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antecedently due. Indeed, in the case of *The United States v. Kirkpatrick*, this court say, that "in long running accounts, where debits and credits are perpetually occurring, and no balances otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time." In this case they have been so applied, and in strict conformity with the times at which such payments were made.

We conclude our view of this question in the language of Judge Hopkinson, in the case of *The Postmaster-General v. Norvell*, Gilp., 134:—"The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final balance falls on the last quarter." A contrary result could be attained only by changing the manner in which the accounts have been kept, and by arranging the actual transactions as they have occurred between the parties;—a proceeding which we think is required neither by the letter nor the objects of the act of Congress. The judgment of the Circuit Court should therefore be, and is hereby, affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern *District of Virginia, and was argued by *693] counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

BENJAMIN D. HARRIS, PLAINTIFF IN ERROR, v. JAMES D. WALL.

The conditions under which a party is permitted and a magistrate authorized to take a deposition *de bene esse* by the thirtieth section of the Judiciary Act are,—

- 1st. That the witness lives at a greater distance from the place of trial than one hundred miles.
- 2d. Or is bound on a voyage to sea.
- 3d. Or is about to go out of the United States.
- 4th. Or out of such district to a greater distance from the place of trial than one hundred miles before the time of trial.

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5th. Or is ancient or very infirm.

And to entitle himself to read the deposition upon the trial, the party must show, —

1st. That the witness is dead.

2d. Or gone out the United States.

3d. Or to a greater distance than one hundred miles from the place where the court is sitting.

4th. Or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.¹

The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof.

Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States.

The service of the notice upon the opposite party should be certified by the magistrate as well as the marshal.

When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

In February, 1839, the following sealed note was executed :—

\$10,391.06.

Clinton, Miss., February, 1839.

On or before the first day of January, eighteen hundred and forty, we or either of us promise and bind ourselves, our heirs, &c., to pay to Benjamin D. Harris, his heirs or assigns, the sum of ten thousand three hundred and ninety-one dollars and six cents, with eight per cent. interest thereon from the date hereof.

Given under our hands and seals, the day and date above written.

T. W. WINTER. [SEAL.]

JAS. M. WALL. [SEAL.]

*Suit was brought upon this note at May term, 1840. Judgment went against Winter by default, [*694 and it is not necessary to notice him further.

Wall put in three pleas. The first two were substantially the same, and were, that the introduction of slaves into Mississippi, as merchandise, after the first day of May, 1833, was prohibited by the constitution of that State, and the contract for their purchase and sale, therefore, void. These pleas

¹ See Rev. Stat., § 863, and *Egbert v. Citizens Ins. Co.*, 2 McCrary, 386.

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averred that the note was given for the purchase of slaves so introduced. To these pleas the plaintiff took issue.

The third plea was, that the slaves were above the age of fifteen years, and were introduced into the State of Mississippi from one of the United States as merchandise, and sold to Winter by the plaintiff, without having complied with the fourth and fifth sections of an act entitled "An act to reduce into one the several acts concerning slaves, free negroes, and mulattoes," passed June 15th, 1822. To this plea the plaintiff demurred.

In November, 1844, the cause came on for trial, issue having been joined upon the first two pleas, and a joinder in demurrer having been filed as to the third. The jury found a verdict for the defendant upon the issue upon the first two pleas, and the record did not show any judgment of the court upon the demurrer.

In the course of the trial, the plaintiff, Harris, took four exceptions to opinions of the court.

1st. As to the admissibility in evidence of the deposition of William S. Rayner.

2d. As to the admissibility in evidence of parts of the deposition of Benjamin G. Sims.

The 3d and 4th were, that Wall had filed a bill in chancery against Harris, which Harris had answered; and that Wall could not, in a trial at law, introduce evidence to contradict Harris's answer.

1st exception,—as to Rayner's deposition.

The following is the notice and certificate attached to the deposition.

"Jackson, May 1, 1843.

"MR. B. D. HARRIS, or MESSRS. RIVES & SHELTON, his Attorneys at Law:—

"Take notice, that on Wednesday next, the third day of May, A. D., 1843, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, between the hours of eight o'clock, A. M., and three o'clock, P. M., at the town of Jackson, I shall take the deposition of William S. Rayner, (about to depart the State,) to be read *695] on the part of the *defendant *de bene esse* in a certain action at law, depending in said court, wherein said Harris is plaintiff, and Winter and Wall defendants; where you can attend. Yours, &c.

"GEO. W. MILLER, U. S. Commissioner.

