PRATER AD. *vs.* FRAZIER & WIFE.

This being an action of replevin, the court below admitted the writ and return as evidence of possession of the property in controversy by defendant. HELD, immaterial whether this was right or wrong, as the same fact was afterwards proven by the sheriff, who was a competent witness.

The declarations of an administrator are not competent evidence to prejudice the rights of the legal representatives of his intestate.

Our replevin statute, which provides for putting the plaintiff into possession of property before his title is adjudicated, was incidentally declared to be constitutional in *Fleeman et al. vs. Horen et al.* (3 *Eng. R.* 355,) and the court adheres to the opinion there expressed.

A party entitled to the possession of property, without title, may maintain replevin against one who withholds it, under *sec.* 1, *ch.* 136, *Digest.*

Though a party come lawfully into possession of another's property, yet the owner may bring replevin therefor without demand, if the possessor has exercised acts of ownership over the property inconsistent with plaintiff's title, as by attempting to sell it &c.—as held in *Beebe vs. De Baun,* 3 *Eng. R.* 510.

The declarations of a donor against the title of the donee, made in his absence, are not admissible in evidence to defeat the title of the latter.

There can be no fixed and universal rule as to the effect of an estoppel *in pais* —each case must depend very much upon its own circumstances.

As between the immediate parties, such estoppels are not conclusive.

Where the evidence of a gift is clear and unequivocal, an actual delivery need not be shown, in case the jury shall be satisfied from all the facts and circumstances that a delivery has been made.

"The confessions or admissions of a party should always be received with caution, and unless made fully and fairly, and upon occasions to call out the truth, and upon reflection; or if made in casual conversation after great lapse of time, they are the weakest possible evidence, admitted in courts of justice."

Where admissions are made by a person for the purpose of deterring creditors from seizing his property, or from any other motives other than a direct intention to bestow the property on another, they are entitled to no weight against him.

Where a party who continues in possession of property, makes admissions that it belongs to another, in a contest between them for the property, it is competent to show a mistake of law or fact to rebut such admissions, and to show that they were not true.

A mere naked declaration that property belongs to another, made by the owner, does not confer title, though it may be evidence of title.

When property is transferrable by parol, a parol conveyance, if complete and otherwise unobjectionable, will override a documentary title.

An administrator cannot set up the fraud of his intestate to defeat an action originally commenced against him.

Where the donor remains in possession of a slave, the will or deed by which it is given, must be recorded in the county in which one of the parties lives, but need not be recorded where the slave may be. *Digest, ch.* 153, *Art.* 2, *sec.* 7, 8.

Where title to a slave is proven to have been in the intestate, and there is no proof that he had conveyed it, his administrator is entitled to recover it.

It does not follow, under all circumstances, that a gift from a father to a child is good without actual delivery. It is upon the supposition that the child, who is the donee is itself in the family, and under the immediate control of the father, that the law will dispense with actual delivery.

Appeal from the Hempstead Circuit Court.

In February, 1849, George W. Frazier and Felitia Ann E. his wife, brought an action of replevin against Edmund T. Gatlin in the Hempstead circuit court, for two slaves, *Julia*, a woman, and her child, *Cyrene*. The action was in the *detinet*, the declaration alleging that on the 1st January, 1848, defendant received said slaves from said plaintiffs, to be re-delivered on request &c In the original declaration, no special demand was alleged, but plaintiffs obtained leave to amend by averring a special demand, whereupon defendant moved for a return of the slaves, which had been replevied, but the court overruled the motion.

After the suit was commenced, Gatlin died, and the action was revived against Phillip F. Prater, as his administrator.

Prater filed three pleas; 1st. *non detinet.*

2. Property in Gatlin, his intestate, traversing property in plaintiffs.

3. Property in Elizabeth Gatlin, with a like traverse.

Issues to these pleas, trial, verdict and judgment for plaintiffs.

Bill of exceptions by defendant, showing the following facts:

Lazarus Gatlin, witness for plaintiffs, testified that he knew the parties, and negroes in controversy. The woman *Julia* was

the mother of *Cyrene*. When he first knew *Julia*, she was in Tennessee, in the possession of Wm. Baswell, and belonged to him. Baswell was the father of Edmund T. Gatlin's first wife, never heard of any claim to the negro except Baswell's, never knew how, or from whom, he obtained her. Had known her from 1832 or 1833: she was in Baswell's possession three or four years.

