No. 13081

Supreme Court of Illinois

Stevens

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vs.

Osgood

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 224.

Prepared

Stevens

vs

Osgood

Supreme Court—Third Division.

URI OSGOOD, ET. UX.,
Appellants,
vs.
HENRY K. STEVENS,
Appellee.
} Appeal from Will Circuit Court.

Record.

ABSTRACT OF CASE.

1 Caption of Record.

2 Precipe for Writ of Sci. Fa. to foreclose Mortgage.

2–5 Writ of Sci. Fai. and Sheriff's return of service.

2 Commencement of Sci. Fa. states that Henry K. Stevens, by his Att'ys, &c., did file, &c., a certain Deed of Mortgage, &c., duly executed, acknowledged, certified and delivered, and recorded, [but no time is alleged,] setting forth a copy of same in the Sci. Fa.

3–4 Copy of Mortgage, acknowledgment and certificate of record,
3 [Near top of page,] Mortgage recites, "That said party of the first "part is justly indebted to said party of the second part in the sum "of $4000,00, lawful money, secured to be paid by his certain "Bond bearing even date herewith for the sum of four thousand
3 "Dollars, and payable to said Henry K. Stevens." Property Mortgaged, L. 1 in B. 27, in that part of the City of Joliet, laid out platted and recorded as Bowen's Addition to Joliet.

3 [Near bottom of Page, after the habendum clause.] "Provided "always," &c.,—"that if the said party of the first part," &c., "shall well and truly pay or cause to be paid," &c., "the aforesaid "sum of money with such interest thereon, at the time and in the "manner specified in the above mentioned Bond according to the "true intent and meaning thereof, that then and in that case these "presents and every thing herein expressed shall be absolutely "null and void."

No. Folio.....Cost, Am't.....Rec'd pay'mt from Appellant.

5 After executing the Mortgage the Sci: Fa: contains the following allegations:—"And whereas the monies secured to be paid by said "Mortgage Deed, are fully due with the interest thereon arising "and remain unpaid. And whereas the condition of said Bond re- "ferred to in the said Mortgage, among other things, provided for "the payment of the sum of one thousand dollars and interest "thereon, at and after the rate of six per cent. per annum, on the "12th day of October, A. D. 1858."

5 Command to the Sheriff to Summon the Defendants (in the Court below) to appear "to show cause (if any they have) why judgment "should not be rendered against them for *such sum or sums of* "*money as shall be found due and owing* to the said Henry K. "Stevens."

6 December Term, 1858; Rule to plead extended.

General Demurrer to Sci: Fa: filed Dec. 16, 1858.

7 May Term, 1859; Demurrer argued and taken under advisement by the Court.

October Term, 1859; Demurrer to Sci: Fa: overruled and Defendants (in the Court below) abide by their demurrer, whereupon by order of Court the Defendants were called and not further answering, judgment was entered against them by default, in favor of Plaintiff, "for his damages in his declaration mentioned," and the Clerk ordered to assess the damages. The Clerk assessed and reported the damages at $1120,00, which was approved, and judgment entered for that amount in *damages*, with costs of suit against the Defendants and execution awarded [not against the Mortgaged premises] but against the Defendants.

7 Defendants excepted and prayed for an appeal to the Supreme Court, which was granted, on condition that an Appeal Bond be filed in sixty days with J. E. Streeter, security in the sum of $1500,00.

7 Oct. 20, 1859, during the same October Term, Appeal Bond executed and approved in open Court.

9 Appeal Bond set out.

10 Clerk's Certificate to Record.

11 Assignment of Errors.

12 Joinder in Error.

URI OSGOOD. Appellant
in pro. per and of Counsel, &c.

Supreme Court—Third Division.

URI OSGOOD, ET. UX.,
Appellants,
vs.
HENRY K. STEVENS,
Appellee.
} Appeal from Will Circuit Court.

POINTS AND BRIEF OF APPELLANTS.

1st. There is no allegation whatever of the time or place, when or where the Mortgage set out in the Sci. Fa. was executed, acknowledged or delivered—*as to time*, See 1, Chitty's Pl'ds. 257 to 263; Gould's Plds. Ch. 3 § 92; Stephens on Plds. 292, Rule II. *As to venue.* See 1. Chitty's Plds. 266–268; Gould's Plds. Ch. 3, §§ 102–103–106; Stephens Plds. 287-8-9.

2d. The Mortgage recited in the Sci. Fa. discloses an indebtedness in gross of $4000,00, without showing whether it was by installments or otherwise, and the Sci. Fa. alleges that by the condition of the Bond referred to in the Mortgage, $1000,00 and interest thereon, became due on the 12th October, 1858; but there is no allegation showing whether this $1000,00 and interest, was the first, last, or any other installment. And there is no allegation showing that the last installment was due when the suit was commenced. See Rev. L. 304-5, § 23; D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 475-6; Day *vs.* Cashman, et. al.

3d. There is no averment in the Sci. Fa. of a request to pay or of a refusal to pay—nor is there any breach of any kind alleged in the Sci. Fa. See 1 Chitty's Plds. 320-332-336-337; Gould's Plds. Ch. 4, § 27.

4th. There is no certainty in the Sci. Fa. and it no where appears what amount of money is due and unpaid on the Mortgage; nor does said Sci. Fa. require the parties to appear and show cause why judgment should not be rendered *for any* given sum of money *due and unpaid.* See 1 Chitty's Plds. 261; Gould's Plds. Ch. 4, § 23; Rev. L. 304-5, § 23; D. Cook & Co's Ed. 976.

5th. A *Sire Facias* to foreclose a Mortgage is a proceeding *in rem.* and judgment and execution should be awarded against the property Mortgaged. In this case the judgment is *in personam*, and is for $1120,00 damages and execution awarded against the Defendants below. See Rev. L. 304-5, § 23. D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 25, Menard vs. Marks; Id. 231,—Marshall vs. Maury; 4 Gil. Rep. 57, State Bk. vs. Wilson, et. al.

URI OSGOOD. Appellant
in pro. per and of Counsel, &c.

224. - 11

Supreme Court

Wm Osgood et Ux
Appellants

vs

Henry K Stevens
Appellee

Abstract & Points

Filed Apr. 16. 1860
G. Goland
Clerk

Supreme Court - 3d. Division

Mrs Osgood et. ux. appellants

vs. Appeal from ~~Hist~~ Circuit Court

Henry K. Stevens appellee

Argument of appellants

This was a proceeding in the Court below to foreclose a mortgage by Sire Facias -

The Sci: Fa: in this proceeding represents both a writ & declaration, & should contain & should contain all the essential & necessary allegations of a declaration in an action of debt - A general demurrer was interposed to the Sci: Fa: by the Defendants in the Court below, which was overruled by the Court, & the Defendants in that Court standing by their demurrer, the Court gave judgment by default, & ordered the Clerk to assess the damages, which was done & reported to the Court at the sum of $1120.00 & judgment rendered against the Defendants below for that amount in damages, & Execution awarded against said Defendants - The Defendants in that Court prayed an appeal from the judgment, which was granted & the appeal bond filed & approved & the appeal perfected during the same term when the judgment was rendered

The Errors assigned are as follows.

"1st. That the Sire Facias aforesaid & the matters "therein Contained are not sufficient in law for the "said Henry K. Stevens to have or maintain his afore- "said action & his judgment & Execution against them"

"2dly That the Demurrer interposed to the said Sire Facias "was improperly & illegally overruled, when the same "ought to have been sustained"

"3dly - The judgment aforesaid is improperly & illegally "rendered & entered against the said Mrs Osgood & C. "Virginia Osgood & Execution thereon improperly & illegally

"awarded, & they pray that the judgment aforesaid for
"the Errors aforesaid & for other Errors apparent on the
"record & proceedings aforesaid may be reversed" &c

If the Sci: Fa: is defective in substance, then the demurrer was well taken & should have been sustained - The Commence-ment of the Sci: Fa: after the Caption & direction is as follows "Whereas on the Eighteenth day of October in the year of our "Lord one thousand eight hundred & fifty eight, Henry K. "Stevens by Parks & Elwood his Attorneys, did file in the Office "of our Clerk of our Circuit Court in & for our said County "of Will a certain deed of Mortgage against Mr Osgood & "E. Virginia Osgood his wife of said County of Will, duly "executed, acknowledged, certified & delivered by said "Mr Osgood & E. Virginia Osgood his wife to Henry K. "Stevens, & recorded in the Office of our Recorder, in & for our "said County, which said Mortgage deed is in words & "figures following to wit:- (The Mortgage is here set out in full with Certificate of acknowledgment & record, bear-ing date October 12th 1854, & recites that) "Whereas the said "Party of the of the first part is justly indebted to the said "Party of the second part in the sum of $4000.00 lawful mon-"ey secured to be paid by his certain bond bearing even "date herewith, for the sum of $4000.00 & payable to said "Henry K. Stevens" &c, without naming any time - Which Mortgage provides "that said Party of the first part" &c. shall "well & truly pay or cause to be paid to the said party of the "second part" & the aforesaid sum of money with such "interest thereon, at the time, & in the manner specified in the "above mentioned bond, according to the true intent & "meaning thereof &c, then said Mortgage to be void -

