DODD *vs.* MCCRAW.

Where a person holds adverse possession of a slave, and a third party obtains judgment and causes execution to issue against the former owner, the statute of limitations in favor of the party in possession is not arrested by the delivery of the execution to the sheriff, but it continues to run until the actual seizure of the property.

Every gift, unaccompanied with possession, is not void as against creditors and purchasers: it is so, only where it is not founded on a consideration deemed good in law.

The mere fact of existing indebtedness does not render a voluntary conveyance absolutely fraudulent or void in law as against creditors, if there was no intention on the part of the grantor to delay or defraud his creditors.

The gift of a negro child by a father to his daughter, when he is in independent circumstances, is not unreasonable, nor does it afford a presumption that it was made to injure or defraud creditors. Such gift not being fraudulent at the time, the subsequent embarrassments or failure of the father would not make it so.

If a stranger make a gift of a slave to a child, who is living with its father, the latter has the control of the gift as the natural guardian of the child, but the possession is in the former. So, if the father make the gift to his child in such case, the latter has the possesion.

Fraud is a mixed question of law and fact to be submitted to the jury, and to be established by competent proof. If the jury find fraud without any or sufficient evidence, it is the duty of the court to set aside their verdict. The court will not interfere, however, where there is a mere preponderance of testimony, but where the verdict is so manifestly against evidence as to shock our sense of justice and right.

The owner may well bring an action of replevin against the purchaser, where his property has been sold under execution against a third person.

Writ of Error to Pulaski Circuit Court.

This was an action of replevin, in the *cepit et detinet,* for a female slave named Harriet, brought by James M. Dodd against Pleasant McCraw, determined in the Pulaski Circuit Court, at the October term, 1845, before the HON. J. J. CLENDENIN, then one of the Circuit Judges. The suit was commenced in White county, and the venue changed.

The defendant pleaded, first, property in himself, second, property in one John Humphries. The plaintiff replied to each plea, property in himself, to which defendant took issue.

The cause was submitted to a jury, who returned the following verdict: "We the jury do find for the defendant as being the owner of the negro woman, and costs of suit."

Whereupon, judgment for return of the slave to defendant, was rendered.

The plaintiff moved for a new trial on the grounds, that the court improperly admitted testimony offered by defendant, and excluded evidence offered by plaintiff; that the court erred in giving instructions asked by defendant; and that the verdict was contrary to law and evidence. The court refused a new trial, and the defendant took a bill of exceptions, setting out the evidence, &c., which follows, in substance:

"John Humphries, witness for plaintiff, testified as follows: At least 20 years ago, in the State of Georgia, I gave the negro girl in question to my daughter, Eliza (the plaintiff's wife), when they both were small children. About the same time I gave each of my daughters a negro. Plaintiff's wife is now about 26, and the negro 25 years old. At the time I gave the negro to Eliza, I was in independent circumstances—paid taxes on 35 negroes, and was worth $20,000 after paying all my debts. Have lived in this State 9 or 10 years. My daughter, Eliza was married to plaintiff on the 13th February, 1840; she lived with me until she was married. The negro in controversy

was always called and known in the family as Eliza's, and so considered. Plaintiff and his wife lived with me for one, two, or three months after they were married, then moved to themselves, and took the negro with them, and had possession ever after until she was levied on by the sheriff, which was about 21 days before the 14th day of April, 1845. After McCraw bought the negro at sheriff's sale, he took possession of her, and started to lead her off, and the sheriff replevied her under the writ in this case. My circumstances have varied since I have been in this State—have bought and sold a number of negroes, and a considerable quantity of other property, since I came to the State. Was worth $20,000 after paying all my debts, when I gave the negro to Eliza. McCraw took the negro on the 14th April, 1845. She is worth $300.

Cross Examined: I was not embarrassed as early as 1838—was embarrassed in 1839-40-41-42. Have not paid taxes on this negro since plaintiff has had her—do not think I paid taxes on her either in 1841 or 1842, or at any time since plaintiff's marriage. The instrument of writing was executed by me, and placed on record without plaintiff's knowledge or consent, in confirmation of what I had before done. I took off 21 of my negroes at one time, and sold them to pay debts, years after said gift was made. At the time I gave the negro girl to my daughter, I was not embarrassed at all. I never said I would not pay McCraw's judgment—think I might have said that if I had to pay it, it would be unjust. I never offered to sell this negro during the time my daughter lived with me, but said on all occasions, when any person wished to trade for her, that she belonged to Eliza, and that I had no right to sell her. The negro would hire for $5.00 per month; and was taken from McCraw on the 14th April, 1845.

John B. Lafave, witness for plaintiff, testified: 'I have lived neighbor to, and been acquainted with John Humphries, ever since he came to the State, and have always understood the negro in controversy belonged to his daughter, Eliza, plaintiff's wife. The plaintiff, Dodd, has had the negro in possession ever since his marriage, on the 13th February, 1840, and has been living in this State ever since. Hum-

phries came to this State about 10 years ago, and has lived here ever since.'