Mary Gatlin testified, that plaintiff's wife, Felitia Ann E. Frazier, was the daughter of Edmond T. Gatlin, and witness was his mother. Witness was present at the house of Edmond T. Gatlin, in Tennessee when he brought home the negro, *Julia*, from Baswell's. Edmond T. said he had got the negro girl for his wife, and he hoped she would make as good a negro as her mother. He also said his getting the negro was against the wish of Baswell's wife, and one of his daughters, other than Mrs. Gatlin. Edmond T. Gatlin's wife was daughter of Baswell. Baswell brought the negro, *Julia*, with him when he came to Tennessee. Never heard Edmond T. say any thing of the ownership of the negro, except as above stated. Had known him all his life. *Cyrene* was *Julia's* daughter.

Mrs. Parks testified that she knew all the parties to the suit, and the negroes in Tennessee.

Wesley Norwood testified, that about six years previous to the trial, he heard defendant's intestate, Edmond T. Gatlin, say the negro in controversy was not his, but belonged to his daughter in Tennessee. Mrs. Frazier was not then in this State, but she afterwards came out, and witness always understood Gatlin to refer to her in the above conversation. She came to the country three or four years previous to the trial; and was probably not 21 years old then. When the above statement was made by Gatlin, he had a wife, the daughter of Prater, and had a child other than Mrs. Frazier, either before or soon after said conversation. The said negroes had been in the possession of two or three persons since; and were seized under execution, and Prater went security to get them released. Prater hired the woman out for some time, and she was ultimately returned to Gatlin,

and had ever since been in his possession—was four or five years since she was returned to him.

Wm. Moody testified that about the time Edmond T. Gatlin came to this State, he heard him say the negro woman belonged to his daughter in Tennessee. After Mrs. Frazier came to the country, Gatlin acknowledged her as his daughter. She was then about 15 years old, and she lived with her father. Gatlin came to the State in 1843, witness thought. Knew nothing of Prater having the negro in possession. When Gatlin made the above statement, he was talking about his daughter. Witness was then 14 years old, and lived near Gatlin, in Pike county.

On cross-examination: Gatlin said the negro belonged to his daughter. He then had no wife. He came to the country after witness did—say 12 months. Witness came in 1840 or 1841. This all occurred before Gatlin married his last wife.

George W. Shover testified that he lived 7 or 8 miles from Gatlin, and had seen the negro woman in controversy at Gatlin's.

Plaintiff then offered to read, in evidence to the jury, the writ and sheriff's return thereon, issued in this case, to show the fact that the negroes were taken from the possession of defendant's intestate, Gatlin; defendant objected, the court overruled the objection, and defendant excepted.

Stephen Gatlin testified that, some time prior to the 15th July, 1849, Edmond T. Gatlin attempted to trade off said negroes and other property in his possession.

Mark Allen testified that he heard Edmond T. Gatlin say the negroes were his daughter's, at a time when the negroes were under execution. This was about five years before the trial. Gatlin was then living on the Bois d'Arc, in Hempstead county. He had one son. The negro woman had no child then, and Gatlin had no other negroes.

John B. Sandifer testified that he was sheriff of Hempstead county, and, as such, took the negroes in controversy from the possession of Edmond T. Gatlin, defendant's intestate. The woman would hire for $100 without the child, $75 with it, per year.

Child was about 2, woman 21 or 22 years old. Both worth $700.

Here the plaintiff closed.

Defendant proved and read in evidence the following bill of sale:

"*To all to whom these presents may or shall come*—GREETING:

Know ye, that, for and in consideration of the love and natural affection which I, William Baswell, of the county of Lawrence, and State of Tennessee have and bear towards my daughter Elizabeth Gatlin, formerly Elizabeth Baswell, and wife of Edmond T. Gatlin, of Giles county, Tennessee, and for and in consideration of the sum of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, have this day given, granted, bargained, sold and delivered, and by these presents do give, grant, bargain, sell and deliver, unto said Edmond T. Gatlin, a certain negro girl, slave for life, named *Julia* Ann, 7 or 8 years old, to have and to hold to him, the said Edmond T. Gatlin, his heirs, executors or administrators forever; and I, the said William Baswell, for myself, my heirs, &c., do hereby covenant and agree to and with the said Gatlin, his heirs, &c., to warrant and forever defend the title of the said negro to the said Gatlin, his heirs, &c., against the lawful claims of all persons whatsoever, claiming, or to claim, in, by, or through him, the said Baswell or otherwise; and that said negro is sound and slave for life. In testimony whereof, I have hereunto set my hand and seal, this 14th day of February, 1835.

WILLIAM BASWELL, [SEAL.]"