After copying said Mortgage the Sci: Fa: proceeds as follows:-

"And whereas the foregoing recited deed of "Mortgage was duly executed & acknowledged by the said "Mr Osgood & E. Virginia Osgood his wife, & by them de-"livered to said Henry K. Stevens - And whereas the "Moneys secured to be paid by said Mortgage deed are "fully due, with the interest thereon arising & remain

"unpaid - And whereas the Conditions of bond referred to in
"said Mortgage among other things provided for the payment of
"the sum of one thousand dollars & interest thereon at & af-
"-ter the rate of six per cent per annum on the 12th. day of
"October A.D. 1858 - And whereas said land in said Mortgage
"deed described is situated in our said County of Will"

"Now therefore we Command you that you do forthwith
"summon the said Wm Osgood & C. Virginia Osgood his
"wife, if they shall be found in your County, personally to
"be & appear before the Circuit Court of our said County of Will
"on the first day of the next Term thereof, to be held at the Court
"House in the City of Joliet in the County & State aforesaid, on
"the first Monday of December next to Show Cause (if any
"they have) why judgment should not be rendered against
"them for such Sum or sums of money as shall be found
"due & owing to the said Henry L. Stevens, & also further to do,
"& receive whatever by the judgment or order of our said Court
"shall be awarded in the premises & this they shall in no
"wise omit, & have you then & there this writ"

The Sci: Fa: representing a declaration as well as
proces, the same rules will apply to it, (so far as regards the
matter of pleading) that would be applicable to a declaration.
No venue is laid & no time stated in the Sci: Fa: when
the Mortgage therein recited was executed, acknowl-
-edged or delivered, or when the money secured thereby
became payable, or that it was under Seal - In plead-
-ing it is necessary to lay a proper venue, & to state a
time when every material fact took place - It is true
that the precise day on which a material fact alleged
in pleading, took place in most cases is not necessary
to be stated, Except when the date of a record, or
other writing, or some other fact, the time of which
must be proved by a written document is alleged
Gould's Pldgs. 88 §§ 64-67 - §. 67 reads as follows -
"But in pleading any written document - such as -
"a record, specialty, promissory note, bill of Exchange
"&, the day on which it is alleged to bear date is material

"& must therefore be truly stated: As there will other-
"wise be a variance between the writing itself & the
"description of it in the pleading - Thus in debt on bond
"if the Plaintiff counts upon a writing obligatory, as
"bearing date on a certain day, & the instrument is
"actually dated on a different day; the variance will
"be fatal to the action - Although the date is strictly
"no part of the Contract, it nevertheless enters into
"the description of the instrument: and therefore a
"misstatement of the date describes a different
"deed from that exhibited in evidence - And the same
"rule obtains whenever the time stated in the plead-
"-ing, on either side is to be proved by a record or
"written instrument referred to in the pleading"
See also 1. Chitty Pldg. 257 - In this case it would be
necessary in order to sustain the action, to produce
both the mortgage & the bond therein referred to -

Again Certainty is an essential requisite, &
there is no allegation in the Sci: Fa: from which it
can be ascertained when the money sought to be
recovered, with the interest thereon became due &
payable - The allegation that $1000. & interest thereon
at Six per Cent became due & payable on the 12th of
October 1858. according to the condition of the bond re-
-ferred to, does not in any manner shew from what
time the interest was payable, & from this allegation
it is clearly shown that the $4000. mentioned in the
Mortgage was payable by instalments & it is not
shown either by the mortgage recited, or by any allega-
-tion in the Sci: Fa: whether the $1000. was the 1st last,
or intermediate instalment or whether it was a bal-
-ance remaining due - See 1. Chitty Pldg. 261. where the
author in treating on the subject of Certainty, in
relation to a declaration, uses the following language
"thus. It is still more material that Certainty & Accu-
-racy be observed in the more essential parts of the dec-
-laration which state the Cause of action itself, & on

same page; "So a declaration in debt on a certain "bond, without stating the particulars is not suffi- "ciently certain" - Id. 263 - Goulds Pleds 182 §§. 27-28. 29. In relation to the necessity to the necessity of an allegation that the last instalment has become due & payable, when a Mortgage is payable by instalments see Rev. L. 3024-5 §. 43. 2 D. B. Cook & Co's Ed. 976. §. 23. 1 Scam. Rep. 475-6. Day vs. Cushman et al.

The Conclusion of the Sci: Fa: requires the Sheriff to summon the Defendants below, to appear "& Show Cause (if any they have) why judgment should "not be rendered against them for such sum or sums as "shall be found due" &c; not for any specific sum or such sum of money as may be due by virtue of said mortgage, as required by the Statute above referred to - There is an entire absence of Certainty in every mate- -rial part of the Sci: Fa:

Again, there is no averment of a request to pay or of a refusal to pay, & no breach whatever is laid in the Sci: Fa: - In Chitty Pleds. Vol. 1. 332. the Author says "Thirdly - The breach of the Contract being "obviously an essential part of the Cause of action, must in "all Cases be stated in the Declaration" &c - Id. on P. 336 - "The breach in general should be certain & express, "& a general Statement that the defendant has not "performed, non performavit his agreement or promise, "is bad on demurrer, though aided by verdict" - Id. P. 337. "The omission of a breach cannot be aided or Cured by "verdict" - The same doctrine is laid down by other writers on pleadings -

It Cannot be Contended from the fact of the Mortgage being set out in the Sci: Fa: that the necessary rules of pleading are obviated - As well might it be Contended that a party might file his Mortgage, bond or note, on which his action is founded, & require the Defendant to appear & Show Cause why judgment should not be en- -tered against him on such Mortgage, bond, or note -

It is necessary for the protection of the rights of parties litigant, that the rules of pleading should be strictly adhered to, & enforced, & I apprehend that the Court will hold the parties to the rules of law as they exist.

The Sci: Fa: in this case, is not in any respect drawn in conformity with that in the Case of Woodbury vs. Manlove et. al. in 14. Mds. Rep. 213. which is cited by the Counsel for appellee, with sound approbation, as the Court will readily perceive on examination of that Case. In that Case the Sci: Fa: contained distinct allegations that the last installment in the Condition of the Mortgage deed, had long since become due & payable according to the terms of said Condition therein contained, & according to the tenor & effect of the promisory notes or obligations in the Condition of said Mortgage recited, it appeared that the Defendant therein was indebted to the Plaintiffs in the sum of $1010.00. with interest from the time when the said notes or obligations became due & payable, & that the Defendant had wholly failed to pay, although often requested so to do.

Then follows the Command to the Sheriff to summon the Defendant to appear & Show Cause why judgment should not be rendered against him for said Sum of $1010.00 Together with the interest as aforesaid which appears to be due & owing from him (the Defendant) to them, by virtue of the Mortgage aforesaid & Condition therein Contained. There is a wide difference between the Sci: Fa: in the foregoing Case in the 14th Mds. & the one in this Case. The necessary allegations in the Sci: Fa: under consideration, to enable the Plaintiff in the Court below, to maintain his action, are entirely omitted, & no breach whatever is laid. The demurrer according to all rules of pleading, should have been sustained, & the Court erred in overruling it.

Again the judgment & Execution are improperly rendered & awarded against the Defendants below. & Cannot be sustained. The judgment should have been in debt & damages, & Execution awarded against the mortgaged

premises agreeably to the law authorising foreclosures of mortgages under our Statute - A mortgage is defined to be a debt by specialty, secured by a pledge of lands. (See Coote on Mortgs. P. 1.) & judgment should be rendered in the form of any other judgment in debt, & execution awarded against the mortgaged premises -

It is contended by the Counsel for the appellee, that the appeal is taken from the decision of the Court below in overruling the demurrer, & that the appellants had no right to take an appeal except from a final judgment; and that by excepting to the decision of the Court in overruling the demurrer, the appellants have waived all other Errors - I shall make no argument on the matter of a right to appeal from an intermediate order of Court - This is not claimed - There was no necessity that the record should show any exception taken by appellants to the ruling of the Court on the demurrer - It is sufficient that the record shows the appellants stood by their demurrer, & the demurrer admitted nothing which was not well pleaded - The record not only shows that the appellants stood by their demurrer, but that judgment was rendered by default, the damages assessed by the Clerk, & execution awarded against the defendants below - That thereupon the defendants below excepted &c - & prayed an appeal from the judgment of the Court to the Supreme Court - The appeal was perfected during the session of the Court, when judgment was rendered, by its approval, & in the time allowed by the Court - Errors are assigned in this Court by the appellants, & joined in by the appellee, covering the whole ground, & the whole record, with the Errors therein, come before the Court for consideration - It is admitted by appellee that the form of the judgment & order for execution are erroneous, & the Court is asked to correct the judgment & issue execution against the mortgaged premises -