Cross Examined: 'I know the negro well: she was at Humphries' until plaintiff moved to himself, and was always called Eliza's negro. Eliza (plaintiff's wife) lived with her father from the time he came to the State, until she married.'

William E. Woodruff, witness for plainiff, stated: 'I have been acquainted with Humphries' family ever since he came to the State. I know the negro in controversy, and have always understood from Humphries' family that she belonged to his daughter, Eliza. Plaintiff has had possession of the negro ever since his marriage. He lived on my land for several years after he was married. I was intimately acquainted with Humphries' family, both before and after Dodd's marriage.'

Cross Examined: 'I never heard Humphries claim the negro as his own, or offer to sell her: he has always told me that she belonged to his daughter. Humphries told me he was embarrassed before he left Georgia, but did not say at what particular time.'

John B. Humphries, witness for plaintiff, testified: 'I am a son of John Humphries, and brother to plaintiff's wife—Have lived in John Humphries' family from infancy; and the negro in controversy has been called and known as plaintiff's wife's negro, ever since I can recollect: the negro was always considered in the family as my sister's property.'

Cross Examined: 'I never heard Humphries claim the negro as McCraw had levied on, and bought under his execution.'

C. R. Brown, witness for plaintiff, testified: 'I have been acquainted with John Humphries' family seven years. When I first became acquainted with them, I boarded in the family about two years. The negro girl in question was always called and considered in the family as Eliza's property. Plaintiff took the negro when he was married, and has had possession of her ever since. All the parties have lived in this State ever since I first knew the family.'

Cross Examined: 'Humphries and his family controlled this negro before Eliza's marriage, as they did the other negroes.'

Re-Examined: 'Plaintiff's wife lived in Humphries' family from my first acquaintance with her until her marriage—plaintiff lived four or five months with Humphries after his marriage.'

Here plaintiff closed.

The defendant proved the following facts: That on the 18th December, 1843, Pace, for the use of Stone, recovered a judgment in this court, against John Humphries, for $219, damages and costs, founded upon a contract entered into by Humphries on the 7th Nov., 1840. That on the 16th day of May, 1842, the defendant recovered judgment in this court against said John Humphries for $311.14, founded upon a contract entered into between them in February, 1839. That on the 2d July, 1845, writs of *venditioni exponas,* with a clause of fieri facias in each, were issued by the clerk of this court on said judgments, directed to the sheriff of White county, who certified and returned thereon, that both of said writs came to his hands on the 25th January, 1845, and that on the 21st day of March, 1845, he levied both of said writs on said negro girl, Harriet, and after having given due and proper notice, he sold said negro girl, at the court house door, at public auction, on the first day of the Circuit Court of White county, to the defendant, for $200; and that the property specified in said writs of *venditioni exponas* was sold, and exhausted by said sheriff at said sale for $——— before said negro was sold. It was also proven that the *fi. fa.* upon which the *ven. ex.* in the case of McCraw vs. Humphries is based, came to the hands of the sheriff of White county, on the first of December, 1843.

James Lawson, witness for defendant, testified: 'I cannot tell Humphries' circumstances in 1839—did not have much to do with him at that time—about 1840, I had some business with him. In 1842, I returned several executions against him, no property found. In 1840, plaintiff paid taxes on one negro.'

It was also proven that the whole of the property sold under said writs of *venditioni exponas* was not sufficient to satisfy the same, and they were returned that no other property could be found.

Geo. C. Watkins, witness for defendant, testified: 'In 1840, I received a claim from Georgia against John Humphries for $1800—

this was my first acquaintance with his circumstances. His embarrassments did not commence here until 1841 or 42. Humphries has paid a portion of the Georgia debt, and secured the remainder. He has paid a considerable portion of Ashley's debt—the debt I received from Georgia, was dated in 1835 or 1836—part of the debts in my hands has been paid. In 1843 or 1844, there were several executions against him returned *nulla bona*. I consider Humphries broke now, and have considered him so since 1842. He did not consult me about putting his property out of the way. I have been acquainted with him for a long time, and have usually acted as his attorney.'

Howerton, witness for defendant, swore: 'I saw the negro girl at Humphries' house in 1839 or 1840—did not know whether she belonged to him or not—do not know that he exercised ownership over her—never heard him say the negro belonged to him.'

Smith, witness for defendant, stated: 'I saw the girl at Humphries' house—he controlled her as he did the rest of the negroes—never heard him say she belonged to him.'

Cross Examined: 'Plaintiff's wife lived with Humphries at the time of which I have spoken—it was before she was married—I was intimate with Humphries' family—lived near him for several years, and the negro in controversy was always known, and called in the family, as Eliza's negro.'

The above is all the evidence given on the trial.

The plaintiff moved the court to instruct the jury as follows:

1st. That if the jury believe from the evidence, that Humphries gave the negro, Harriet, to his daughter, Eliza, at a time when he was not embarrassed, and was worth twenty thousand dollars—that the negro has ever since been called and considered in the family, and by those who knew them, as the property of Eliza—that Eliza lived with her father during her minority, and until her marriage with Dodd—that Dodd received the negro with his wife, and has had possession ever since, until she was levied on by the sheriff, and that Dodd so had possession for the period of five years and upwards, as his own; that in law those facts constitute a valid gift without deed, and that the possession, by the father, of the negro, while his infant

daughter, Eliza, lived in his family, may be considered as the possession of the daughter up until the period of her marriage.

