McLARREN ET AL. *vs.* THURMAN.

When the original writ bears date on a day other than that on which it was issued, the plaintiff is entitled to an amendment thereof, on motion, so as to show its true date.

A motion to amend is not abandoned by the plaintiff's filing a replication to a plea in abatement of the writ.

A defendant, by going to trial on the issue made by the plaintiff's replication to his plea, waives his demurrer to the replication. In such case the plaintiff sustains no injury by the failure of the court to determine the sufficiency of his replication; and, therefore, the court will not reverse the judgment, at his instance, for such error.

An action is commenced, under our statute, by filing a declaration, and the voluntary appearance of the defendant; or by filing a declaration and suing out a writ of summons.

The writ of summons should bear teste upon the day of its issuance; and the presumption of law is, that its date is the true date, therefore that fact cannot be questioned, except upon a motion to amend the writ.

Appeal from the Circuit Court of Washington county.

This was an action of *Trover,* brought by Charles McLarren and Eliza McLarren, against Elizabeth Thurman, and determined in the Circuit Court of Washington county, on the 8th day of June, 1846, before the Hon. SEBRON G. SNEED, Judge.

The declaration, which is in the usual form, is endorsed "filed 25th Sept. 1845," and the writ of summons bears date on the same day; two bonds for costs are copied into the transcript; one filed on

the 25th September, the other on the 10th October, 1845. The defendant appeared at the return term of the writ, and filed a plea in abatement, averring that the plaintiffs were non-residents, and did not file a bond for costs before or at the time of suing out their writ, and praying judgment, that the writ and declaration be quashed. The plaintiffs then moved to amend the writ, "by inserting the true date when said writ was issued," and to cause the declaration to be endorsed with the true day; and in support of their motion filed the affidavits of their attorney of record, and of the clerk of the Circuit Court; whereby it appeared that the declaration and first bond for costs were presented to the clerk to be filed on the 25th September, and a writ of summons ordered to be issued; that the declaration was marked filed, and the writ then filled up, but not issued, because the clerk believed that the obligor in the bond for costs was not a permanent resident of the State, and, therefore, he declined to issue the writ, and so informed the plaintiffs' attorney, who told him to do nothing further in the matter until a good bond was filed; that a bond for costs, approved by the clerk, was filed on the 10th October, and that the clerk, after such bond was filed, handed out the writ previously prepared, but unintentionally omitted to correct the date, and make it bear date when it truly issued, and omitted to endorse the declaration as filed on that day. The court overruled the motion to amend, and the plaintiffs excepted.

The plaintiffs replied to the plea in abatement, that before and at the time of issuing out their writ of summons, they filed a good and sufficient bond for costs, concluding with a verification, and prayer that the writ and declaration be adjudged good. The defendant demurred to the replication, and assigned for cause the conclusion thereof. The demurrer does not appear to have been disposed of; but the parties went to trial upon the issue made by the replication to the plea. Verdict for the plaintiffs, and judgment that the defendant answer over. The defendant moved for a new trial, which was granted, and the plaintiffs excepted, and filed their bill of exceptions, setting out all the evidence adduced upon the trial, and the instructions given and refused; all of which is omitted as no point is made in the opinion of the court in reference to it.

The case was then submitted to the court, neither party requiring a jury; and the court found for the defendant. The plaintiffs moved for a new trial, but the court overruled their motion, and they excepted and set out the evidence adduced to the court, which is, in substance, the same as that contained in the affidavits filed on the motion to amend the writ.

The plaintiffs appealed, and assigned for error the overruling of their motion to amend the date of the writ, and of filing the declaration; the trial of the issue upon the replication, when the same was admitted by the demurrer; the sustaining the defendant's motion for a new trial, and the overruling of the plaintiffs' motion for a new trial.

D. WALKER, for the appellants.

E. H. ENGLISH, contra.

OLDHAM, J. It is contended for the appellee that the appellants, by replying to the plea of the appellee, abandoned their motion to amend the writ. We cannot admit such to be the case. That is a rule of pleading, and does not apply to a motion like the present. The right of the plaintiffs to amend the writ in accordance with the facts set forth by their motion, and the accompanying affidavits, is fully established by authority. Our statute of amendments, *Rev. Stat. ch.* 116, *sec.* 112, is very broad and comprehensive. It provides that "the court in which any action may be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance for the furtherance of justice, on such terms as may be just, at any time before final judgment rendered therein. In *Haines* v. *McCormack,* 5 *Arks. R.* 613, this court held that "if the writ bore teste upon a day, other than the true one, the plaintiff, by moving to amend the writ, should have been allowed the privilege." *See, also, Robinson* v. *Burleigh,* 5 *N. Hamp. Rep.* 225.

The defendant below, by going to trial upon the facts put in issue by the plea and replication, must be considered as having waived her demurrer. The plaintiffs sustained no injury in consequence of the

court not determining the sufficiency of their replication in point of law; hence it is no ground for reversal. A judgment will not be reversed at the instance of a party who sustained no injury from the error. *Overly* v. *Paine,* 3 *J. J. Marsh.* 717. *Sterrett* v. *Creed,* 2 *Hana* 343. *Trabue* v. *McKettreck,* 4 *Bibb* 180. *Hughes* v. *Stickney,* 13 *Wend.* 280.