There is nothing before the Court by which the judgment can be corrected - The Sci: Fa: shows a mortgage

given to secure the payment of $4000.00. with an allegation in said Sci: Fa:, that by the condition of the bond referred to in the mortgage, Among other things, for the payment of $1000. & interest at six per cent, on the 12th. day of October 1858 — If it be true that by the condition of the bond the sum of $1000. & interest became due Oct. 12. 1858. when was the balance payable? & how is the Court to determine?. & from what time is the interest to be computed? There is nothing before the Court by which to determine these facts — Nor is there any thing from which the Court can ascertain whether the $1000. alleged to be due Oct. 12. 1858 were the 1st. last or intermediate instalment — That it must have been an instalment, by virtue of said mortgage & bond, is evident from the fact of making the allegation that the precise amount of $1000. was due by the condition of the bond at that date —

From an inspection of the record, every thing seems to be uncertain & doubtful, & it seems to me, to be unnecessary further to multiply words, & that under the law, there is no way to avoid a reversal of the judgment & order of the Court below, & when the proper time shall arrive, the appellants will be ready to interpose what they conceive to be a good, valid & meritorious defence to the Mortgage

Wm Brook appellant &
of Counsel &c —

224 – 11

Supreme Court

Mrs Osgood Thom
appellants
vs.
Henry L. Stevens
appellee

Argument of
appellants

Mrs Osgood appl
& [illegible] Counsel &c –

Filed May 17. 1866
L. Leland
Clerk

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5 Command to the Sheriff to Summon the Defendants (in the Court below) to appear "to show cause (if any they have) why judgment "should not be rendered against them for *such sum or sums of "money as shall be found due and owing* to the said Henry K. "Stevens."

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Supreme Court—Third Division.

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1st. There is no allegation whatever of the time or place, when or where the Mortgage set out in the Sci. Fa. was executed, acknowledged or delivered—*as to time*, See 1, Chitty's Pl'ds. 257 to 263; Gould's Plds. Ch. 3 § 92; Stephens on Plds. 292, Rule II. *As to venue.* See 1. Chitty's Plds. 266–268; Gould's Plds. Ch. 3, §§ 102–103–106; Stephens Plds. 287-8-9.

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4th. There is no certainty in the Sci. Fa. and it no where appears what amount of money is due and unpaid on the Mortgage; nor does said Sci. Fa. require the parties to appear and show cause why judgment should not be rendered *for any* given sum of money *due and unpaid.* See 1 Chitty's Plds. 261; Gould's Plds. Ch. 4, § 23; Rev. L. 304-5, § 23; D. Cook & Co's Ed. 976.

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in pro. per and of Counsel, &c.

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Wi Osgood et ux
Appellants

vs

Henry K Stevens
Appellee

Abstract & Points

Filed Apr. 18, 1860

L. Leland
Clerk

SUPREME COURT.

APPEAL FROM WILL COUNTY.

HENRY K. STEVENS, Appellee,
vs.
URI OSGOOD, *et ux.*, Appellants.

POINTS FOR APPELLEE.

I. In the written argument filed on the part of the appellee, the *fifth* and last point of the appellants is considered and answered first. In answer to that point, we at once concede the irregularity of the final judgment rendered in the cause; but call the attention of the Court to the fact, that the real controversy between the parties at the Circuit, was on the sufficiency of the *scire facias*;—that the appellants interposed a general demurrer, which was overruled; that they elected to stand by their demurrer; and, on the occasion of the announcement of his opinion by the Circuit Judge, that they "excepted" as the record shows, "TO THE OPINION AND RULING OF THE COURT "IN OVERRULING THEIR DEMURRER, and prayed an appeal from "the judgment of this Court to the Supreme Court."

1. If, for the purposes of this question, it be supposed, that the appeal, though taken before the *actual* entry of the judgment, yet related thereto, and dated therefrom, then, as the appellants, in full view of *all* the errors on the record, selected and specified one particular alleged error of the Court below for their appeal, they must by the appellate Court be treated and held as having waived all others, upon the general principles governing the doctrine of *waiver*. See 4 Gil. 430; 13 Ill 211; 5 Gil. 599; 5 Gil. 225; 5 Gil. 459. Also see 13 Johns 576 *et sequentia*; 1 Scam. 471; 17 Ill. 247; 22 Ill. 139 id 389; 4 Wendell 183, and cases cited by Chancellor.

2. If, for the purposes of this question, it be supposed, that the appeal was taken *at the time* and *on the occasion* of the overruling of the demurrer, and in view of that decision alone, then it should not be construed by the appelate Court to reach forward to errors subsequently committed, and with no reference to which it was taken. A writ of error was the proper, and in that case the only legitimate remedy.

II. To the appellants' *first* point, it is replied :—

1. The scire facias, in respect to the alleged defects, conforms to the precedent reported in 14 Ill. 213, Woodbury vs. Manlove, *et al.*

2. The proceeding by *scire facias* bears only an imperfect and qualified analogy to actions at common law. The record, which is set forth, contains sufficiently for all essential purposes, a statement of time and place. Stephens on Pleading, p. 295.

III. To the *second* point it is replied, that the scire facias first avers, that the whole indebtedness named in and secured by the mortgage had become fully due; and then, reciting that part of the condition of the bond which related to the claim that was the subject matter of the suit, avers that there is now due $1000 and interest. As the whole is due, and as this is a part of the whole, this of course must be due; and as it is the only part remaining unpaid, it must by reasonable construction be considered as the last instalment in the series. But whether the last in the order of installments or not, is of no consequence. This procedure is not by the statute limited to the *last* instalment, but applies to *any* balance due, *after* the last payment shall have matured.

IV. To the *third* point, we have but very little to say.

V. To the *fourth* point it is replied that there is no uncertainty in the statement of our claim. It is $1000, which became due 12th Oct. 1858, with interest at 6 per ct. The interest could be ascertained by computation. The mandatory clause, though it does not specify the amount of the indebtedness, refers to and is to be construed with the contents of the writ:

If the Court should agree with us in these views, yet as the record is now in this Court, we are willing, that the judgment should be amended by adding the omitted clause, directing its operation *in rem*, if it can be done consistently with the law and the practice of the Court.

R. S. Chap. 5, Sec. 2.

PARKS & ELWOOD,
Of Counsel for Appellee.

224 - 11

Appeal from Will.

Henry K. Stevens.

Appellee

vs

Uri Osgood, Et ux.

Appellants

Printed Points for Stevens.

Filed Apl. 24. 1860

L. Leland

Clk.

Supreme Court—Third Division.

URI OSGOOD, ET. UX.,
Appellants,
vs.
HENRY K. STEVENS,
Appellee.
} Appeal from Will Circuit Court.

Record.

ABSTRACT OF CASE.

1 Caption of Record.

2 Precipe for Writ of Sci. Fa. to foreclose Mortgage.

2–5 Writ of Sci. Fai. and Sheriff's return of service.

2 Commencement of Sci. Fa. states that Henry K. Stevens, by his Att'ys, &c., did file, &c., a certain Deed of Mortgage, &c., duly executed, acknowledged, certified and delivered, and recorded, [but no time is alleged,] setting forth a copy of same in the Sci. Fa.

3–4 Copy of Mortgage, acknowledgment and certificate of record,
3 [Near top of page,] Mortgage recites, "That said party of the first "part is justly indebted to said party of the second part in the sum "of $4000,00, lawful money, secured to be paid by his certain "Bond bearing even date herewith for the sum of four thousand
3 "Dollars, and payable to said Henry K. Stevens." Property Mortgaged, L. 1 in B. 27, in that part of the City of Joliet, laid out platted and recorded as Bowen's Addition to Joliet.

3 [Near bottom of Page, after the habendum clause.] "Provided "always," &c.,—"that if the said party of the first part," &c., "shall well and truly pay or cause to be paid," &c., "the aforesaid "sum of money with such interest thereon, at the time and in the "manner specified in the above mentioned Bond according to the "true intent and meaning thereof, that then and in that case these "presents and every thing herein expressed shall be absolutely "null and void."

No. Folio..10.....Cost, Am't.....Rec'd pay'mt from Appellant.

5 After executing the Mortgage the Sci: Fa: contains the following allegations:—"And whereas the monies secured to be paid by said "Mortgage Deed, are fully due with the interest thereon arising "and remain unpaid. And whereas the condition of said Bond re- "ferred to in the said Mortgage, among other things, provided for "the payment of the sum of one thousand dollars and interest "thereon, at and after the rate of six per cent. per annum, on the "12th day of October, A. D. 1858."