Lazarus Gatlin, sworn on behalf of defendant, testified that he knew the name of the woman sued for, here and in Tennessee, and she was always called Julia Ann. He knew her in Baswell's possession, and after she came to Edmond T. Gatlin, and always heard her called by that name. Edmond T. came to this State in 1840. He sold the negro to witness once, gave him a bill of sale, and took his notes; but the trade was afterwards cancelled, and bill of sale and note given up. The ob-

ject of this was to keep creditors from taking the negro. She was always in the possession and under the control of Edmond T. Gatlin, so far as witness knew. Mrs. Frazier did not come to this State until years after her father came out. Gatlin had three children by his first wife, and two or three by his last wife. In 1836, or about that time, he left Tennessee, and went to Mississippi, and left his daughter and said negro at his fathers in Tennessee. When he came to this State, he left his daughter at her grand-father's in Tennessee. She lived with him here awhile but was not married at his house.

The sale aforesaid was sham, and made to keep officers from levying on the negro.

Edmond T. went to Mississippi on business, and left the negro to wait on his daughter, under control of witness and his father. When he was in Mississippi, the negro and daughter were at the house of witness part of the time, and under the control of witness. Whilst the negro and Mrs. Frazier were at the house of Edmond T.'s father, the latter did not take much control over her.

Stephen Gatlin testified that he knew the negro woman in controversy whilst she was in possession of Baswell; she was always called Julia Ann. Edmond T. Gatlin had her in 1835 or 1836; was not able to state the precise time he got her. Witness knew Edmond T. all his life, and was intimate with him, and never heard of the negro belonging to his daughter or any one else but him. Went with Edmond T. from Tennessee to Mississippi in 1835. Edmond T. returned home following fall or winter, and witness returned in 1838. When they started, the negro was left with the father of Edmond T., and when witness returned she was in possession of the latter, who remained in Tennessee some three years thereafter, and then came to this State, and brought the negro with him. In this State, the negro was transferred to Prater, to secure some debts. Edmond T. was a good deal in debt. The negro was returned by Prater to Edmond T., who, in 1842, was married to Prater's daughter. It was after the marriage that Prater got the negro in possession.

Witness was present when the negro was seized by the sheriff. The debt was arranged through Prater, by notes, and Prater hired the negro out to reimburse himself. Edmond T. always acted as the owner of the negro—witness had often heard him say so—never heard any other claim set up to her—he always used her as his own. Edmond T. got the negro, in the fall of 1835, after returning from a trip to Vicksburg, for Baswell's daughters. When witness returned to Tennessee from Mississippi, in 1838, (and remained only two weeks,) the negro was at Edmond T.'s father's, and his daughter was at his brother's, going to school. Edmond T. was with his father, or another brother. The first wife of Edmond T. died before he went to Mississippi, but, after he got the negro from Baswell, and before witness returned to Tennessee, he understood Edmond T. married again.

There was some difficulty between Prater and Gatlin about the hire of the negro. Edmond T. claimed that Prater was holding the negro after he had got the money to indemnify himself. The first wife of Edmond T. was Baswell's daughter. He got the negro before going to Mississippi—got her in the spring, and went to Mississippi in the fall, witness thought—got her before the death of his first wife: some two years after his trip to Vicksburg for Baswell's daughters.

B. F. Hempstead testified that, in 1842, he was one of the attorneys who instituted suit by attachment in favor of Preston against Edmond T. Gatlin; was present when the sheriff executed the writ. He levied upon the negro in controversy, and she was released by Prater giving bond. Prater claimed the negro, but she was seized as Gatlin's property. The suit was dismissed before trial, by order of plaintiff therein, on transfer to him of a $30 note. Gatlin was either present or cognizant of the facts. Did not know who pointed out the property as belonging to Gatlin.

William H. Bizzell testified that Gatlin had the negro in Pike county—was his security for a debt to Owen, and came over to Hempstead county to see him about it, and Prater claimed the negro, and Gatlin said he had sold her to him; and upon witness

pressing for his debt, he put his horse out of the way. Gatlin was always in debt, at least from a short time after he came to the country. Gatlin married Prater's daughter in 1842, and made one crop before he came to Hempstead.

John B. Sandifer testified that, in a certain conversation he had with plaintiff, George W. Frazier, some time since, he said he had expected to find an instrument in Tennessee by which he could establish his right to the negro in controversy; but that he had sent there, and could only get the bill of sale above set forth, or an instrument of similar import. The woman was worth $600, child $100, hire $75 per year.

Another witness stated that the woman was worth $600, child $200, and hire $75 or $80 by the year.

Here defendant closed.

Stone, witness sworn for plaintiff, stated that he heard defendant, Prater, say Gatlin had the negro, but, so soon as his daughter come of age, the negro went to her; and Prater's daughter who had married Gatlin, would then be left with several children and without means of support.

To the testimony of *Stone,* defendant objected, and moved the court to exclude it, but the court overruled the objection, and defendant excepted.

