NYBLADH *v.* HERTERIUS *ET AL.*

Circuit Court, N. D. Illinois. February 8, 1890.

1. ACTIONS—JOINDER—MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

Under Rev. St. Ill. c. 110, § 22, abolishing the distinction between the forms of action of trespass and case, an action for false imprisonment can be joined with an action for malicious prosecution.

2. PLEADING—DEMURRER—OYER.

In an action for false imprisonment and malicious prosecution, where the defendants demur to the declaration, setting up that they prayed and obtained oyer of the record of judgment of acquittal set out in the declaration, and that such record shows that the acquittal was not on the merits, but on a plea on limitation, the court cannot consider what purports to be a copy of the record of acquittal set out in the demurrer, if the record in the case at bar does not show that oyer was prayed and granted.

3. SAME—OYER OF RECORD.

In Illinois oyer cannot be demanded of a record.

At Law. Demurrer to *narr.*

Action by Carl A. Nybladh against C. J. E. Herterius *et al.* for malicious prosecution and false imprisonment.

W. Davis and *F. S. Murphy,* for plaintiff.

Williams, Lawrence & Bancroft, for defendants.

BLODGETT, J. The declaration in this case contains three counts: (1) For malicious prosecution of plaintiff; (2) for false imprisonment of plaintiff; (3) for malicious prosecution,—to all which plaintiff demurs generally.

The *first* point of demurrer insisted on by defendants is that the declaration is bad for misjoinder of causes of action, it being contended that an action for false imprisonment cannot be joined with an action for malicious prosecution. Under the common law, trespass was the usual remedy for false imprisonment, and case the remedy for malicious prosecution, and counts in these two forms of action could not be joined. But the statute of Illinois (chapter 110, § 22) abolishes the distinction between these two forms of action, and the supreme court of this state has held that these two forms of action may be joined in the same suit. *Krug* v. *Ward,* 77 Ill. 603; *Barker* v. *Koozier,* 80 Ill. 205.

Second. Defendants having prayed and obtained, as they say in their demurrer, oyer of the record of judgment of acquittal set out in the declaration, argue from such record that such judgment of acquittal was not had upon the merits, but upon a plea of the Illinois statute of limitations. As the record in this case does not show that oyer was prayed, and granted by the court, what purports to be a copy of the record referred to in the declaration, set out in the demurrer, cannot be so considered. The court cannot say that what purports to be the record of plaintiff's acquittal, set out in this demurrer, by the unautho-

rized act of the defendants, is the record upon which plaintiff relies. Aside from this, the law seems well established in this state that oyer cannot be demanded of a record. *Giles* v. *Shaw,* Breese, 219, and other cases there

cited. The court, therefore, cannot consider on this demurrer the question as to whether the plaintiff was acquitted or found not guilty of the criminal offense for which he was arrested, as set out in the declaration, under the plea of the Illinois statute of limitations. The demurrer is therefore overruled as to all the counts, and the defendants ruled to plead to the merits of the case within 20 days.