5 Command to the Sheriff to Summon the Defendants (in the Court below) to appear "to show cause (if any they have) why judgment "should not be rendered against them for *such sum or sums of* "*money as shall be found due and owing* to the said Henry K. "Stevens."

6 December Term, 1858; Rule to plead extended.

General Demurrer to Sci: Fa: filed Dec. 16, 1858.

7 May Term, 1859; Demurrer argued and taken under advisement by the Court.

October Term, 1859; Demurrer to Sci: Fa: overruled and Defendants (in the Court below) abide by their demurrer, whereupon by order of Court the Defendants were called and not further answering, judgment was entered against them by default, in favor of Plaintiff, "for his damages in his declaration mentioned," and the Clerk ordered to assess the damages. The Clerk assessed and reported the damages at $1120,00, which was approved, and judgment entered for that amount in *damages*, with costs of suit against the Defendants and execution awarded [not against the Mortgaged premises] but against the Defendants.

7 Defendants excepted and prayed for an appeal to the Supreme Court, which was granted, on condition that an Appeal Bond be filed in sixty days with J. E. Streeter, security in the sum of $1500,00.

7 Oct. 20, 1859, during the same October Term, Appeal Bond executed and approved in open Court.

9 Appeal Bond set out.

10 Clerk's Certificate to Record.

11 Assignment of Errors.

12 Joinder in Error.

URI OSGOOD, Appellant
in pro. per and of Counsel, &c.

Supreme Court—Third Division.

URI OSGOOD, ET. UX.,
Appellants,
vs.
HENRY K. STEVENS,
Appellee.
} Appeal from Will Circuit Court.

POINTS AND BRIEF OF APPELLANTS.

1st. There is no allegation whatever of the time or place, when or where the Mortgage set out in the Sci. Fa. was executed, acknowledged or delivered—*as to time,* See 1, Chitty's Pl'ds. 257 to 263; Gould's Plds. Ch. 3 § 92; Stephens on Plds. 292, Rule II. *As to venue.* See 1. Chitty's Plds. 266–268; Gould's Plds. Ch. 3, §§ 102–103–106; Stephens Plds. 287-8-9.

2d. The Mortgage recited in the Sci. Fa. discloses an indebtedness in gross of $4000,00, without showing whether it was by installments or otherwise, and the Sci. Fa. alleges that by the condition of the Bond referred to in the Mortgage, $1000,00 and interest thereon, became due on the 12th October, 1858; but there is no allegation showing whether this $1000,00 and interest, was the first, last, or any other installment. And there is no allegation showing that the last installment was due when the suit was commenced. See Rev. L. 304-5, § 23; D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 475-6; Day *vs.* Cashman, et. al.

3d. There is no averment in the Sci. Fa. of a request to pay or of a refusal to pay—nor is there any breach of any kind alleged in the Sci. Fa. See 1 Chitty's Plds. 320-332-336-337; Gould's Plds. Ch. 4, § 27.

4th. There is no certainty in the Sci. Fa. and it no where appears what amount of money is due and unpaid on the Mortgage; nor does said Sci. Fa. require the parties to appear and show cause why judgment should not be rendered *for any* given sum of money *due and unpaid.* See 1 Chitty's Plds. 261; Gould's Plds. Ch. 4, § 23; Rev. L. 304-5, § 23; D. Cook & Co's Ed. 976.

5th. A *Sire Facias* to foreclose a Mortgage is a proceeding *in rem.* and judgment and execution should be awarded against the property Mortgaged. In this case the judgment is *in personam,* and is for $1120,00 damages and execution awarded against the Defendants below. See Rev. L. 304-5, § 23. D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 25, Menard vs. Marks; Id. 231,—Marshall vs. Maury; 4 Gil. Rep. 57, State Bk. vs. Wilson, et. al.

URI OSGOOD. Appellant
in pro. per and of Counsel, &c.

224

Supreme Court

Wi Bogard et Ux
Appellants

vs

Henry K Stevens
Appellee

Abstract & Points

Filed April 18, 1860
L. Leland
Clerk

$10. Jd. Clk.

Appeal from Mill.

Henry W. Stevens,
Appellee
ads.
Uri Osgood, & ux
Appellants.

Argument for appellee.

1. We will first consider the Fifth and last point made by the Appellants; that the final judgment in this cause was in personam, and wants the essential clause, required by our statute, awarding a special execution for the sale of the mortgaged premises.

The form of the judgment is unquestionably erroneous, or at best imperfect. We will not trifle with the Court by undertaking to maintain it. This must be conceded in the outset.

But we ask the attention of the Court to the attitude, which the appellants have seen fit to assume in this appeal; and shall submit, whether they now here are in a position properly to demand a reversal of this judgment, upon that ground.

As a matter of fact, apparent enough from the face of the record, the only controversy in the Circuit Court was on the sufficiency of

the Scire facias. The appellants interposed a general demurrer. It was overruled. They decided to stand by their demurrer; and the plaintiff was suffered to take judgment by default. On the occasion of the announcement by the Court of its opinion, overruling the demurrer, and before the actual entry of the judgment, the appellants prayed an appeal. Now, it is quite certain that there was no necessity for "excepting" to this decision, in the ordinary sense of that term, as used in practice. But they saw fit to specify the ground of their appeal in this manner. The language of the record is, —

"thereupon come said defendants, and
"except to the opinion and ruling of the Court,
"in overruling their demurrer, and pray an
"appeal from the judgment of this Court to the
"Supreme Court of said State."

We know, that an appeal only lies from a final judgment or decree to the Supreme Court; that necessarily the whole record must come before the Court; and the Record, when brought here, is found to disclose this formal defect. A writ of Error would have afforded the defendants an appropriate opportunity to correct it; unless, in the meantime, as is probable it had been noticed by the attorneys for the plaintiff; and they had taken the necessary steps to amend it themselves. But,

3

here, before the actual entry of the judgment upon the record, an appeal is taken upon a specified ground, and limited by the appellant explicitly to a particular Error. If we consider the appeal as dating from that stage of the proceedings, when the judgment was actually drawn out in form and entered upon the record by the clerk; and when the appellants had a full view of all preceding defects, then, this voluntary and express restriction of the appeal to a particular error ought to be and is, we submit, to be considered a virtual and studious or waiver release of all other Errors. The policy of the system of judicial appeals plainly dictates, that the appellate court should not be burdened with any other matters, than such as the complaining party designates as essential to his rights. It is upon this principle, that no errors in the rulings and instructions of the inferior court in the progress of a trial will be noticed here unless excepted to. In this connexion, we especially ask the attention of the court to the language of Ch. Kent in Gelston v. Hoyt 13 Johns. 576 et seq. The error here, however decisive, ~~was essential to~~ in its effect upon the validity of the judgment, is manifestly a technical one, - an informality by the clerk in framing it's terms, and to be amended of course, as in no wise touching the merits of the case. And, it may well

1 Scam 471.
4 Gil. 430.
13 Ill. 211.
5 Gil 599.
5 Gil 225.
22 Ill 139,
id 389.

Bac. Abridgment "Error" Ks. 5-6.

Bouvier Dict "waiver"

13 Johns 576 et seq.

4

be supposed, that the appellants, in the absorbing interest and strong confidence they felt in their main points, which had really been the sole points of controversy between the parties, were disposed to leave all others out of the proposed review. The effect, moreover, of this course upon the opposite party is obvious. His attention was thus withdrawn from all other considerations; and diverted from the necessity of examining ~~the~~ them, as to any other particulars.

In ordinary cases, ~~we doubt~~, of appeal or writ of Error, this Court, unless limited by the assignment of Errors, or a formal release or stipulation, would no doubt look through the entire record, and give the complaining party the benefit of any Error which it might disclose whether brought to the notice of ~~known to~~ the opposite party or not. But it seems to us, that in a case like the one at bar, it is no more than a reasonable application of the principle of waiver, ~~in a mere matter of form~~, and one which the economy of our systems of appeals strongly commends, to say, that as to a matter of form and simple clerical mistake, susceptible of amendment, as of course upon motion in proper season in the court below, an appeal, taken in the way this was taken, must be considered, as fairly and justly limiting the appellants to the battle ground, which they have themselves distinctly and deliberately

5 marked out, and to which the opposite
party was invited. If deemed to have been
waived, then, of course, the appellants could
not resume the advantage of it by embracing it
in their general assignment of Errors; the legitimate
extent of which will be measured and find by reference to
the whole record.

The foregoing views have gone upon the
idea, that the appeal, though prayed for before
the actual entry of the judgment in form, yet
technically relates to the final judgment rendered; and must be
supposed to comprehend the whole record of the
cause; as well what took place after the
obnoxious decision, as before.

But, may we not fairly argue, here, if it
plainly appears from the showing of the Record,
that the appeal was taken from the decision of
the Circuit Court overruling the demurrer to
the Scire facias, and on the occasion of the
announcement of that decision, and before
the commission of the Error which afterwards
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correct which alone that appeal was taken.

