ALSTON *vs.* BALLS AND ADAMS.

On a special contract to pay hire for a slave and return him at the end of the term, the party hiring is liable for the hire and value of the slave if he runs away and escapes, though without cause or fault on the part of the hirer: otherwise, perhaps, as to his liability for the value of the slave, if there is no special contract to return him.

Appeal from Johnson Circuit Court.

This was an action for the hire and value of a slave. The declaration sets out a hiring by the plaintiff to the defendants of a negro slave for the year 1849, and alleges that the defendants, on the first day of January, A. D. 1849, at &c., "did make and deliver to the plaintiff their certain promise in writing, which bears date," &c., whereby they promised to pay a specified hire, to furnish clothes, &c., "and return said boy to the said Alston, at Clarksville, Arkansas, on the first day of January, 1850:" the breach is, that the defendants neither paid hire, furnished the clothes, nor returned the boy.

The defendants filed four pleas: the second and third, are, in substance, that the negro slave, in the month of April, without cause, or any fault on the part of the hirer, ran away and escaped; that the plaintiff had immediate notice thereof, and that the defendants exerted all reasonable means for the recovery of the slave, &c., whereby they were unable to deliver him at the expiration of the term.

The plaintiff demurred to the second and third pleas, and the court overruled his demurrer, and he appealed.

WALKER & GREEN, for the appellant. Where one hires a slave for a year and he is sick or runs away, the hirer must pay the hire. (*George v. Elliott, 2 Hen. & Munf. R.* 6. 5 *Mon. R.* 359.

1 *Bibb's Rep.* 536.) And under the general promise or obligation to return a slave at the termination of the hiring, a party may be excused from doing so if the slave run away without his fault. (*Keas v. Yewell, 2 Dana* 348.) But where there is a special covenant to return him, without providing for such contingency, the hirer would not be excused. (*Ch. on Con.* 735. 8 *T. R.* 267. 10 *East* 533. 6 *T. R.* 650.)

F. W. & P. TRAPNALL, for the appellant. Contracts implied by operation of law, admit of a liberal construction, and a party may be excused by inevitable accident, (5 *Conn.* 381,) but express covenants are strictly construed, and the person covenanting not only assumes to do the matter stipulated, but takes on himself the risk of performance. (*Warren v. Powers,* 5 *Conn.* 381. *Chesterfield v. Balton, Com. Rep.* 627. *Hetley's Rep.* 54. *Aleyn R.* 26. 10 *East* 533. 6 *T. R.* 750.,) and is bound to make his contract good, notwithst[illegible]ding inevitable accident. (*Selw. N. P.* 381. *Ch. Con.* 273. 3 *John. R.* 45. 17 *Ves.* 3 *Bos. & Pull.* 300. 1 *Dallas* 210,) [illegible]ess he guard against the contingency, (*Ch. Con.* 15, 131, 273. 2 *Str.* 763. 2 *Vern.* 280. 1 *Ch. Cas.* 83. 3 *Burr.* 1637. 2 *Hen & M. inf.* 6.) The defendants were therefore bound to return the sla[illegible] according to their express covenant to do so.

ENGLISH, for appellee, Adams. This was a case [illegible] bailment of the *fifth* class, called a *locatum* or hiring for a rewa[illegible], (2 *Kent* 585, 6,) and in such cases the hirer is bound to use ord[illegible]ary care and diligence, and answerable only for ordinary neglect. (2 *Kent* 586, 7,) and when called upon he must re-deliver it, or account for his default by showing a loss of it by violence, theft or accident. (2 *Kent* 587, 8.)

The hirers did not expressly bind themselves to return the slave at all events, but, in general terms, to return the slave at the end of the year: which was simply what the law required, unless prevented by accident, &c. That the law recognizes the running away of slaves, who have the power of will and motion

and who cannot in all cases be restrained without harsh and cruel means, as a sufficient excuse for a failure to deliver them, when the hirer is free of blame or negligence, is settled in the cases of *Young v. Thompson*, 3 *S. & M.* 129. *De Fonclear v. Shattenkirk*, 3 *J. R.* 170. *Beverly v. Brooke*, 2 *Wheat.* 100. *Singleton v. Carroll et al.*, 6 *J. J. Marsh.* 527. *Keas et al. v. Yewell*, 3 *Dana* 248. *Chase v. Mayer et al.*, 9 *L. R.* 247. See also *Story on Bail., sec.* 216. *Perry v. Hewlett*, 5 *Porter* 318. *Boyer v. Anderson*, 2 *Peters* 150. *Story on Bail., secs.* 217, 408, 577. 4 *Martin R.* 65. 4 *McCord* 223.