2d. That if the jury believe from the evidence, that Dodd had uninterrupted possession of said negro, in right of his wife, claiming her as his own from the time of his marriage, on the 13th day of February, 1840, until she was levied on by the sheriff, on the 21st day of March, A. D. 1845; and that he so held possession between those periods for the term of five years, that by law such possession for five years, vested in Dodd the absolute title and ownership of said negro against said Humphries, and those claiming under him by execution or purchase, and made her subject to his debts—capable of being sold and conveyed by him; and that such possession vested the title and ownership of said negro in Dodd, independent of the gift from Humphries to his daughter.

3d. That if Humphries was not embarrassed by debts at the time he gave the negro to his daughter, no subsequent embarrassment would, of itself, vitiate that gift.

4th. That if the jury should believe from the evidence, that the negro is Dodd's property, either by the gift, or by the length of his possession, claiming her as his own, or by both conjoined, that by law she cannot, at the same time be the property of Humphries, so as to vest any title in the purchaser under execution against him.

5th. That by law, in the gift of the negro by Humphries to his daughter, if the jury believe from the evidence that he was not embarrassed at the time, the consideration of natural affection from a father to his daughter is good in law, to uphold the gift, coupled with possession in the daughter, and her husband, and is a consideration which the law favors.

The court gave the first, third, fourth and fifth instruction, but refused to give the second, and in lieu thereof, read to the jury the *5th section of the 65th chap. of the Rev. Stat.,* which is as follows: "Where any goods or chattels, or slaves, shall be pretended to have been loaned to any person with whom, or those claiming under them, the 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 pre-

tended to have been made of any use of property by way of condition, reservation, or remainder in another, the same shall be taken as to all creditors and purchasers of the person 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 property were declared by will or deed in writing, proven or acknowledged, and recorded, as required by this act.'

To which refusal of the court, to give said second instruction, and to the reading of said section of the Statute to the jury, the plaintiff excepted.

On motion of defendant, the court instructed the jury, also, as follows:

'If the jury believe from the evidence, that the gift of Humphries to his daughter, was intended to delay, hinder, or defraud creditors, as to debts then subsisting, or to be contracted afterwards, it is void as to creditors; and in order to set aside the gift or transfer to Mrs. Dodd on the grounds of fraud, it is not essential that either Mrs. Dodd or her husband knew of such fraud. That by the law of this State, every gift, or other conveyance of slaves, or other personal property, made with the intent to hinder or delay creditors, or other persons, of, or in, the collection of their debts, is void as to creditors and purchasers, prior and subsequent to such conveyance.

That by law an execution binds the slaves of a defendant from the time it comes to the sheriff's hands to be levied.

That under the law of this State, a gift, or conveyance, of slaves, or other personal estate, is void as to creditors, unless the possession accompany the gift or conveyance.'

To which instructions plaintiff excepted.

Dodd brought error. The errors assigned are: 1st. That the court below refused to give the second instruction asked by the plaintiff: 2d. The court gave the instructions moved by the defendant: and 3d. The refusal of a new trial.

WATKINS & CURRAN, for the plaintiff. The court erred in refusing to give the 2d instruction asked by Dodd. It is settled by a series of decisions that adverse possession for the time limited for bringing an action for recovery of a slave gives the possessor a valid *title,* which

he may avail himself of, in an action against him to recover possession by plea, *or if dispossessed, he may recover the slave on the title gained by force of the statute.* The possession not only bars the action of the original owner, but *vests the property* in the possessor. *Henderson* v. *Hoyes,* 4 *Yerger* 507; *Keyler* v. *Mills,* 2 *Mart. & Yerg.* 426; *Porter* v. *Badgett et al.,* 4 *Yerg.* 174; *Shelly et al* v. *Gray,* 11 *Wheat.* 361; *Brent* v. *Chapman,* 5 *Cranch.* 358; *Auld* v. *Norwood,* 5 *Cranch.* 361; *Garth's ex.* v. *Barksdale,* 5 *Munf.* 101; *Carter et al.* v. *Carter et al., ib.,* 108; *Smart* v. *Baugh,* 3 *J. J. Marsh.* 363; *Fitzhugh* v. *Anderson et al.,* 2 *Hen. & Munf.* 289; *Boutright* v. *Meigge,* 4 *Munf.* 145; *Newby's ad'r.* v. *Blakey,* 3 *Hen. & Munf.* 57; *Travis* v. *Claborn,* 5 *Munf.* 435; *Duval* v. *Bibb,* 3 *Call.* 363; *Cook* v. *Wilson's ad'r,* 6 *Lit.* 437; *Stalley* v. *Evil,* 5 *Lit.* 281; *Thompson* v. *Caldwell,* 3 *Lit.* 163; *Davis* v. *Mitchell,* 5 *Yerger* 281. This rule would apply even though it was proved that Humphries gave the negro with the *avowed purpose of defeating McCraw's debt. Keyler* v. *Miles,* 2 *Martin & Yerger* 426. The reading of the 5th sec. of the statute of frauds in lieu of the 2d instruction, aggravated, rather than palliated, the error of the court in refusing the instruction. That statute is only for the protection of creditors of or purchasers from the possessor, whereas the principle of law embodied in the instruction is for the benefit and protection of the possessor himself. The distinction is obvious, and is illustrated in *Orr et al.* v. *Pickett et al.,* 3 *J. J. Marsh.* 386. The only question in regard to this instruction is whether the facts necessary to sustain it were proved. We submit that the legal effect of facts, proved in this case is, that Dodd was in possession from his marriage, 13th Feb., 1840, until the levy, 21st March, 1845. Title draws to it possession, and the possession in law is presumed to be with the title, unless an actual adverse possession is shown. Where there are many persons living together, constituting one family, and there are slaves in the service of the family, subject to the occasional order of each member of it, the possession in law should be regarded *as in those of the family who have right to the property.* In such case, if an infant be the real owner and have right to slaves, the infant should be regarded as in possession, although the father control-