If the injured party desires to take advantage of subsequent Errors, a writ of Error was at his command for that purpose. By adopting the proces of appeal, during the term and before the completion of the proceedings in the Court below, ——— thus removing the cause of that Court, from the further jurisdiction and control and depriving the opposite party of his opportunity for amendment of errors of form subsequently occurring, (which otherwise he would have had) it seems to us not unfair to contend, that he should be limited here to a review only of what he elected and proposed to review, in stating his appeal.

The doctrine of Waiver, upon which these positions are sought to be maintained, is a reasonable one; conducing to subserve the purposes of justice, and preeminently useful to simplify, economize, and relieve appellate or revisory litigation.

17 Ill 247. And if we understand the rulings of this Court, running through all its reports, it has laid hold of this principle, whenever it could properly do so, to compel parties, at the proper season to take such steps as were important to their rights, and not throw on the supreme tribunal finally the accumulated burthens of their own negligences, indiscretions and mistakes.

7 11. As to the First point made by the appellants in this case, we answer:—

1. That the scire facias in this respect seems to be in conformity with the precedent containd in 14 de Illinois 213. Woodbury vs Manlove et al;— a precedent which not only paſed the criticism of very able counsel and finally of the court; but was especially commended to the confidence of the profession by the reporter;— we presume, not without conference with the judges.

2. But the appellants forgit, that there exists but a very imperfect analogy between ordinary pleadings in common law actions, and this special statutory proceedig. In the former, the cause of action generally consists of facts of such a nature, that they might have occurred at any time and any place. The plaintiff is of course bound to appriz his adversary of the case which he proposes to maintain. A narrative, certain and intelligible, of the facts is demanded. To make such a narrative, the essential circumstances of time and place are necessary. And hence the rule. But even here, the rule is held by the

courts with a most tax hand. If the appellant, who, judging from his copious citations from Stephens on Pleading, has great reverence for this authority, had read thoroughly all his great preceptor had to say on the subject of time, he would have seen, that even in England, the doctrine of certainty as to time is not applied to real and mixed actions.

See Steph. Pl. p. 295. margin.

And even in personal actions, in which its utmost rigor is felt, it applies only to traversable facts, and is, except in special cases, always treated as forming a non-essential part of the issue.

3°. Under our statute, providing for this proceeding, the foreclosure must be in the county where the premises are situated, and where the mortgage is recorded. It is based on the fact of registry; and it is entirely unimportant for any possible purpose, where, perchance, the instrument may have been executed, acknowledged and delivered. No question of venue can arise.

4. As to the time of execution, acknowledgment and record, the dates of these acts respectively, as

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indicated in the copies of the mortgage and accompanying certificates, embodied in the writ, will sufficiently show. The nature of the writ, which is always founded upon matter of record, and of which the characteristic function is to charge a party with liabilities arising there= =from, does not require, that such facts as are expressed distinctly on the face of the record, should be again formally recited or alleged. The record must be set out in the writ, and must be a perfect record; and, if this appears, all the reasonable demands of the case are answered.

III. To the second point made by the appellant we answer:—

The Scire facias in general terms states that the indebtedness secured by the mortgage is "fully due, with the interest thereon arising and remains unpaid." — If the whole indebtedness —(and the phrase "the indebtedness" means that, unless qualified to mean less) — is fully due then, we take it, any component part of that indebtedness must be "fully due." And, if any part is due, then every part is due. And if every part is due, then the last part must

be due. And if the part mentioned in this writ is due, then, (the whole being due) it is of infinitely small consequence, what place it happens to occupy, in the order of payments set forth in the bond, whether first or last or middle. This is the sole remnant of the whole indebtedness, which we claim to be due, and for which we bring suit. According to the ordinary course of things, it would seem reasonable to suppose, that as it was the only part of the original debt remaining unpaid, it was the last instalment in the series. And this must be so, unless the mortgagor, from a preternatural eagerness to pay his debts, anticipated the last payment, and ~~left a prior~~ leaped clear over a prior intervening instalment in order to make it. We shall leave the court to judge from this record, on the whole, whether the appellant would be likely to exhibit that kind of eagerness.

IV. To the third Point we answer:-

In devising it, the mind of the appellant evidently wandered from the track of Scire facias and became lost in debt and assumpsit. We do not sue on ~~the promise or~~ a promise or obligation to pay money. We simply ask to enforce a specific lien upon land, our right to which depends upon the naked fact of the

11

non payment of a certain sum of money.
If our lien is good in point of form in law;
and if the condition of fact exists, on which
the statute permits us to enforce it – that is,
non payment, then, our case is complete.
It would no doubt have been courteous
in the mortgagee to have made a respectful
request for his money, before going to law.
It is barely possible, indeed, that some such
request was made. But we cannot con-
= sider that courtesy, graceful and handsome
as it would have been, a sine qua non
under this Statute, to our right of foreclosure.

V. as to the Fourth point:

What we claim and all we claim in the
Scire facias is the sum therein stated to be
due and payable – viz, $1000. due 12th Oct.
1858. with interest. If we have stated our
claim at less than it should be, that is
our misfortune, and a grievious one certainly,
for this foreclosure must inevitably exhaust
our whole security.

This, like any other pleading, must be
construed reasonably. If so construed, the
meaning is and only can be that $1000
and interest is due. This is the only
indebtedness stated, averred or claimed in the

recitals of the Scire facias. Only so much of the condition of the bond was set forth as was necessary to express and indicate the claim for which the suit was instituted. It might have been more specific; but this would hardly have made it really more intelligible.

~~As to the amount due for interest, the rate of same is declared by law at six per cent, and the period of time must have been from the date of the bond~~

As to the amount due for interest, that was a mere matter of computation by reference to the bond. Without such reference, the averment would have been perfect. The ~~meaning~~ obvious import of it would have been, that the period of time for which the interest should be computed was from the date of the bond. That might not have been true in point of fact; but the averment would not the less have been ~~perfect~~ complete in point of form.

The writ serves as process and declaration, and in its latter office must no doubt

contain all the essential averments, to compose a cause of action. But we have yet to learn, that in a declaration for debt or damages, the precise amount due must be specifically stated. — In the reciting part of this writ, the amount of the principal of the alleged indebtedness is stated with certainty; and full data furnished for computing the interest. The mandatory clause necessarily refers to this pleading allegation of the indebtedness claimed; and there was no need to repeat it. — Indeed, we do not see, but that, without the recital of the condition of the bond, limiting the amount of the claim to a part only of the whole original indebtedness expressed in the mortgage, the writ would have if accompanied by an averment that it was fully due. been good. The claim then would have been for the whole $140000, leaving the true amount ~~in bank~~ to be ascertained on trial by inspection of the bond and endorsements, or other proof.

The Court will observe, that the writ here almost literally follows the language of the statute, in prescribing the form of the mandatory clause.

VI. If the Court should be with us in our position,
that the appellants are not in a predicament to
R.S. Ch V. §2. "Amendments &c." take advantage of the informality in the judgment,
we are, nevertheless, desirous that it should be
corrected. As we have already been subjected to the delay of an appeal, it is
obviously, now simply a question of
costs, should the other points of the appellants
be adjudged untenable. And, if it be within
the power of the court to do so in its adjudication
of the case, we certainly can have no objection to
a modification and amendment of the judg=
=ment, to make it conformable to the statute.

Parke & Elwood
for Appellee

224-11

Supreme Court

Appeal from Will.

Uri Osgood et ux
Appellants
vs.
Henry H. Stevens
Appellee.

Argument for Appellee.

Parks & Tillwood
Of Counsel.

Fild Apl. 20. 1860
Leland
Clk.

SUPREME COURT.

APPEAL FROM WILL COUNTY.

HENRY K. STEVENS, Appellee,
vs.
URI OSGOOD, *et ux.*, Appellants.

POINTS FOR APPELLEE.

I. In the written argument filed on the part of the appellee, the *fifth* and last point of the appellants is considered and answered first. In answer to that point, we at once concede the irregularity of the final judgment rendered in the cause; but call the attention of the Court to the fact, that the real controversy between the parties at the Circuit, was on the sufficiency of the *scire facias*;—that the appellants interposed a general demurrer, which was overruled; that they elected to stand by their demurrer; and, on the occasion of the announcement of his opinion by the Circuit Judge, that they "excepted" as the record shows, "TO THE OPINION AND RULING OF THE COURT "IN OVERRULING THEIR DEMURRER, and prayed an appeal from "the judgment of this Court to the Supreme Court."

