35/5

March 1845 #6

Thomas H. Benton
vs.
Jesse G. Sindell
St. Louis Co.

} Bank of Missouri

STATE OF MISSOURI----Sct.

The State of Missouri....To the Judge of the Eighth — Judicial Circuit in said State....**GREETING:**

WHEREAS, *In the record and proceedings in a certain cause lately pending in the Circuit Court within and for the County of* St Louis — *in said circuit, wherein* Jesse G. Lindell was plaintiff and Thomas H Benton, garnishee of the Bank of Missouri, was ——— *defendant manifest error, hath intervened, to the great damage of the said* defendant — *as by* his *complaint, we are informed;*

Now, we being willing that the error, *if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **command you,** *that you send to us certified under your* **seal,** *the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the* third *Monday in* October — *next, so that our Judges of our Supreme Court on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.*

WITNESS, Hampton L. Boon, *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* fourteenth ——— *day of* March *in the year of our Lord, one thousand eight hundred and forty-* six.

H. L. Boon.

No 1 State of Missouri } ss. Be it Remembered that heretofore
County of St Louis } to wit, on the eighteenth day of July A. D. eighteen hundred and thirty-seven, there was issued by the Clerk of the St Louis Circuit Court within and for the County aforesaid, "a Writ of Attachment on a Fieri Facias," in the words and figures following to wit:

Attachment "County of St Louis ss The State of Missouri To the Sheriff of the County of St Louis — Greeting — Whereas on the Twenty-eighth day of December Eighteen hundred and twenty-five, at our Circuit Court, before our Judge thereof, Jesse G. Lindell recovered against the President Directors and Company of the Bank of Missouri, the Sum of Eight hundred Dollars upon certain Notes of the said Bank of Missouri, and also the penalty of Five per cent per month on the amount of each and every of said notes appearing to be due, from the third day of October Eighteen Hundred and twenty-one, until the same shall be paid, together with his costs and charges by him about his suit in that behalf expended which to the said Jesse G. Lindell were adjudged, as appears to us of record; and whereas afterwards to wit, on the fourth day of May eighteen hundred and thirty-seven, there issued from the Office of the Clerk of our said Court, a pluries writ of Fieri Facias in favor of the said Jesse G. Lindell against the said President Directors and Company of the Bank of Missouri returnable to the July Term of our said Court for the year Eighteen hundred and thirty-seven, directed to you as Sheriff of our said County, and commanding you as you had been oftentimes theretofore commanded, that of the goods and chattels, lands and tenements of the said President Directors and Company in your bailiwick, you cause to be made the aforesaid Sum of Eight hundred

p. 2 — Dollars, with the penalty and costs aforesaid: And whereas on said writ of Fieri Facias, return was made by you that no property belonging to the said President Directors and company of the Bank of Missouri was found in your county, and the said Lindell having applied to our said court for an attachment in this behalf, Therefore we command you to attach the said President Directors and company of the Bank of Missouri by all and singular their rights and credits, or so much thereof, as shall be sufficient to secure the aforesaid sum of Eight hundred Dollars with the penalty and costs aforesaid, in whose hands or possession soever the same may be found in your bailiwick, and also that you summon every person having any moneys or effects belonging to said President Directors and Company and every Debtor thereof, who may be found in your county, that they be and appear before our said court to be begun and held at the City of St Louis, within and for the county aforesaid of St Louis on the Second Monday of November next, then and there to answer touching any monies or effects of the said President Directors and Company, in their hands, or any debt they may owe to the same — and have you then there also this writ, with your return thereon, how you execute this ~~writ~~. Same.

Seal Witness John Ruland, Clerk of our said Court and the seal thereof hereto affixed at Office, in the City of St Louis, this eighteenth day of July eighteen hundred and thirty-seven.

Jno. Ruland Clerk"

Sheriffs return "Executed this writ by summoning Thomas H. Benton as Garnishee on the Nineteenth day of July 1837 and by summoning George H. Kennerly as Garnishee on the 27th of July 1837 by declaring to each of them, that by virtue of this writ, I did summon them to appear in Court at

p. 9 the return day of this writ to answer on oath such In:terrogatories as may be exhibited against them on the part of the plaintiff touching their indebtedness to the President Directors and Company of the Bank of Missouri the Defendants in this writ, they both refusing to hear the writ read, All done in the County of St Louis.

James Brotherton Sheriff
By M. Brotherton D Shff"

8 p 350 And on the 15th day of November A. D. 1837. the following proceedings were had in this case to wit:

No. 1 reasons to dismiss filed "Jesse G. Lindell vs The President Directors &c of the Bank of Missouri. Motion & reasons filed for dismissing the Attach:ment by Thomas H. Benton and George H. Kennerly garnishees which motion and reasons are in the words & figures following viz

Motion & reasons "Nov. Term 1837 Lindell vs President Directors &c of the Bank, of Missouri Thos. H. Benton and George H. Kennerly Garnishees. The said garnishees by Atty move the Court to dismiss the writ of Attachment issued in this cause & the execution rendered on said Judgment for the fol:lowing reasons.

First — Because at the date of the issuing of said Exe:cution in favor of said plaintiff, there was no such corporation existing as the President Directors &c of the bank of Missouri.

Second — Because the names of said Thomas H. Benton & said Geo H. Kennerly are not set forth in said writ of Attachment or the Praecipe therefor, nor does the re:turn on said writ show that any property in the hands of said Garnishee was attached under said writ, nor does said return specify that said Sheriff saw or heard of any property credits or effects belonging to said Defendants in the hands of said Thomas H. & Geo. H or either of them.

Magenis Atty for Garnishees

Allegations & Interrogatories

"Jesse G. Lindell Plff vs Thomas H. Benton & George H. Kennerly Deft. In virtue of an Attachment issued on the return of a Fieri Facias on the Judgment in suit of said plaintiff vs The President Directors & Company of the Bank of Missouri, the Sheriff summoned as Garnishee the above named Thomas H. Benton & George H. Kennerly debtors of the said Bank & thereupon the said Plaintiff comes & alleges that each of the said garnishees is & at the the time he was respectively summoned as garnishee on the above Attachment was a Debtor of the said President Directors & Company of the Bank of Missouri in this to wit: ——————————

That at the said time each of them was & still is indebted to the said President, Directors & Company of the Bank of Missouri in a large sum to wit, fifteen thousand Dollars for money lent & advanced by the said President, Directors & Company to the said Garnishees respectively at their respective requests. And them still in arrear & unpaid & also in this, that at the said time each of the said garnishees was & still is indebted to the said Bank of Missouri in a large sum of money to wit, ten thousand Dollars upon & in virtue of promissory notes of the said garnishees by them before that time respectively made & also in this, to wit, that at the said time each of the said garnishees was & still is indebted to the said Bank of Missouri, in a large sum of money to wit, eight thousand Dollars upon & in virtue of Judgments of the Circuit court of St Louis county, rendered against them respectively in favor of the said Bank, which still remains of record in the said Court unreversed & unsatisfied.