On cross-examination, Stone said that, in said conversation, Prater further stated that he had had a difficulty with Gatlin about his daughter; and Prater seemed to speak about the ownership of said negro as though he was not speaking from his own knowledge, but on information from others—and from Gatlin himself.

Norwood, recalled, stated that the attachment referred to by Hempstead, was the same to which he alluded in his previous testimony.

Which was all the testimony.

Defendant moved the following instructions to the jury:

"1. That, in order to entitle the plaintiffs to recover, the jury must be satisfied, by the evidence, that they were, at the institution of the suit, the owners of the property sued for, and were

entitled to the immediate possession thereof, or had a special property therein, and were entitled to the immediate possession thereof.

"2. That, when a party comes lawfully and peaceably into possession of property, which he treats as, and believes to be, his own, he cannot be sued for the same, without a previous demand therefor; and if the jury believe, from the evidence, that such was the fact in respect to the defendant's intestate in this case, they must find for the defendant, unless a demand was made for the property, by plaintiffs, prior to the institution of this suit, and such demand proven in this case.

"3. That, under the state of pleadings in this case, plaintiffs cannot recover unless they prove a special demand for the property sued for on Gatlin before the institution of the suit.

"4. When it becomes a question whether a party holds property adversely, in his own right, or under and for another, as contended for in this case, the jury should take all the acts and conduct of the party while in possession, and all his declarations made before any controversy arises in respect to the character in which he holds, whether adversely or not, and, upon the whole, to determine the fact as to the ownership.

"5. That, in order to constitute a gift of slaves, or other personal property, there must be an actual delivery of the property to the donee, unless in cases where, as a ship at sea and such like, no actual delivery can be made.

"6. That a promise to give property, is not binding on the donor, and cannot be enforced.

"7. That a sale of slaves must be based on a good consideration, and no title passes without delivery.

"8. Confessions or admissions of a party, should always be received with great caution, and unless made fully and fairly, and upon occasion to call out the truth, and upon reflection, or if made in casual conversation after great lapse of time, they are the weakest possible evidence admitted in courts of justice.

"9. That if the jury believe, from the evidence, that the admissions imputed to Gatlin in this case, were made for the pur-

pose of deterring creditors from seizing his property, or from any motives other than a direct intention to bestow the property on his daughter and hold it simply as hers, they are entitled to no weight in this cause.

"10. That when a party was, and always continued, in possession of property, makes admissions that the property belongs to another, in a contest between them for the property, it is competent to show a mistake of law or fact to rebut such admissions, and to show that the admissions were not true.

"11. That admissions as to legal rights have no force, and are not binding admissions—only having any force as to matters of fact—and if a party says he has no legal right to property, when in truth he has by law, this admission has no force.

"12. That, when a party in possession makes admissions that the property is in another, such admissions should be free from all reasonable objections in themselves, or corroborated by other circumstances as to the real ownership, and slight circumstances would destroy their force.

"13. A mere naked declaration that property belonged to another, does not confer any title whether made by the owner or others.

"14. That a clear documentary title cannot be overturned by mere parol declarations.

"15. The declarations of a party as to the construction or effect of deeds or writings, or as to the law of descents and distributions, are of no effect.

"16. That no declarations of an administrator, as to the rights of his intestate, can bind or affect the intestate.

"17. That an administrator is the representative, by law, of the creditors of intestate, and can set aside a fraudulent conveyance to defeat creditors.

"18. That any slaves or personal property given to the wife during marriage, and reduced to possession by the husband, becomes the property of the husband, as absolutely as if bought and paid for by him, and descends to his heirs and not to those of his wife.

"19. That if the jury believe, from the evidence, that Baswell had title to the property, that he conveyed the same to Gatlin by bill of sale, in this case the title of Gatlin is full and complete, and cannot be defeated but by sale or gift, accompanied by actual delivery subsequent to the conveyance to Gatlin.

"20. That gifts of slaves can only, and must, be made by will or deed, and proven and recorded in the county, within six months after date thereof, where the slaves are, if the donor remain in possession after the pretended gift, and otherwise the same confers no title."

But the court refused to give any of said instructions, and defendant excepted.

The court instructed the jury, against the objections of defendant, as follows:

"1. To enable the plaintiffs to recover, they must show property in themselves.

"2. If the jury believe that Gatlin bought the slave of Baswell for a money consideration, and had not sold the same at the time of his death, or given the same to Frazier's wife, then they will find for the defendant.

"3. If the jury believe that Gatlin came by the property in right of his first wife, the mother of Mrs. Frazier, and owned the same at the time of his death, by law the descent is cast upon Mrs. Frazier, and they will find for plaintiffs.

