HAZEN *vs.* HENRY.

To authorize a new trial upon the ground that the verdict is contrary to evidence, it is essential that it should not only be against the weight of evidence, but that it should be so much so, as, on the first blush of it, to shock our sense of justice.

Where a party offers no legal, but is permitted to introduce a mass of illegal testimony, and yet the verdict is against him, it is a strong reason why this court should not grant him a new trial.

Plaintiff read to the jury, as evidence, a statement in the hand-writing of defendant, without accounting for his possession of it—Held that in the absence of proof to the contrary, the legal presumption is that he obtained it fairly, in the course of business.

Where, in a statement made out by the defendant, he admits that he has funds in his hands, belonging to another, and the plaintiff reads such statement to the jury, the defendant should not be allowed to give in evidence, declarations made by himself, subsequently to the time he drew up such statement, denying its correctness.

Writ of error to the circuit court of Crawford county.

ACTION of assumpsit, by John Henry against Thomas Hazen, determined in the circuit court of Crawford county, before the Hon. R. C. S. BROWN, one of the circuit judges. The declaration contained a special count on a draft, and a count for money had and received.

At the August term, 1843, the defendant demurred to the first

count, and pleaded *non assumpsit* to the second, upon which issue was taken. The demurrer was sustained—there was a trial of the issue on the second count, and a verdict and judgment for the defendant. The plaintiff appealed to this court, and the demurrer to the first count, was held to have been well taken, but the judgment reversed, and a new trial ordered. See *Henry vs. Hazen,* 5 *Ark. Rep.* 401.

The issue on the second count was again submitted to a jury, at the September term, 1844, and a verdict and judgment for the plaintiff for $130.

The defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence. The court overruled the motion, the defendant excepted, and set out the evidence produced on the trial, which, in substance, follows:

The plaintiff read to the jury a draft, in these words:

"*Van Buren, August* 27, '41.

Mr. Thomas Hazen, please pay to Jno. Henry one hundred and thirty dollars in specie or its equivalent, as soon as you receive the amount of my acc't of the Government from Capt. William Armstrong. M. W. HUTCHISON."

Upon which was the following acceptance:

"I hereby accept the within, on the within conditions, if the acc'ts are not curtailed below my own acc'ts & notes.

THOMAS HAZEN.

August 17, 1841."

The plaintiff also read to the jury, without showing how it came to his possession, a statement in writing, which was admitted to be in the hand-writing of the defendant, it being a statement of account between Hutchison, the drawer of the draft, and Hazen, in which Hutchison was charged with various items, in all amounting to $750.00, and among them the following item—"*my acceptance to John Henry* $130." He was also credited with the following items:

"Your order in favor of Sorrells, in my possession, $100.00
Draft passed by Capt. Armstrong, 806.00"

This was all the evidence offered by the plaintiff. The defend-

ant proved by W. Walker, Esq., the attorney of the plaintiff, that, before bringing the suit, witness called on defendant for the amount of the draft, that Hazen said the account of Hutchison against the Government, had been curtailed below his own demands against Hutchison, and he had nothing to pay Henry. Witness showed Hazen the above account, and asked him if it were not in his hand-writing? Hazen said it was, but was not correct, that he had not received the amount credited to Hutchison, and offered to show witness his books, but witness declined examining them. Witness did not recollect distinctly to what amount Hazen said Hutchison's acc't against the Government had been curtailed, but that is was, perhaps, to about $500.00.

M., a witness for defendant, stated that about the last of August, 1841, he heard Capt. Armstrong, the Superintendent of Indian Affairs, talking with Hazen about Hutchison's account for rations furnished the Indians; that Capt. A. said he would do all he could to get the account passed, but would recommend its curtailment, and had no doubt but it would be curtailed. Witness further stated that he had heard Hazen say that Hutchison's account had been curtailed by the War Department to $500.00, and he had lost by Hutchison, &c.

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

That the court below erred in overruling his motion for a new trial, &c.

PASCHAL, for the plaintiff. Proof of the receipt of a bill of exchange or other security never proves the receipt of money. Money can only be received in cash, gold or silver. *Beardsley vs. Root,* 11 *John. N. Y. Rep.* 464. *Rollston vs. Bell & Dallas, Penn. Rep.* 242. *Smith et al. vs. Adlin,* 4 *Yeats Rep.* 468. *Luckitt vs. Bohannon,* 3 *Bibb. Ky. Rep.* 378. It is deemed useless to cite the English cases, as they are summed up in the American cases cited, and do not vary the principle. The case of *Floyd vs. Day,* 3 *Mass. Rep.* 403, would seem to rule that the receipt of a negotiable security will sometimes sustain action for money had and received; but this

decision has itself been repeatedly overruled in that State, and it is now held that money must have been received. *Goodenow vs. Tyler,* 7 *Mass.* 36. *Denton vs. Perkins et al.,* 2 *Pick.* 86. *Chesterfield Man'g Company vs. Dehon et al.,* 5 *Pick.* 7.