led and caused the slaves to work as he pleased; and where many persons are in the enjoyment of property, be they adults or infants in part, those who trust upon the faith of the property are bound to discriminate, and to ascertain at their peril who has title, among those using the property. *Orr et al.* v. *Pickett et. al.,* 3 *J. J. Marsh.* 269. This authority shows that Mrs. Dodd was in possession before and at the time of her marriage, and that Dodd was in possession during the time he lived in Humphries' family.

It is contended on the other side that in computing the period of Dodd's possession, the terminus is when the execution came to the sheriff's hands and not when he was dispossessed by the levy. This is not a question of *right* but of *possession;* Dodd only relies upon the length of his possession, upon the hypothesis that he held *without right;* if he had right by the gift there is no necessity that he should rely upon his possession. A sheriff who receives an execution, does not thereby acquire an absolute or general property but only a special property by the seizure. 1 *Ch. Pl.* 151; 2 *Saund. Rep.* 47, *a. note* 1. The sheriff *by the delivery* of the execution acquires *no interest* in the property of the defendant. He can acquire no interest or property in the goods until he has made an *actual seizure.* True, by common law, the goods were bound from the teste and by our statute from the *delivery* of the writ; but because the goods are so bound, it does not follow, that the sheriff acquires possession or any interest in them *before seizure.* The law gives him *only a right to seize* and take possession of those goods. *Jackson* v. *Catlin,* 8 *J. R.* 584; *Heyl* v. *Burling,* 1 *Caine's Rep.* 18; 4 *East.* 214; In *Payne* v. *Drew,* 4 *East.* 523., all the cases are examined by Lord Ellenborough, who delivered the opinion of the court of K. B., says that though the delivery of the *fi. fa.* binds the goods of the debtor yet the property in and possession of the goods is not divested out of him *until execution executed by actual seizure. Sheckerborn* v. *Valkenburg,* 11 *J. R.* 529; *Boikes* v. *Mitter,* 6 *J. R.* 195; 2 *Tidd Prac.* 925. In *Hotchkiss* v. *McVicker,* 12 *J. R.* 403; SPENCER J., says no case can be found authorizing a sheriff to maintain action for goods before seizure and that it has been repeatedly held that neither the property or possession is altered by the delivery of the writ to the

sheriff, but both continue in the debtor *until execution executed.* This construction was given by Lord Hardwick in *Louthal* v. *Tonkins,* 2 *Eq. Ca. Abr.,* 381.

2d. Was the original gift to Mrs. Dodd valid? 1st. It was objected that it was not accompanied by possession. In response to this we submit that it was not a gift to take effect *in futuro* but *in presenti,* and the possession was delivered as fully and amply as the nature of the case and the situation of the parties would admit. The possession of the father was not in the least inconsistent with the gift, because, he as the natural guardian of his daughter, was the proper person to hold possession. That the delivery was sufficient, see *Grangiac* v. *Ardin,* 10 *J. R.* 293.

In *Kumingham* v. *McLaughlin,* (3 *Monroe* 30) *held* that where a gift is made to an infant and the father takes possession he holds as natural guardian and the possession is the infant's, and such a case is not within the statute of frauds so as to subject the property to the creditors of the father. And so, in *Howard* v. *Williams* [Com. Law Journal, No. 2, p. 231—1 Bailey's Rep. 571, S. C.] it was held that a parent could well make a gift to his infant child and that possession by the donor, if the donee reside with the parent, was not to be deemed a badge of fraud. If the gift to Mrs. Dodd was not complete it is impossible for a parent to make a valid gift to an infant child. The second objection to the gift is, that it was fraudulent. A voluntary conveyance by a parent to a child is not fraudulent as against creditors, but when made in good faith by way of advancement and abundant property at the time of the conveyance is retained by the parent to pay all his debts, it is good against existing as well as subsequent creditors, even though the property retained, should afterwards so depreciate in value as to be insufficient to pay all existing debts. *Coulter* v. *Griswood,* 1 *Walker's Ch. R.* 437; *Van Wyck* v. *Seward,* 6 *Paige Ch.* 62; *Bank of U. S.* v. *Housman,* 6 *Paige* 526; *Seward* v. *Jackson,* 8 *Cowan* 406; *Jackson* v. *Post,* 15 *Wend.* 588; *Salmon* v. *Bennet,* 1 *Conn.* 525; *Hindees Lessee* v. *Longworth,* 11 *Wheat; Sexton* v. *Wheaton,* 8 *Wheat.* 229. In *Bartlett and wife* v. *Waite & Moulton,* (4 *V. T. Rep.* 389) the property retained by the donor was afterwards destroyed by a freshet, yet held that if the conveyance

