complete.

Such statutes are not passed at the instance or for the benefit, either of lawyers or their clients — they are procured by the intrigue of a different creature altogether, one who wants to get judgments and executions without the terrible labor by which the Grand Profession is mastered, and who feels it not exactly safe to encounter the risk, the burning

on the skill of the bar in an open-  
-field endeavor to get judgment  
on a promissory note.

I sincerely beg the pardon of  
the Court for any unseemly  
heat of language in the course  
of this discussion; but my  
feelings are so strong against  
every innovation of the kind  
I am now combatting, that  
it seems to me incredible that  
lawyers and judges of learning  
and experience, should seriously  
indulge to uphold one of such  
a character.

Admit the right of the Legislature  
to enact this statute as a mere  
regulation of practice, and there  
is no limit to the exercise  
of such a right, this side of a  
simple prohibition of trial by  
jury, which, of course would never  
be attempted.

If the defendant may, as a con-  
dition precedent to a trial by jury,  
be required to make affidavit of  
a good defence upon the merits,  
he may also be required to state  
the nature of that defence, - to

Specify the state of demands between himself and the plaintiff, — to show by an exhibit the balance due from one party to the other — to disclose the evidence by which he expects to maintain his defence — and then, under pretence of merely regulating the introduction of evidence &c. these statements and disclosures of the defendants may be made evidence for the court or jury.

In one word, either this act is unconstitutional, or a statute can be devised under which a defendant may be summoned before a single judge and compelled to confess a judgment against himself, without plea, evidence or trial.

If on the other hand this act be declared void, as infringing one of the most sacred and valued constitutional rights of American citizens, the way is clear, — the administration of public justice will go on in the old channels, hewn through the rocks and mountains.

= tains of human experience  
by the toil of the bench and the  
bar through the most hono-  
= able centuries of the world's history

I submit here for consideration  
of reference, that part of my  
printed brief which relates to this  
part of the case, and in this  
connection ask the particular  
attention of the court, to the  
case of

Parsons v. Bedford & al. 3 Peters 447.

And in that connection to the  
cases of

Greene v. Briggs & al. 1 Curtis 311  
Armstrong v. Jackson, 1 Blackford 375.

But the question at bar is one  
to be determined, not chiefly  
by authority, by cases hunted  
up in books of reports, but by  
sound reason, and the applica-  
= tion of principles too well-  
-known to require the citation  
of books in their support.

### ERROR III.

The appellant, in due time filed in said cause, his plea of the general issue, and put himself upon the country for trial, nevertheless the court, on motion of the appellee struck said plea from the files, and denied said appellant a trial by jury, for no other reason than that said appellant would not file an "affidavit of merits" with said plea.

#### *Points and Authorities :*

Constitution Art. 13, S. 6, 8, 19.  
Sedgwick S. & C. L., 542, 612, and cases.  
1 Bow. Inst. 7, No. 5.  
Ross v. Irving, 14 Ill. R. 171.  
Act of 1853, Sec. 3, 14.  
Following cases on "affidavit of merits."  
McDonald v. Olwell, 17 Ill. 375.  
Castle et al v. Judson, Ibid. 381.  
McDonnell v. Murphy, et al, 20 Ill. 346.  
Corbin v. Turrill, et al, Ibid. 516.  
Hurd et al v. Burr et al, 22 Ill. 29.  
Whitney et al v. Fuller, et al, Ibid. 33.  
Anthony &c. v. Ward, Ibid. 180.

1. The point now made does *not* appear to have been raised in any previous case.
2. The Constitution declares that the right to trial by jury shall be inviolate in *all* cases. This act attempts to prohibit it in *all* cases *ex contractu*, except upon the condition that an affidavit of defence be filed.
3. The right to trial by jury does not depend on guilt or innocence, defence, or no defence. *The defendant has the right to take the judgment of twelve jurors, instead of one Judge, upon the EVIDENCE against him, whether he has any defence or not.*
4. The object of the constitutional guaranty was not so much to guard against open and bold attempts to take away the trial by jury, as to protect the citizen against just such plausible innovations as this. If such an affidavit may be required, the legislature may go further, require a sworn admission of the amount due, and declare such admission evidence before the court or jury, and thus sweep away a trial by jury in ninety-nine cases in every hundred.
5. This act seeks to compel a defendant under the pains and penalties of perjury, to admit his adversary's right to recover, waive a jury, abandon defence, and submit to the opinion of the judge upon the evidence against him.
6. The "law's delay" is absolutely no reason for looking with any degree of favor upon such an act. The true remedy is, an increase of Judges.
7. It must be a refreshing consolation to the citizens of Chicago, to reflect that the legislature has endeavored to establish a presumption of law, that they owe everybody who may choose to amuse himself or gratify his malice by an action against one of them.
8. As one of the officers of this court I enter my solemn protest against all such legislation, whereby extraordinary privileges are given to, or burdens imposed upon the inhabitants of particular localities in this State. I never have believed, and trust I never shall believe, that such acts deserve the dignity or name of laws, or are within the proper province of the legislature.