And the said plaintiff exhibits the following Interrogatories to be answered by each of the said Garnishees according to law. viz: ——————

p. 5 — 1st Are you not and were you not at the time you were summoned as Garnishee in this cause a Debtor of the above named Bank, & if so, to what amount, & when & in what manner did the debt accrue —

2nd Are you not & were you not at the time you were summoned as Garnishee in this case indebted to the said bank for money lent to you by the same & never repaid & if so, in what amount, when was the loan made, by what instrument in writing, if any evidenced & what has become of said instrument. —

3rd At the time you were summoned as Garnishee, were you not & are you not now indebted to the said Bank of Missouri, upon & in virtue of certain promissory notes, if so, what were the several amounts & dates of such notes & when did they respectively fall due & what has become of them. —

4th At the time you were summoned as Garnishee were you not & are you not now indebted to the said Bank, upon & in virtue of a Judgt or Judgts of the circuit Court of St Louis County, if so, when was the Judgt rendered, for what amount and how much, if any of it, has been paid. —

5th At the time the said bank ceased to transact the business of banking were you not indebted to the same if so, in what sum & have you paid any part thereof, if so, how much have you paid, when did you pay it, did you pay in money or in what commodity & how did you pay — Did you settle or compromise said debt or any part thereof, if so, how much thereof, & in what manner did you settle or compromise the same

Gamble & Allen
Attys. p. t.

And on the 28th day of August A. D. 1838, the following further proceedings were had in this cause viz

p. 6. Jesse G. Lindell vs President &c of Bank of Missouri
continued Continued.

And on the 15th day of December A. D. 1838 the following motion to dismiss was filed to wit:

Mo. to dismiss "November Term 1837 Lindell vs Bank of Missouri Thomas H. Benton & George H. Kennerly, Garnishees. The said Garnishees by their Attorney move the Court here to dismiss the said Attachment for the following reasons:

First — Because at the date of the issuing of said Attachment, there was no such Corporation existing as the President, Directors and Company of the Bank of Missouri

2nd — Because no Execution has issued against said Defendant the Bank, within one year and a day prior to the date of issuing the last Execution, nor had there been a writ of sci. fa. to revive said Judgment.

3rd — Because neither in the said writ of Attachment nor in the praecipe ordering the same is the name of either said Thomas H. Benton or Geo H. Kennerly mentioned, nor has the said Sheriff shown by his said return that there was any property of said Defendant in the hands of said Benton & Kennerly or either of them

Magenis Atty for Benton & Kennerly

4th — Because the Execution upon which said Attachment issued, was improperly issued and wholly void.

Magenis Atty for Garnishees

p. 378 And on the 7th day of January A. D. 1839 the following further proceedings were had in this cause to wit:

Mo. to dismiss overruled "Jesse G. Lindell vs The President Directors & Company of the Bank of Missouri. Now at this day comes as well the said plaintiff as the said Thomas H. Benton and George H. Kennerly Garnishees as aforesaid, by their respective Attorneys and thereupon the said motion of the said Garnishees to dismiss the said Attachment is by them

pr. 7 — submitted to the court, which being seen and heard & by the court here fully understood, it is considered that said motion be overruled.

p. 385 And on the 10th day of January A. D. 1839, the following further proceedings were had in this cause viz:—

Order on Shff to amend return

"Jesse G. Lindell vs The President Directors & Company of the Bank of Missouri. On motion of Attorney for the plaintiff it is ordered that the Sheriff amend the return in this cause, by inserting after the names of Thomas H. Benton & George H. Kennerly garnished, the words — "said to be debtors of the Defendants and whom I was directed by Attorney of the plaintiff to summon as such"

p. 392 And on 15th day of January A. D. 1839 the following further proceedings were had in this cause viz:—

Order to strike out Amendment

"Jesse G. Lindell vs The President Directors & Company of the — of Missouri. On motion of the Attorney for the plaintiffs, it is ordered that the amendment of the Sheriffs return on the fieri facias with regard to the summoning of the garnishees, be stricken out. And the said garnishees by their Attorney move the court to be discharged.

And on the 16th day of January A. D. 1839 the following motion to be discharged from the operation of said attachment was filed, in the words and in figures following viz —

Mo. to be discharg. filed —

"Jesse G. Lindell vs The President Directors &c. Attachment. George Kennerly & Thomas H. Benton Garnishees. And the said Garnishees by their Counsel move the court to be discharged from the operation of said attachment and assign therefor the following reasons.

1st Because at this date there is no such Corporation existing in this State as the President Directors &c. of the Bank of Missouri, the charter thereof having expired according to the original act of Incorporation.

2d Because, neither in the said writ of attachment nor

p. 8 — in the said Execution, nor in the precipe ordering the same, are the name of said Garnishees, or either of them mentioned, nor has the said Sheriff shown by his said return, that there was any property of said Defendants in the hands of said Garnishees or either of them. ——————

3rd — Because said Execution is irregular & void

Magenis Atty for Garnishees"

And on the 19th day of January A. D. 1839 the following further proceedings were had in this cause viz:

Mo. to be discharg'd sustained "Jesse G. Lindell vs The President Directors Company of the Bank of Missouri. Now at this day comes as well the said plaintiff as the said Garnishees by their respective Attornies and thereupon the said motion to discharge the said garnishees, are by them submitted to the Court, which being seen and heard & by the Court here fully understood, it is considered by the Court that said motion be sustained & that said Garnishees be discharged, with their costs against said Plaintiff —————— Bill of Exceptions filed. which Bill of Exceptions is in the words &c following.

