

STAYTON *vs.* NEWCOMER.

The transcript sent up to this court is presumed to be a true and perfect copy of the original record.
A writ without the seal of the court is a mere nullity, and imposes no legal obligation upon the defendant to appear, and defend against the action.
Judgment by default reversed, because it does not appear from the transcript that the writ of summons was sealed by the clerk.

Appeal from the circuit court of Phillips county.

THIS was an action of assumpsit, by Newcomer against Stayton, determined in the Phillips circuit court, at the October term, 1844, before JONES, judge.

On the 4th of October, judgment by default was rendered against Stayton, and a writ of inquiry awarded. On the 9th of the month, he appeared and filed a motion, verified by affidavit, to set aside the judgment, upon the grounds that he had retained counsel to defend the case, who had informed him that the necessary plea had been filed in due time, and that he had a meritorious defence which he desired to interpose. His counsel also made affidavit that he had been retained, prepared the plea, was under the impression he had filed it in time, and did not ascertain that he had not until after the judgment by default. He also stated that defendant had a defence to the merits. The court overruled the motion, and the defendant excepted. At the following term, the damages were assessed, final judgment rendered, and Stayton appealed.

The writ of summons, as copied into the transcript sent up to this court, does not appear to have been sealed by the clerk with his official seal. The clerks, in making transcripts, usually make a scrawl or zigzag circle to represent the seal upon the original writ, which is omitted in this case.

The appellant assigns for errors: 1st, That by the record it appears that no process ever issued in said suit against said appellant, valid in law, to compel his appearance thereto: 2d, The court erred in refusing to set aside the judgment by default, &c."

PIKE & BALDWIN, for appellants.

From the transcript filed, the writ appears not to have been sealed, whether this be a mistake in the transcript or not, we do not know.

To grant or deny the motion was no doubt matter of discretion with the court, but not arbitrary discretion. It is not the policy of the law, because it is not consistent with justice, whose hand

maid the law is, or ought to be, to prevent a party from defending on the merits. Surely in this case the court below denied justice, by adhering to a stern rule of practice. The judgment should be set aside on terms.

OLDHAM, J., delivered the opinion of the court.

It is contended by the appellant that the summons sued out against him in this case is null and void, and that, consequently, he was under no legal obligation to appear in obedience to its mandate. The transcript sent into this court is presumed to be a true and perfect copy of the original, and if so, it totally fails to confer any jurisdiction over the person of the appellant. The statute requires all writs issuing out of any court of record to be sealed with the judicial seal of such court. It is apparent, upon inspection, that no seal is affixed to the writ, nor is there any excuse offered by the clerk for the omission. The writ being unsealed is a mere nullity, and as such imposed no legal obligation upon the appellant to appear and defend against the action. This being the state of case, the judgment by default is erroneous and ought to be reversed. It is therefore, ordered and considered, that the judgment herein rendered be and the same is hereby reversed and set aside with costs: and it is further ordered that the case be remanded to the Phillips circuit court to be proceeded in according to law, and not inconsistent with this opinion, and that the appellant be considered as in court.