"4. If the jury believe that Gatlin received the slave in trust for his daughter, Mrs. Frazier, and had the same in possession at the time of his death, they will find for the plaintiffs.

"5. To constitute a good gift of slaves, when it be by parol, that is without any writing, possession must accompany the gift, but if it be the father who makes the gift, his retaining possession is the possession of the child.

"6. A demand in cases of this kind is usually necessary, but if the jury believe that the property in question belonged to Mrs. Frazier, and that Gatlin had converted the property by a sale, no such demand before suit is necessary."

To the giving of which instructions, defendant excepted.

The cause was tried at the November term, 1849, before the Hon. JOSIAH GOULD, Judge. Defendant brought error.

PEKE & CUMMINS, for the appellant, contended that the defendant below was entitled to demand before suit brought; that this case did not come within the principle laid down in *Beebe vs. De Baun,* (3 *Eng.* 505) as the defendant had not "so conducted himself as to render a demand wholly unavailing," being then in peaceable possession of the property, and able to deliver it, though he had formerly made sham sales. That the action of replevin in the detinet, is unconstitutional, as it deprived a party of his property and afterwards tried the right of property, while the constitition expressly provides that no person shall be dissiezed of his freehold, or deprived of his property except by the judgment of his peers or the law of the land, which means *trial and judgment in accordance with the course of the common law.* (3 *Story on Cont.* 661. 2 *Inst.* 50, 51. 2 *Kent's Com. Lect.* 24, *p.* 10. 1 *Tucker Blac. Com. App.* 304, 305.) That the court erred in refusing to give all the instructions asked by the defendant below, and in the instructions given of its own motion: and to show that there was no such gift and delivery of the slave by the father to his child in this case as to render the gift irrevocable and pass the title, referred to the cases of *Godfrey vs. Hays,* 6 *Ala.* 501. *Martin vs. Johnston,* 7 *Leigh* 319. *Adams vs. Hayes,* 2 *Iredell* 361. *Durett vs. Sewall,* 2 *Ala.* 669. *Sims vs. Sims, ib.* 117. *Fowler vs. Stuart,* 1 *McCord* 504. *Ewing vs. Ewing,* 2 *Leigh* 341. *Tate vs. Hilbert,* 2 *Ves. Jr.* 120. *Irons vs. Swallpiece,* 2 *Barn. & Ald.* 552. *Hunter vs. Jones,* 6 *Rand.* 540. *Cook vs. Husted,* 12 *J. R.* 188. *Slaughter's ad. vs. Tutt,* 12 *Leigh* 147.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first objection to the judgment, as presented by the record, relates to the reading of writ and return as evidence of the possession of the property in controversy. It is not material to decide whether the circuit court ruled correctly or not in this par-

ticular, as the same fact was abundantly established afterwards by the sheriff of the county, who was unquestionably a competent witness for that purpose.

The testimony of Stone was clearly incompetent, and consequently should have been excluded. The declarations of Prater could not be received to the prejudice of the rights of the legal representatives of his intestate, and if he was cognizant of the facts testified by Stone, he was a competent witness himself, and should have been examined touching the same.

The constitutionality of the act upon which this suit was founded, was incidentally discussed by this court in the case of *Fleeman et al. vs. Horen et al.,* (3 *Eng.* 355.) It was there declared to be within the pale of the constitution, and we have not been able to perceive any good reason why we should not adhere to the opinion there expressed.

We will now proceed to the consideration of the several instructions given and refused by the court; as they present most of the questions material to a proper disposition of this case. The first asked by the defendant in the court below was refused. The first section of our replevin statute, and upon which this suit was based, provides that "whenever any goods or chattels are wrongfully taken or wrongfully detained, an action of replevin may be brought by the person having the right of possession, and for the recovery of the damages sustained by reason of the unjust caption or detention." It is clear, from this, that a mere naked right of possession alone, coupled with proof of actual possession by the defendant, without the title to the property, are all-sufficient to enable the party thus entitled to recover in this action. In the case of *Crocker vs. Mann,* (*Missouri R., republication, vol.* 1, 2 *and* 3, *page* 383,) the supreme court of Missouri said that "By the act to regulate replevin, (*R. C.* 659,) which provides "that in all cases where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof, without his or her consent, it shall be lawful for such person to bring an action of replevin therefor against any

person in whose hands the same may be found." "This statute," that court said, "was intended to put the action of replevin on a useful footing. All, that is necessary to be done to comply with this statute, is to show the plaintiffs possessed the property actually, or had the right to the immediate possession, and that the same was found in the hands of another: that other must account for such possession." The same doctrine was recognized by this court in the case of *Beebe vs. De Baun,* (3 *Eng.* 564.) This action, under our statute, is designed to restore the possession to its rightful owner, and as such it is not absolutely essential that the plaintiff should show a clear legal title to the property. Under this construction of the act, the first instruction is too comprehensive, and consequently was properly refused.

