petition and summons in this suit, and a delivery of that petition and summons to the defendants in person, is disposed of by the same rule which displaces, as irrelevant and immaterial, the exception taken to the jurisdiction.

The question of variance between the note and the description of it in the petition, it is not easy to comprehend, unless indeed it is intended by the defendants to insist, that a note should have its date inserted at its beginning only, and cannot be dated at the termination of it; for the note at the bottom bears upon it the date as well as the place of its execution, viz., Matagorda, September 23, 1844, and the description and the petition accord with both these facts. It is true, the petition contains a recital that Matagorda is within the State of Texas, but by no extreme of cavil can this recital be converted into a misdescription of the note. Upon the whole case, we think the judgment of the District Court was correct, and we accordingly order it to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel. On consideration whereof, it is now here ordered, and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs and interest, until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas.

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*ABRAM SHEPPARD AND JOHN DUNCAN, PLAINTIFFS IN ERROR, *v.* PEYTON S. GRAVES. [*512

In this case, as in the preceding, it is decided, that where the plaintiff averred enough to show the jurisdiction of the court and the defendant pleaded in abatement that the plaintiff was disabled from bringing the suit, on account of residence, it was incumbent upon the defendant to sustain the allegation by proof.

Until that was done, it was not necessary for the plaintiff to offer any evidence upon the subject.

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

The parties were the same as those in the preceding case, and the point upon which the decision of the court turned was the same as one of those decided in the preceding case.

It was argued, in conjunction with the other, by the same counsel.

Mr. Justice DANIEL delivered the opinion of the court.

This is a suit between the parties to the case No. 65, and is in all its features essentially the same with the former case with one exception, which will be pointed out.

In this suit, as in No. 65, the defendants below demurred to the petition, pleaded in abatement to the regularity of the service of process, to the disability of the plaintiff on the score of residence, and then interposed a defence in the nature of the general issue, but tendered no proofs in support of their defences, either in abatement or in bar. The plaintiff, to sustain the jurisdiction of the court upon the question of residence, and to meet the pleas in abatement, offered to read the deposition of two witnesses Rugely and Blair, residents of the city of New Orleans, in the State of Louisiana, taken *de bene esse* before a Commissioner in the city of New Orleans, under the act of Congress of 1789. The reading of these depositions was objected to by the defendants, because the Commissioner did not certify that the witnesses resided at a greater distance than one hundred miles from the place of trial, but stated only that they were residents of the city of New Orleans, within the Eastern District of the State of Louisiana, and beyond the jurisdiction of the District Court of Texas. The court permitted the introduction of oral evidence to prove that the city of New Orleans was at a greater distance than one hundred miles from Galveston, the place of trial; and ruling also that the court itself knew judicially the mail routes and distances thereof, and that New Orleans, the place of taking said depositions, was more than one hundred miles from Galveston, the place of trial, permitted the depositions to be read in evidence.

*513] *Whether the District Court erred in allowing an omission in the certificate of the Commissioner to be supplied by oral evidence, or could regularly act upon knowledge assumed to be within its judicial cognizance, we do not consider it necessary to examine, in order to dispose of the case before us. It must be recollected that the defendants below attempted no proof whatsoever in support of any of their pleas. The plaintiff having averred enough to show the jurisdiction of the court, and nothing having been adduced to impeach it, that jurisdiction remained as stated, and the plaintiff could lose nothing by adducing either imperfect evidence, or no evidence at all, in support of that which clearly existed, and which he, under the circumstances,

could not be called on to sustain. Even then had the case in the District Court stood upon an issue regularly formed upon the pleas in abatement, the evidence of the depositions was wholly unnecessary—the ruling of the court upon that evidence was immaterial, and should not impair the strength of the plaintiff's case, which was perfect without it. But the exception to the ruling of the court on this point, must be unavailable upon another view, as given in our consideration of the preceding case. By interposing the plea of the general issue after their several pleas in abatement, the defendants have effectually waived those pleas, and surrendered the positions covered by them. The judgment of the Circuit Court must in this case also be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas.

SAMUEL MARSH, WILLIAM E. LEE, AND EDWARD C. DELAVAN, PLAINTIFFS IN ERROR, *v.* EDWARD BROOKS, AND VIRGINIA C. HIS WIFE, CHARLES P. BILLON, AND FRANCES E. HIS WIFE, WALTER G. REDDICK, AND DABNEY C. REDDICK.

This court decided, in 8 How., 223, that the recitals in a patent for land, referring to titles of anterior date, were not of themselves sufficient to establish the titles thus recited.

*The titles themselves being now produced, it is decided, that a permit, given by the Lieutenant-Governor of Upper Louisiana, in 1799, to a person to form an establishment on the Mississippi, followed by actual possession and improvement, entitled the occupant to 640 acres, including his improvements, although the Indian title was not then extinguished. [*514

It was not the practice of the Spanish government to make treaties with the Indian tribes, defining their boundaries; but to prevent settlements upon their lands without special permits. Such permits, however, were usual.

The construction of the treaty between the United States and the Sac and Fox Indians, must be that the latter assented to an occupancy which was as notorious as their own.

The act of Congress, approved April 29, 1816, (3 Stat. at L., 328,) confirming