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interest. This part of the decree is equitable; and as we coincide with the views of the circuit court on all the points of the case, the decree is affirmed.

Decree affirmed.

*JOHN B. GORMAN and others, Plaintiffs in error, v. PETER [*115
LENOX's Executors, Defendants in error.

Demurrer.—Action on replevin bond.—Evidence.—Set-off.

On a demurrer being filed, the rule is, that the party who has committed the first fault shall have judgment against him.

Where a declaration is on a bond given to prosecute with effect a writ of replevin, and the breach assigned is, "that the suit was not prosecuted with effect," it is sufficient.

A *certiorari* had been issued by the supreme court to the circuit court, on an allegation of diminution, and the judgment in the replevin suit certified to the supreme court, under the *certiorari*, substantially differed from the judgment described in the declaration on the replevin bond, in a suit in the circuit court, brought after the judgment was rendered; in the circuit court, in the suit on the replevin bond, the judgment was used in evidence without objection: *Held*, that the judgment was properly given in evidence, to show the amount of damages which the plaintiffs in the replevin suit had sustained; and the defendants in the suit on the replevin bond had no right to go into any inquiry as to the evidence on which the verdict was rendered. Evidence of set-off between the plaintiffs and the defendants, in a suit on a replevin bond, the set-off not having any application to the demand on the replevin bond, which was given after a distress for rent, and in which judgment for the rent had been given for the avowant, is inadmissible. The evidence was not offered to show that judgment had been satisfied, but that it ought never to have been given.¹

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

This case was argued, at January term 1840, by *Hoban* and *Coxe*, for the plaintiffs in error; and by *Brent*, for the defendants: at this term—

McLEAN, Justice, delivered the opinion of the court.—This case comes before this court from the circuit court of the district of Columbia, on a writ of error. An action was brought in the circuit court, by the executors of Lenox, against the plaintiffs in error, on a bond given by them in the penalty of \$3400; with the condition, "that the said John B. Gorman should well and truly prosecute a certain writ of replevin with effect;" and also, "should return the goods and chattels replevied, if the same be adjudged, and in all things stand to and abide by, perform and fulfil, the judgment of the court in the premises."

*To the declaration the defendants filed a plea of performance, to which the plaintiffs demurred. The defendants also put in a plea of [*116 set-off, that the testator was indebted unto the said Gorman, in the sum of \$1238.96, for so much money, &c., and for a like sum for goods, wares and merchandise. To this plea the plaintiff replied the general issue of *non assumpsit*. The statute of limitations was also replied to this plea of set-off, on which issue was joined. The cause on these issues was submitted to a jury, who returned a verdict for the plaintiffs, for the sum of \$1088.25, as

¹ In replevin, on a distress for rent, the tenant cannot set off an independent demand against his landlord. *Beyer v. Fenstermacher*, 2 Whart. 95; *Peterson v. Haight*, 3 Id. 150; s. c. 1 Miles 250.

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the amount of damages on the bond. After the verdict, the demurrer filed to the plea of performance was argued and sustained; and thereupon, a judgment was entered for the penalty in the bond, to be released on the payment of the sum found by the jury.

On the trial, the plaintiffs, by their counsel, offered in evidence to the jury, the record and minutes of proceeding in the case of *Gorman v. Lenox's executors*, and claimed the verdict of the jury for the amount of the rent in arrear found by the jury in that case. And the defendants then "offered to prove the set-off filed in this cause, for the purpose of showing that no rent in arrear was actually due, as found by said verdict, from Mrs. Arguelis, as charged in the said avowry; and that, therefore, the plaintiffs were not damaged to that amount. But the court were of opinion, that such evidence, so offered by the defendants, was inadmissible; to which decision defendants excepted." And the defendants further prayed the court to instruct the jury, that the plaintiffs were not entitled to recover for the rent in arrear, as aforesaid found by the jury, in the record aforesaid, above given in evidence; which the court refused to give.