Error IV. pg. 7. Brief -

This assumption of error denies the right of the court below to strike out the appellants notice of setoff, for want of an affidavit of merits.

Strictly speaking, the setoff is not a defence - it is a counter claim, and taken by itself, admits the plaintiffs demand, but seeks to discharge it by a demand against the plaintiff, to be proven on the trial.

Even if the statute be not utterly void, it is not to be extended by any implication but is to be restricted by every intendment. It does not necessarily follow that because a denial of the plaintiffs cause of action cannot be put in without oath, that the defendant cannot admit the plaintiffs claim, and declare his counter demand to discharge it. On the contrary, as to this counter demand, the defendant becomes a plaintiff,

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and there is any validity  
in a requirement of an  
affidavit of merits, then in  
this case, the defendant  
is entitled to have such an  
affidavit, before the plaintiff  
can be permitted to deny his  
demand. By what other prin-  
ciples can the case be deter-  
mined? When the defendant  
admits the plaintiff's claim  
and sets up new matter,  
he becomes himself to all  
intents a plaintiff - he  
has the right to open and close  
the case, and if the proofs  
and pleadings warrant, may  
actually have an affirmative  
judgment in his favor for  
the recovery of the sum which  
may be his due.

See printed brief and in  
connection with Sec. 19. of  
Practice Act, the case  
of Hurd et al. v. Burr et al.  
22 Ill. R. 29.

Error V. 1/2 7. 8. printed Brief -

I submit this point upon  
the matter already urged in  
support of the first error assigned.

20. ~~Agenda~~ No. 8  
2441  
~~Supreme Court~~ -

Posters B. Roberts

- v -  
James Thompson &  
John Alston -

Argument  
of  
Charles C. Boney  
for appellant

To be filed May 6, 1862

J. Leland  
clerk

State of Illinois f.

In the Supreme Court at Ottawa  
Of the April Term A.D. 1863

Porteus B. Roberts

v.  
James Thomson &  
John Alston

Appeal from Superior  
Court of Chicago -

Petition for Rehearing.

The said Porteus B. Roberts respectfully prays a rehearing of the above - entitled cause, which was heard and decided at the last preceding term of this court, for the following among other reasons, to wit;

1. The only material question in the case, has not been considered by the court.
2. The opinion given by the

court, is confined to compa-  
=paratively unimportant  
exceptions taken in the  
court below, and which,  
for all the purposes of  
this application, may  
be admitted to have been  
made for delay. For it is  
a right of a defendant, or a  
plaintiff, to delay a cause,  
if that be his interest,  
and the law allow him  
to do so.

3. The main question —  
Whether refusing to  
try a complete and  
perfect common  
law issue, unless  
the defendant will  
support his plea by his  
own oath that he has  
a good defence upon  
the merits, is an  
infringement of the  
constitution in this,  
that it attached a  
condition to the right  
to trial by jury, does

not appear from any published case to have ever been considered by this court.

It was made for the first time in this case. The act of the legislature in question is of very recent date, and very limited territorial operation.

4. If the phrase "upon the merits" means anything, it prevents a defendant from making a defence at law which may be perfectly good in law, as for instance taking advantage of a variance, or other like defence upon the trial.
5. It does not require that the court, as is said in the opinion given, should "waive" this objection to the dignity of a constitutional question.

— it is surely a question,  
and it is both novel  
and important. It  
was nearly thirty years  
after the statutes of bail  
were passed, before the  
leading cases arose.

6. Beside this, the court  
has not passed upon the  
4<sup>th</sup> Error assigned -  
If the third had been  
sustained, this would  
have fallen to the ground  
— but if the 3d. be over-  
ruled, the sword must  
be two edged, and cut  
both ways - The 19<sup>th</sup>  
Section of the Practice  
Act, makes the defen-  
dant a plaintiff, and  
the plaintiff a defendant  
as to the matter of a  
counter claim.