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Marshal's return:—"Executed by handing Wm. M. Rives a copy between the hours of eleven, A. M., and twelve, M., May 1, 1843.

"ANDERSON MILLER, *Marshal*,
By Z. P. WARDELL, *D. M.*"

"The deposition of William S. Rayner, taken before the undersigned commissioner of affidavits in and for the Southern District of Mississippi, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi in the town of Jackson, between the hours of eight o'clock, A. M., and three, P. M., on the 3d day of May, A. D., 1843, according to a notice by me issued and hereunto annexed; said deposition to be read as evidence on the part of the defendant *de bene esse* in the trial of a certain action at law, depending and mentioned in the Circuit Court of the United States for the Southern District of Mississippi, wherein Benjamin D. Harris is plaintiff, and Winter and Wall defendants."

(Then follows the deposition, to which is attached the following certificate:—)

"United States of America, Southern District of Mississippi, sct.

"I, George W. Miller, commissioner of affidavits, &c., in and for the Southern District of Mississippi, do hereby certify that the foregoing deposition of William S. Rayner was taken, subscribed, and sworn to before me, and by me reduced to writing in the presence of said witness, at the time and place mentioned in the caption thereof, at the time of which I was attended by James M. Wall, one of the defendants, and William M. Rives, Esq., attorney for plaintiff, who declined putting any interrogatories to said witness. I further certify that I am not a counsel for either party, or interested in the event of said cause.

"Given under my hand and seal at Jackson, this 3d day of May, A. D., 1843.

"GEO. W. MILLER, *U. S. Commissioner.*"

The court allowed the deposition to be read in evidence, to which the plaintiff excepted.

2d exception,—respecting the deposition of Sims.

This deposition had upon it the following indorsement, viz.:—

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*696] *“ When sworn to, it is agreed this deposition of B. G. Sims may be used in the cause stated in the caption as evidence.

“ RIVES & SHELTON & THOMPSON, *for Plaintiff*.
MAYES & CLIFTON, *for Defendant Wall*.”

After the defendant had read to the jury the deposition of Benjamin G. Sims, which was done subject to exceptions, the plaintiff moved the court to exclude from the jury that part of said deposition which proved or tended to prove said plaintiff to be a negro-trader; but the court overruled said motion, on the ground that the counsel of the plaintiff had agreed in writing on said deposition, that the same might be read in evidence.

This opinion of the court constituted the second exception.

The third and fourth exceptions were abandoned by the counsel for the plaintiff in error, and need not be further noticed.

The cause was argued by *Mr. Nelson*, for the plaintiff in error, and *Mr Clifton*, for the defendant in error.

Mr. Nelson.

The first exception relates to the admissibility in evidence of the deposition of William S. Rayner, and is grounded on the insufficiency of the notice, under the act of September 24th, 1789, § 30.

That act authorizes the taking of the deposition of a witness *de bene esse* “who shall live at a greater distance from the place of trial than one hundred miles,” or “is bound on a voyage to sea,” or “is about to go out of the United States,” or “out of such district (in which a cause may be depending) and to a greater distance from the place of trial than one hundred miles,” upon proper notice to the adverse party.

Now the notice given in regard to this deposition does not bring the case within the act of Congress, because, whilst it states that the witness was about to depart the State, it does not allege that it was about to go to a greater distance than one hundred miles from the place of trial, and it might well have been that the witness would leave the State, and yet be within reach of the process of the court.

To show the strictness with which the act of Congress in question has been construed, reference is made to the cases following. *Bell v. Morrison et al.*, 1 Pet., 355; *The Samuel*, 1 Wheat., 9; *The Patapsco Ins. Co. v. Southgate*, 5 Pet., 604; *The Thomas and Henry*, 1 Brock., 373.

The second exception regards the admissibility in evidence of part of the deposition of Benjamin G. Sims, which the court below suffered to go to the jury, because of the agreement of counsel appended to it.

*It is submitted that the court erred in this, since [697 the true construction of that agreement is, that the deposition was to be received in evidence only in so far as the matters contained in it were legally admissible in support of the issues joined in the causes; and it being conceded, as indeed it cannot be denied, that the portion of the deposition excepted to was not in itself evidence, the agreement could not make it admissible. It is like the case of a witness examined on the stand, whose statements improperly made in the hearing of the jury will be excluded by the court at any time during the trial.

The third and fourth exceptions, which relate to the admissibility of the answer in chancery, are believed to be untenable.