was valid *at the time it was made* it will not be rendered fraudulent by subsequent events rendering the grantor insolvent.

The mere fact of indebtedness does not *per se* constitute a substantive ground to avoid a voluntary conveyance for fraud, even in regard to prior creditors. *Verplank* v. *Starry,* 12 *J. R.* 536; *Patrick* v. *Gopp, Ambler R.* 599; *Gilmore* v. *North Am. Land Co., Peters C. R.* 461; *Cadogan* v. *Kennet, Cowp. R.* 433; *Doe* v. *Routlege, Cowp. R.* 705; *Lush* v. *Wilkinson,* 5 *Ves.* 387; *Holloway* v. *Millard,* 1 *Madd. Rep.* 414; *Cathcart* v. *Robinson,* 5 *Peters Rep.* 277; at least unless the circumstances of the case justly create the presumption of fraud actual or constructive, from the condition, state and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors—Ch. KENT, in speaking of this subject, (2 *Kent's Com.* 422 *note* (*a*) says, that this is the tendency of both the English and American decisions and that the contrary doctrine ruled by him, *Reade* v. *Livingston,* (3 *J. Ch. R.* 501) is, he greatly fears *too stern for the present time.* There can be no pretence in this case that there were any doubts existing at the time, and whether the gift was made to defraud *subsequent* creditors is purely a question of fact in regard to the intent, and which, like other facts, cannot be assumed by the jury without evidence, but must be proved and determined by the circumstances attending the transaction. *Read* v. *Livingston,* 3 *J. Ch. R.* 501; *Burnett* v. *Bedford Bank,* 11 *Mass.* 421; *Damon* v. *Byant,* 2 *Pick.* 411; *Howe* v. *Word,* 4 *Greenl.* 195; *Sexton* v. *Wheaton,* 8 *Wheat.* 229; *Benton* v. *Jones,* 8 *Conn.* 186. What circumstance or particle of evidence is there in this case indicating a design to defraud subsequent creditors? The only means by which the verdict can be sustained is to indulge the jury in the presumption or inference that the gift was intended to hinder creditors (notwithstanding the transaction was not attended by any circumstances indicating a fraudulent intent) simply because the donor became insolvent some 15 or 20 years after the gift! None of the badges of fraud enumerated in *Troyne's case,* except the 2nd, *possession*; but as this court has held (vide, *Cocke* v. *Chapman,* 2 *Eng.* 179, and *Feild* v. *Sims, ib.,* 273) that there is no such thing as fraud in law as distinguished from fraud in fact, and that these badges are not fraud *per se* but mere evidences

of fraud, and may be explained, the possession in this instance is explained and accounted for by the relation existing between the donor and donee. Even if the rule was different and the possession of the donor was fraud *per se,* it would not apply to this case; the donor did not have the possession in law, *vide authorities supra.* Mr. Roberts (*Treat. on fraud. convey.* 29) in remarking on *Stilman.* v. *Ashdown,* (2 *Atk.* 481) in reference to this extrinsic badge of fraud, enumerated in *Troyne's case* says: "for though the father had possession until his death the presumption of fraud arising from that circumstance is answered by the fact that the father held by right of natural guardianship during the nonage of his child."

But there is another view of this case, which was not presented by the instructions at the trial, and which, of itself, must be sufficient, and that is, that Mrs. Dodd acquired title by the length of her possession before her marriage, even though the gift was fraudulent. Gifts although fraudulent under the statute, are only voidable (not absolutely void) as against creditors and purchasers, who think proper to assail them. They are not utterly void or void *ab initio,* but merely avoidable; and therefore valid and effectual to pass the title until impeached. *Osburn* v. *Moss,* 7 *J. R.* 161; *Anderson* v. *Roberts,* 18 *J. R.* 315; *McKie* v. *Caines,* 5 *Cowen* 347. The rule of law giving title by possession the time limited by the statute enures to the benefit, and gives title to an infant where the possession is held either by the infant, his guardian, or any other person for him. *Davis* v. *Mitchell,* 5 *Yerger Rep.* 281.

FOWLER, contra. The verdict is good. It finds "for the defendant as being the owner," &c. A finding for the defendant is a full response to the issues. *Dyer* v. *Hatch,* 1 *Ark. Rep.* 346. *Wilson* v. *Bushnell, ib.* 471. *Hawks* v. *Crofton,* 2 *Bun. Rep.* 698. *Worford* v. *Isbell,* 1 *Bibb Rep.* 248. *Roach* v. *Hulings,* 16 *Pet. Rep.* 321.