1. If, for the purposes of this question, it be supposed, that the appeal, though taken before the *actual* entry of the judgment, yet related thereto, and dated therefrom, then, as the appellants, in full view of *all* the errors on the record, selected and specified one particular alleged error of the Court below for their appeal, they must by the appellate Court be treated and held as having waived all others, upon the general principles governing the doctrine of *waiver*. See 4 Gil. 430; 13 Ill 211; 5 Gil. 599; 5 Gil. 225; 5 Gil. 459. Also see 13 Johns 576 *et sequentia*; 1 Scam. 471; 17 Ill. 247; 22 Ill. 139 id 389; 4 Wendell 183, and cases cited by Chancellor.

2. If, for the purposes of this question, it be supposed, that the appeal was taken *at the time* and *on the occasion* of the overruling of the demurrer, and in view of that decision alone, then it should not be construed by the appelate Court to reach forward to errors subsequently committed, and with no reference to which it was taken. A writ of error was the proper, and in that case the only legitimate remedy.

II. To the appellants' *first* point, it is replied :—

1. The scire facias, in respect to the alleged defects, conforms to the precedent reported in 14 Ill. 213, Woodbury vs. Manlove, *et al.*

2. The proceeding by *scire facias* bears only an imperfect and qualified analogy to actions at common law. The record, which is set forth, contains sufficiently for all essential purposes, a statement of time and place. Stephens on Pleading, p. 295.

III. To the *second* point it is replied, that the scire facias first avers, that the whole indebtedness named in and secured by the mortgage had become fully due; and then, reciting that part of the condition of the bond which related to the claim that was the subject matter of the suit, avers that there is now due $1000 and interest. As the whole is due, and as this is a part of the whole, this of course must be due; and as it is the only part remaining unpaid, it must by reasonable construction be considered as the last instalment in the series. But whether the last in the order of installments or not, is of no consequence. This procedure is not by the statute limited to the *last* instalment, but applies to *any* balance due, *after* the last payment shall have matured.

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V. To the *fourth* point it is replied that there is no uncertainty in the statement of our claim. It is $1000, which became due 12th Oct. 1858, with interest at 6 per ct. The interest could be ascertained by computation. The mandatory clause, though it does not specify the amount of the indebtedness, refers to and is to be construed with the contexts of the writ :

If the Court should agree with us in these views, yet as the record is now in this Court, we are willing, that the judgment should be amended by adding the omitted clause, directing its operation *in rem*, if it can be done consistently with the law and the practice of the Court.

R. S. [redacted] Chap. 5, Sec. 2.

PARKS & ELWOOD,
Of Counsel for Appellee.

224-11

Appeal from Will.

Henry K. Stevens
Appellee
vs
Uri Osgood, Et ux
Appellants

Printed Points for Stevens.

Filed Apl. 24. 1860
S. Leland Clk.

SUPREME COURT.

APPEAL FROM WILL COUNTY.

HENRY K. STEVENS, Appellee,
vs.
URI OSGOOD, *et ux.*, Appellants.

POINTS FOR APPELLEE.

I. In the written argument filed on the part of the appellee, the *fifth* and last point of the appellants is considered and answered first. In answer to that point, we at once concede the irregularity of the final judgment rendered in the cause; but call the attention of the Court to the fact, that the real controversy between the parties at the Circuit, was on the sufficiency of the *scire facias*;—that the appellants interposed a general demurrer, which was overruled; that they elected to stand by their demurrer; and, on the occasion of the announcement of his opinion by the Circuit Judge, that they "excepted" as the record shows, "TO THE OPINION AND RULING OF THE COURT "IN OVERRULING THEIR DEMURRER, and prayed an appeal from "the judgment of this Court to the Supreme Court."

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2. The proceeding by *scire facias* bears only an imperfect and qualified analogy to actions at common law. The record, which is set forth, contains sufficiently for all essential purposes, a statement of time and place. Stephens on Pleading, p. 295.

III. To the *second* point it is replied, that the scire facias first avers, that the whole indebtedness named in and secured by the mortgage had become fully due; and then, reciting that part of the condition of the bond which related to the claim that was the subject matter of the suit, avers that there is now due $1000 and interest. As the whole is due, and as this is a part of the whole, this of course must be due; and as it is the only part remaining unpaid, it must by reasonable construction be considered as the last instalment in the series. But whether the last in the order of installments or not, is of no consequence. This procedure is not by the statute limited to the *last* instalment, but applies to *any* balance due, *after* the last payment shall have matured.

IV. To the *third* point, we have but very little to say.

V. To the *fourth* point it is replied that there is no uncertainty in the statement of our claim. It is $1000, which became due 12th Oct. 1858, with interest at 6 per ct. The interest could be ascertained by computation. The mandatory clause, though it does not specify the amount of the indebtedness, refers to and is to be construed with the context of the writ :

If the Court should agree with us in these views, yet as the record is now in this Court, we are willing, that the judgment should be amended by adding the omitted clause, directing its operation *in rem*, if it can be done consistently with the law and the practice of the Court.

R. S. Chap. 5, Sec. 2.

PARKS & ELWOOD,
Of Counsel for Appellee.

224

Appeal from Will.

Henry K. Stevens

Appellee.

vs

Mrs Osgood E. Fuller

Appellants.

Printed Points for Stevens.

Filed Apl. 24. 1860

L. Leland Clk.

1

The People of the State of Illinois.—
By the Grace of God free and Independent

To all to whom these presents May come Greeting.—

Know ye that We having Cause to be inspected the records and proceedings now remaining in the Office of Our Clerk of Our Circuit Court in and for Our County of Will do find there certain records in words and figures following to Wit.—

United States of America
State of Illinois
County of Will

Pleas before the Honorable Jesse O Norton Judge of the Eleventh Judicial Circuit of the State of Illinois and presiding at the December Term of the Will County Circuit Court begun and holden at the Court House in the City of Joliet in said County and State aforesaid in pursuance to the Statutes in such Case Made and provided on the first Monday (the same being the Sixth day) of December in the year of Our Lord One Thousand Eight Hundred and Fifty Eight and of the Independence of the United States the Eighty Third.—

Present. Honorable Jesse O Norton Judge of the Eleventh Judicial Circuit of said State
Fred. A Bartleson States Attorney " " " "
Alonzo Sands Sheriff of Will County Illinois
Alexander McIntosh Clerk of the Will County Circuit Court

Be it remembered. That on the Eighteenth day of October in the Year of Our Lord One Thousand Eight Hundred and Fifty Eight. Came Henry R Stevens by Parks and Edwards his Attorneys and presents and files the following papers in our said Court in Words and figures following to Wit.—

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"Henry M Stevens"

"vs"

"Uri Osgood & Virginia Osgood wife"
"of said Uri Osgood."

To "A M Pardee" Esq Clk Circuit Court"

"Please issue Scire facias &c.
"Shff Will, to foreclose accompanying Mortgage (Bond attached) for last
"payment due 12th October 1858. principal $1000.– and interest at 6 p.
"Cent $60.–" = "$1060.–

"The Sci fa should contain an Averment that the
"Condition of the bonds, referred to in the said Mortgage amongst other
"things provides for the payment of the Sum of $1000.– and interest
"thereon at and after the rate of six per cent per Annum on the 12th
"day of October A.D 1858. See precedents in case of Ingoldsby vs M'Ewen
"Now pending."

"Parker & Edwards. for Plff.–

"Dated Oct 16th 1858"

Upon which Precipie the following
Writ of Scire Facias was issued in words and figures
following to Wit.–

"State of Illinois" }
"County of Will" } ss.– "Will County Circuit Court of the December
"Term thereof in the year of Our Lord One
"Thousand Eight Hundred & fifty Eight

"The People of the State of Illinois."–

"To the Sheriff of Our County of Will

"Greeting."–

"Whereas on the Eighteenth day of October
"in the year of Our Lord, One Thousand Eight Hundred and Fifty Eight
"Henry M Stevens, by Parker and Edwards his Attorneys did file in the
"Office of Our Clerk of Our Circuit Court, in and for Our said County
"of Will a certain Deed of Mortgage against Uri Osgood, and C.
"Virginia Osgood his wife, of said County of Will duly executed & acknow-
"ledged, Certificate and delivered by said Uri Osgood and C Virginia
"Osgood his Wife to Henry M Stevens and Recorded, in the Office of our
"Recorder in and for Our said, County which said Mortgage deed is

in Words and figures following to Wit:-

"This Indenture made this Twelfth day of October in the "Year of Our Lord One thousand Eight Hundred and fifty four, between "Uri Osgood and Virginia Osgood his Wife of the City of Joliet State "of Illinois party of the first part and Henry M Stevens of the same place "party of the Second part; Whereas the said party of the first part is justly "indebted to the said party of the Second part in the sum of Four thou= "sand Dollars lawfull Money Secured to be paid by his Certain Bonds bearing "even date herewith for the said sum of Four Thousand Dollars and payable "to the said Henry M Stevens." Now Therefore This Indenture Witnesseth "That the said party of the first part for the better Securing the payment "of the Money aforesaid with interest thereon according to the tenor and "effect of the said Bonds above Mentioned, And also in Consideration of "the further sum of One dollar to them in hand paid by the said party "of the second part, at the delivery of these presents the receipt whereof "is hereby Acknowledged have granted bargained sold and Conveyed "and by these presents do grant bargain sell and convey unto the said "party of the second part his heirs and Assigns forever All of the following "described Lot, piece, or parcel of land situate lying and being in the County "of Will and State of Illinois to Wit:-

"Lot Number One (1) in Block Number "Twenty Seven (27) in that part of the City of Joliet Originally laid Out "platted and Recorded, As Bowens Added Town to Joliet" To have and to "hold the same, Together with all and singular the tenements Hereditaments "priviledges and Appurtenances thereunto belonging or in any wise appertaining; and also all the estate interest and claim whatsoever in Law "as Well as in Equity which the party of the first part has in and to "the premises hereby Conveyed unto the said party of the second part "his heirs and Assigns and to their only proper use benefit and behoof.