The second was also properly refused. The very reverse of this instruction would seem to be the law. Where a party comes lawfully and peaceably into the possession of property, which he treats and believes to be his own, instead of entitling himself to a demand before suit, he most clearly forfeits such right. This court, in the case of *Beebe vs. De Baun,* already referred to, said: "The law dispenses with the necessity of a demand, where the defendant has committed acts inconsistent with the title of the plaintiff, and conducted himself in such a way as to render a demand wholly unavailing. It is perfectly evident, from the testimony, that De Baun had done such acts as would amount to a conversion, and would have superseded the necessity of a demand in a suit brought by the sureties for the same property. The question here is, whether his conduct, at and subsequent to the purchase of Beebe, amounted to a conversion as against him; because, if so, he was under no legal obligation to demand the property. He engaged that, in case the trustees would postpone the sale from February to April, he would produce the negroes. The sale was postponed to the time indicated, but he failed to comply with his promise. It is evident from all the testimony touching that matter that, had Beebe made a formal demand of the negroes before the institution of the suit, it could not have availed any thing; and indeed, he was not bound to

make a demand, as De Baun was still acting in regard to the property in a way that was wholly inconsistent with his title." If the defendant in this case has exercised acts of ownership over the property by selling or attempting to sell it, his conduct was clearly inconsistent with the title of the plaintiff, and consequently superseded the necessity of a demand. The proof is abundant upon this point, and we think there can be no doubt but that, by his repeated acts of ownership and conversion of the property, he placed himself entirely without the pale of such right. The court below, therefore, ruled correctly in refusing this instruction. The third was properly refused for the same reason.

The fourth was not warranted under the state of case as presented by the record. The declarations of the defendant's intestate, tending to negative the title of the plaintiffs, and not made in their presence, were not admissible. Thus, in trover for bonds of the intestate, the defendant (the intestate's son) insisted the intestate gave them to him. The intestate's declarations, tending to negative this, made in the defendant's absence, were held inadmissible. (See *Rorning vs. Rorning,* 2 *Rawle* 241. *Scull et al., ad. of Irwin vs. Wallace's exs.,* on error, 15 *Serg. & Rawle* 331, 233.) The declarations of the defendant's intestate, going to negative the title of the plaintiffs, are not shown to have been made in the presence of either, and consequently, under the authorities referred to, they were not competent evidence in favor of the defendant. But, whilst we concede that the defendant cannot in this case avail himself of the subsequent declarations of his intestate, made in the absence of the plaintiffs, or either of them, we by no means admit that he is therefore estopped from denying the title of the plaintiffs. The supreme court of New York, in the case of *The Welland Canal Co. vs. Hathaway,* (8 *Wend. R.* 483,) when speaking upon the subject of estoppel, said: "An estoppel is so called because a man is concluded from saying anything, even the truth, against his own act or admission. The acts set up in this case, it is not pretended, constitute a technical estoppel, which can only be by deed or matter of re-

cord, but it is said they should operate by way of estoppel—an estoppel *in pais*. Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel under the directions of the court. (*Co. Lit.* 352. *Vin. Abr., title Estoppel,* 422. 19 *John. R.* 490. 1 *Gibb. Ev.* 87.) From the manner in which a party must avail himself of them, it is obvious that there can be no fixed and settled rules of universal application to regulate them as in technical estoppels. There are many acts which have been adjudged to be estoppels *in pais,* such as livery, entry, acceptance of rent, &c., but in many, and probably most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of the case. As a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. The case of *The First Presbyterian Congregation of Salem vs. Williams,* strikingly illustrates this proposition. There the plaintiffs, by their attorney, called upon the defendant for his rent, and inquired if there was any property upon the premises, out of which it could be collected by distress: he answered, there was not, and pointed out all the property he had, which was but a trifle. On the trial of the ejectment brought for the default in payment of the rent, the defendant offered to show there was sufficient property on the premises, out of which the rent could have been collected. The court decided that he was estopped from disputing the truth of his admissions to the plaintiff's attorney. All the cases I have seen, in which the acts or admissions of the party are adjudged to operate against him in the nature of estoppel, are generally cases where, in good conscience and honest dealing, he ought not to be permitted to gainsay them." The case of *Wallis vs. Truesdale* (6 *Pick.* 457) is also directly in point. The court there said: "As to the question of property, the jury were instructed that the declarations made by the plaintiff were strong evidence against him, but were

