concurring herein, its judgment is therefore reversed, and the cause remanded for further proceedings in that court.

(a) State v. Slater, 22 Mo. R. 464; State v. Ferguson, 29 Mo. R. 416. Instructions—31 Mo. R. 402.

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ROSS v. THE STATE OF MISSOURI.

1. Criminal Law—Practice—Demurrer.—Where a defendant demurs to an indictment, and his demurrer is overruled, the court cannot enter up judgment against him, and assess his punishment; a plea should have been put in, and a trial had by a jury.
2. Same.—In criminal cases a demurrer is not considered as a confession of guilt.

ERROR TO PLATTE CIRCUIT COURT.

McBRIDE, J. The defendant was indicted at the March term, 1842, of the Platte Circuit Court, for a violation of the dram-shop law. At the July term the defendant appeared by his attorney and filed his demurrer to the indictment, which having been overruled by the court, the court proceeded to assess the fine, and enter judgment against the defendant. The question presented on the record in this case has heretofore been decided by this court; that is, whether it is proper in a criminal case, where the defendant demurs to the indictment, and his demurrer is overruled, for the court to assess the fine, and enter judgment thereon. In Thomas v. The State, 6 Mo. R. 457, the court say, "but the statute directs that in all cases where the defendant does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, as if the defendant had formally pleaded not guilty to such indictment."(a) "The law never contemplated that a man charged criminally, means to confess the indictment to be true when he demurs; even in civil cases the defendant who has a demurrer decided against him, is allowed to withdraw his demurrer and plead. A jury should have been impanneled to find whether the defendant was or was not guilty." The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings therein.

(a) Neales v. State, 10 Mo. R. 500; State v. Maeder, 11 Mo. R. 363; Austin v. State, 11 Mo. R. 366; Lewis v. State, 11 Mo. R. 366; State v. Moody, 24 Mo. R. 560; State v. Devlin, 25 Mo. R. 174.

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COCKRILL v. KIRKPATRICK.

1. Contracts—Bonds and Notes.—A note payable "in the currency of this State," is payable either in gold or silver coin, or in the notes of the Bank of Missouri.
2. Same.—A note payable "in the current money of Missouri," is payable in gold or silver coin alone.
3. Same—Evidence.—Where a note is made payable "in the currency of the State," it is not competent to show by parol testimony, that it was understood by the parties to mean any other than gold and silver, or notes of the Missouri Bank.
4. Lost Instrument.—The contents of a written instrument cannot be proven, until the loss or destruction of the instrument is proven.
5. Principal and Agent—Demand.—A principal cannot maintain an action against an agent for money collected by him until a demand is made.
6. Same.—Whether a demand has been made is a question for the jury. It may be shown by circumstances.
7. Same—Tender.—Although a tender may be made and refused, the plaintiff is entitled to recover his debt. The tender prevents the interest from running, and if the money be brought into court will save costs.
8. Same.—A tender need not be in constitutional coin, but will be good in bank notes, unless objected to for that reason. If, however, the notes be depreciated, the refusal to accept will be presumed for that reason.

ERROR TO RANDOLPH CIRCUIT COURT.

David Todd, for Plaintiff. The plaintiff insists upon these points to reverse the judgment: 1. That evidence to prove witness' understanding

of the legal effects of a contract, to be different from the substantial contents of an absent contract, is illegal and incompetent. 7 Mo. R. 515. 2. If the defendant has collected money for plaintiff, and a demand is made, and no payment, a recovery can be had, and for interest from refusal. 3. A demand may be inferred, and is not to be proven in express terms. 4. When money is tendered and not received, upon suit the plaintiff can recover the principal, and unless the money is in court upon the plea of tender, and there paid
698 over, judgment must go for the plaintiff. 13 Wend. 390. 5. That if a note is payable in currency at a particular day, and is not paid on that day by the payor, and it is his duty to seek the creditor for that purpose, he is not permitted subsequently to pay it in such currency without the consent of payee. 6. A plea of tender made of such currency after such day of payment, is not good.

John B. Clark, for Defendant. The defendant in error relies upon the following points and authorities to sustain the decision of the Circuit Court: 1. The defendant in this case was but the agent of the plaintiff in the collection of the money in the note, and had a right to collect the same in the kind of currency contracted to be taken by the plaintiff, although nothing was said in the note about the kind of money agreed to be paid and received in discharge; yet if there was an agreement to take currency, and the agent received the same kind of money agreed to be taken by the principal, he is bound to receive the same from the agent. Theobold on Agency, 356. 2. In this case the plaintiff has no right of action until he makes a demand of the agent to account. This principle has been decided by this court in the cases of Benton v. Craig, 2 Mo. R. 189; Burton v. Collin, 3 Mo. R. 315. 3. There being no special instructions to the agent in this case, and he having transacted the business of his principal in the usual manner observed in the country at that time, the principal was bound, and the agent absolved from any liability, although a loss ensued. Theobold on Agency, 356.

McBRIDE, J. Cockrill brought his action before a justice of the peace in Randolph county, against Kirkpatrick, for money collected by the defendant for the plaintiff, where the defendant obtained judgment; from which the plaintiff appealed to the Circuit Court, where the defendant again having judgment, the plaintiff sued out his writ of error and has brought his case to this court.

The following is the evidence as preserved by the bill of exceptions, to-wit: R. Denson testified that he was indebted to Noble on a note: that said note was assigned by Noble to the plaintiff: that above two years ago he paid
699 the amount, $30 12½, to the defendant, who had said note for collection; that he paid said note in Illinois bank paper, except 12½ cents which he paid in specie: that it was paid in notes on the Springfield or Shawneetown Bank. His note to Noble was payable in the currency of this State: that it was his understanding that the note was to be paid in the common currency of the country, and that Springfield, Shawneetown, Indiana, &c., bank paper, was at that time the common currency of the country, but that there was more Illinois paper than any other kind.

N. Coates testified, that about January, 1842, he was doing business in Cockrill's store in Huntsville, when defendant came there and said to plaintiff, I have collected or have got your money from Denson; plaintiff said very well, or I am glad of it; that witness then went into another room, and in a few minutes after, on his return, heard plaintiff say to defendant, I will not pay any such price, or any such charges; that he understood this to be in relation to a charge which defendant made for collecting the money; that the parties separated; he did not see or hear defendant offer plaintiff any money, nor did he see defendant have any.

J. R. Abernathy testified, that Springfield bank paper sunk greatly below par, and ceased to circulate generally, in the month of February, 1842; that previous to that time the money in circulation was principally Illinois, Kentucky, &c.

Thereupon the plaintiff asked the court to instruct the jury as follows: