RINGO *vs.* FIELD.

In an action of replevin, in the *cepit* and *detinet*, the plea of *non cepit* puts in issue the *taking* alone, and admits the property and possession in the plaintiff.

Under such issue, the defendant is precluded from offering evidence of title in himself, or another, the effect of his plea being to disclaim title and possession, and admit them in the plaintiff.

A non-suit cannot be ordered in any case, by the court, without the consent and acquiescence of the plaintiff.
The correct motion is, to instruct the jury, that, if the evidence has not proven a matter necessary to be proven, they must find for the defendant.
This court will not review the evidence set out in a bill of exceptions, to see whether it sustains the verdict of the jury or not, where no application was made to the court below to set it aside, or its judgment not taken upon the question.

Writ of error to the circuit court of Pulaski county.

THIS was an action of replevin for a box of specie, brought by William Field against William H. Ringo, to the circuit court of Pulaski county, March term, 1842.

The declaration was in the *cepit* and *detinet*, and charged that the defendant, on &c., at &c., "in a certain banking house, there called the Real Estate Bank of the State of Arkansas, *took* one box of silver coin, containing one thousand dollars, of the goods and chattels of the plaintiff, of value, &c., and unjustly detained the same, and still detains," &c.

By the return of the sheriff, on the summons issued by the clerk it appears that he delivered to the plaintiff the box of specie claimed in the declaration, the plaintiff having given him bond as required by the statute.

At the return term, the defendant demurred to the declaration, on the ground that—"the declaration was for the *taking* and *detention* of the property, whereas is should have been for *one* or the *other*." The court overruled the demurrer, and the defendant pleaded (at the following term of the court) *non cepit*, upon which issue was taken.

The cause was submitted to a jury, and they returned, as their verdict—"the jury find that the box of specie mentioned in the declaration, of the value of one thousand dollars, was taken and detained in manner and form as alleged in the declaration, that the same is the property of the plaintiff, and that he is entitled to possession thereof, and we assess the plaintiff's damages at one cent."

The judgment of the court was accordingly rendered, that the plaintiff retain possession of the box of specie, and recover of defendant the damages assessed, &c.

From a bill of exceptions taken in the case, the following facts appear.

On the trial of the cause, the plaintiff introduced in his behalf, as a witness, Thos. W. Newton; who stated that the defendant, as deputy clerk of the United States District and Circuit Courts, in and for the District of Arkansas, presented to him, Newton, then Marshal of said District, duplicate accounts, regularly approved and allowed against the United States, for the fees and per diem pay due said plaintiff, as clerk of said courts, amounting to the sum of $1,333.68-100, on which accounts he, as such Marshal, paid the defendant the sum of *one thousand dollars in specie,* and gave his certificate to the plaintiff for the residue of the accounts, taking the receipt of the defendant, as deputy clerk, on the accounts; which accounts were read to the jury, and are spread out in the bill of exceptions. Witness further stated that the defendant deposited *one thousand dollars in specie* in the Real Estate Bank of the State of Arkansas, for which he received the certificate of the cashier of the bank, which certificate is as follows:

"No. 51, Principal Bank, Real Estate Bank of Arkansas, 29th July, 1841. This certifies that Wm. H. Ringo has this day deposited in this bank one thousand dollars in specie, subject to his order on the return of this certificate.

THOS. W. NEWTON, *Cashier.*"

This certificate was also read to the jury. "It was further given in evidence, that the cashier of the bank, at the time, marked a box containing $1,000, in specie, as the property of defendant, and that the bank, under the certificate of deposit, would have used the $1,000 deposited by defendant if she had desired, and that defendant was not, on the return of the certificate, entitled to the same specie so deposited, but only one thousand dollars in specie, of any which the bank chose to pay him."

"It was further stated in evidence, that the Real Estate Bank had suspended specie-payments, and that this was a specie deposit, treated by the bank as such, and that the same box would have been returned on the presentation of the certificate. That at the time said Marshal paid the defendant the one thousand dollars of

specie, it was the only specie he had on deposit in the said bank as funds of the United States. It was further stated, that the box so marked by the cashier of the bank, was the same delivered to the sheriff, in obedience to the writ of replevin, issued in this case."