not conclusive: this was certainly proper, unless, as the defendants contend, they operated by way of estoppel, which cannot be maintained. If these declarations had been acted on by the other party, and thereby the plaintiff had acquired some advantages, or the defendants had sustained damages, it would have been otherwise." (See, also, *Tufts vs. Hays,* 5 *New Hamp.* 453.) Let us now apply the rule, laid down in the cases referred to above, to the one at bar. It will not be contended but that, in case third persons had been influenced to act upon the admissions of the defendant's intestate, as, if they had been induced to purchase the property of Mrs. Frazier before her marriage, or of her and her husband jointly since that event, they would have been protected in such purchase. In that case, unless he were estopped by his admission, he would have it in his power to entrap the innocent and unsuspecting, and thereby to perpetrate the grossest injustice. This the law will not tolerate. But how can this doctrine apply to the plaintiffs below? Were they influenced by the declarations to act in any way that could possibly result in their injury? It is most manifest that they were not. It is clear, therefore, that, as between the present parties, the doctrine of estoppel cannot be made to apply, and that the defendant below is fully at liberty to deny the right of the plaintiffs. The fourth instruction was, therefore, properly refused.

The fifth was also properly refused. The proposition here laid down is too broad, and should have been so qualified as to have opened up the question of constructive delivery. We have looked into an immense mass of authorities upon this point, and after a full and careful review, have been constrained to adopt those which hold, that, where the evidence of the gift is clear and unequivocal, an actual delivery need not be shown, in case the jury shall be satisfied, from all the facts and circumstances, that a delivery has been made. It is admitted that the rule requiring proof of actual delivery is laid down as the law and that without any qualification, in the cases referred to, both in Virginia and Alabama. (See *Ewing vs. Ewing,* 2 *Leigh* 337. *Brown vs.*

Handley, 8 *ib.* 119. *Slaughter's ad. vs. Tutt,* (2 *ib.*, and 2 *Ala.*) A different doctrine, however, has been held by the courts of New York, South Carolina, and some other States of the Union, and, amongst others, the supreme court of this State. One of the leading cases in New York is that of *Grangiae, surv., &c. vs. Arden,* (10 *John R.* 293.) The facts of that case were, that a father had bought a lottery ticket, which he declared he had given to his daughter E., and wrote her name upon it, and after the ticket had drawn a prize, he declared that he had given the ticket to his child E., and that the prize money was hers; this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. The same qualification of the rule was laid down by the constitutional court of South Carolina, in the case of *Davis vs. Davis,* (1 *Nott & McCord* 225.) The court in that case said: "Parol gifts to a child are common, and it has not been usual to evidence such gifts by any solemn act of delivery. The formal ceremony of a delivery is not essentially necessary. It is sufficient if it appear that the donor intended an actual gift at the time, and evidenced such intention by some act which may fairly be construed into a delivery; as in the case cited from Strange, where the donee was put into possession by being entrusted with a key, &c. In the principal case, there was evidence given which was proper for the jury to consider as evidence of an actual delivery. The donor acknowledged he had given the negroes to his daughter, when questioned on the subject, and at a time when she had one of them in her arms. This was, in itself, evidence of a delivery or surrender of his right to his daughter; and, accompanied with other circumstances, might be deemed a sufficient proof of a prior delivery of all the negroes in dispute. The doctrine of these latter cases was recognized and acted upon by this court in the case of *Dodd vs. McCraw,* (3 *Eng. R.* 101); and being fully satisfied with that decision, the point is no longer open to controversy. Upon the question of the sufficiency of the proof to establish either an actual or constructive

delivery, we, of course, can express no opinion, as it is not presented by the record.

The sixth is a mere abstraction, as there is no evidence upon which to predicate it. The seventh was properly disallowed for the same reason.

The eighth was clearly legitimate, and ought to have been given to the jury. With regard to oral admissions in general, and as to the third class of admissions in particular, viz: unconnected and casual representations, they have occasionally met with great disfavor as a dangerous kind of evidence, receivable with great caution, (*Myers vs. Baker, Hardin* 549,) with suspicion; and the jury were admonished to see that it was the intention of the party to admit a fact from being satisfied of its truth." See *Phil. on Ev., Cow. & Hill's Notes* 211, and the cases there cited.

The ninth was strictly the law, and consequently should have been given in charge to the jury. The case of *Wallis vs. Tuesdell et al.* is directly in point. The jury were instructed, in that case, that the declarations were strong evidence against the plaintiff, but not conclusive, and that if, from the whole evidence, they should be satisfied that the property belonged to him, and that his declarations were made for the purpose of preventing his creditors from attaching it, they might find a verdict in his favor. These were instructions of the lower and sustained by the supreme court.

