STATE BANK *vs.* WILLIAMS ET AL.

Abstract principles of law, inapplicable to the facts of a case, should not be given in charge to the jury.

But if given, the party in whose favor they operate cannot object to them.

To instruct a jury, "that the uninterrupted possession of a slave, for the space of five years, gives the possessor the right of property, unless there is some note, memorandum or instrument of writing, acknowledged and recorded, showing the property to be in another, other than the possessor," is too comprehensive, and unwarranted by sec. 5, chap. 65, of the Rev. Stat.

So, also, to instruct, "that the uninterrupted adverse possession of slaves, or holding possession of them as his own property, for five years, gives the possessor the right of property, unless there is some note, memorandum or instrument of writing, acknowledged and recorded, showing the property to be in another, other than the possessor."

Where no time of payment is fixed in the will, specific legacies are due at the end of one year from the death of the testator.

But in such cases the executor may resist payment, by showing that there are not assets in his hands, sufficient to discharge the liabilities of the estate, without resorting to the specific legacies.

Where fourteen years have elapsed since the probate of the will, and the time has long passed for the final settlement of the estate, by the executor, and the close of his authority as such, the legal presumption is that the debts have all been paid, and the affairs of the estate finally settled.

Writ of error to the circuit court of Pulaski county.

THIS was an action of detinue for a slave, determined in the circuit court of Pulaski county, at the May term, 1844, before the Hon. J. J. CLENDENIN, one of the circuit judges. The suit was brought by John Williams, in right of his wife Sarah, J. M. Woodfin, in right of his wife Catharine, and William McCarty, a minor, by his guardian, the said Woodfin, which said Sarah, Catharine, and William, were children of Sarah McCarty, deceased.

There were two counts in the declaration; the first, charging that in January, 1843, plaintiffs delivered to defendant a slave, named George, to be re-delivered to them on request—usual breach. The second, that plaintiffs had casually lost the slave, &c.—following the common form of a declaration in detinue. The defendant pleaded *non detinet*, upon which issue was taken; the cause was submitted to a jury, they found for the plaintiffs, and judgment was accordingly rendered in their favor against the bank.

Pending the trial, the bank excepted to the decision of the court, refusing to instruct the jury as moved by her, and instructing as asked by the plaintiffs; and took a bill of exceptions, setting out the evidence, and the instructions refused, and given: from which it appears:

The plaintiffs read, as evidence, a copy of the will of James Lockert, admitted to probate, 21st January, 1829, which contained, among others, the following provisions:

"I, James Lockert, of the Territory of Arkansas, Pulaski county, being, &c., do make, &c., viz: It is my will, in the first place, that all my just debts shall be punctually paid.

2d. I give unto the lawful heirs of my daughter, Sarah McCarty's body, now deceased, my negro woman, Pat, together with the increase of her body for life, to be equally divided among them, together with what she has received."

Wm. S. Lockert testified, that the Sarah McCarty, mentioned in the will, was dead at the time the will was made: that she left five children, two of whom, William and John, died without issue, one during minority, the other after he became of age; that the

remaining three, Sarah, Catharine and William, mentioned in the declaration, were living, and the latter was a minor. That Jarot McCarty was the husband of Sarah McCarty, and the father of her children, above mentioned. That he came to the Territory of Arkansas, in the year 1819, and had continued to reside in the Territory and State since then. That the negro woman, Pat, named in the will, was living—after the making of the will she had a boy child, and called him George—he was then about eleven years old—had been in the possession of said Jarot McCarty, from his birth until sold under execution, in Hot Spring county, in the year 1843, as the property of said Jarot McCarty, and purchased by the State Bank. In 1840, the heirs of Sarah McCarty claimed him, and on a trial of the right of property their title was adjudged good—that Jarot McCarty testified on that trial, that George belonged to the said heirs. Witness being asked if Jarot McCarty always had possession of the boy until sold to the bank, said the heirs had permitted him to use the boy. Witness also proved that Williams married Sarah, and Woodfin, Catharine McCarty.

It was further proven that the negro was regularly sold, under an execution in favor of the bank, against Jarot McCarty, and purchased by the bank, and taken into possession under the purchase, in the year 1843. The value of the boy, his hire, &c., were also proven.

