HOWELL *vs.* VINSANT.

To actions originally brought in the circuit court on notes or bonds, usury cannot be set up except by plea verified by affidavit. But Rev. Stat. chap. 87, sec. 89, dispenses with the formality of pleading in suits brought before justices of the peace, or in trials on appeals to the circuit court, and no affidavit is necessary for the admission of the defence of usury: parol evidence to impeach the consideration of a note or bond for usury may be introduced without plea or affidavit.

Writ of Error to the Circuit Court of Crawford County.

John Howell sued Isaiah Vinsant upon a writing obligatory for $78.25, before a justice of the peace of Crawford county, in January 1845. The justice made the following entry of the trial and judgment: "Came the parties and the defendant having proved that the writing obligatory upon which this action is founded, was void by reason of the *usurious* interest thereon reserved by the plaintiff, it is therefore considered by the court that said defendant go hence, without day, and recover of plaintiff his costs" &c.

Howell appealed to the circuit court of Crawford, where the cause was tried at the August term, 1845, before BROWN, judge.

The case was submitted to a jury, who found for defendant, and judgment was rendered accordingly. Howell moved for a new trail, which was refused, he excepted and took a bill of exceptions, from which it appears, that on the trial of the cause, Howell introduced the bond sued on as evidence. It is copied in the bill of exceptions, was executed by one John Hancock and defendant, Vinsant, to Howell for the sum above stated, dated March 24th, 1842, and due at twelve months.

Vinsant introduced a witness who testified that he heard Howell say that he had loaned Hancock the sum of $125, for which he and defendant, Vinsant, executed two writings obligatory to him for the sum of $178, one of which was for $78.25, and was the obligation sued on. That the sum of $125 dollars was the sole consideration for the said two writings obligatory, and that the agreement was that Howell was to have twenty-five per cent. To which testimony Howell objected, and moved the court to exclude it from the jury, upon the ground that there was "no plea of usury specially pleaded" in the cause: but the court refused to exclude the evidence, and plaintiff excepted. The above is the substance of all the evidence introduced, as stated in the bill of exceptions.

Howell brought error.

PIKE & BALDWIN, for the plaintiff. The only question is whether the evidence was admissible; and that depends upon the question whether the defence of usury could be set up except by plea under oath. In the circuit court such a defence must be accompanied by affidavit. *Secs.* 74, 75, *Pr. at Law, Rev. St.* 629. There is no provision of law dispensing with pleadings before justices. That no pleadings are necessary there is a mere notion. No defence can be set up in the circuit court on appeal, except what was set up before the justice. How can it appear what defence was set up there unless his record shows it?

The defence of usury is not encouraged by the courts. A party

will not be allowed irregularly to avail himself of it. *Lovett vs. Cowman,* 6 *Hill* 225. *Fulton Bank vs. Beach,* 1 *Paige,* 429.

Least of all will he be allowed to surprise the other party with it. That defence was not interposed, in any legal way, before the justice, and could not be relied on in circuit court.

W. WALKER, contra.

OLDHAM, J. This was an action brought before a justice of the peace upon a writing obligatory. Upon the trial before the justice judgment was rendered for the defendant, from which the plaintiff appealed to the circuit court, and upon a trial *de novo,* in that court, a verdict was found for the defendant, and judgment was rendered accordingly. The plaintiff has brought the case into this court by writ of error.

For the plaintiff it is contended that the defence of usury cannot be set up except by plea verified by affidavit. Such is the law governing cases brought originally into the circuit court. But the legislature has made a different provision in relation to suits brought before justices of the peace. By the *Rev. St. ch.* 87, *sec.* 89, it is enacted that "on the trial if all suits upon contracts before any justice of the peace or in any circuit court on appeal, whether brought by the original claimant, or any person for his use, or by the payee or obligee of any note or bond, or his assignee, it shall be the duty of the justice or court to hear and determine such cause on its merits, and to hear parol proof or other legal evidence to impeach the consideration or validity of such note or bond." The formality of pleading is dispensed with, and no affidavit is necessary for the admission of such a defence. The defence was properly admitted in the case before us. The evidence, as set forth in the bill of exceptions, fully warrants the verdict. The judgment must therefore be affirmed.