The court properly refused the second instruction moved by Dodd, for the following legal grounds, to wit:

1. It was too general; it was in some respects abstract; and wholly unauthorized by the facts detailed in evidence.

2. The executions came to the sheriff's hands long before the ex-

piration of five years from Dodd's marriage; and was a lien upon the slave from the time it was received by the sheriff. *Rev. Stat.* 378, *sec.* 24. 2 *Tidd's Pr.* 1000 *et seq.*

3. The executions were levied on the slave before the expiration of five years from the time that Dodd took her into possession at his removal from Humphries' house.

4. It being, as determined by the jury, a gift when Humphries was involved in debt, and calculated to hinder, delay or defraud his creditors, Dodd's possession was the possession of Humphries until after the full expiration of the five years. *McConnell* v. *Brown, &c.,* 5 *Monroe's Rep.* 484. 2 *Tidd's Pr.* 1004, 1006.

5. If the gift was made in fraud, it is submitted whether any length of time could give Dodd a *bona fide* title against the creditors of Humphries.

6. The first instruction given, on Dodd's motion, was in substance the same thing as the second, especially as far as the second is founded in law; and therefore the court properly refused to give it, because it had been already substantially given. *King* v. *Bailey,* 6 *Mo. Rep.* 580.

7. In cases of the statute of limitations, time stops running at the institution of the suit—the issuing of the writ, not at the time of its service. So, by analogy, it stops in this case at the time the execution came to the sheriff's hands, not at the date of the levy.

The reading of sec. 5 of ch. 65 of the Revised Statutes, by way of instruction to the jury, though it may not be strictly applicable to the facts in the case, yet Dodd can take no advantage of it, because it was more favorable to him than to McCraw. *Ashley* v. *May,* 5 *Ark. Rep.* 409.

The instructions moved on the part of McCraw were all legitimate, and are sustained in the following principles and authorities, to wit:

1. Every conveyance or assignment, in writing or otherwise, of any estate or interest in goods and chattels, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, debts or demands, as against creditors and purchasers, prior and subsequent, shall be void. *Rev. Stat.* 414, *sec.* 2, 4. 1 *Peters C. C. R.* 464.

2. Independent of the statutes of fraud, &c., at common law, gifts or voluntary conveyances, which obviously defeat the claim of a creditor, are fraudulent as to him. *Hopkirk* v. *Randolph et al.*, 2 *Brockenb. Rep.* 137.

3. And in such case, the donee (as Dodd is) will always be required to prove the fairness of his title, that it is not only without taint, but free from suspicion. 2 *Brockenb. Rep.* 137.

4. Where a party is indebted at the time of a voluntary conveyance to a child, such conveyance is presumed to be fraudulent as a conclusion of law, as to those debts. *Hanson* v. *Buckner's devisees,* 4 *Dana's Rep.* 254. *Manhattan Co.* v. *Osgood et al.,* 15 *John R.* 168. *Gilmore* v. *N. Am. Land Co.,* 1 *Peter's C. C. Rep.* 464. *Arnold* v. *Bell,* 1 *Hayw. Rep.* 396. 2 *Saund. Pl. & Ev.* 528. *Reade* v. *Livingston,* 2 *J. C. R.* 500.

5. And such legal presumption of fraud, as to prior debts, arises regardless of the amount of such debts, or of the property conveyed, or of the intentions or circumstances of the party conveying. 4 *Dana's Rep.* 254. 3 *John. Ch. R.* 500.

6. The law will not permit an enquiry to be made into such matters, or allow them any weight or influence. 4 *Dana's Rep.* 254. 3 *John. Ch. Rep.* 500.

7. But subsequent creditors would be required to go so far, and only so far, in showing indebtedness on the part of the donor, as would raise a reasonable presumption of a fraudulent intent. 4 *Dana's Rep.* 254.

8. Where the sale or gift of a slave is made to hinder, delay, or defraud creditors, under the statute, it is wholly immaterial whether the donee or purchaser knew of the fraudulent intent or not. *King* v. *Bailey,* 6 *Mo. Rep.* 580. *Reade* v. *Livingston,* 3 *John. Ch. Rep.* 504. *Hildreth* v. *Sands,* 2 *John. Ch. Rep.* 42.

9. A voluntary conveyance, though made with no actual fraudulent intent, is in judgment of law fraudulent, as to prior creditors. *Jackson* v. *Seward,* 5 *Cowen's Rep.* 70, 71. *Sexton* v. *Wheaton,* 5 *Cond. Rep.* 425. 1 *Pet. C. C. R.* 464. 3 *J. C. R.* 504.

10. The statute of frauds should always be construed liberally for

the suppression of fraud. 5 *Cowen's Rep.* 71. *Twyne's Case,* 2 *Co. Rep. part* 3, *p.* 82. *Hopkirk* v. *Randolph et al.,* 2 *Brockenb. Rep.* 139. *Hildreth* v. *Sands,* 2 *John. Ch. Rep.* 49.

