Statute of Frauds, as the general rules of evidence, by which evidence to contradict or vary a written instrument is excluded."

The commission, with this testimony and these objections, were returned and filed on the 12th of July, 1824. Some time after which the plaintiffs by their petition stated, that they had by mistake alleged in their bill, that all the defendants were non-residents when in truth the defendant Richard Henderson always has been, and is now a resident of Montgomery County in this State. Whereupon they asked leave so to amend their bill as to pray process of subpœna against him.

BLAND, C., 16th January, 1826.—An order of publication, such as that prayed for by the bill of these plaintiffs, is allowed by the Acts of Assembly only as a substitute for a subpœna in certain specified cases, which are thus made exceptions to the general rule, which requires, that the regular process of the Court should be prayed for and issued against all who are to be called in as parties and defendants to the suit. Hence it must appear upon the face of the bill, that the case is of such a nature as to authorize an order of publication warning a resident defendant to appear, or it must be expressly stated in the bill, that the parties therein named do not reside within the State, so as thereby to lay a proper foundation for praying for an order of publication warning them to

**246** * appear and answer. Where a husband and wife who neither of them reside within the State, are proposed to be made defendants, it is necessary that she should be warned by the order as well as her husband, otherwise her interests cannot be bound. *Martin* v. *Russell*, *MS. 22d December*, 1797. In all cases the granting of such an order of publication is almost as much a matter of course as the issuing of a subpœna; because it is conceived that the plaintiff proceeds upon it at his peril, for if the case be such, or the defendant be not in fact a non-resident, so as to authorize such an order, any decree which the plaintiff may thus obtain must be considered as utterly void in point of fact. *Carew* v. *Johnson*, 2 *Scho. & Lefr.* 280. These plaintiffs having discovered their mistake, do well therefore to have their bill amended in this respect. Let the amendment be made as prayed.

After which, on the 17th of November, 1826, the defendant Richard Henderson alone filed the following plea:

"This defendant by protestation to all the discoveries and relief, in and by the said bill sought from or prayed against this defendant and others, doth plead in bar, and for plea saith, that by an Act of Assembly made and passed at April Session in the year one thousand seven hundred and fifteen, entitled, 'An Act for Limitation of certain actions, for avoiding suits at law,' it was amongst other things enacted, that all actions of trespass *quare clausum*