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against the plain letter of the statute, to suppose they so intended.

In the present case there is no complaint that the demandant did not tender a sufficient sum to pay all the claims of the mortgagees; and we are of opinion that upon the tender being made, the deed of mortgage became absolutely void and the land discharged from the incumbrance, and that the demandant thereby acquired a right to enter into the land and hold it against the mortgagees, and that he may well maintain this action to obtain possession.

Judgment on the verdict.

HEZEKIAH PARSONS *versus* SAMUEL A. PEARSON.

A scire facias brought against the endorser of a writ, to recover the costs of the original suit, is local, and must be brought in the county and in the court where the record of the judgment in the former suit remains.

Where a judgment is rendered in favour of a defendant against a plaintiff, not an inhabitant of this state, for costs, the endorser of such plaintiff's original writ becomes liable immediately to pay such costs, and a scire facias may be maintained against him without suing out an execution upon the judgment.

THIS was a scire facias against *Pearson*, as endorser of an original writ in a suit commenced by one *Jesse Carr*, an inhabitant of the state of *Vermont*, against the said *Hezekiah Parsons*, and in which judgment was rendered here in this court at November term, 1817, in favor of *Parsons*, to recover his costs. It appeared from the scire facias that both the parties to it were inhabitants of the county of *Coos*.

Pearson objected that this scire facias ought to have been brought in the county of *Coos*, where the parties to it reside, and not in this county, and relied upon the statute of February 9, 1791, § 4, by which it is enacted "that all personal or transitory actions, where both parties are inhabitants of this state, may be commenced in the county wherein either of the parties to the suit may be an inhabitant, and not elsewhere in this state."

But by the court.—This objection is not well founded. A scire facias against an endorser is not a transitory action.

It is founded upon a record, is in its nature local, and must be brought not only in the court, but in the county where the record remains.

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Pearson then objected, that the scire facias was defective, in not shewing what return had been made upon the execution which had issued upon the judgment against *Carr*.

By the court.—The statute of February 9, 1791, sec. 7, declares that all original writs shall be endorsed on the back thereof near the bottom, with the name of the plaintiff, if he be an inhabitant of this state, or in like manner by his agent or attorney, being an inhabitant of this state; and where the plaintiff is not an inhabitant of this state, then the writ shall be endorsed in the manner aforesaid by some responsible person who is an inhabitant of this state, “and the plaintiff’s agent or attorney, who shall endorse his name as aforesaid, shall be liable in case of the plaintiff’s living out of the state, or upon the neglect, inability or avoidance of the plaintiff and return of *non est inventus*, or that such execution as may have issued against the plaintiff is unsatisfied, to pay the defendant all such costs as he shall recover, where the plaintiff shall not support his action, on scire facias to be brought against such endorser within one year,” &c.

When a judgment for costs is rendered against a plaintiff who is an inhabitant of this state, the endorser of his original writ is, under the statute, liable only upon the neglect, inability, or avoidance of such plaintiff, appearing by a regular return of an execution duly issued upon the judgment. In order, therefore, to charge an endorser in such a case, the defendant must sue out an execution upon the judgment, and have it regularly returned. The neglect, inability, or avoidance of the plaintiff can be proved only by the return upon the execution, and the endorser is not liable till the execution has been returned.

But when the plaintiff, against whom such a judgment is rendered, is not an inhabitant of this state, the endorser of

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the original writ becomes liable immediately, and no execution need be sued out in order to charge him. The stipulation of an endorser in such a case is that all costs which the defendant may recover against the plaintiff shall be paid as soon as judgment is rendered.

In the present case it appears that Carr is an inhabitant of Vermont. The liability of the defendant does not, therefore, depend upon the return of the execution, and this objection is not well founded.

J. I. Swan, for the plaintiff.

BURGESS MEDCALF, PLAINTIFF IN ERROR,

versus

BENJAMIN SWETT.

A writ of error does not lie to reverse a judgment of the court of common pleas, from which an appeal might have been claimed.

THIS was a writ of error to the court of common pleas, in this county, brought to reverse a judgment rendered there at February term, 1817, from which judgment it appeared that the plaintiff in error might have claimed an appeal.

J. Bell, of counsel for the defendant in error, moved the court to quash the writ of error, as having issued improperly, and contended that error did not lie in such a case. 4 *Mass. R.* 171. *Savage vs. Gulliver*.—6 *Mass. R.* 4. *Jarvis vs. Blanchard*.—9 *Mass. R.* 228. *Champion vs. Brooks*.

Nelson, for the plaintiff.

Per curiam. The law on this subject is the same in this state as in *Massachusetts*. It has often been decided here that error does not lie to reverse a judgment, from which an appeal might have been claimed.

Writ of error quashed.