CUMMINS, for the defendant. Every point of *law* involved in this case has been previously decided by this court, upon an appeal by the present defendant. 5 *Ark. Rep.* 401. The present verdict is fully sustained by that decision.

The court will not disturb a verdict unless it be against the weight of evidence, "so much so that, on the first blush of it, it should shock our sense of justice and right." *Howell vs. Webb,* 2 *Ark. Rep.* 360. *Vandever vs. Wilson,* 5 *Ark. Rep.* 407.

JOHNSON C. J., delivered the opinion of the court.

The record in this case raises but one single question for the consideration and decision of this court. The points heretofore decided by this court, we consider in strict accordance with the law, and the only question which now remains for our decision, is whether the court below should have granted a new trial upon the ground that the verdict of the jury was contrary to the evidence. In order to authorize a new trial upon the ground that the verdict is contrary to the evidence, it is essential that it should not only be against the weight of evidence, but that it should be so much so as on the first blush of it to shock our sense of justice and right. We will now inquire whether the facts of this case are such as to bring it within the rule here laid down. It is objected by the defendant that the account current between Hazen and Hutchison, which was rendered by Hazen himself, is not entitled to full credit, since it does not appear by what means the plaintiff became possessed of it. In the absence of proof, to the contrary, the legal presumption is, that he obtained possession if it fairly, and in the regular course of business. There is no attempt to show, nor is there any insinuation, that he used any unfair or dishonest practices to possess himself of it. The admissions of a party when they militate against his own interest, and are made freely and voluntary, furnish the highest possible evidence against him. It is a general rule with respect to admissions, as it is in all other cases,

that where an entry or declaration is entire, and one part is explained by another, the whole is to be taken as evidence. What credit is to be given to the whole or part is a question for the consideration and discretion of the jury; and, therefore, where a party has admitted the claim made by another, but at the same time has made a counter claim, his statement of a counter claim is evidence to be left to the jury, as to the existence of such counter claim. *See Starkie on Evidence,* 2 *Vol., p.* ———, and the cases there cited. But what a party to a cause had said at one time cannot be given in evidence, by himself, to explain what he has said at a former time, which the other party has given in evidence. *Blight vs. Ashley et al.,* 1 *Pet. Rep.* 15. *Stewart vs. The Inhabitants of Sherman,* 5 *Conn.* 244. *Newman vs. Bradley,* 1 *Dallas,* 240. *Farrel vs. Miller, ib.* 392. *Carven vs. Tracy,* 3 *John.* 427. *Fenner vs. Lewis,* 10 *J. R.* 38. *Wailing vs. Toll,* 9 *John.* 141. We will now proceed to apply these tests to the case before us. The plaintiff in the court below introduced, as evidence to the jury, a draft drawn by Hutchison in favor of himself, and accepted by the defendant upon the condition that the claims of Hutchison against the General Government should not be curtailed below the amount of his own demand against him. He also offered, at the same time, a statement of the account between Hutchison and the defendant, which was admitted by the defendant to be in his own hand-writing, for the purpose of showing that the contingency, upon the happening of which the said acceptance was to become absolute, had actually occurred. In this statement the defendant charged himself with the sum of one hundred and thirty dollars, which he acknowledges to be the amount of his acceptance to the plaintiff. The condition upon which the defendant assumed the payment of the debt, was that the claim of Hutchison against the government should not be curtailed below the amount of his claims against him, and in the account rendered by himself, it clearly appears that such curtailment was not made. The statement in writing is certainly equal in grade and dignity, as evidence, to a mere verbal declaration. Here then is a free and voluntary admission, that the sum claimed in the declaration is due and owing to the plaintiff. But

the defendant on the trial attempted to escape from the consequence of his own admissions by showing, and that, too, by the plaintiff's attorney, what he himself had said before the institution of suit, in order to explain, and even to destroy the force and effect of the statement formerly rendered by himself. The testimony of Walker was clearly illegal, and would have been excluded, had a motion been interposed for that purpose.

Another question arises in this case, and that is whether in the event of its being returned to the court below, there is a probability that the result would be different upon another trial. The case, when stript of all foreign and extraneous matter, would leave the defendant without one scintilla of evidence upon which to rest his defence. The defendant did not offer one particle of evidence which was not illegal, and which would not have been excluded upon motion; and the jury having found against him, after having been permitted to introduce a mass of matter to which he was not entitled by law, he has but little cause to complain. The evidence introduced by the plaintiff, was competent to go to the jury, and it was their province to consider of its sufficiency. True it is, if the jury, instead of finding for the plaintiff, had found against him, he would have been estopped from any advantage of the illegal matter introduced by the defendant, because he stood silently by and permitted it to go to the jury without raising any objection to it. This case, when viewed in its most favorable light, on the side of the defendant, cannot reach higher than a mere question of preponderance of testimony, and in all such cases, the jury are the proper and exclusive judges, unless there is such a palpable departure from the evidence as to shock the sense of right and justice. We are of opinion, that the verdict in this case, is sustained by the soundest and best established principles of law, and that therefore it ought not to be disturbed. It is therefore considered and adjudged, by the court, that the judgment of the court below be affirmed with costs.