MILES V. ROSE.

[Hempst. 37.] 1

Superior Court, Territory of Arkansas. April, 1826.

PLEADING AT LAW—NON-ASSUMPSIT—PAYMENT—REPLICATION—ISSUE MADE—APPEAL—ERROR.

- 1. A judgment in assumpsit will be reversed if the cause is tried without replication to good pleas in bar, such as non-assumpsit and payment.
- 2. Until replication, the jury could not he sworn to try the issue, for in fact there is no issue between the parties to be tried.

Appeal from Chicot circuit court.

Before JOHNSON and SCOTT, JJ.

OPINION OF THE COURT. This was an action of trespass on the case, on promises, brought by [Enoch] Rose against [Benjamin L.] Miles, to which the latter pleaded non-assumpsit and payment. Without making an issue, or replying, or noticing these pleas, Rose proceeded, a jury was sworn, the cause tried, and a judgment rendered in his favor, from which Miles has appealed to this court. The pleas of Miles were a good bar to the action until avoided, traversed, or denied by replications; and without which a jury could not be sworn to try the issue, for in fact there was no issue made up between the parties. This error is too manifest to require reasoning from the court, and was doubtless the result of inattention on the part of Rose. Reversed.

¹ [Reported by Samuel H. Hempstead, Esq.]

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