The instructions which the court refused to give the jury, and those given, fully appear in the opinion of this court.

HEMPSTEAD, for the plaintiff. 1. In an action of detinue, *general,* or *special* property, coupled with a right to *immediate* possession, is absolutely necessary to a recovery. *Gordon vs. Harper,* 7 *Term R.* 9. 1 *Saund. Pl. & Ev.* 435. 1 *Chitty's Pl.* 139. 2 *Saund. R.* 47, *a.* 4 *Bing.* 106. The property in the will was devised subject to the payment of debts, and until it was affirmatively proved, that the debts were discharged, and distribution made to the heirs, no right to the immediate possession of the slave, in the declaration, was shown to be in them.

2. The uninterrupted possession of a slave for *five* years vests the right of property in the possessor, as between himself and creditor, unless the possession is evidenced by a recorded will or deed. *Rev. St. page* 414, *sec.* 5. The slave in controversy was purchased by the bank, as the property of McCarty after he had possessed him more than ten years. It appears that he was the *natural* guardian of the heirs who are now suing, but this did not entitle him to the possession, or control of their personal estate. 2 *Kent's Com.* 219. *Genet vs. Tallmadge,* 1 *J. C. R.* 3. 3 *Bro. Ch. Cas.* 186.

WATKINS & CURRAN, contra. A party, to avail himself of the statute of limitations in such case as this, must not only show that he or those under whom he claims has held possession for the term prescribed by the statute, but he must also show that it was an uninterrupted, continuing, adverse possession under color of title. *Smart vs. Baugh,* 2 *J. J. Marsh.* 365. *Smart vs. Johnson, ib.* 373. *Boatright vs. Meggs,* 4 *Mun.* 145. *Burns vs. Swift,* 2 *Serg. & Rawle,* 466.

It is proved that McCarty held as bailee of the defendants in error; if so, no length of time would bar their action. *Darden vs. Allen,* 1 *Dev. (N. C.) Rep.* 466.

This case is not within the statute of frauds. *Penny vs. Davis,* 3 *B. Monroe,* 313. *Orr et al. vs. Pickett et al.,* 3 *J. J. Marsh.* 280. *Forsyth vs. Kreakburn,* 7 *Monroe,* 99. *Kenningham vs. McLaughlin,* 3 *Monroe,* 32. 3 *Hen. & Mun.* 449.

Title draws to it the possession. To complete a title, possession and the right of property must concur, and possession by operation of law accompanies the title, unless the contrary is shown, and until it is shown. It is therefore not necessary, to entitle a plaintiff to recover that he should prove that he had been in possession within the time limited by the statute. *Hawk vs. Senseman et al.,* 6 *Serg. & Rawle,* 21.

When the defendants in error proved that they once had title it was sufficient to enable them to recover unless a title derived from them was shown, and as the bank claimed that their title had been

divested by the length of McCarty's possession, it devolved upon her to prove that the case was within the statute. 1 *Dev.* 466.

The court did not err in refusing to give the instruction asked for by the bank; because a court is not bound to give an instruction where it is a mere recital of general, abstract principles, and not accompanied by or based upon a statement of the testimony. *Rhett vs. Poe,* 2 *Howard (S. C.) Rep.* 457. *Danly vs. Edwards,* 1 *Ark.* 437. *Robins vs. Fowler,* 2 *Ark.* 183.

Although the instructions given may be erroneous, yet if upon the whole the verdict is correct, the judgment will not be reversed. *Saunders vs. Johnson,* 1 *Bibb,* 322. *Clark vs. Byrd,* 6 *Monroe,* 299. 6 *Monroe,* 606. *Fleming vs. Gilbert,* 3 *J. R.* 528. *Dale vs. Lyon,* 10 *J. R.* 447.

Even if it be doubtful whether the instruction given had any effect upon the finding, the presumption is in favor of the judgment. *Waller et al. vs. The State,* 4 *Ark.* 88. *Lenox vs. Pike,* 2 *Ark.* 14. *Wood, Ex parte,* 3 *Ark.* 532. *Wilson vs. Light,* 4 *Ark. Rep.* 158.

This statute went into operation on the 20th March, 1839, and that is the era from which the period of possession must be computed. *The People vs. The Supervisors of Columbia,* 10 *Wend.* 363; consequently, it is impossible that this case could be within the statute.