Bill of Exception "Benton & Kennerly summoned as Garnishees on writ of attachment at suit of Lindell vs Bank of Missouri Bet it Remembered that in this case the said Benton & Kennerly moved the Court to be discharged from the operation of said attachment on reasons filed, which motion & reasons in support thereof are as follows — (which motion and reasons will be found set out on page No 7) which motion was by the Court sustained & the said Benton & Kennerly accordingly discharged, to which Judgment of the Court sustaining the said motion the said plff by his Counsel excepts & prays that this Exception may be enquired sealed & made a part of the record which is done accordingly. S. E. Sawless Seal

p. 9 — And on the 26th day of April A. D. 1841 the following
12 L 330 Exceptions to the Interrogatories were filed to wit: —
Excepns to Interrogs filed — "Jesse G. Lindell vs President Directors &c of BK of Missouri Exceptions by Thomas H. Benton one of the Garnishees herein to the Interrogatories filed in this cause." —
which Exceptions are in the words and figures following
Exceptions to Interrogatories "St Louis Circuit Court. Lindell vs Benton. The said Thomas H. Benton comes and excepts to the Interrogatories herein and each of them; for that they are illegal & improper to wit:
1 — That said Interrogatories ask other things than respecting moneys & effects of the said Bank in his hands & respecting any debt he owed the said Bank.
2 — That the Second Interrogatory inquires illegally respecting instruments in writing, that may have been made by said Benton & as to the disposition of them.
3 — That the third Interrogatory inquires illegally as to what disposition has been made of promissory notes alleged to have been made by said Benton. —
4 — That the fifth Interrogatory inquires into sundry particulars as to said Bentons compromising or paying debts, if any there were due by him to said Bank, long before he was summoned as garnishee, and refers back to the period when said Bank stopped doing business, for the point of time to which said Benton is to confine his answer and that if said Benton paid or compromised such debts before he was summoned as a garnishee, the manner of doing so is immaterial.
Wherefore for these and other causes the said Benton prays that he may not be required to answer said Interrogatories &c.

Spalding & Tiffany

And on the 28th day of April A. D. 1841. the following fur

12 L 338

p. 10.

Exceptions Overruled.

: ther proceedings were had in this cause viz: ——
"Jesse G. Lindell vs President & Directors of the Bank of Missouri. Now at this day come the parties aforesaid by their respective Attorneys and thereupon the said Exceptions of Thomas H. Benton garnishee herein to the allegations and interrogatories exhibited against him in this cause is by them submitted to the Court, which being fully and heard and by the Court here fully understood. It is considered by the Court, that said Exceptions be overruled. ——

And on the 29th day of April A. D. 1841 the following further proceedings were had in this case to wit: ——

Answer of T. Benton filed

"Jesse G. Lindell vs President & Directors of the Bank of Missouri. Answer of Thomas H. Benton garnishee herein filed which Answer is in the words and figures following viz

Answer of T. Benton

"St Louis Circuit Court July Term 1840 Jesse G. Lindell vs The President Directors and company of the bank of Missouri and Thomas H. Benton and George R. Kennerly garnishees.

The said Thomas H. Benton summoned as a garnishee aforesaid saving and reserving to himself all exceptions to the manifold errors and irregularities in the proceeding of the said plaintiff and to the interrogatories filed by him as aforesaid and protesting that there was no President Directors and Company of the Bank of Missouri in existence at the time he was summoned as garnishee aforesaid or since that time, for answer to the said Interrogatories or so much thereof as he is advised it is material for him to answer unto, answers and says, that about twenty years ago, and for several years previous thereto, he had large dealings with the said bank of Missouri, amounting in the whole to upwards of Seventy thousand Dollars, the history of which dealings, even if the Statute under which he is

p. 11 summoned, required it, it would be impossible for him after to give after the lapse of so many years, and especially as much of his business with the said Bank was done by Agents, and that since the bank stopped payment about nineteen years ago, he had had no dealings with it, nor become indebted to it in any way, & that at the time of said stoppage he was indebted to the said bank, on several promissory Notes for money lent, the amounts and number of which he cannot now specify, which notes with his knowledge and approbation were transferred to the United States and delivered to its Agent to satisfy a debt due from the said Bank, to the United States, that suit was brought on said notes in the Circuit Court of St Louis County and Judgment recovered in the name of the said bank, for the United States for about Seven thousand Dollars and the same notes as this Respondent has been informed and believes were sent to Tennessee where the indorser resided, and where this Respondent then had and now has property, to be there put in suit for the benefit of the United States, execution being also issued in St Louis County on the judgment obtained in said County, and real Estate of the Respondant sold thereon, and that he owed nothing to the bank of Missouri on that judgment or any other judgment at the time he was summoned in this case, or since. that since the transfer of said notes to the United States and except for the debts so transferred, this Respondent has never had any notice from said Bank of St Louis or from any one employed in settling its affairs or collecting its debts, that any other debt was due or claimed from him to the bank, and has believed from that time, that his debts to the bank were

p. 12 settled to its satisfaction, that besides the notes so transferred to the United States as above stated, there were many other notes given to the bank in the course of his dealings with it nineteen or twenty years ago and upwards, mostly executed by agents, some of which were stock notes, but the number and amount of which he is unable to state, and prays to be hence dismissed, with his costs &c.

Thomas H. Benton

Be it Remembered, that on this Eleventh day of July 1840, personally appeared before me, William W. Seaton Mayor of the City of Washington, Thomas H. Benton and made oath to the above instrument of writing, which he also signed in my presence.

Given under my hand & the seal of the Corporation of Washington this 11th day of July 1840.

Attest

Seal C. H. Wiltberger Register W. W. Seaton Mayor

And on the 30th day of April A. D. 1841 the following further ~~proceedings~~ Exceptions to Bentons Answer were filed.

Exceptions to Bentons answer filed

"March Term 1841 Lindell vs Benton et al garnishees

The said Jesse G. Lindell by his Attorney comes & excepts to the answer of Thomas H. Benton filed in the above cause & says, that the same is uncertain evasive & insufficient & does not confess or avoid, traverse, or deny the allegations & interrogatories filed against him & for ~~&~~ specification he sets forth & shows

1 — That the said answer does not respond to the first Interrogatory aforesaid, inasmuch as it does not admit ordering, that he was not at the time he was summoned as garnishee as aforesaid a debtor of the Bank of Missouri & if indebted, the amount, & when & in what manner the debt accrued.

2 — That the said answer does not respond to the

p. 13 — second Interrogatory aforesaid inasmuch as it does not admit or deny, that he was not at the time he was summoned as garnishee as aforesaid indebted to the Bank of Missouri, for money lent to him by the Bank, & never repaid, & if so, the amount, when the loan was made, & by what instrument of writing, if any evidenced & what has become of same.