The appellant therefore  
prays the court to refer  
again to the 5<sup>th</sup> and 6<sup>th</sup>  
pages of his printed brief  
and to the 3d and subse-  
=quent pages of his written  
argument, herewith sub-  
=mitted, and to allow  
him a rehearing of this  
cause, if the court shall  
be of opinion that the  
law of the land so  
requires.

Respectfully  
Charles C. Borchers  
for appellant,  
petitioner -  

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244.

Porter, B. Roberts

James Thomson  
John Alston

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Petition for  
Rehearing

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Filed Apr 24, 1863.

J. L. and M.

Borners

STATE OF ILLINOIS.

IN THE

SUPREME COURT

OTTAWA TERM, A. D. 1862.

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PORTEUS. B. ROBERTS, Impleaded with F. T. SHERMAN,

v.

JAMES THOMSON and JOHN ALSTON,

---

*Appeal from Superior Court of Chicago.*

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BRIEF OF CHARLES C. BONNEY  
FOR APPELLANT.

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CHICAGO, ILL :  
G. B. MAIGNE & CO., BOOK AND JOB PRINTERS.  
1862.

# STATE OF ILLINOIS, ss.

{ IN THE SUPREME COURT AT OTTAWA,  
{ OF THE APRIL TERM, A. D 1862.

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|                       |   |                                                   |
|-----------------------|---|---------------------------------------------------|
| PORTEUS B. ROBERTS,   | } | <i>Appeal from Superior Court<br/>of Chicago.</i> |
| <i>Inpleaded with</i> |   |                                                   |
| FRANCIS T. SHERMAN,   |   |                                                   |
| <i>v.</i>             |   |                                                   |
| JAMES THOMSON,        |   |                                                   |
| JOHN ALSTON.          |   |                                                   |

## BRIEF OF CHARLES C. BONNEY,

FOR APPELLANT.

This was an action of assumpsit, upon a promissory note, brought by the appellees as indorsees against the appellant and his co-defendant as makers. The defendant Sherman was not served—the appellant Roberts, being duly served appeared and expressed his willingness to defend the action. So much of the subsequent proceedings as has been deemed essential to an understanding of the questions raised, is given under the several assignments of error which are set forth below.

### ERROR I.

1. The appellees, plaintiffs below, did not file any sufficient copy of the indorsement by which they claimed title to the promissory note sued on, nevertheless the said Superior Court

denied the motion of said defendant to continue said action for want of such copy.

*Points and Authorities.*

1. The statute requires a "copy" and gives an absolute right to a continuance for want of it. The appellees filed only a copy of the note, with the names of the payees written across the back of it "*in blank*."

Practice Act, Sec. 9.

2. A "copy" is a true transcript of an original writing.

Bon. Law Dic. "Copy."

3. An indorsement or assignment of a negotiable instrument is an order and direction by which the payee, under the authority of the statute, transfers his title to the instrument to some other person, and authorizes the maker to pay the money therein specified to such person.

4. Under our statute of negotiable instruments, the title to such instrument cannot be transferred, except by assignment.

Statute and cases under it.

5. It is self evident that there can be no obligation, without an obligee.

Smith v Bridges, Bre. R., 2.

Mayo v. Chenoweth, Bre. R., 155.

6. An indorsement in blank, does not pass the *legal title* to the instrument, but only gives the holder a *power of appointing* the payee — a power which, so to speak, runs with the instrument. The equitable title passes by mere delivery, and the possession of the instrument is a protection against intermediate equities.

1 Salkeld, 130.

1 Campbell, 442.

Camden *et al* v. McKoy, 3 Scam 437.

Cushman v. Derment, 3 Scam 499.

Carroll v. Weld, 13 Ill. 683.

Hance v. Miller, 21 Ill. 686.

Sappington v. Pulliam, 3 S. 385.

7. An instrument with blanks in it, cannot be a copy of an instrument with the blanks filled up.

pellant had leave to plead by a day named within the same term, and filed this plea within the time allowed.

2. The established order of pleading rests on this rule; that a party shall not at one stage of the case, make a defence which is inconsistent with his preceding action therein. Thus a defendant may interpose several dilatory defences, provided only, that he interpose them in the order which the rules of pleading require.

Gould's Pleading. c. 5 Sec. 1. 2.

