

Burnap v. Wight.

damages on account of other injuries, does not vitiate the declaration. The allegations respecting his credit, business, and the like, may properly be rejected as surplusage. Excluding them entirely from the declaration, it still shows a good cause of action. They may be stricken out on motion; or the court will not allow any evidence to be given under them on the trial. It is well settled, that where unnecessary allegations are made in a declaration, which are foreign and irrelevant to the cause, they will be rejected as surplusage, and need not be proved; nor will they vitiate even on special demurrer. 1 Chitty's Pl. 262; Stephen's Pl. 524; Tucker v. Randall, 2 Mass. 283; Granis v. Clark, 8 Cow. 36; Wilmarth v. Mountford, 8 Serg. & Rawle, 124. And after a general verdict for the plaintiff, the judgment will not be arrested, but it will be presumed that no damages were given on the faulty allegations. Steele v. Western Ireland Navigation Company, 2 Johns. 283; Richards v. Farnham, 13 Pick. 451.

The circuit court erred in sustaining the demurrer; and the judgment must be reversed, and the cause be remanded for further proceedings.

Judgment reversed.

FRANCIS BURNAP v. JAMES M. WIGHT.

MOTION TO DISMISS WRIT OF ERROR.

A defence of the statute of limitations cannot be interposed by a motion to dismiss; it must be relied on by plea.

Where a writ of error is sued out within five years, the failure to have the process served before the expiration of the five years, does not bring the case within the operation of the statute.

THE defendant in error entered a motion to dismiss the writ of error for the reason, that the writ was not issued until after five years from the rendition of the judgment in the circuit court. That no writ of error was issued and delivered to the proper officer for service before the expiration of five years; that the writ of error and *scire facias* were not delivered by the plaintiff in error for the purpose of being served until after the expiration of five years from the rendition of judgment.

J. MARSH, for the motion.

14	303
64a	125
64a	680
14	303
168	366
14	303
97a	53

 Frink et al. v. Darst.

FRANCIS BURNAP, in person, *contra*.

TREAT, C. J. Wight recovered a judgment against Burnap on the 3d of November, 1847. Burnap sued out a writ of error on the 23d of September, 1852, which was not delivered to the keeper of the record until the 2d of June, 1853. A *scire facias*, issued at the same time, was not put into the hands of the sheriff till the 1st of June, 1853. A motion is now made to dismiss the writ of error, because the statute of limitations operates as a bar to its prosecution.

The motion must be refused on two grounds. 1. A defence of the statute of limitations cannot be interposed by a motion to dismiss. It must be relied on by plea, so that the plaintiff may reply that the case is within the exceptions in the statute. 2. The record shows that no such defence can avail the defendant. The writ of error was sued out within five years from the rendition of the judgment. The issuing of the writ was the commencement of the suit in this court. The bar of the statute was not then complete. The failure to have the process served before the expiration of the five years, did not bring the case within the operation of the statute. It was served before the return day. There is, therefore, no pretence for saying that the plaintiff caused the writ to issue without any intention of prosecuting it.

The motion is denied.

Motion denied.

14	304
132	606
33a	76
14	304
60a	302
14	304
179	271

JOHN FRINK et al., Plaintiffs in Error, v. JACOB DARST, Defendant in Error.

ERROR TO PEORIA:

A deed which grants, sells, and conveys to A. B. all the right, title, and interest in and unto certain described lands, which the vendor has, to have and to hold to him, his heirs and assigns, forever; with all the privileges and appurtenances thereunto belonging; will not vest a subsequently acquired title by the releasor in the releasee, if the former had no interest in the land at the time the deed was executed.

An estate in "fee-simple absolute" means a perfect title; and the seventh section of chapter twenty-four of the Revised Statutes, entitled "Conveyances," has application only to titles of this character.

The case of *Frisby v. Ballance*, 2 Gilman, 144, overruled.

THIS was an action of ejectment brought by Frink & Walker against Darst to recover possession of certain land. Plea, not