The hirer who covenants to deliver the slave at the end of the term, does not insure against all accidents, and is excused for non-delivery, if, without his default, the slave die, run away, &c. *Harris v. Nichols*, 5 *Munf.* 483. *Graham v. Swearingen*, 9 *Yerg.* 276. 3 *Hayw.* 224. 4 *Ib.* 10. 7 *Yerg.* 474. 10 *Ib.* 48. And the owner, in case of death, will not only lose his slave, but the hire also for the unexpired term. *Collins et al. v. Woodruff*, 4 *Eng.* 463.

FOWLER, also for appellee, Adams. A man who hires a slave is only bound to use ordinary diligence and care, and does not insure the slave against all accidents, such as death, running away, &c. *Graham v. Swearingen*, 9 *Yerg. Rep.* 277. *Wheeler's Law of Slavery* 154. *Young v. Bruce et al.*, 5 *Litt. Rep.* 324. *Harris v. Nicholas*, 5 *Munf. Rep.* 489. Where he covenants to deliver the slave at the end of the term and the slave dies, it excuses him for the non-delivery. *Wheel. L. of Slav.* 154. 5 *Litt. Rep.* 324. So if the slave run away without his fault. 9 *Yerg.* 276. *Wheel. L. of Slav.* 154. *Singleton v. Carroll et al.*, 6 *J. J. Marsh. Rep.* 528. *Keas v. Yewell*, 2 *Dana Rep.* 248.

Mr. Justice WALKER delivered the opinion of the Court.

Alston hired to Balls a negro boy for twelve months, and Balls with Adams as his security, entered into a written agreement with Alston to pay for the services of the boy and return him to Alston at the end of the year. Upon this contract, Alston sued

Balls and Adams, and alleged, as a breach thereof, the non-payment of the hire and the failure to return the slave. The defence interposed (and out of which the only question of importance arises) was, that the slave, without the fault of the hirer, had absconded to parts unknown, so that he could not deliver him to the owner.

In the absence of a special contract to return the slave, the defence might have prevailed, but where the parties contract to do an act which it is lawful and possible for them to perform at the time the contract is made, nothing but the act of God or the public enemy of the country will excuse its performance. Thus, it has been held, that if a party covenant to do an act, nothing short of showing that it cannot, by any means be done, will relieve him from his obligation. *Beebe v. Johnson,* 19 *Wend.* 500. Where one incurs an obligation by his own act, he will be bound to the extent of his engagement, and will not be excused for its non-performance by accident from inevitable necessity. *Clancy v. Overman,* 1 *Dev. & Bat.* 402. A party who covenants to perform acts not on their face impossible, illegal or immoral, and not shown to have become so, will be held to performance, notwithstanding the difficulty attending those acts, or the hardship of the particular case. *Stone v. Dennis,* 3 *Porter* 231. And Chief Justice MARSHALL, in the case of *Pollard v. Shaffer,* 1 *Dallas* 210, where the British army, a public enemy, had destroyed a tenement which the lessee covenanted to keep in repair, held the tenant to be excused from keeping his covenant, saying, "That a covenant to do this against an act of God, or an enemy, ought to be so specific and express, and so clear, that no other meaning could be put upon it."

There can be no doubt of the correctness of the principle settled in these cases. Indeed, their correctness, even by the decisions that have, by construction extended the defence, so as to embrace the case under consideration, seems to be conceded. In the case of *Singleton v. Carroll et al.,* 6 *J. J. Mar.* 529, which is mainly relied upon as a case in every respect in point, after substantially recognizing the rule as we have stated it above, the Court said, "The true ground however, generally, upon which,

in such cases, to rest the defence of the covenanter, is that the loss is not to be considered as provided against by a general covenant:" and the case of *Pollard v. Shaaffer,* decided by Chief Justice MARSHALL, is cited; and 2 *Selwin Nisi Prius* 412, is also cited; in each of which, it was the act of an alien enemy that excused the covenanter from the performance of his covenant, and not the mere absconding of a slave, or the casual loss of property.