11. As the intent, in such conveyances, is generally concealed within the bosom of the actors, it is the duty of the court and of the jury to infer it from the character of the transaction; and as the equity of the creditor is generally stronger than that of a mere volunteer, the court or jury ought to lean to the side of the creditor, and consider every gift or voluntary conveyance as coming within the Statute, and fraudulent, unless its fairness is conclusively proved. *Hopkirk* v. *Randolph et al.,* 2 *Brockenb. Rep.* 137.

12. The connexion between the parties, as where the gift or conveyance is made to a son or daughter, is a material and important circumstance to be submitted to the jury, to establish the fraud. 2 *Saund. Pl. and Ev.* 530.

13. It is not even necessary that a man should be indebted at the time he makes a voluntary conveyance or gift in order to make it fraudulent; if he does it with a view to future indebtedness, it is equally fraudulent. *Sexton* v. *Wheaton,* 5 *Cond. Rep.* 426.

14. And the circumstance of a man's becoming indebted immediately after making such gift or voluntary conveyance, tends to prove the fraudulent intent. *Sexton* v. *Wheaton,* 5 *Cond. Rep.* 427.

15. A father makes a voluntary conveyance to his child and is considerably indebted and embarrassed and on the eve of bankruptcy at the time, and reserves an insufficiency to pay his debts, the conveyance is void, though no fraudulent intent appears. *Reade* v. *Livingston,* 3 *John. Rep.* 504.

16. The conveyance or gift to Dodd and wife being in law fraudulent, Dodd's possession is Humphries' possession, as to the creditors of the latter, (consequently time stopped when the *fi. fa.* was delivered to the sheriff.) *McConnell* v. *Brown, &c.,* 5 *Monroe's Rep.* 484.

The court below properly refused a new trial, because,

1. The finding of the fraudulent conveyance from the facts and circumstances, even if not a conclusive presumption of law, is ex-

clusively in the province of the jury. *Jackson* v. *Mather,* 7 *Cowen's Rep.* 304, 305. *Bogard* v. *Gardley,* 4 *Smedes & Marsh. Rep.* 310.

2. It is the peculiar province of the jury to weigh and determine the worth of evidence, where there is evidence on both sides. *Dooley* v. *Jennings,* 6 *Mo. Rep.* 63. *Lewis* v. *Read,* 6 *Ark. Rep.* 430. *Roach* v. *Hulings,* 16 *Pet. Rep.* 323.

3. It is not sufficient to set aside the verdict of the jury, that they found against the preponderance of evidence. *Howell* v. *Webb,* 2 *Ark. Rep.* 364. 6 *Ark. Rep.* 430.

4. To authorize a new trial, the verdict must be so much against the weight of evidence, as on first blush to shock our sense of justice and right. 2 *Ark. Rep.* 364. 6 *Ark. Rep.* 430. *Vandever* v. *Wilson,* 5 *Ark. Rep.* 407.

5. The fact of transfer being made with intent to defraud subsequent creditors, is peculiarly in the province of the jury to decide, and when their verdict is found, it should not be disturbed on light ground. *Bogard* v. *Gardley,* 4 *Smedes & Marsh. Rep.* 310. *Hinde's Lessee* v. *Longworth,* 6 *Cond. Rep.* 274.

6. Even if the court slightly erred in its instructions, given on motion of Dodd, the verdict will not be set aside, though not strictly in accordance with such instructions, if from the whole record it appear that the verdict is legally right and just. *Thompson et al.* v. *Lemoyne,* 5 *Ark. Rep.* 313.

7. Blood and natural affection among near relations, though a good consideration, yet it will not support a contract against creditors and *bona fide* purchasers. 2 *Bl. Com.* 444. *Fink* v. *Fink's Ex'rs,* 18 *John. Rep.* 149.

8. The consideration between Dodd's wife and Humphries, was merely a good consideration: it was a voluntary gift on the part of the latter on account of his affection for his child, and not conveyed by a marriage contract and in consideration of the marriage, so as to make the consideration a valuable one. A valuable consideration, and one for love and affection, which is a good consideration, are very different. 6 *Cond. Rep.*

9. Whether the possession of Humphries during the minority of Dodd's wife was her possession; and whether he delivered the slave to her during her minority and residence with him, are facts exclusively belonging to the jury to determine from the evidence; and they so having found the facts, their verdict should not be disturbed. *Cook* v. *Husted,* 12 *John. Rep.* 188. *Grangiac* v. *Arden,* 10 *John. Rep.* 296.

10. To make a gift valid, there must be a delivery of possession. 10 *John. Rep.* 296. 12 *John. Rep.* 188.

11. The judgment of the Circuit Court should not be reversed on account of erroneous instructions given, where the party complaining has shown no right of action. *Newman* v. *Lawless,* 6 *Missouri Rep.* 301.