But, independently of these exceptions, the plaintiff in error insists that the judgment of the court below must be reversed, because the record shows that nothing has been found to justify that judgment.

The issues passed upon the jury, as the court will perceive, are wholly immaterial, the existence or non-existence of the facts involved in them in no wise affecting the rights of the parties to the controversy.

They put the defence in the action exclusively on the ground of the consideration of the bill sued upon, which was, that it had been given for slaves introduced by the plaintiff into the State of Mississippi after the 3d day of May, 1833.

Now that this consideration was a good one, has been over and over again settled by this court. *Groves v. Slaughter*, 15 Pet., 449; *Harris v. Runnels*, 5 How., 135; *Truly v. Wanzer et al.*, 5 How., 141; *Sims v. Hundley*, 6 How., 1.

In the last of these cases, on page 6, Chief Justice Taney says,—“It is the settled law in this court, that contracts of this description, made at the time when these notes bear date, were valid, and not prohibited by the constitution of Mississippi.”

This being the law of the case, it is clear that the plaintiff below might have treated these pleas as nullities, and, as far as they were concerned, have signed judgment for the want of a plea.

But he inadvertently took issue upon them, and the jury decided the facts against him; and in that state of the case it is

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equally clear that he might have moved the court for judgment *non obstante veredicto*.

This he omitted to do, and now the inquiry is whether that omission precludes him from availing himself of the insufficiency of the judgment in this court.

That it does not, the plaintiff in error thinks is clear upon principle as well as upon authority.

*That the issue was not material, see 2 Saund., 319 *698] (No. 6).

That the defect is error, for which the judgment will be reversed, it is respectfully submitted, will be conclusively shown by the following cases. 6 Cranch, 221, 223, 225; Kirby, 139; 2 Root (Conn.), 4, 204; 2 T. R., 759; 2 Archb. Pr., 758; 1 Mason, 62; 4 How., 131.

In the case last cited, the question was elaborately examined, and the principle and practice settled, under circumstances much less strong than those which are disclosed in the record in this case.

But it is supposed by the counsel for the defendants in error, that the judgment rendered in the court below must be sustained because it is said to be a general judgment, and that the third of the pleas of the defendant below set up a sufficient defence to the action.

To this it is answered, in the first place, that there was no judgment rendered in the court below upon that plea, and this is manifest from the whole record.

The plea was in bar, and, if good, furnished a full defence to the plaintiff's action. Yet a jury was called to decide the issues of fact, wholly unnecessary to be passed upon if the plea in question had been adjudged good.

Nor does the judgment profess to be rendered on the demurrer,—it is on the verdict.

As to the form of a judgment on demurrer, see 2 Saund., 300 (No. 3); 2 Archb. Pr., 11; Archb. Forms, 306; Tidd's P. Forms, 200.

Even, however, if it were otherwise, and judgment had been rendered on the demurrer, it could not have been supported.

This plea was framed on the act of Mississippi of the 18th of June, 1822, 4th and 5th sections (How. & H. Dig., 156).

The first-mentioned of these sections (the fourth) prescribes the mode and manner in which slaves may be imported as merchandise into Mississippi; the fifth, what shall be done when such slaves are sold.

The sixth section of the same act imposes a penalty of \$100

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for every slave sold without a compliance with the provisions of the fourth and fifth sections.

Now it is apprehended, that, upon the true construction of this act, the non-compliance by the seller with the provisions of the sections mentioned does not invalidate a sale made by him. On the contrary, the sixth section of the act, by its terms, recognizes the validity of such sales.

*The plea does not allege any combination or collusion between the plaintiff and defendant in regard [*699 to the introduction of the slaves sold into Mississippi. Can it, then, be doubted, that, under the provisions recited, the defendant acquired a title to the slaves in question under his purchase? And if so, is it not equally clear, that, though liable to the penalty denounced by the sixth section of the act in question, the plaintiff is competent to enforce his contract against the defendant? It can hardly be that the defendant has acquired a title to the property purchased, and yet is not answerable for its price.

Questions of this character have been frequently considered and decided. See 11 Wheat., 258; 4 Burr., 2069; 6 T. R., 410; 3 T. R., 418; 1 Bos. & P., 295; 7 Taunt., 246; 4 N. H., 290; 8 Wheat., 357; 12 Pet., 70; Walker, 293; 1 Litt., 16, 19.