In the case of *Keas v. Yewell, 2 Dana* 249, the other Kentucky case cited by the counsel, and relied upon as in point, the Court say, "Tested by the literal import of the covenant, there could be but little dispute that this plea furnishes no sufficient excuse for not having the slave to surrender in obedience to the decree. Her running away was not guarded against by any stipulation in the covenant, nor is it, properly speaking, that description of casualty which would be termed inevitable, so as to relieve the parties from the effect of their covenant by the principles of the common law. But still, in our estimation, it constitutes a valid defence to the action:" and the reason assigned by the Court for so holding it a valid defence is, in their own language, "That the casualty by which the slave was lost, is a peril incident to the nature of such property, and therefore, in contracts or covenants concerning such property, that peril should never be presumed to have been intended to be guarded against, unless so expressly stipulated." To sustain this course of reasoning, the Kentucky courts cite no authority whatever, where a similar question has occurred. The case in 5 *Littell* was a case in which the hirer was excused from paying the hire of a slave that died during the time for which he was hired, without the fault of the hirer: and the case in 5 *Littell* was decided on the authority of the case of *Harris v. Nicholas,* 5 *Munf.* 487, which was also a case where the excuse for not keeping the covenant was the death of the slave. The covenanters were excused from performing their covenants, in each of these cases, upon the ground that they were prevented by the act of God, against which, no man is presumed to covenant, because no human agency can arrest it. Not so in

the case before us. It is true that there was a risk to run. The slave might abscond. And so, upon a covenant to deliver stock, or to pasture a horse and return him, the cattle or the horse might escape and never be reclaimed. All these casualties are incident to such undertakings; and if the party contracting was unwilling to run the risk or hazard attending them, he should have excepted them in his contract. This covenant is a security to the owner of the slave for his property, and may have materially influenced him in making the hire upon the terms agreed upon. We cannot say how this was, but find an unqualified covenant to return the slave. If the terms are responsible, they are such as the party voluntarily assumed, or if it be doubtful whether he intended to assume this much, the well established rule of construction is, that it shall be construed most strongly against the party making it.

Another rule, equally clear is, that the contract should be so construed, if possible, as to give force and effect to all of its parts, so that no part of it shall be rejected as useless or unmeaning, if they can be reconciled so as to give each effect and force. It will at once be seen, that under the construction given to this clause in the covenant, it is rendered wholly unmeaning and nugatory, for the obligation of the law, in the absence of any contract to return the slave, impose obligations upon the hirer precisely similar, and to the same extent that the Kentucky and Tennessee courts construe this contract as imposing. So far from this, the parties are presumed to know the law; and unless they intended to bind the hirer beyond his mere legal liability, it is to be presumed they would have made no covenant on the subject. The Kentucky court, and also the Tennessee court, have cited 5 *Munf.*, as a leading authority for the decisions they have made, and have fallen into the same train of reasoning, and have wholly overlooked, and, in effect, discarded the several familiar and well established rules for construing contracts to which we have referred.

The question is one of interest in a State like ours, where slaves are held as property, and contracts of hire are of common

occurrence. The covenant to return the slave to the owner when his term of service has expired, is an important feature in the contract: and when it is considered that he at once parts with the possession and control of his slave, and confides him to the care of one who, for the time being, absolutely commands his time and directs his movements, it is but reasonable to suppose that he intended to impose an obligation upon the hirer to return him at the expiration of the time, whilst, on the other hand, the hirer, aware of the risk he might run by thus covenanting, if he had doubts upon the subject, could either except this contingency out of his covenant, or modify the contract in other respects to suit himself before entering into it.

In the case before us, we find an unqualified undertaking on the part of the hirer to return the slave to the owner at the end of the year. These terms, onerous or not, were voluntarily assumed by the hirer. It was a subject matter which the party is presumed to have been capable of performing, and which, at law, he is bound to perform unless excused from so doing by the act of God or the public enemy of the country.

The Circuit Court erred, therefore, in overruling the demurrer of the plaintiff to the third and fourth pleas of the defendant. And for this error, the judgment must be reversed, and the cause remanded, to be proceeded in according to law.