"Provided Always and these presents are upon this express Condition "that if the said party of the first part his heirs Executors Administrators "Shall well and truly pay or Cause to be paid to the said party of "the second part his executors Administrators or Assigns the aforesaid "Sum of Money with such interest thereon at the time and in the Manner "Specified in the Above Mentioned Bond According to the true intent "and Meaning thereof that then and in that case these presents and everything "herein expressed shall be Absolutely Null and void.

(Over)

"In Witness Whereof the said parties of the first part hereunto set "their hands and seals the and year first above written."

"Sealed and delivered in presence of"
"G.D.A Parks"

"Wm Osgood" (Seal)
"C Virginia Osgood" (Seal)

"Which said Mortgage was duly acknowledged, as follows "to-Wit"

"State of Illinois" } ss.
"Will County." }

"I Gavion, D.A. Parks a Notary Public in and "for said County in the State aforesaid do hereby Certify that Wm "Osgood and C Virginia Osgood who are personally known to me "as the real persons whose names are subscribed to the above Mort= "gage Appeared before me this day in person and Acknowledged that "they executed, and delivered the said Mortgage as their free and voluntary "Act for the uses and purposes therein set forth. - And the said C. Virginia "Osgood wife of the said Wm Osgood having been by me examined sep= "erate and Apart and out of the hearing of her husband, and the Contents and "Meaning of the said Mortgage having been by me made Known and fully "explained to her Acknowledged that she had freely and voluntarily executed "the same and relinquished her dower to the lands and tenements therein men= "tioned without Compulsion of her said husband and that she does not "wish to retract the same. - "Given under My hands and Notarial Seal this "Twelfth day of October in the year of our "Lords one Thousand Eight Hundred and Fifty four"

"Seal"
"Notarial"

"G.D.A Parks Not. Pub. Will Co"

"And on the back of said Mortgage deed is endorsed the "following Certificate of records to wit." -

"Ill. 19.4921."

"State of Illinois" } ss.
"County of Will" }

"This Instrument was filed for Record, the 18th "day of October A.D 1854, at the hour of 8 O'Clock A.M and duly "Recorded in Book 35. page 378"

"R. E. Barber Recorder"

"And Whereas the foregoing recited deed of Mortgage was duly-

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"Executed and Acknowledged by the said Wm Osgood and Virginia
"Osgood his wife and by them delivered to said Henry N Stevens.
"And Whereas the Moneys secured to be paid by said Mortgage deed
"are fully due, with the interest thereon arising and remain unpaid.—
"And Whereas the Condition of the Bond referred to in the said
"Mortgage among other things provided for the payment of the sum
"of One Thousand Dollars and interest thereon at and after the rate of
"Six per cent per annum; on the 12th day of October A.D 1858.— And
"Whereas said Lands in said Mortgage deed described is situated in
"Our said County of Will.

"Now Therefore We Command you that
"you do forthwith Summons the said Wm Osgood and Virginia
"Osgood his wife if they shall be found in your County personally to
"be and appear before the Circuit Court of Our said County of Will
"on the first day of the next Term thereof to be holden at the Court
"House in the City of Joliet in the County and State aforesaid on the First
"Monday of December next— to show cause (if any they have) why
"judgement should not be rendered against them for such sum or
"Sums of money As shall be found due and owing to the said Henry N Stevens
"And Also further to do and receive whatever by the Judgement or
"Order of Our said Court shall be awarded in the premises, and this
"they shall in no wise omit.— "And have you then there this Writ."—

"Witness Alexander McIntosh. Our Clerk of
"Our said Court and the Seal thereof hereto
"Affixed at Office in the City of Joliet in the
"County and State aforesaid this 18th day of
"October A.D 1858."

L. S.

"A McIntosh Clk"
"By R Bostedo Jr Deputy."

On which Scire Facias is the following endorsement by the
Sheriff in Words and figures following to wit

"I return this Writ served by reading the same to the within named
"Wm Osgood and Virginia Osgood his wife this 2nd day of
"November A.D 1858"

2 Services 1.00
2 miles .10
1 Ret .10
1.20

G R Dyer Sheff
By O Simmons Dept

And afterwards. to Wit:- on the Ninth day of December in the year of Our Lords one thousand Eight Hundreds and fifty Eight the Court being then judicially sitting for the adjudication of business the following among other proceedings were had entered of record by said Court in words and figures following to Wit:-

"Henry N Stevens"

"1481" (by)

"Uri Osgoods and Virginia Osgood his Wife" } "Sci Fa. to Foreclose Mortgage"

"Ordered by the Court on Motion "of said defendants by Uri Osgoods in his own proper person that the "rule to plead heretofore entered herein be and is hereby extended until "Thurs day of next week."-

And Afterwards. to Wit:- on the Sixteenth day of December in the year last aforesaid. comes Uri Osgoods defendant in his own proper person and files his Demurrer which is in words and figures following to Wit:-

"Uri Osgoods and Virginia Osgood his wife" } "on Sci fa to foreclose Mortgage"

(att)

"Henry N Stevens"

"And the said Defendants "come & defend the wrong & injury when &c- & say that the said Scire "Facias & the Matters & things therein contained in Manner & form as the "same are above Stated are not sufficient in law for the said Plaintiff "to have or Maintain his aforesaid Action thereof against them & "that they are not bound by law to answer the same.- And this they "are ready to verify.- Wherefore &c- they pray. judgement &c"-

"Uri Osgoods Plff & Atty"

And afterwards to Wit:- on the Twenty seventh day of May in the year of Our Lords one thousand Eight Hundreds and fifty nine. Be being one of the regular days of the said May Term and the Court being duly organized and sitting for the adjudication of business the following proceedings among others were had and Entered of Record by said Court in Words and figures following to Wit:-

"1481"

"Henry K Stevens"
vs
"Wm Osgood and C. Virginia Osgood his wife" } "Sci Fa. to Foreclose Mortgage"

"Now comes said Plaintiff by Parks and Edmond his Attorneys. And said Defendants also come in their own proper person. And now comes on to be heard the Arguments of Counsel upon the Defendants Demurrer to the Writ of Scire Facias herein. And after hearing the said Counsel the same is by the Court taken under Advisement."

And afterwards. To Wit. on the Eleventh Day of October in the year last aforesaid. the Court being there judicially sitting for the Adjudication of business the following among other proceedings were had and entered of Record by said Court in words and figures following To Wit.

"Henry K Stevens"
vs
1481 Wm Osgood and C. Virginia Osgood his wife } "Scire Facias to foreclose Mortgage"

"And now at this day the Court having at a previous term heard the Arguments of Counsel upon said Defendants Demurrer to the Writ of Scire Facias herein and taken the same under Advisement. and now the Court being fully advised in the premises Orders that the same be and is hereby Overruled. Thereupon come the said Defendants in their own proper persons and say that they will Abide by their said Demurrer. Thereupon comes the said Plaintiff by Parks and Edmond his Attorneys on whose Motion it is Ordered by the Court that the Defendants herein be now called. Thereupon said Defendants was three times Solemnly Called but Come not nor any person for them nor have they filed their pleas herein in Obedience to a rule of Court heretofore entered requiring them so to do, but of this fails and make default which by Order of Court is taken and entered of Record. Whereupon it is Ordered by the Court that said Plaintiff do have Judgment against said Defendants for his damages in his declaration mentioned but because said damages are unknown to the Court and being founded

"On An instrument in Writing for the payment of Money only it is
"Ordered that the Clerk of this Court do Assess and report the Amount
"of said Damages, and said Clerk having Assessed the Plaintiff dam-
-Ages herein reports the same to the sum of one Thousand one hundred
"And Seventy Dollars.- Whereupon it is Ordered by the Court that said
"Report be and is hereby Approved to the same Aforesaid"

Therefore it is

Dec of 1130.- "Considered that said Plaintiff do have and recover of said Defen-
"dants his damages as Aforesaid Assessed to the sum of One
"Thousand one hundred and twenty Dollars, together with his Costs
"And Charges by him About his Suit in this behalf expended and
"have execution Therefor."-

"Thereupon Come said Defendants and
"excepts to the Opinion and ruling of the Court in Overruling their
"Demurrer and prays an Appeal from the Judgment of this Court
"to the Supreme Court of said State and the Court being fully Advised
"in the premises it is Ordered that such Appeal be and is granted
"upon Condition that said Defendants do within Sixty days from
"date file their Bond in the sum of Fifteen hundred Dollars
"with J.E. Streeter as Security and also their Bill of exceptions
"herein".-

And Afterwards to Wit:- on the twentieth
day of October in the Year last Aforesaid, the Court being then
fildecindly sitting for the Adjudication of business the following
Among other proceedings was had and entered of Record by said
Court in Words and figures following to Wit:-

"Henry K Stevens."