The tenth should likewise have been given. The court of appeals of Kentucky, in the case of *Craig vs. Baker,* (*Hardin's R.* 289,) said: "Men are bound to state facts truly, when they speak of them, and are bound, in many instances, to disclose them, or be barred of a right growing out of them; but no man is bound by an admission of law, or a mistake of the law in his judgment upon his own right; much less by a mistake of the legality of his adversary's claim. If the principle was once admitted that a better estate could be defeated, released or extinguished by a mistake of opinion, or confession of law, or the expressions of intention by the holder not to prosecute the right, made by

parol, in the common pursuits of life, we might shortly expect a description of bills in chancery, before unknown, and which might be styled emphatically, bills to perpetuate "the mistakes of the right" and the perjury of witnesses. The case of *Polk's lessee vs. Robertson & Cockrel,* 1 *Tenn.* (*Overton's*) *R.* 463, is to the same effect. See, also, *Leforce vs. Robertson,* (*Litt. Sel. Cas.* 223,) and *Moore vs. Hichcock,* (4 *Wend.* 222, 298.

The eleventh is substantially the same with the tenth, and consequently ought to have been given. The twelfth was substantially the same with the eighth, and consequently ought to have been given.

The thirteenth was an appropriate instruction, and should have been given. A mere naked declaration, that property belongs to another, even though it should be made by the true owner, cannot be said of itself to confer a title. It is nothing more than evidence of title, and stands as a mere nucleus around which other evidence may be made to cluster, and from which, when all taken together, a perfect title may or may not be presumed, according to circumstances.

The fourteenth was properly refused. The property in dispute being transferred by parol, of course a parol conveyance, if complete and otherwise unobjectionable, would override a documentary title.

The fifteenth is substantially the same with the eleventh, and consequently should have been given.

The sixteenth is without a foundation in the evidence. The administrator did not testify in the case, and it has already been ruled that what he had said as deposed by another was incompetent.

The seventeenth was properly excluded. The administrator stands in the shoes and stead of the intestate, and he can only make such a defence as could have been made by the party whom he represents, unless new matter of defence shall have arisen since the death. He cannot set up the fraud of his intestate to defeat an action originally commenced against him.

The 18th was properly refused. There was no evidence of a

gift of the property in controversy to the wife of Gatlin during the marriage or at any other time; consequently the instruction was purely abstract, as applied to this case.

The nineteenth is defective, and ought to have been refused for the reason already assigned in respect to the 5th.

The twentieth is defective in requiring the instrument to be recorded in the county where the slaves are. The *7th section of art.* 2, *of chap.* 153, declares that "No gift of any slave shall pass or vest any right, estate or title in or to any such slave in any person whatsoever, unless the same be made, First. By will duly proved and recorded; or Second. By deed in writing, to be proved by not less than two witnesses, or acknowledged by the donor and recorded in the county in which one of the parties lives, within six months after the date of such deed." The *8th section* of the same act further declares that "This act shall only extend to gifts of slaves, whereof the donors have, notwithstanding such gifts, remained in possession thereof, and not of gifts of such slaves as have come to the possession of, and remain with the donee, or some other person claiming under such donee." It was not material, therefore, that the instrument evidencing the gift should have been recorded in the county where the negroes may have been, and, as a matter of course, the court should not have so instructed.

Having disposed of all the instructions asked for by the defendant below, we will now proceed to examine those given by the court of its own motion. The first was improperly given, as it was subject to the same objection as the one first asked by the defendant. The second was most clearly right. It is manifest that, in case the title was once in Gatlin, and he never had parted with it, either by a lease or gift, his administrator was entitled to recover the property in controversy. The third is a mere abstract proposition, as there was no evidence upon which it could be based. The fourth was wholly unauthorized for the same reason. The fifth is not strictly in accordance with the law, and is well calculated to mislead the jury. It does not follow, under all circumstances, that a gift from a father to a child

is good without actual delivery. It is upon the supposition that the child, who is the donee, is itself in the family and under the immediate control of the father, that the law will dispense with actual delivery. The sixth was properly given. If the property was in the plaintiff below, and the defendant had converted it by a sale, it is clear that no demand was necessary before suit.

Upon a full view of the whole case, it is apparent that there are numerous errors, and for which the cause ought to be reversed. It is, therefore, considered and adjudged that the judgment of the Hempstead circuit court herein rendered, for the errors aforesaid, be reversed, and the cause remanded, with instructions to be proceeded in according to law and not inconsistent with this opinion.

Mr. Justice SCOTT dissented from the opinion of the court as to the 4th instruction asked by deft. He said it was good law.—REP.