In any view, therefore, which may be taken of this act of Mississippi, (assuming it to be in force, though some intimation is given in the notes of the defendant's counsel, that it has been repealed,) it is submitted, that it cannot avail to defeat the recovery by the plaintiff of his demand. But it is insisted that the question does not arise in this case, the record showing that the demurrer, at the time of the trial of the issues before the jury, was undisposed of, and that the judgment was rendered on the verdict alone.

Mr. C. R. Clifton, for defendant in error, in reply.

1. The act of 1789, which authorizes the taking of the deposition of a witness *de bene esse*, nowhere requires that the notice should show that the case was within the provisions of the act. The decisions cited by the counsel for the plaintiff only establish what has never been controverted, that the party who offers a deposition taken *de bene esse* must show that the case provided for by the act existed, and that there had been a full compliance with its requisitions.

In this case the counsel of the opposite party attended the examination.

When the deposition was offered, in open court, the party offering it proved, that, at the time it was taken, the witness

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was on his way to the republic of Texas,—that is, he was “about to go out of the United States,”—and that he then, at the time of offering it, resided in that republic. These facts having been proved by evidence *aliunde*, the certificate of the commissioner showed every other fact required by the act of Congress to render the deposition competent, and we insist there was a compliance with all its provisions.

The only object of the notice was to secure the attendance *700] of the counsel at the examination. He attended, and pleads in abatement to the notice, that it was insufficient,—his presence refuting his plea.

2. The deposition of Sims ought not to have been excluded. The issue was as to what was the consideration of the bond sued on: it being averred on the one side that it was for slaves introduced into the State of Mississippi and sold in the year 1836, and denied on the other. The deposition contains several circumstances conducing to show the truth of this averment; and among these is the one objected to,—that is, that the plaintiff had carried slaves to Mississippi for sale, and was, in fact, engaged in the avocation of a “negro-trader.” How far the defendant would have been permitted to go in making this proof, in opposition to the will of the plaintiff, it is not now needful to inquire, since no such opposition was made. This fact was proved in a deposition, which the plaintiff agreed should be read as evidence to the jury; and he cannot now ask the appellate court to reverse the judgment, because the court below held him to his own agreement.

(The counsel then proceeded to the discussion of the point involving the construction of the constitution of Mississippi, and arising on the issues found by the jury for the defendant; but was arrested for the moment by the chief justice, who, after conference with the other members of the court, said, that this question had been repeatedly settled by this court, and the court could not consent to consider it an open question, and hear it again argued. The counsel acquiesced with manifest reluctance, and, being asked by a member of the court if there was any other point in the case, said:—)

There is a special plea founded upon the fourth and fifth sections of the act of the 18th of June, 1822, which, if not repealed by the provision of the constitution of Mississippi as to the introduction of slaves, presents a valid defence to the action. It is demurred to.

In Mississippi, these sections have been considered as repealed, upon the ground that the constitution, which is the supreme law, prohibits the introduction of slaves absolutely,

and therefore repeals all laws permitting them to be imported upon condition.

This court, adhering to its former decisions, cannot regard these sections as repealed, because, if the constitution did not prohibit their introduction from the 1st day of May, 1833, the law which specified the conditions upon which they might be imported and sold remained in full force.

The language of these sections is:—"It shall not be lawful for any person or persons to import in to this State, from any of *the United States, or the Territories thereof, as [*701 merchandise, any slave or slaves, either negro or mulatto, or of any other description whatever, above the age of fifteen years, without having previously obtained a certificate, signed by two respectable freeholders in the county of the State or Territory from whence such slave or slaves is or are brought; which certificate shall contain a particular description of the stature and complexion of such slave or slaves, together with the name, age, and sex of the same; and, furthermore, that the slave or slaves therein mentioned and described have not been guilty of murder, burglary, arson, or other felony, within their knowledge or belief, in such State or Territory; which certificate shall be signed or acknowledged before the clerk of the county of the State or Territory where the same is given and certified by said clerk, specifying therein that the persons whose signatures are affixed thereto are respectable freeholders of the county and neighbourhood in which they reside.

"Any person, who shall sell any slave or slaves brought into this State as merchandise, shall cause to be registered with the register of the Orphan's Court of the county where such slave or slaves are, or are first sold, every certificate as aforesaid, the seller previously swearing that he believes the contents of such certificate or certificates to be just and true; which oath said register is hereby authorized and required to administer; for which service he shall receive the sum of one dollar for each certificate so registered." (See How. and Hutch. Digest, 156, and Hutchinson's Mississippi Code, 513.) The sixth section of the act imposes a penalty of \$100 for every slave sold without a compliance with the said fourth and fifth sections, recoverable in any court of competent jurisdiction.