This record is most loosely and informally made up. But little attention seems to have been paid to the issues made, or to the order in which they were tried. To the plea of set-off, the plaintiffs below replied the general issue of *non assumpsit*, and also the statute of limitations; when the more regular mode of testing the validity of the plea would have been by a demurrer. Indeed, it is a matter of surprise, that *so obvious a course *117] was not taken. But this irregularity seems not to be important, as on the trial of these issues, the defendants offered evidence under the plea of set-off; which was overruled by the court. This, in effect, determined the matter of the plea.

The demurrer to the plea of general performance, seems not to have been decided until after the verdict was rendered. As this plea was clearly bad, the demurrer was very properly sustained by the court. A demurrer being filed, the rule is, that the party who has committed the first fault shall have judgment against him. And on this demurrer, a question is raised as to the sufficiency of the declaration. The breach assigned in the declaration is, that the said Gorman did not prosecute the writ of replevin with effect, nor return the goods and chattels replevied, nor pay to the plaintiffs the damages and costs recovered. The breaches are not assigned with care, and the judgment recovered in the replevin suit is inartificially stated in the declaration. But it seems, where the declaration is on a bond, given to prosecute with effect a writ of replevin, a breach assigned as in this declaration, "that the suit was not prosecuted with effect," is sufficient. 11 Eng. C. L. 236; 6 Har. & Johns. 139; 2 Gill & Johns. 441-443.

The record of the judgment in the replevin suit, as certified in obedience to the writ of *certiorari*, substantially differs from the judgment described in the declaration; but the record of this judgment was only used as evidence in the circuit court; and no objection was made to it. The variance, not having been excepted to in that court, it cannot now be noticed. The objection, as stated in the second bill of exceptions, was, that the amount of the rent in arrear found by the jury could not be received in evidence in this suit. The action being brought on a penal bond, under the Maryland practice, it was the province of the jury to assess the damages which the

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plaintiffs had a right to recover ; and the judgment in the replevin suit was given in evidence, to show the amount of damages which the plaintiffs had sustained. This was undoubtedly correct ; and it is equally clear, that the defendants had no right to go into any inquiry as to the evidence on which the verdict was rendered. The jury found, in the replevin suit, the amount *of rent in arrear, on which the distress was made ; and this was the proper criterion of damages in that case. There was no error in [*118 the circuit court, therefore, in overruling this objection.

It is equally clear, that the court properly rejected all evidence under the plea of set-off. This was, substantially, an attempt to prove that there was no ground for the verdict and judgment for damages in the replevin suit. The offer was not to show that such judgment had been satisfied, but that it ought never to have been given. This evidence of set-off was also inadmissible, on the ground, that it relates to different parties from those in the present suit. Upon the whole, the judgment of the circuit court is affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

**Ex parte* ANDERSON CRENSHAW.

[*119]

Practice.

An appeal was prosecuted by the complainants in the circuit court of Alabama, to the supreme court, and the citation required by the act of congress had not been served on the appellee, and he had no notice of the appeal ; in printing the copy of the record of the circuit court, the return of the marshal of the district, stating that the citation to the appellee had not been served, was accidentally omitted. The court, on motion by the counsel for the appellee, declared the decree in the case, made at January term 1840, null and void ; revoked the mandate issued by the circuit court of Alabama, and dismissed the appeal.

APPEAL from the Circuit Court of Alabama. At January term 1840, the case of Jefferson L. Edmonds *et al.*, appellants, *v.* Anderson Crenshaw was brought before the court, on appeal from the decree of the circuit court of Alabama, which had been given in favor of the appellee ; in which court, the bill of the complainants, the appellants, was ordered to be dismissed. The supreme court had proceeded to hear and adjudge the case, after argument for the appellants by their counsel, Mr. Key, no counsel appearing for Crenshaw (14 Pet. 166), and had reversed the decree of the circuit court. It was afterwards discovered, that a citation on the appeal had never been served on the appellee, and that the court was, by an accidental circumstance, in the printing of the transcript of the record for the use of the supreme court, led to the belief that the appellee had been cited to appear, in the manner required by the judiciary law. Under this belief, the court had proceeded to a decision of the case.

Sergeant, for Crenshaw, on notice to *Key*, the counsel for Jefferson L. Edmonds and others, moved the court, on the first day of the term, to set