3 — That the said Answer does not respond to the third Interrogatory aforesaid inasmuch as it does not admit or deny, that he was not at the time he was summoned as Garnishee as aforesaid indebted to the said Bank, of Missouri upon & in virtue of promissory notes. & if so, their several amounts, dates, & when they became due & what has become of them.

4 — That the said Answer does not respond to, the fourth Interrogatory aforesaid, inasmuch, as it does not admit or deny, that he was not at the time he was summoned as garnishee as aforesaid indebted to the said Bank, in & upon & in virtue of a Judgment or Judgments of the Circuit Court of St Louis County & if so, when was the Judgment rendered, the amount of same & how much, if any, had been paid. ——————————

5 — That the said Answer does not respond to the fifth Interrogatory aforesaid inasmuch as it does not admit or deny, that at the time the Bank of Missouri ceased to transact the business of banking he was not indebted to the Bank, & if so, the sum now, whether he has paid any part thereof & if so, how much, & when & whether it was paid in money, or what commodity, & how & whether he settled or compromised said debt or any part thereof & if so how much & in what manner it was settled or compromised

6 — That the said Answer does not categorically or

p 114 — specifically answer any of the Interrogatories propounded.
In all which & divers other particulars the said answer is evasive imperfect & insufficient, wherefore the said plaintiff doth except thereto & prays that the said deft may be compelled to amend the same & put in a full & sufficient answer to the said Interrogatories.

B. Allen p. q."

X 13 p. 47 And on the 28th day of October A. D. 1841 the following further proceedings were had in this cause to wit:—

Exceptions to answer Sustained

"Jesse G. Lindell vs The Bank of Missouri Defendant Thos. H. Benton & George H. Kennerly garnishees. Now at this day come the said plaintiff and the said Benton by their respective Attorneys and thereupon the said exceptions of said plaintiff to the answer of Thos. H. Benton garnishee herein, is by them submitted to the court, which being seen and heard and by the court here fully understood, It is considered by the court, that said Exceptions be sustained and it is ordered by the court that said Benton file herein a more full and

14 L 294 sufficient answer within ninety days from this date.

And on the 18th day of December A. D. 1843, the following further proceedings were had in this cause to wit:—

"Jesse G. Lindell vs Thomas H. Benton Garnishee of the President Directors &c of the Bank of Missouri. Now at this day come the parties by their Attorneys and thereupon on motion of said plaintiff, and it appearing to the court that the answer of said Garnishee is informal and insufficient, it is ordered that he file a more full and perfect answer herein, within sixty days from this time.

And on the 23rd day of September A. D. 1844 the following further proceedings were had in this cause viz:—

Further answer of Gar. filed

"Jesse G. Lindell vs Thomas H. Benton garnishee of the Bank of Missouri. The Garnishee this day files his further answer and is discharged from the Attachment

p. 15 upon which he is brought into court upon payment of the costs of the attachment."

Further answer of Garnishee

which answer is in the words & figures following viz. "St Louis Circuit Court April Term 1844 Jesse G. Lindsle vs The Bank of Missouri. Thomas H. Benton who was summoned as a garnishee in the above case, further answering and in addition to the answer and amended answer heretofore filed, says, that he has not been able to obtain access to the books and papers of said bank, but was furnished on the 20th day of the present month with some items, from extracts from said books taken about the year 1841, which he believes to be correct and confirming the belief declared in the answers heretofore made that this Respondent owed nothing to said bank at the time he was garnished in this case. That from the extracts so shown to him he is able to state more particularly the nature and amounts of the debts mentioned in previous answers, and to say that, at the time said Bank ceased to do business, he was indebted to the same in the sum of about $6.400, on two promissory notes, one for the sum of $1.300 and one for the sum of $4.500 and also, for the sum of $422 22/100 on account of interest upon said notes as this Respondent believes, the whole of which was assigned to the United States by said Bank, as declared in previous answers, and Judgment obtained for the United States on the same as stated in previous answers and that he owed nothing to the said bank of Missouri on said two notes and and account or, on said Judgment or any other Judgment at the time that he was garnished in this case.

And this Respondent further answering says it also appeared by said extracts shown to him and which he believes to be correct, that he was further indebted to said bank, when it ceased to do business in

p. 16 the sum of $3.200 on account of a promissory note. for the payment of which the stock, held by said Respondent in said Bank, amounting to $6.300 was pledged at 80 per cent, being all paid up stock, and to the best of his knowledge parts bought by him at par at or about the time it was so pledged & part subscribed for and paid by him in full, and the said stock, was taken in payment of said note by said bank, as in other cases of the like kind and that he owed nothing to said bank on account thereof at the time he was garnisheed in this case. ——— And this Respondent has a further defence to this proceeding against him by the said plaintiff saith, as to the said alledged debt, or any part thereof alledged by said Plff to be due from this Respondent to the said Bank on account of money lent or advanced to him. that the same or any part thereof did not accrue within five years next preceding the commencement of this proceeding against him. And as to the said debts alledged by the said Plff to be due from this Respondent to said bank, upon and in virtue of promissory notes, that the same or any part thereof, did not accrue within ten years next preceding the commencement of said proceedings against him. — And this Respondent further answering and in affirmance of his previous answers, saith that at the time he was summoned as Garnishee in this case, he was not indebted to the said bank in the sum of fifteen thousand Dollars or any part thereof, for money lent and advanced to him, except as herein above set forth, nor in the sum of $10.000 upon or in virtue of promissory notes or any part thereof, except as above herein set forth nor in the sum of $2000 or any part thereof, upon or by virtue of Judgments in the Circuit Court of St Louis County except as herein above set forth, nor was

p 17 — this Respondent indebted to said bank, in any way, or any account, at the time he was garnished or the bank ceased to do business, except in the manner a:bove set forth. ——— And this Respondent having chiefly transacted his bank by an agent and with but little personal knowledge of its details and having had no dealings with said bank since about the year 1821 when it ceased to act, as hereto:fore declared, and knowing that said bank, its agents, attornies or assignees, has not claimed from him, or made known to him any demand since the transfer of his debts to the United States as before set forth, and being informed by persons having access to the books and papers of said bank, that there is no claim against him on said books or a:mong said papers as left by said bank, this Res:pondent is confirmed in the belief that he owed it nothing at the time that he was garnished in this case & believes himself entitled to all legal and and equitable defence, and in addition to his other defences he claims the benefit of the statutes of limit:ation applicable to the case.