The facts stated in this plea are confessed on the record. The judgment of the court for the defendant is general.

This court will inspect the entire record, and give judgment for that party who may appear to be entitled to it; and if the plea interpose a good defence to the action, the judgment of

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the court below, according to familiar principles, will not be disturbed.

The counsel on the other side assumes, that, even if this were so, the defence disclosed by that plea is not a valid one; and he refers to a variety of cases for the purpose of sustaining that position.

The first of these is that of *Armstrong v. Toler*, from 11 Wheaton, which, as it is understood by me, cannot be tortured into an authority for the plaintiff. On the contrary, it decides, that, where a contract grows out of an illegal act, a court of justice will not lend its aid to enforce it. The selling *702] of a *slave, without a previous compliance with the requisitions of the law, which could alone make such sale legal, was an illegal act; and this, therefore, is an authority for the defendant.

The case from 4 Burrow was an action on a bond given by the defendant to the plaintiff, to repay to the plaintiff the one half of a sum of money which the plaintiff had previously paid, for himself and the defendant, to a third party, in relation to a transaction forbidden by act of Parliament; and it was said by the court to be a fair and honest transaction between these two, and not in violation of the act.

That from 6 T. R., 410, *Booth v. Hodgson*, is an authority for the defendant.

In delivering the opinion in 3 T. R., 418, Lord Kenyon expressly declares that none of the provisions of the act were infringed.

1 Bos. & Pull. decides, that, if the contract be stained by any thing illegal, the plaintiff shall not be heard in a court of law. *Simpson v. Bloss*, 7 Taunt., 246, holds that no action can be founded on an illegal contract, and furnishes a test for determining what is an illegal contract, which is decisive against this.

The case from 4 N. H., 290, is an express authority for the defendant. It decides, that, when a statute inflicts a penalty for the doing of a particular act, that act is, by implication, prohibited and illegal. "Where an illegal contract is made between parties who are *in pari delicto*, the contract is void, and neither party can maintain any action which requires for its support the aid of such illegal contract."

The other cases seem to me to have no very direct application to the question, and certainly furnish no support to the idea, that a party can successfully assert a right in a court of justice, to which he has entitled himself by a violation of law.

Indeed, I had supposed, if there was a universal and uncontroverted proposition in the common law, as it is known and

understood in England and in this country, it was, that no act done in violation of the laws of the land, or in disregard or contravention of its principles, can be the foundation of a claim which can be enforced at law or in equity. And this has been the rule from Lord Holt to the present time, as can be shown by an unbroken series of decisions. In truth, this principle is much older than the common law, and was incorporated into that system from the civil law, whence it comes to us, clothed with the sanction of many centuries.

Where the law, as in this case, declares it shall not be lawful to do a particular thing, unless under certain conditions and limitations, no action can be maintained upon a contract *growing out of the doing of that thing, unless those [*703 conditions and limitations have been complied with. To declare an act unlawful, and at the same time to give a remedy to the person guilty of doing it, founded on his illegal act, would be to make the law as a house divided against itself. The law was never guilty of the absurdity of giving a legal action for an illegal act.

In *Bartlett v. Vinor*, Carth., 251, Chief Justice Holt says,—"Any contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflict a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute." The same is held in *Bensley v. Bignold*, 5 Barn. & Ald., 335; *Drury v. Defontaine*, 1 Taunt., 136; 14 Mass., 322; Holt, N. P., 425. This rule is now applied as well to cases *mala prohibita* as *mala in se*. 2 Bos. & P., 374, 375; 5 Barn & Ald., 341; 2 Wils., 351; 17 Mass., 281.

"The policy of a penal statute may be enlarged, not for the purpose of inflicting the penalty, but to avoid the contract." Dwaris on Statutes, 752; *Mitchell v. Smith*, 1 Binn. (Pa.), 110-118; 4 Yeates (Pa.), 34-54; 4 Serg. & R. (Pa.), 151.

No recovery can be had for printing a newspaper, whose publisher does not first make the affidavit directed by the act, though the act does not, in terms, avoid the contract. *Marchant v. Evans*, 8 Taunt., 142; *Roby v. West*, 4 N. H., 285.

The 17 Geo. 3, ch. 42, sec. 1, declares, all bricks made for sale shall be 2½ inches thick and 4 wide, and the second section imposes twenty shillings for every thousand bricks so made of less dimensions, as a penalty. Held, that bricks of less dimensions could not be recovered for, though there was

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nothing in the act declaring the sale void. *Law v. Hodgson*, 2 Campb., 147.