The bill of exceptions states: "That the above being all the evidence adduced on the part of the plaintiff, the defendant, by attorney, moved the court *for a non-suit* in this case; which motion the court overruled, to which the defendant excepted, &c.

The bill of exceptions further shows, that the defendant offered to read in evidence to the jury:

1st. A written agreement between himself and the plaintiff, that the defendant was to act as deputy clerk of the plaintiff, and perform the duties belonging to the clerk's office of the District and Circuit Courts of the United States for the District of Arkansas, for a specified time, for which plaintiff was to allow him one-half of the profits of the office, &c.

2d. The nomination and appointment, in writing, by plaintiff of defendant to be his deputy, and a certified copy of an order of the Circuit Court of the United States for the said district, approving the appointment.

3d. The fee books and records of said courts, together with accounts against the United States for fees and per diem pay due the clerk of said courts, during the time specified in the contract between the plaintiff and defendant, above referred to.

All of which the court excluded from the jury as evidence, on the ground that they were not material, and relevant to the issue.

The bill of exceptions further shows, that at the request of the plaintiff, the court instructed the jury:

"1st. That if the jury believe, from the evidence, that the box of specie mentioned in the declaration, was set apart for Ringo, and marked in Ringo's name, and deposited in his name in the bank, it is sufficient to constitute a legal possession in Ringo.

2d. That if the jury believe, from the evidence, that the right of property is in the plaintiff, he is entitled to recover.

3d. That the bare fact of Ringo's signing his name as deputy clerk, is no proof that he was deputy of Field."

To which instructions the defendant excepted.

Ringo brought the case to this court, by writ of error, and assigns as error:

"1st. That the court overruled the motion to instruct the jury to find as in case of non-suit.

2d. That the court excluded the evidence offered by defendant.

3d. That the judgment should have been for defendant.

NOTE—The opinion in this case was delivered at the July term, 1844, but the judgment was held up on a motion for reconsidera tion, which was not disposed of until the July term, 1845—then refused.

TRAPNALL & COCKE, for the plaintiff.

HEMPSTEAD & JOHNSON, contra.

SEBASTIAN, J., delivered the opinion of the court, at the July term, 1844.

An action of replevin, at common law, is a remedy for recovering damages for the wrongful taking away a person's goods. The plaintiff can only recover damages for the taking of the goods, and the detention of them until the replevy, and not the value of the goods themselves. 1 *Saunders*, 347, *b. n.* 2; but by our statutes a recovery may be had of the value of the goods also, in case they have not been replevied. Our statute gives this remedy for either the wrongful taking, or for the wrongful detention of chattels. For the first of which, the declaration is in the usual form, and charges the defendant with the taking and detaining of the goods or chattels. And for the last, where the wrongful detention only is complained of, a form of the count in the *detinet* is prescribed, and which, as this court has decided in *Pirani vs. Barden*, 5 *Ark.* 81, must be substantially pursued. The form of action adopted in this case is that of the *cepit et detinet*, to which the only plea filed by the defendant, is that of *non cepit*, which puts in issue only the fact of an actual taking, and admits the property and possession in the plaintiff. *Wilson vs. Royston*, 2 *Ark. Rep.* 315. *Pirani vs. Barden*, 5 *Ark. Rep.* 81. *May vs. Head*, 1 *Mason's Rep.* 322, and it is in-

competent for the defendant to show title in himself, or in another person, for the effect of the plea is to disclaim the title and possession, and admit them in the plaintiff. *Rogers vs. Arnold,* 12 *Wend.* 33. The issue here made was thereby rendered extremely narrow, embracing nothing but the naked fact of the tortious taking, and necessarily rendering all evidence, not tending to prove or disprove that issue, irrelevant. The issue was of little consequence to either party, for the plaintiff having replevied the box of specie, could proceed only for damages for its detention, and the defendant, had the issue been found in his favor, would not have been entitled to a return, but only excused from damages. *Walton vs. Kersop,* 2 *Wilson,* 354. The pleadings of the parties having settled the title and possession of the property, the court and the parties were concluded, and the only matter in controversy was the damages.