Sworn to & Subscribed before me this 23rd day of September 1844. John Ryland Clk } Thomas H. Benton".

15 p 253 And on the 26th day of September A. D. 1844 the follow:ing further proceedings were had in this cause to wit:

Traverse &c Exceptions &c filed "Jesse G. Lindell vs Thomas H. Benton garnishee of the bank of Missouri. The plaintiff this day files a trav:erse to parts of the additional answer of said Garni:shee and exceptions to that part setting up the Stat:ute of limitations."

which Traverse of parts of the answer & exceptions to the part setting up the Stat. lim. ———

Traverse &c "Jesse G. Lindell vs. The Bank of Missouri and Thomas

p. 18 — H. Benton Garnishee. And the said Pett G. Lindell as to the Answer of the said Garnishee exhibited & filed in this cause on the 26th day of September 1844 and as to the part of said Answer wherein it is pretended and alledged that the said Thomas H. Benton, at the time he was garnisheed in this case owed nothing to said bank, the said plaintiff doth deny and traverse the same, and he prays that it may be enquired of by a Jury whether or not the said Thomas H. Benton was indebted to said Bank (the Defendant in this cause) in manner and form as set forth in the allegations & interrogatories filed in this cause by the plaintiff.

Bates & Allen Atty.

And as to that part of said Answer wherein it is confessed & stated "that at the time said bank ceased to do business, he (the said garnishee) was indebted to the same in the sum of about $6.400 on two promissory notes, one for the sum of $1300 and one for the sum of $4.500 and also for the sum of $422.99/100 on account of interest upon said notes" and wherein it is stated that the same "was assigned to the United States by said Bank," this plaintiff doth deny and traverse the allegation of the said garnishee, that the same was assigned to the United States by said bank, and he prays that the same may be enquired of by a Jury.

Bates & Allen Atty"

And as to that part of said Answer wherein it is alleged that Judgment was obtained for the United States on the two promissory notes and interest thereon, (as above stated) and that he owed nothing to said bank of Missouri on said two notes and account, or on said Judgment, or on any other Judgment at the time he was garnisheed in this case, this plaintiff doth deny and traverse the same and pray that the truth or untruth of that part

19 page of the answer may be enquired of by a Jury.

Bates & Allen Atty

And as to that part of said answer wherein it is confessed and stated that he (the garnishee) "was further indebted to said bank, when it ceased to do business, in the sum of $5.200 on account of a promissory note for the payment of which, the stock held by said Respondent in said bank, amounting to $6.500 was pledged at eighty per cent, and alleged by said Garnishee, that the said stock was taken in payment of said note, by said bank as in other cases of the like kind, and that he owed nothing to said bank, on account thereof at the time he was garnished in this case" this Plaintiff doth deny and traverse the alleged fact that the stock of the said garnishee was taken in payment of said note by said bank. And he doth also deny & traverse the allegation in that part of the answer contained, that the said garnishee owed nothing to said bank on account thereof, at the time he was garnished in this case. And he prays that the truth or untruth of that part of the answer may be enquired of by a Jury.

Bates & Allen Atty

And as to all the parts of the said answer wherein the said garnishee has alleged, set up or pleaded the Statute of limitations or, attempted to defend himself against the just claims of this plaintiff by claiming the benefit and protection of the said Statute of limitations, this plaintiff doth except and object in law, to all such parts of said answer.

And for cause of Exception and by legal objection he assigns the following.

1st The Statute of limitations is special in its terms and applies itself to the actions therein particularly na

p. 20. :med and does not reach the case of a garnishee. ——
2 — The said Garnishee at and before the time the said bank ceased to do business, was a Corporator of said bank, and a Director thereof. He stood in a fiduciary relation to said bank, and, as he states in his answer that neither the bank nor its agents or attornies, have demanded the money, which he admits that he owed at the time of the suspension of the bank, he, being such fiduciary, cannot now set up the Statute of limitations in bar of the plaintiffs just demand. —
3 — At the time the said bank ceased to do business (as mentioned in the answer) said garnishee was a Director of said bank, and owed said bank for borrowed money, more than $11.000, whereas the charter of said bank forbade any Director to borrow from the bank more than $3.000 —, and this plaintiff now submits that said garnishee cannot set up the Statute of limitations or defeat the recovery of a debt so con:tracted.

Bates & Allen Atty."

15 p. 313 And on the 22nd day of November A. D. 1844 the follow:ing further proceedings were had in this cause to wit

Mo. to strike out Traverse — filed "Jesse G. Lindell vs Thomas H. Benton garnishee of the bank of Missouri. Motion on behalf of garnishee to ~~traverse~~ strike out traverse to his answer for reasons filed which motion is in the words and figures following to wit

Mo to strike out Traverse "Jesse G. Lindell vs Bank of Missouri Thomas H. Benton Garnishee. Motion on behalf of the said garnishee to strike out and declare null and void the traverse of parts of the answer of said Garnishee exhibited & filed 23 Sept 1844 ——————

For the following among other reasons.
1 — Said traverse presents no proper issue to be tried between the parties. ——————

p 21 — 2 — The answers of the garnishee are to be taken together and as whole must be taken as true, whereas the traverse admits one part of the answer and denies the other. ——————

The said garnishee also moves the Court, that the exception filed by the said plaintiff to that part of garnishees answer which relies on the Statute of limitation be overruled and that said defence of the Statute of limitation be held sufficient as set forth in said answer

L. E. Lawles for garnishee"

15 p 385. And on the 13th day of December A. D. 1844 the following further proceedings were had in this cause viz:

Motostrike out traverse overrul^d. "Jesse G. Lindell vs Thomas H. Benton garnishee of the President Directors &c of the Bank of Missouri. Now at this day come the parties by their Attorneys and thereupon the motion of the said garnishee to strike out the traverse to parts of the answer of said garnishee filed herein is submitted to the Court which being seen heard and fully understood, it is ordered that said motion be overruled. ——————

And on the 28th day of October A. D. 1845, the following further proceedings were had in this cause to wit.