And in the case of *Sprenger v. McElwain*, 6 Ohio, 442, it is decided, that where the statute forbids the keeping of a ninepin alley, under a penalty, a carpenter who builds one, knowing the object, cannot recover the price of building.

It would be useless to multiply authorities on this point. The courts of England and this country, with a rare uniformity, have held that every contract made in violation of the laws of the land, or without complying with its provisions, or which is made in disregard or contravention of the statute or common law, is void, and cannot be enforced in law or in equity. 1 Leigh, N. P., 6-13; 2 Pet., 539; 2 Carr. & P., 472; 4 T. R., 466; 3 Id., 454; Cowp., 191; 2 Doug., 698; 1 Mau. & Sel., 593; 5 Barn. & Ad., 887; 4 Pet., 410; 5 Johns. (N. Y.), 320; 1 Rand. (Va.), 76; 3 Id., 214; 1 Barn. & C., 192; 5 Id., 887.

*704] *Mr. Justice GRIER delivered the opinion of the court.

On the trial of the issues of the fact in this case before the Circuit Court, the defendant offered to read the deposition of William S. Rayner, which had been taken *de bene esse*, under the thirtieth section of the Judiciary Act. It was objected to by the plaintiff's counsel, as not coming within the conditions prescribed by that act. The court admitted the deposition, and sealed a bill of exceptions, which is the foundation of the first assignment of error.

A notice was served on the plaintiff's counsel, signed by the commissioner or magistrate, and stating the time and place at which it was intended to be taken, and that "I shall take the deposition of William S. Rayner, (*about to depart the State*,) to be read on the part of the defendant, *de bene esse*," &c.

When the deposition was offered, the defendant proved to the court, that "when said deposition was taken, said Rayner was on his way to the republic of Texas, to reside there, and that he was a citizen of, and resided in, said republic."

It has been decided by this court, in the case of *Bell v. Morrison*, 1 Pet., 351, that "the authority to take depositions in this manner, being in derogation of the rules of common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible."

The conditions under which a party is permitted, and a magistrate authorized, to take depositions *de bene esse*, under

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this act, are,—1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or is bound on a voyage to sea; 3d, or is about to go out of the United States; 4th, or out of such district to a greater distance from the place of trial than one hundred miles, before the time of trial; 5th, or is ancient or very infirm.

The magistrate is required also to deliver to the court, together with the depositions so taken, a *certificate of the reasons of their being taken*, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show, that, at the time of the trial,—1st, either the witness is dead; 2d, or gone out of the United States; 3d, or to a greater distance than one hundred miles from the place where the court is sitting; 4th, or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

Now, assuming that the defendant has brought himself within the conditions which would enable him to read a deposition regularly taken and certified according to the requisitions of this act, the question is, whether this deposition was so taken and certified.

*The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain [*705 limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. The act of Congress requires them to be certified by the magistrate. It would be reasonable, also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is “about to depart the State,” not that he is bound on a voyage to sea, or about to go out of the United States, or a hundred miles from the place of trial.

This notice is appended or annexed to the deposition, with a return of service by the marshal; but the service is not certified by the magistrate, nor does he certify, as required by the act, “the reasons” for taking the deposition. The presence of the plaintiff’s attorney, who declined to take any part in the proceedings, cannot affect the case, or amount to a waiver of any objection to the want of authority apparent on the face of this certificate.

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We are of opinion, therefore, that the court erred in admitting this deposition to be read to the jury.

The third and fourth exceptions have been abandoned on the argument, and the second does not appear to be well taken. When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for *not* excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them.

The record in this case does not show that any judgment was given by the court below on the demurrer. If a defendant plead several pleas in bar, either of which is a defence to the whole action, and one be found in his favor, he is entitled to judgment. For this reason the parties may have considered it unnecessary to pray the judgment of the court on the plea demurred to, as the issues on the other pleas had been found in favor of the defendant, and judgment rendered thereon for him. And the plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. The validity of the defence set up in that plea is consequently not before this court, and cannot be noticed. But as the trial of these issues below took place before the decision in this court of the cases of *Rowan* *706] *v. Runnels*, 5 How., *135, and *Sims v. Hundley*, 6 How., 1, and as these cases show that the issues of fact are immaterial, though found for the defendant, the defence will probably turn wholly on the decision of the point raised by the demurrer.

The judgment of the Circuit Court is reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.