3. In this State, at least, only a plea "in chief," or "to the merits" waives the right to plead a personal privilege to be sued elsewhere, in abatement.

Cobb v. Ingalls, Bre. R, 180.

Shepard v. Ogden, 2 Scam. 260.

Walker *et al* v. Welsh *et al*, 14. Ill. 277.

And other cases.

4. A motion for a more specific disclosure of the causes of action, is not inconsistent with a subsequent plea that the defendant ought to be sued elsewhere upon the same causes of action. After an amendment of a declaration, a defendant may even have a continuance on his motion, and *at the next term*, file such plea in abatement.

Sheppard v. Ogden, 2 Scam. 260.

5. A defendant has the same time to plead, after a bill of particulars—or after oyer, as at the return of the summons. He should not plead till after declaration—meaning, of course, a sufficient declaration.

3 Chitty Gen. Pr. 703,

Kerford v. Edpards, 12 Jur. 440.

Douglass a. Green, 2 Chitty R, 7.

5. The court proceeded to try the *sufficiency* of the plea on *motion*. The *propriety* of the plea, only, is so triable—whether the plea be sufficient in law, must in the first instance be tried upon demurrer. If this distinction be abolished, demurrers may become obsolete, and plaintiffs shield themselves from the sometimes serious consequences of a judgment on demurrer in favor of a defendant. But it seems hardly supposable that this action of the court below will be seriously defended.

7. But the plea was sufficient. It is drawn in the very

words of the statute, a sufficient way of pleading even in indictments. The objection made is, that the plea does not deny that the action was commenced by attachment. If it was so commenced, the plea was improperly filed and the objection goes, not to the *sufficiency* of the plea, but to its *propriety*, and the remedy is by motion to strike out the plea, without regard to its contents, as if in an action of trover, non assumpsit should be pleaded. The plea might be good, but not receivable in this action. The court must be presumed to know the kind of action before it, whether *ex delicto* or *ex contractu*, *in personam* or *in rem*.

8. But this exception of attachment cases, is in a subsequent section of the statute; and it is not referred to and engrafted on the enacting clause, and perhaps need not be negatived in pleading. If proper matter of plea, it should be replied. It is conceded, however, that the rule requiring a plea to the jurisdiction to be certain to every intent in particular, appears at first blush to apply with force.

Sedgwick, Stat. & Con. Law 62, 223.  
1 Chitty Pl., 223.

### ERROR III.

The appellant, in due time filed in said cause, his plea of the general issue, and put himself upon the country for trial, nevertheless the court, on motion of the appellee struck said plea from the files, and denied said appellant a trial by jury, for no other reason than that said appellant would not file an "affidavit of merits" with said plea.

#### *Points and Authorities :*

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Hurd et al v. Burr et al, 22 Ill. 29.  
Whitney et al v. Fuller, et al, Ibid. 33.  
Anthony &c. v. Ward, Ibid. 180.

1. The point now made does *not* appear to have been raised in any previous case.

2. The Constitution declares that the right to trial by jury shall be inviolate in *all* cases. This act attempts to prohibit it in *all* cases *ex contractu*, except upon the condition that an affidavit of defence be filed.

3. The right to trial by jury does not depend on guilt or innocence, defence, or no defence. *The defendant has the right to take the judgment of twelve jurors, instead of one Judge*, upon the EVIDENCE against him, whether he has any defence or not.

4. The object of the constitutional guaranty was not so much to guard against open and bold attempts to take away the trial by jury, as to protect the citizen against just such plausible innovations as this. If such an affidavit may be required, the legislature may go further, require a sworn admission of the amount due, and declare such admission evidence before the court or jury, and thus sweep away a trial by jury in ninety-nine cases in every hundred.

5. This act seeks to compel a defendant under the pains and penalties of perjury, to admit his adversary's right to recover, waive a jury, abandon defence, and submit to the opinion of the judge upon the evidence against him.

6. The "law's delay" is absolutely no reason for looking with any degree of favor upon such an act. The true remedy is, an increase of Judges.

7. It must be a refreshing consolation to the citizens of Chicago, to reflect that the legislature has endeavored to establish a presumption of law, that they owe everybody who may choose to amuse himself or gratify his malice by an action against one of them.

8. As one of the officers of this court I enter my solemn protest against all such legislation, whereby extraordinary privileges are given to, or burdens imposed upon the inhabitants of particular localities in this State. I never have believed, and trust I never shall believe, that such acts deserve the dignity or name of laws, or are within the proper province of the legislature.