16 p 353 Judgment "Jesse G. Lindell vs Thomas H. Benton garnishee of the Bank of Missouri. On Garnishment. Now at this day comes the said plaintiff by his Attorney and not requiring a Jury, thereupon all and singular the premises are by him submitted to the Court which being seen heard and fully understood, the Court doth find as to the first issue within joined between said parties that the said garnishee was indebted to the said bank in manner and form as the said plaintiff in his traverse to the answer of said garnishee hath alledged and as to the second issue within joined between said,

the word "them" altered so as to read "him" in conformity with the entry as made on the record Jno Richard Clk

p 22 — parties, the Court doth find that the said bank did not assign to the United States the indebtedness due by said garnishee and admitted in his Answer, to said bank in manner and form as the said garnishee in his said Answer hath alleged, and the Court doth further find, that judgment was not obtained for the United States on two promissory notes and interest thereon, and that said garnishee did owe to said bank of Missouri on said two notes and account; and the Court doth further find as to that part of said Answer wherein it is confessed and stated, that he the garnishee "was further indebted to said bank, when it ceased to do business in the sum of $5.200 on account of a promissory note, for the payment of which, the Stock, held by said Respondent in said bank, amounting to $5.500 was pledged at the eighty per cent and alleged by said Garnishee, that the said stock was taken in payment of said note by said bank, as in other cases of the like kind and that he owed nothing to said bank on account of thereof, at the time he was garnished in this case," that the stock of the said Garnishee was not taken in payment of said note by said bank, and that said garnishee did owe said bank on account thereof at the time he was garnished summoned in this case, and the Court doth further find that the said garnishee is indebted unto the said bank of Missouri in the sum of Fifteen thousand three hundred and twenty Dollars. It is therefore considered by the Court that the said plaintiff recover of the said garnishee the sum of twelve thousand three hundred and fifty-two Dollars being the amount of the Judgment rendered against the said Defendant and interest thereon from the date thereof, together with the costs and charges in this behalf expended and have thereof execution.

p 23 And on the 9th day of January A. D. 1846 the following further proceedings were had in this cause viz:

mo to set aside Judgment filed

Jesse G. Lindell vs Thomas H. Benton garnishee of the bank of Missouri. The said Garnishee by his Attorney this day files a motion to set aside the Judgment entered against him at the April Term of this court last herein."

which motion to set aside is in the words & c following

motion to set aside Judgt

"Circuit Court St Louis Jesse G. Lindell vs Thomas H Benton garnishee of the bank of Missouri.

Motion on behalf of said garnishee to set aside the Judgment entered against said garnishee in favor of said Jesse G Lindell at the April Term of this court on the 20th October 1845.

Which motion is founded on the irregularity and nullity of said Judgment appearing on the face of the record.

L. E. Lawless of Garnishee"

And on the 2nd day of March A. D. 1846, the following further proceedings were had in this cause to wit:

mo. to set aside Judgt overruled

Jesse G. Lindell vs Thomas H. Benton garnishee of the bank of Missouri. Now at this day come the parties aforesaid by their respective Attorneys and thereupon the motion of the said garnishee to set aside the Judgment rendered against said garnishee at the April Term of this Court, is by them submitted to the court, which being ~~submitted~~ seen heard and fully understood It is ordered by the court that said motion be and the ~~the~~ same is hereby overruled.

State of Missouri } ss I John Ruland Clerk of the
County of St Louis } Circuit Court, within and for the County aforesaid, certify the foregoing to be a full true and complete Transcript of the Record and proceed

p. 20 — ings in the case of "Jesse G. Lindell vs Thomas H. Benton Garnishee of the Bank of Missouri as fully as the same remains of record and on file in my Office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Office, in the City of St Louis this Sixth day February A. D 1846. M: Ruland Clk

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(4.) 22

r.

Thomas H. Benton garnishee
of the Bank of Missouri
~~appellant~~ Plff in error
vs
Jesse G. Lindele ~~appellee~~
Deft in error.

Filed March 18. 1846
H. L. Boon clk

Fee $8.50. pd plff in error

Art 4. D 21. Pier:

Thomas H Benton, plaintiff in Error
vs
Jesse G. Lindell, defendant in Error

In the Supreme Court March Term 1846

Error to the St Louis Circuit Court

The plaintiff in Error by his attorneys L.E. Lawless and Thomas T. Gantt, comes and shows to the Supreme Court here that the ~~jud~~ record of the judgment & proceedings in the above entitled cause is erroneous, and that the said Circuit Court committed error therein in this to wit—

1st. That said Circuit Court proceeded to try the issues of fact ~~[illegible]~~ made on the answer of said plaintiff in Error, (garnishee below) before the determination of the issues of law made thereon— Rev. Co. 1845-816. §1.— 1. Mo Rep 258 = 260 = 501.

2nd. That the issues of fact made on the said answer were, without the consent of the garnishee and in his absence, tried by the Court, and not by a jury. Pratte & Cabanne vs Corl. Vol 9th Mo Dec. 163

3d. Because the said judgment and the record thereof is in other respects informal ~~and insufficient~~ irregular and illegal.

L. E. Lawless
Thos T. Gantt
for plaintiff in Error.

22

Benton
vs
Lindell

Error.

filed Oct. 21. 1846
A. L. Brown clk

Benton v. Lindell

~~Appeal from~~ Error to Cl.
Mouis Co.

Lindell recovered a judgment against the Bank of Missouri in 1825, and not being able to make the debt by fi: fa: sued out an attachment, under the statute, & summoned Benton as garnishee. This was in 1837. After a variety of proceedings, not material to be noticed, Benton filed his answer in 1841. The answer was excepted to, & the exceptions sustained. At the April Term 1844 a further answer was filed - which in substance denied all indebtedness to the Bank, at the time of the garnishment & relied also on the statute of limitations. So much of the answer as denied indebtedness was traversed, & exceptions were taken to that part of the answer which set up the statute of limitations. The objection to this part of the answer was, that the garnishee having been a ~~dir~~ corporator & director of said Bank & owing the debt to said Bank in a fiduciary capacity, he could not avail himself of the statute. On the 22nd. Novr 1844 a motion was made by the garnishee to strike out the traverse to his answer & to overrule the exception taken to that part of the answer which relied on the statute of limitations. This motion was overruled. On the 28th oct. 1845 - the following entry appears ~~from~~ on the record ~~that~~ = Now at this day comes the said plaintiff,

by his attorney & not requiring a jury, therefore all & singular the premises are by him submitted to the court, which being seen &c. the court doth find as to the first issue &c. that the said garnishee was indebted &c." (proceeding to find all the issues for the pltff.) A judgment was rendered against the plaintiff in error for $12 352.

On the 9th Jany 1846 the plaintiff in error moved to set aside this judgment for irregularity - which motion, on the 23rd March 1846, was overruled - but no exceptions were taken. The record is brought to this court by writ of error.

This case falls within the principle settled by this Court in the cases of Pratte & Labanne v. Carl (9 Mo. R. 164) and Sutton v. Clark (Ib. 559.) It appears upon the face of the record, that the court upon the submission of the plaintiff alone, tried the issues of fact, found a verdict upon them all for the plaintiff, & entered a judgment on this verdict. To correct this error, a motion in the court below is unnecessary. Pratt v. Rogers 5 Mo. R. 53. Carr v. Edwards 1 Mo. R. 137. Forney, Dobbyns & Shade v. State of Missouri 9 Mo. R. 634.

As the case goes back, it may not be amiss to notice the decision of this Court in overruling the defence of the statute of limitations, although no exception was taken to this decision at the time. We have not been able to discover any thing in the letter or spirit of the statute of limitations, which restricts its privileges to any particular class of debtors. Nothing is said in the act, from which it can be inferred that debts contracted in a fiduciary character are exempted from its operation, nor is there any thing in the phraseology or object of the statute, which would preclude garnishees from its benefit. The statute was framed to protect persons from stale demands, which are presumed to have been paid, & the evidence of which payment the debtor is presumed to have lost or failed to preserve. If

garnishees are understood to be excluded from the benefits of the act, it will be very easy, in all cases, to evade the statute entirely, by collusion between the creditor & a third person. An indebtedness may be created by the creditor, for the very purpose, of defeating such a defence on the part of his debtor, & in this way the statute be rendered nugatory.

The other judges concurring, the judgt. is reversed & the cause remanded.

W. B. Napton

43.

Benton
v.
Lindell

Opinion of
the Court

W. B. Napton

Filed July 3. 1847.
A. L. Boon clk.

Thomas H Benton, plaintiff in error
vs
Jesse G. Lindell, Defendant in error

Writ of error to St Louis Circuit Court.

The defendant below, and plaintiff in error in this Court was served with a summons as garnishee of the Bank of Missouri, and the usual allegations and interrogatories were served upon him. He appeared and filed an answer to the allegations and interrogatories. This answer was partly denied or traversed, and partly excepted to. The exceptions to the answer raised the question of the legal sufficiency of it, or in other words, raised a question of law.

On the 24th day of October 1845. the case was called for trial in the absence of Judge Lawless who was the attorney for plaintiff in error. But, though it does not appear by the record, it is stated here, by way of exoneration of Judge Lawless and for no other purpose, that some days previous, the Court had declared that no other jury trials would be had at that term (April T. 1845) and had discharged all jurors from attendance on Court.——

—— In the absence of the plaintiff in error, and no person representing him in Court, the Circuit Court passing by, and omitting all consideration of the questions of law presented by the record, proceeded without the intervention of a jury to try the issues of fact, and gave judgment against Mr Benton for nearly fifteen thousand Dollars.

Of all this, neither Mr Benton nor his counsel had any notice until the following or November Term. The April Term was adjourned on the 28th October. But the record does not show this.

At the November Term 1845 Judge Lawless appeared and on behalf of plaintiff in error, moved to set the judgment aside for irregularity. This motion was overruled. The case was then brought to this Court by writ of

error.

To reverse the judgment, the plaintiff in error makes the following points.

1°. That it was erroneous and irregular in the Circuit Court to cause the issues of fact to be tried before the determination of the issues of law, and in fact, without making up to this time any disposition of the issues of law. Rev. Co. of 1845. Tit. Practice. p. 816. §1. Menefee v D'Lashmutt & al. 1 Mo. Rep. 258.

2°. That it was erroneous and irregular for the Circuit Court to take upon itself, without the express consent of both parties, the trial of an issue of fact without the intervention of a jury — Platte & Cabanné v Coal 9 Mo. Rep. 163. Sutton v Clark 9 Mo. R. 559.

3°. That an irregular judgment may be set aside for irregularity at any time within five years from the rendition thereof, and therefore the motion was not too late, being filed the subsequent Term. Rev. Co. of 1845. page 831. §8.

4°. That there was no need of a bill of exceptions, and no need for the plaintiff in error to have excepted to the ruling of the Court below, in order to present the case for review to this Court. Barr v Edwards 1 Mo. R. 137. West v Miles, assignee &c 9 Mo. R. 167.

The course of the Court below in this case was unusually irregular and violatory of law, and as the points made are such as have already received the direct interpretation of this Court, the argument for the plaintiff in error will be brief.

As to the first point the statute is express and unmistakeable: Even if, after deciding the questions of fact, the Court had proceeded to

determine the matters of law: it may be with much apparent reason contended that the irregularity is good ground for declaring the judgment void, the Court having no power to disregard the express directions of the statute before quoted, and reverse the order of proceedings. But in the case at bar the irregularity is still more glaring: for the questions of law remain to this day undisposed of, as will be seen by the record.

The second point is as to the error of the Court assuming the functions of a jury without the consent of the parties. The consent of both parties ought to appear by the record: else the trial of a matter of fact by the Court is error. (9 McR 589. 163.) In this case it appears, according to the fact, that plaintiff in error was not in Court when the traverse was tried.

As to the third point, the revised Code of 1845, page 831. §8 is in point and decisive of the proposition of plaintiff in Error

As to the fourth point, the objection of the Counsel for defendant in Error is anticipated that here was no bill of exceptions & therefore no case presented for ~~the~~ review by this Court: The plaintiff in Error contends that no bill of exceptions was necessary. The judgment rendered 24. October 1845, was a final judgment: and from a final judgment appeal or writ of error may be had to this Court without need of excepting (1 Mc. 137. 9 Mc. 167.) It is only to judgments or rulings not final, such as the rejection or admission of testimony, and the like that exceptions must be taken at the time, or the Supreme Court will not notice

the decision thereof by the Court below. Such were the cases of 7. Mo. Rep. 209. Ford v. Whitehill 6 Mo. 253 Error then would lie to the judgment of 24th. Oct. 1845. that being a final judgment even if the motion of Benton for a new trial to set aside that judgment for irregularity had not been made. The plaintiff in error can afford to dispense with all the record since the following that judgment of October 1845. a writ of error lies to that, & if this Court considers it erroneous, it will be reversed whether excepted to or not. (9 Mo. 167).

