LEVY *vs.* MITCHELL.

The admissions of an agent are binding upon his principal, if made within the scope, and during the existence of the agency, but after his agency ceases, admisssions of statements by him are not binding, and cannot be given in evidence to charge the principal.

THIS was an action of covenant, by James Levy against Jacob Mitchell, 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 action was founded on a writing of agreement between Levy and Mitchell, dated 1st day of Jan'y, 1841, in which Mitchell bound himself to put Levy into full possession of a house in Louisville, Ky., which he sold him for $1600, free of charge or expense on the part of Levy; and Levy agreed if he sold the house within two years for more than $1600, to divide the overplus with Mitchell. Breach laid in the declaration—that defendant did not put plaintiff in possession of the house free of charge or expense, but that he was forced to expend divers large sums of money, &c., to obtain possession thereof. The defendant pleaded covenant performed. The case was submitted to the court, sitting as a jury, and verdict and judgment were given for defendant.

Pending the trial, the plaintiff offered evidence which was excluded by the court, to which he objected, and took a bill of exceptions setting out all the evidence offered by him upon the trial; from which it appears:

That Mitchell lived in Little Rock, and that prior to the time of the sale of the house to Levy, Thomas Bates, of Louisville, was his agent there, for the purpose of renting the house, paying taxes upon it, &c. That after Mitchell sold the house to Levy, he wrote to Bates, informing him of the fact, and requesting him to make with Levy, who was authorized to call on him for the purpose, a final settlement of his agency, and deliver to Levy all the papers in relation to the house and lot, &c.

The plaintiff offered to read, as evidence, letters written by Bates to Mitchell after he had closed his agency with Levy, as above directed, to show that he had paid taxes, and other charges, due upon the house and lot before he purchased it of Mitchell, which the court excluded, and he excepted.

WATKINS & CURRAN, for the plaintiff. A party taking an exception to the testimony of a witness should only object to such

part as is not competent; if he excepts to the whole, and a part is not excepticnable, it will not avail him on that account. So, also, if the objectionable part of the evidence be very unimportant. *Beebe vs. Bull,* 12 *Wend.* 504.

TRAPNALL & COCKE, contra. The admissions of an agent when they are part of the *res gestae,* are binding on the principal. *Story on Agency,* 128-9, but not otherwise: and the facts contained in the declaration must be proven *aliunde. Paley,* 257, 268-9. The agent himself is a competent witness, and therefore his admissions are not the best evidence. *Story,* 129. *Smith vs. Howard,* 8 *Bingham,* 45. In this case the statements were made after the agency had ceased.

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

The papers offered to be given in evidence by the plaintiff, and which were excluded by the court, consisted of letters written by Bates to Mitchell some time after the close of his agency. When Bates surrendered the property and papers to Levy according to the directions of Mitchell, his power as agent ceased. The admissions of an agent are binding upon his principal if made within the scope, and during the existence of the agency; but after his agency ceases, his admissions or statements are not binding. The statements in question being made after a settlement with Levy and a surrender of the property to him, are not the admissions of an agent which will bind the principal, and were therefore properly excluded by the court.

Bates was a competent witness to prove the facts relied upon, and if it was necessary or material to establish them upon the trial, he should have been called as a witness, or his deposition should have been taken. Judgment affirmed.