"1481" (by)

"Wm Osgood & C. Virginia Osgood his Wife" | "Sci Fa to foreclose Mortgage."

"Now at this day comes Wm
"Osgood in his Own proper person and presents to the Court And files
"herein for Approval the Appeal Bond heretofore Ordered in this
"Cause with J.E. Streeter as Security,- And the Court being fully
"Advised in the premises Orders that the same be and hereby is

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"Approved and Confirmed."—

Which Bond is in words and figures following to Wit:—

"Know All Men by these presents:- That we Uri Osgood & Joseph E "Streeter of Will County & State of Illinois, are held & firmly bound "unto Henry N Stevens of Cook County & State in the penal sum of "Fifteen hundred Dollars Lawfull Money of the United States, for "the payment of which well and truly to be made we bind ourselves "our heirs Executors & Administrators, jointly Severally & firmly by "these presents:- Witness our hands & Seals. this Nineteenth Day of "October A.D, 1859."—

"The Condition of the Above Obligation is such "that Whereas the said Henry N Stevens did at the October Term A.D. 1859. "of the Will County Circuit Court in said State of Illinois & on the Eleventh "day of October A.D 1859. recover a judgment Against the Above "bounden Uri Osgood & Virginia Osgood. his Wife for the sum of "Eleven hundred & twenty dollars, Damages together with Costs of suit "on foreclosure of a Mortgage from which said judgement of the "said Circuit Court the said Uri Osgood has prayed for & obtained "an Appeal on behalf of himself & his said wife & Virginia to the "Supreme Court of said State.— Now if the said Uri Osgood. "shall duly prosecute said Appeal with effect. & shall moreover pay "the Amount of the judgment Costs interest and damages rendered & to "be rendered. against him or against him & said Virginia Osgood. "in case the said judgment shall be Affirmed in the Supreme "Court then the Above Obligation to be void, otherwise to remain "in full force & virtue.—"

"Taken entered into & Approved in Open" "Uri Osgood" (Seal)
"Court this 20th day of October A.D" "Joseph E Streeter" (Seal)
"1859" Attest."—

"D O Norton"
"Judge 11th Judicial Circuit Ills."—

State of Illinois }
County of Will } ss.

I Alexander McFarlan Clerk of the Circuit Court in and for the County of Will and State aforesaid do hereby Certify the within and foregoing to be a full true, and perfect Copy of the Records & the proceedings had in the Will County Circuit Court in the cause therein entitled. And also of the Precipe Writ of Scire Facias. Demurrer and Appeal Bond. filed herein xxx & still remaining in my said Office

In testimony Whereof I have hereunto set My hand and Affixed the Seal of said Court at My Office in the City of Joliet in said County and State this Fifth day of March A.D. 1861.

A McFarlan Clerk

CIRCUIT COURT WILL COUNTY ILLINOIS

State of Illinois - Supreme Court - Third Division

Nic Osgood & C. Virginia Osgood
his wife appellants

vs. Appeal from Will Circuit Court

Henry K. Stevens appellee

And now comes the said Nic Osgood & C. Virginia Osgood & say that in the record & proceedings aforesaid & also in the rendition of the judgment aforesaid & awarding execution thereon, there is manifest Error, and they assign the following Errors

1st. That the Scire Facias aforesaid & the matters therein contained are not sufficient in Law for the said Henry K. Stevens to have or maintain his aforesaid action & his judgment & execution thereof against them

2dly. That the demurrer interposed to the said Scire Facias was improperly & illegally overruled, when the same ought to have been sustained

3dly. The judgment aforesaid is improperly & illegally rendered & entered against the said Nic Osgood & C. Virginia Osgood & execution thereon improperly & illegally awarded, and they pray that the judgment aforesaid for the Errors aforesaid & for other Errors apparent on the record & proceedings aforesaid may be reversed annulled & altogether held for nothing & that they may be restored to all things which they have lost by occasion of the said judgment &c.

Nic Osgood appellant in
pro. per. & of Counsel &c.

Joinder in Error.

Parks & Elwood.
attorneys for appellee.

Will Circuit Court.

No 1481 224

Henry R Stevens.

vs

Asa Osgood & Virginia Osgood his wife

Certified Copy of Records and Papers - - - -

Filed April 18, 1860

L. Leland
Clerk

My fees for Making this Trans - Paid by Deft's Atty

$3.00 O McIntosh

SUPREME COURT.

APPEAL FROM WILL COUNTY.

HENRY K. STEVENS, Appellee,
vs.
URI OSGOOD, *et ux.*, Appellants.

POINTS FOR APPELLEE.

I. In the written argument filed on the part of the appellee, the *fifth* and last point of the appellants is considered and answered first. In answer to that point, we at once concede the irregularity of the final judgment rendered in the cause; but call the attention of the Court to the fact, that the real controversy between the parties at the Circuit, was on the sufficiency of the *scire facias*;—that the appellants interposed a general demurrer, which was overruled; that they elected to stand by their demurrer; and, on the occasion of the announcement of his opinion by the Circuit Judge, that they "excepted" as the record shows, "TO THE OPINION AND RULING OF THE COURT "IN OVERRULING THEIR DEMURRER, and prayed an appeal from "the judgment of this Court to the Supreme Court."

1. If, for the purposes of this question, it be supposed, that the appeal, though taken before the *actual* entry of the judgment, yet related thereto, and dated therefrom, then, as the appellants, in full view of *all* the errors on the record, selected and specified one particular alleged error of the Court below for their appeal, they must by the appellate Court be treated and held as having waived all others, upon the general principles governing the doctrine of *waiver*. See 4 Gil. 430; 13 Ill 211; 5 Gil. 599; 5 Gil. 225; 5 Gil. 459. Also see 13 Johns 576 *et sequentia*; 1 Scam. 471; 17 Ill. 247; 22 Ill. 139 id 389; 4 Wendell 183, and cases cited by Chancellor.

2. If, for the purposes of this question, it be supposed, that the appeal was taken *at the time* and *on the occasion* of the overruling of the demurrer, and in view of that decision alone, then it should not be construed by the appelate Court to reach forward to errors subsequently committed, and with no reference to which it was taken. A writ of error was the proper, and in that case the only legitimate remedy.

II. To the appellants' *first* point, it is replied :—

1. The scire facias, in respect to the alleged defects, conforms to the precedent reported in 14 Ill. 213, Woodbury vs. Manlove, *et al.*

2. The proceeding by *scire facias* bears only an imperfect and qualified analogy to actions at common law. The record, which is set forth, contains sufficiently for all essential purposes, a statement of time and place. Stephens on Pleading, p. 295.

III. To the *second* point it is replied, that the scire facias first avers, that the whole indebtedness named in and secured by the mortgage had become fully due; and then, reciting that part of the condition of the bond which related to the claim that was the subject matter of the suit, avers that there is now due $1000 and interest. As the whole is due, and as this is a part of the whole, this of course must be due; and as it is the only part remaining unpaid, it must by reasonable construction be considered as the last instalment in the series. But whether the last in the order of installments or not, is of no consequence. This procedure is not by the statute limited to the *last* instalment, but applies to *any* balance due, *after* the last payment shall have matured.

IV. To the *third* point, we have but very little to say.

V. To the *fourth* point it is replied that there is no uncertainty in the statement of our claim. It is $1000, which became due 12th Oct. 1858, with interest at 6 per ct. The interest could be ascertained by computation. The mandatory clause, though it does not specify the amount of the indebtedness, refers to and is to be construed with the ~~contexct~~ of the writ :

If the Court should agree with us in these views, yet as the record is now in this Court, we are willing, that the judgment should be amended by adding the omitted clause, directing its operation *in rem*, if it can be done consistently with the law and the practice of the Court.

R. S. Chap. 5, Sec. 2.

PARKS & ELWOOD,
Of Counsel for Appellee.

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Appeal from Will

Henry K. Stevens

Appellee

vs

Abi Osgood, Etux,

Appellants.

Printed Points for Stevens.

Filed Apl. 24. 1860

Leland Clk,

13081