With this view of the issue, which the jury was sworn to try, we will examine the questions raised by the bill of exceptions. The jury found that issue for the plaintiff, and, according to the rule repeatedly recognized in this court, we are to presume that they had sufficient evidence for their finding, unless the contrary appears. We can correct the errors of the court below, but we know of no instance, in which we can reach the verdict of a jury directly, when it is responsive to the issue, unless it has been either sanctioned, formed, or influenced, by or under the judicial action and decision of the court. In such case the court may set aside the finding, where the court below has refused to set it aside improperly, or where it has been materially influenced by the improper admission, or exclusion of testimony, or erroneous instructions as to law. In every such instance, however, we act directly upon, and correct the judgment of the court, which is rendered erroneous by its connection with the verdict of the jury. Are we then authorized by the bill of exceptions to correct any judgment of the circuit court? The exceptions were taken to the decision of the court, overruling defendant's motion for a peremptory non suit. That a party cannot be compelled to take a peremptory non suit against his consent, was decided by this court at its last January term, in the case of *Martin & Van Horn vs. Webb,* 5 *Ark. Rep.* 72. The same point

has been ruled by the Supreme Court of the United States, in many cases. *Elmore vs. Grimes,* 1 *Peters,* 471. *DeWolfe vs. Roland,* 1 *Peters,* 497. *Bank of Cumberland vs. Sutherland,* 3 *Cowen,* 336. In the case before cited of *Martin & Van Horn vs. Webb*, the correct motion is said to be "that the court instruct the jury, that, if the evidence has not proven a matter necessary to be proven, they must find for the defendant." The plain duty of the court was, either to grant or overrule the motion, according to its terms, and in overruling it the court committed no error. We are not at liberty to review the testimony, to see whether it sustains the verdict or not, as no application to set it aside was made to the court, or its judgment taken upon that question. Were the question properly before us, we would not be warranted in interfering, because we might draw different conclusions from the testimony, than that to which the jury arrived. The preponderance must, in such cases, be greatly against the verdict. The only issue to be found was as to the unlawful taking. The custody of the box by the agent was the possession of the principal. The defendant was, as such agent, authorized to receive it for the principal, and pay it over to him. The depositing of it in the bank, whether as a general or special deposit, and taking the certificate therefor in his own name, were acts from which the jury were authorized to find a conversion. *Syeds vs. Hay,* 4 *Term. Rep.* 260. If the deposit was general, it became thereby transferred into a mere debt, the legal title to which was in defendant, and this would have been of itself a conversion. On the other hand a special deposit of it in defendant's own name was at least evidence of a conversion. They were facts, from which the jury might well come to such a conclusion; at least, a finding to that effect should not be set aside. We therefore think that, as no motion was made in the court below to set aside the verdict, we cannot entertain the question here, and if we could, there is no such preponderance of testimony against the verdict, as would warrant us in overthrowing it.

The defendant further excepted to the opinion of the court, excluding the agreement between himself and Field, and his appointment and confirmation as his deputy. If the testimony was irrele-

vant to the issue, or such as would not have probably changed the verdict, it was properly excluded. The agreement which appears in the bill of exceptions only established the rate of compensation for the services of defendant, as deputy clerk, and if it was intended to prove a right to the box of money, or to the appropriation of it, the defendant was concluded by his plea from any such proof, and it was therefore irrelevant to the issue. The appointment of defendant, as deputy of plaintiff, could show nothing more than a license or authority as plaintiff's agent to receive the money from the United States for his principal, and this was already sufficiently established by the testimony of Newton, who was offered as plaintiff's witness, and as such, his testimony could not be impeached by the plaintiff. In any view of the case, therefore, we are clearly of opinion that the testimony excluded was irrelevant to the issue, and, if permitted to go to the jury, could not have materially influenced their finding. The judgment of the circuit court of Pulaski county must therefore be affirmed.