

Dowl. P. C. N. S. 335. Under the Code, Art. 5, sec. 33,²⁹ execution after *judgment on verdict is not stayed even on filing an appeal bond, unless a bill of exceptions has been taken. 133

Remedy for refusal of judge to sign.—If the justices refuse to sign and seal a proper bill of exceptions, the party grieved may have a writ grounded on the Statute, commanding them to put their seals, *juxta formam Statuti*, &c.³⁰ This writ contains a surmise of an exception taken and overruled, and commands the justices that, *if it be so*, they put their seals; upon which, if it be returned, *quod non ita est*, an action lies for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given, and thereupon a peremptory writ issues, Tidd Pr. 864, see Lawler v. Murray, 1 Sch. & L. 75. The first writ was actually issued out of Chancery in the case of *Briscoe v. Ward*, 1 H. & J. 166, and was obeyed by the justices; see the writ 2 Harr. Ent. 675, and precedents there referred to. "If the judge deny his seal, then may the plaintiff in the writ of error take issue thereupon and prove it by witnesses, for it lieth not in the judge in this case to frustrate this excellent law made for the advancement of justice," 2 Inst. 427. But this passage does not mean that the seal shall be proved by witnesses before a jury; it is like the ancient proof of minority, which was by *testes* or by inspection, *per* Parke and Alderson BB. in *Fishmongers' Co. v. Dimsdale*, 6 C. B. 896. In that case the defendants in error severed in pleading, and in addition to the joinder in error pleaded respectively that there was no record of the bills of exceptions, that the Lord Chief Justice did not seal the bill of exceptions, and did not acknowledge his seal, though upon a *sci. fa.* against his executors, he having died before acknowledging his seal, one of them appeared and confessed the seal. The Court said that there was no precedent of a plea of *nul tiel record* to a bill of exceptions when the very record is brought into Court, that the proper method of taking advantage of such an objection was to move to take the bill of exceptions off the record, but that error in fact and error in law could not be pleaded together, and that such new fangled pleas must be stricken out. With us, the judge does not acknowledge his seal, for only a transcript of the record is sent up. The practice now is where the benefit of a bill of exceptions is lost to the party without any default on his part, as by the death of the presiding judge before the bill is sealed, or by his illness, so that all hope of its being settled or sealed is at an end, for the Court to grant a new

²⁹ Code 1911, Art. 5, sec. 55.

³⁰ No appeal lies in such case but the aggrieved party may have a compulsory writ from the court of chancery grounded on the statute commanding the judge to sign, or he may apply to the Court of Appeals which has power to issue a compulsory writ under the statute as incident to the proper execution of its appellate jurisdiction. *Marsh v. Hand*, 35 Md. 123; *Donohue v. Shedrick*, 46 Md. 226. Cf. *Ruppertsberger v. Clark*, 53 Md. 402.

Yet when the lower court refuses to incorporate certain evidence in the exception, this can be reviewed on appeal by exception taken to such refusal, where the refusal is based on the opinion of the court that such evidence is irrelevant. *Carey v. Merryman*, 46 Md. 89.