OLDHAM, J., delivered the opinion of the court.

After the close of the testimony upon the trial of this cause, the defendant below asked the court to instruct the jury, "that the uninterrupted possession of a slave for the space of five years gives the possessor the right of property, unless there is some note, memorandum or instrument of writing acknowledged and recorded, showing the property to be in another, other than the possessor;" which instruction the court refused to give and the defendant excepted. Upon the motion of the plaintiffs below the court instructed the jury, "that the uninterrupted adverse possession of slaves, or holding possession of them as his own property for the space of five years, gives the possessor the right of property, unless there

is some note, memorandum or instrument of writing acknowledged and recorded, showing the property to be in another, other than the possessor." To the giving of which instruction the defendant also excepted, and has brought the case into this court by writ of error for review.

It is specially assigned for error, by the plaintiff in error, that the circuit court overruled the motion for a new trial, but upon inspection of the transcript of the record, it no where appears that any motion was made for a new trial.

The instruction asked by the bank, was properly refused by the court. It was incorrect in point of law, and not applicable to the case before the court in point of fact. By the 65th chap. 5th sec. Rev. Stat. it is enacted, that, "where any goods or chattels or slaves shall be pretended to have been loaned to any person with whom, or those claiming under him, possession shall have remained for the space of five years without demand made and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of any use of property, or by way of condition, reservation or remainder in another, the same shall be taken, as to all creditors and purchasers of the persons so remaining in possession to be void, and that the absolute property is with the possession, unless such loan, reservation or limitation of the use of the property were declared by will or deed in writing, proved or acknowledged, and recorded as required by this act." There is no proof, nor is it pretended that it was the case, that the negro in controversy was loaned to McCarty by the plaintiffs below, or that any reservation or limitation was pretended to have been made by way of condition. Therefore, if the instruction had been asked in the language of the statute, it would have raised an abstract question of law, inapplicable to the facts before the jury, and was for that reason properly refused. *Danly vs. Edwards,* 1 *Ark.* 437. *Robins vs. Fowler,* 2 *Ark.* 183. But the language of the instruction asked was entirely too comprehensive. It asserts that uninterrupted possession for five years gives the right of property, unless there is some note, memorandum or instrument of writing acknowledged and record-

ed, showing the property to be in another, other than the possessor. But by the statute such possession conveys the right of property only in cases of pretended loans, and in cases where "any reservation or limitation shall be pretended to have been made of any use of property, by way of condition, reservation or remainder in another," unless such loan, reservation, or limitation is declared as provided in the act, and then only in favor of creditors or purchasers.

The instruction asked by the plaintiffs below, like that asked for on the part of the bank, was evidently based upon the section of the Revised Statutes above quoted, and is also more comprehensive than the statute itself. The statute, as above stated, confers the absolute right of property by five years uninterrupted possession, only in favor of creditors and purchasers, and not to the possessor generally; and not in favor of creditors and purchasers, if there is some note, memorandum or instrument of writing acknowledged and recorded, showing the property to be in another, other than the possessor. This instruction, like the one asked by the bank, presented a mere abstract question of law; as there was no evidence establishing or tending to establish such a state of case as is contemplated by the section of the Revised Statutes upon which the instruction was based. The instruction, however, could have no effect upon the jury in the determination of their verdict; and if it did, it was certainly in favor of the bank, and she should not therefore complain. It does not afford a sufficient reason for disturbing a verdict and judgment fully warranted by the testimony.

The remaining question raised by the argument, that the plaintiffs below did not show a right of possession, because it did not appear that the debts of the testator were all discharged, is equally unavailing. The legacy was specific and, no time of payment being fixed, was due at the end of a year from the testator's death, *Heagle vs. Gumbank*, 3 *Ark.* 716, but in that case the executor might have resisted payment by showing that there was not a sufficiency of assets in his hands for the discharge of the liabilities of the estate, without resorting to the specific legacies contained in the will for contribution. More than fourteen years had elapsed

between the probate of the will and the bringing of this suit: the time had long since passed for the final settlement of the business of the estate by the executor, and the close of his authority as executor. Under these circumstances the legal presumption is, that the debts due from the estate were all paid, and the affairs of the estate finally settled and adjusted. Judgment affirmed.