For these reasons, the Counsel for plaintiff in error contends that the judgment of the Court below should be reversed. Respectfully submitted

Thos. T. Gantt, for plff in error —

Thos. H. Benton,
vs
J. G. Lindell
Brief of plff in error
Thos. T. Gantt. p.q.

Authorities.
Rev. Co. of Mo. for 1845
page 816. 81. page 831. 88
1. Mo. R. 137. Id. 258
9 Mo. R. 163, 167. 559

Supa Ct. Mar: T. 1847

Thomas H. Benton pltff: in Error
v
Jesse G. Lindell Deft: in Error
} Error to Howard Cont: Court.

Lindell recovered a judgment against the Bank of Missouri, and not being able to make the debt by fi: fa: sued out an attachment, under the Statute, and summoned Benton as a garnishee.

The case was litigated for several years. At one time, the Court gave a judgment discharging the garnishee, which Lindell brought to this Court, and had the judgment reversed, the case remanded - see 6. Mo R. 361.

The case being returned to the Howard Cont. Court, the garnishee answered - The plaintiff Lindell, traversed several parts of the answer, and excepted to certain parts.

The issues of traverse were tried by the Court without a jury, & found for the plaintiff Lindell, and judgment thereon.

It appears by the record that the garnishee took no part in the trial of the issues - nor after the trials did he take any step or make any motion in the cause, at that term. But afterwards, at another term, the garnishee made a motion in the following words -

"Motion on behalf of said garnishee to set aside the judgment entered against said garnishee in favor of said Jesse G. Lindell, at the April term of this court on the 28th. of October 1845, which motion is founded on the irregularity & nullity of said judgment appearing on the face of the record

L. E. Lawless for garnishee."

This motion appears to have been overruled but no exception taken: nor is any objection taken here to the overruling of that motion. (There is no bill of Exceptions.)

The only three errors assigned are the following
1. That the Circuit Court tried the issues of fact before the determination of the issues of law.
2. That the issues of fact were, without the consent of the garnishee, in his absence, tried by the Court, without a jury.
3. Generally — "in other respects informal, irregular & illegal."

As to the first error assigned, we answer
1. There were no issues of law in the case. The pltff: had made issues of fact, by traversing parts of the answer; and also excepted to certain matter in the answer, not responsive to the allegations & interrogatories, & vaguely invoking the Statute of limitations, to protect him against the debts admitted by his answer.

That part of the answer was wholly immaterial, and the pltff: need not have noticed it. The only notice he took of it was to point out its objectionable character: He did not demur to it — and indeed a demurrer would have been inadmissible - R. C. p. 140-1 Ss 31-32 and Tuttle v Gordon 8 Mo. R. 152 —

The garnishee made no response to these exceptions, and so there is no pretense of an issue of any sort, upon that matter. And the Court no doubt considering that whole matter immaterial, took no notice of it, in determining the case.

2. If there had been issues of law in the case, the gainsayer is wrong in supposing that it is an Error for which the judgment ought to be reversed, that the issues of law were not determined before the trial of the issues of fact.

The Statute does indeed say (R.C. p. 816. §.1.) — "When there are several issues of law and of fact in any suit, the issues of law shall be first determined." But that is only directory — a rule of convenience — Suppose two pleas to a declaration — issue on one of them, Demurrer to the other, Joinder — Verdict of a jury for plaintiff on the first, and afterwards decision by the Court on the demurrer, in favor of the same party — The case comes here on writ of Error and this court finds both issues legally rightly determined — Is this Court bound to reverse the judgment simply because the issues, though rightly determined, were not determined in the prescribed order of time?

There are many provisions in our statutes couched in language equally explicit, requiring acts to be done, in certain time & manner — e.g. the filing of bonds for costs before the bringing of suit, and the filing of pleas at certain days — which, always, the Courts consider as directory only, and, at most enabling the opposing party to take a present advantage of the omission, by motion in Court, for judgment or other appropriate remedy.

We suppose it has never been assigned for error, in this Court, that no bond for costs was filed before action brought — or that the plea upon which issue was joined & verdict rendered, was filed after the lapse of six days.

We are not aware of any decision of this Court directly in point — In Ellis v Sumner Sal. 1. 100 R. 260 — there is a passing remark of the Court to the effect that — In general where there is an issue of law & an issue of fact, the question of law should be first disposed of. But the case itself went off on entirely different grounds — that point does not seem even to have been made before the Court.

As to the second Error assigned — we answer

1. The assertion in this assignment that the issues of fact were tried by the Court, without the consent of the garnishee and in his absence, is wholly gratuitous — and besides, it is the assertion of a matter of fact not traversable & triable here.

It is not alleged that the trial was called on, out of turn or in wrong time. He had answered and issues were taken on his answer — and so, in legal contemplation, he was in Court: His absence is not to be presumed from the mere fact that he took no part in the trial — He may have declined taking part in the trial because he had no defence to make.

In contemplation of law, he was present: He had

a right to be – for he was a party to the issues – She had full notice & opportunity to be present. And hence whether he was, physically absent or present, depending as it did, on his own volition, cannot affect the legal merits of the trial.

This assignment alleged that the trial was had by the Court – without the consent of the garnishee – But it does not allege that it was against his will, nor against any act or expression of his to the Contrary.

The answer is ready – no affirmative consent of his was necessary. By the express provision of the Statute, the Court has power to try – all issues of fact joined in any suit, when neither party shall demand a trial by jury – R.C. 819. N. 20 – And it is not pretended that either party demanded a trial by jury in this case.

In support of this assignment of Error, the party cites (as if he relied upon it) the case of Pratt & Babcock v Cook 9. Ind R. 163. That case does not touch the case of the Court trying an issue of fact; but the judgment was reversed because (among other things) the Court assessed damages on a judgment by default, which was expressly forbidden by the Statute – R.C. 1835 Prac: at Law Art 3. N 35 – And the R.C. of 1845 is just the same p 815 N 42.

And so, we conclude that the judgment must be affirmed.

for Deft in Error

Gamble & Baty

March 1847

Supd. Court Mar: T. 1847.

Thos: H Benton
pltf: in Error

v

Jesse G. Lindell
Deft in Error.

Submitted, without oral argument

Brief of Deft in Error
Gamble & Bates attys. p.d.