The remaining question is whether the court properly overruled the plaintiffs' motion for a new trial. A non-resident of the State is required by law, before he "shall institute his suit, to file in the office of the clerk of the Circuit court in which the action is to be commenced, the obligation of some responsible person, being a resident of the State, by which he shall acknowledge himself bound to pay all costs which may accrue in such action." *Rev. St. ch.* 34, *sec.* 1. The question of fact in issue was when this suit was instituted. In *Byrd et al.* v. *Caretal,* 2 *J. R.* 342, it was held that "the time of suing out the writ was the commencement of the action; and also in *Fowler* v. *Sharp,* 15 *J. R.* 323. *In Burdock* v. *Green,* 18 *J. R.* 14, it was held that the issuing of the writ is the commencement of the suit in all cases where the time is material, as to save the statute of limitations. In *Ross* v. *Luther,* 4 *Cow. R.* 158, it was decided that the suit was not commenced until the actual delivery of the writ to the coroner. See, also, *Society for propagating the Gospel* v. *Whitcomb,* 2 *N. Hamp. R.* 227. *Lowery* v. *Lawrence,* 1 *Caines R.* 69. In this last case it was held, the declaration being filed before the writ issued, that the time of filing the declaration could not be considered the commencement of the suit, and had that fact been put in issue, it would have been an immaterial fact.

Our *Rev. St. ch.* 116, *sec.* 1, provides that "suits at law may be commenced in any of the Circuit Courts of this State, by filing in the office of the clerk of such court, a declaration, petition or statement in writing, setting forth the plaintiff's cause of action, and by the voluntary appearance of the defendant, or by filing such declaration, petition or statement in such office, and suing out thereon, a writ of summons, &c." Then the declaration and voluntary appearance of the defendant, or the declaration and suing out the writ, are necessary for the commencement of an action, and in the latter case the suit

cannot be said to be commenced until the writ is actually sued out.

The next enquiry in the present case is, when was the writ sued out? In *Robinson* v. *Burleigh*, 5 *N. Hamp. R.* 225, it was held that in general, the day of the teste of the writ is to be considered as the time of the commencement of the action. But whenever the true time is material it may be shown notwithstanding the teste of the writ. In *Strafford Bank* v. *Cornell, New Hamp.* 330, the same principle was held, and the court cited, in support of it, *Johnson et al.* v. *Smith*, 2 *Burrows* 966. *Morris* v. *Pugh*, 3 *Burrows* 1243. *Walburgh* v. *Saltonstall, T. Jones* 149.

In *Ross* v. *Luther*, 4 *Conn. R.* 138, the writ was filled up some time and left with the witness to be issued, upon a certain event, parol evidence was received to establish, when the writ was placed in the officer's hands, and the court held that the suit was not actually commenced until the delivery of the writ to the coroner. And it has been held, for some particular purposes, the service of the writ is the commencement of the suit. *McDaniel* v. *Reed*, 17 *Ver. R.* 674. In *So. prop. Gos.* v. *Whitcomb*, 2 *N. Hamp. R.* 227, the court say "The evidence of the true time the action is brought, presents a different question. The presumption on this subject is that the date of the writ is the true time, when the action was brought. *Yel.* 71, *note*: 4 *Mass. R.* 263. *"This,"* continues the court, "is grounded on the probability of the fact, and is in analogy to the presumption which prevails as to the execution of notes, deeds, and other instruments. But in England, writs sued out in vacation are generally ante-dated to the preceding term; here they may be ante-dated to any time after fifteen days before the preceding term, and they may by mistake or design be either post-dated or ante-dated. Hence the presumption that the date is the true time the action was brought, is not a presumption *de jure* which cannot be rebutted, but is a presumption *de facto*, and the question may always be submitted to a jury, whether the action was not commenced either prior or subsequent to the date of the writ," and the court cite in support of the doctrine thus stated, *Yel.* 70, *note*: *Burr* 960, 1242. 1 *Bl. Rep.* 320, *ib.* 439.

We have a statute which requires the writ to be dated on the day

that it issues; *Rev. Stat. ch.* 116, *sec.* 3; hence the presumption in this State is a presumption *de jure* and not *de facto,* and, therefore, a party will not be permitted to show that the writ bears date on a wrong day, except upon motion supported by affidavits to correct the date of the writ. *Haines* v. *McCormick,* 5 *Ark. Rep.* 613.

In the present case the writ was filled out by the clerk, and withheld until he could see the attorney for the plaintiffs, who directed him not to issue the writ until a cost bond could be filed according to law. After the bond was filed, the clerk issued the writ by handing it to the sheriff, but neglected to insert the true date. We do not intend to say that an actual delivery of the writ to the officer is necessary for the commencement of the action, but admit that if the plaintiff should file his declaration, and should receive the writ himself, with the intention of delivering it to the officer, it would be sufficient. But in this case the clerk handed the writ to the officer, and until that time the suit was not instituted, and previous thereto a valid cost bond had been filed. The court should have permitted the plaintiff to amend this writ according to the facts. Reversed.