## ERROR IV.

The appellant in due time filed in said cause a notice, in manner and form as required by law, of his claim and demand against the appellee, greatly exceeding the amount claimed in and by said declaration, but the court, without any sufficient cause, on motion of said appellee, struck said notice from the files, and denied the appellant an assessment of the balance which he claimed to be his due, etc.

*Points and Authorities.*

Practice Act, Sec. 19.

1. The intention of the statute is to put parties having claims against each other on an equal footing, no matter which commences suit. The object of the law is, to prevent the multiplication of actions, and unnecessary costs.

2. The defendants claim is to be regarded as a counter declaration, which the plaintiff is required to defend; and every intendment and advantage which the plaintiff has as to his demand, ought also to be allowed to the defendant as to his claim.

3. The statute, being remedial—working no injury—and contravening no superior law, ought to be liberally construed. The appellant moved a default and assessment of the balance his due, unless appellee should file an affidavit of merits, etc. not that the appellant “believed in affidavits of merits,” but to show how absurd must be the attempt to apply such an act. The court by this motion were required to extend the rule to the defendant’s claim, and give him the advantages that would follow, or to deny one of the parties to an action, whom the general law endeavored to make equal, a very large privilege vigorously enforced for the other. The court took the latter alternative, and denied the motion.

## ERROR V.

There was a material variance between the instrument of which a copy was attached to the declaration, and the one given in evidence, nevertheless, the court denied the motion of the appellant to exclude the same, but received the same in evidence and assessed damages thereon, and refused to set aside such assessment.

*Points and Authorities.*

1. This is a renewal of the point that the name of the payee, in blank on the back of the promissory note, was not a "copy" of a special indorsement to the plaintiffs.
2. Such a variance is fatal, and the proper time to make the objection is when the evidence is offered.

*Morris v. Badger*, 6 Cowen, 449.

*Gilpen v. Howell*, 5 Barr. 41.

## ERROR VI.

Thesaid Superior Court erred in overruling the appellants motion in arrest of judgment, etc. as is shown in and by the errors above assigned, and the points made and authorities cited in support thereof.

## GENERALLY VII.

Said record and the proceedings, pleadings, evidence and judgment are otherwise manifestly irregular, insufficient, and contrary to law.

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In the Supreme Court

Roberts vs  
vs.

Thomson et al

Appellants brief

Filed Apr. 21 - 1862

L. Leland  
Clark

Charles L. Berry

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1862.

PORTEUS B. ROBERTS, impleaded, &c., *Appellant*,  
vs.  
JAMES THOMSON and  
JOHN ALSTON, *Appellees*.

## DEFENDANTS POINTS AND AUTHORITIES.

### I.

The cases of *Hance v. Miller*, 21 Ill. 636, and *Francy v. True*, 26 Ill. 185, furnish a perfect answer to the first position assumed by the appellant. The authorities in support of this point are too numerous to attempt a citation.

### II.

The defendant, by *appearing* and moving for a continuance of the case, waived his right to file a plea in abatement.

The record shows that the defendant, in the Court below, filed a written motion for a continuance, thereby entering his *full* appearance and submitting himself to the jurisdiction of the Court.

See Chitty, Gould, Stephens, and any and all other authors on Pleading and Practice.

### III.

The third error assigned by the appellant seems to involve the question whether the right of trial by jury can be regulated by law, and whether the legislature can compel a party to say, in advance, that he has got a defence to an action brought against him, before he can claim his right to a trial by a jury.

In other words, has not the legislature power to say, that a man shall have *something to try* before he tries it.

This Court having repeatedly recognised the validity of the statute referred to, as appears from the appellant's brief, it will be necessary for the appellant to convince the Court, by a course of reasoning, that the law in question is unconstitutional and void. In view of this, we submit this point without argument.

### IV.

The defendant, in the Court below, having refused to comply with the statute, his plea of general issue at set-off were stricken from the files and a default entered against him. He could not, therefore, avail himself of his set-off; if he had one; and unless the Court becomes convinced that the law requiring an affidavit of merits is unconstitutional, there is no error whatever in this case in any way or manner, from its commencement to its conclusion.

HERVEY, ANTHONY & GALT,

*Attorneys for Appellee.*

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Roberts

vs

Thompson

Defendants Points

Filed Apr. 24-1862

L. L. Land

Clerk