And in this case the evidence discloses the fact that independent of the Statute of frauds, and supposing the gift to be valid against the creditors of Humphries, Dodd is not entitled to recover in replevin, because,

1. Replevin in the *cepit* cannot be maintained in any case where trespass could not. 1 *Ch. Pl.* 185 *et seq.*

2. Where a sheriff or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person, trespass cannot be supported against the latter, because they came to him without fault on his part. There was no unlawful taking. 1 *Ch. Pl.* 176. 2 *Saund. Pl. and Ev.* 864.

In this case there is no proof whatever of an unlawful taking by McCraw: therefore the verdict and judgment is right, whether the instructions be all strictly legal or not.

A purchaser at sheriff's sale under the judgment of a creditor, is equally entitled to the benefit of the Statute of frauds with the creditor himself. *Sands* v. *Hildreth,* 14 *John. Rep.* 197. *Hildreth* v. *Sands et al.,* 2 *John. Ch. Rep.* 35, 49. *Sexton* v. *Wheaton* in notes, 5 *Cond. Rep.* 431. *Lessee of Ridgway* v. *Underwood,* 4 *Wash. C. C. R.* 137.

Lands (or other property) held under the debtor's conveyance, made to defraud his creditors, may be sold under *fieri facias,* against

the vendor, as land, &c. in his possession, although it may be in the actual possession of the vendee. *McConnell* v. *Brown, &c.* 5 *Monroe's Rep.* 484. 2 *Tidd's Pr.* 1004, 1006.

And in such case the possession of the vendee is that of the vendor. *ib.*

JOHNSON, C. J. This case is brought into this court to reverse the decision of the Circuit Court, in overruling the plaintiff's motion for a new trial. The errors assigned are: first, that the Circuit Court refused to give the second instruction moved by the plaintiff: second, That said court gave the instructions asked for by the defendant: and third, That said court overruled the motion of the plaintiff for a new trial. We will now consider these several points in the order stated in the assignment. The second instruction moved by the plaintiff is, "That if the jury believed, from the evidence, that Dodd had uninterrupted possession of said negro in right of his wife, claiming her as his own from the time of his marriage on the 13th day of Feb'y, A. D. 1840, until she was levied upon by the sheriff, on the 21st day of March, A. D. 1845, and that he so held possession between those periods for the term of five years; that by law such possession for five years vested in Dodd the absolute title of ownership of said negro, as against said Humphries and those claiming under him by execution or purchase, and made her subject to his debts, capable of being sold and conveyed by him, and that such possession vested the title and ownership of said negro in Dodd, independent of the gift from Humphries to his daughter." This instruction was refused by the Circuit Court, and we presume upon the ground that it was regarded as a mere abstract proposition, and not authorized by the law, upon the state of facts as detailed before the court. The proof was clear that Dodd took possession of the negro at the time of his marriage, and that he retained it until she was taken from him by the sheriff, under an execution against Humphries. The marriage took place on the 13th of February, A. D. 1840, and the execution was levied on the 21st of March, A. D. 1845. The point now to be determined is, whether the Statute of limitations ceased running in Dodd's favor, upon the receipt of the execution by the sheriff, or

continued so to run until the actual levy of the execution. If the former, the space of five years, the Statute bar, had not elapsed; but if the latter, it had, and the title to the property was absolutely vested in the plaintiff. The *24th sec. of chap.* 60, in the *Revised Code,* declares that "no execution shall be a lien on the property, in any slaves, goods, or chattels, or the rights, or shares in any stock, or on any real estate, to which the lien of the judgment, order or decree does not extend, or has been determined, but from the time such writ shall be delivered to the officer in the proper county to be executed." The sense in which, and the extent to which, goods can be said to be bound, by the delivery of the writ of execution to the sheriff, is, that it binds the property as against the party himself, and all claiming by assignment from, or representation through or under him; but it does not so vest the property in the goods absolutely, as to defeat the effect of a sale thereof made by the sheriff under an execution. This was settled in the case of *Smallcomb* v. *Cross, and Buckingham and another, sheriff of London.* (*Ld. Raym.* 252. *S. C.* 1 *Salk.* 320, *and Comyns* 35.) That was the case of a sale by the sheriff under a second writ of *fieri facias,* the former *fieri facias,* which was first delivered to the sheriff, not having been then executed. And it was an action of trover brought by the plaintiff in the last delivered *fieri facias,* which was so first executed, against the sheriff, and the plaintiff in the first delivered fieri facias, which was executed by the sheriff, and the goods sold again, after the goods had been already sold under the last delivered writ. LORD HOLT, in delivering the judgment of the court for the plaintiff, (according to the report in Comyns, which agrees with the other reports of the same case), "declared their reason to be, for that at common law, if there were two writs of fieri facias, the one bearing *teste* on such a day, and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the party had no remedy but against the sheriff; for the sheriff ought to make execution at his peril, and the sheriff shall be excused if there was no default in him; as if he, who took the first writ out, conceals it in his hand, the sheriff may rightfully make execution on another writ which bears the last *teste,* but came first to his hands, and it hath been held, that

if a recognizance be extended, the executor ought to satisfy that before a judgment not prosecuted, and, therefore, in the present case, as he who brought his fieri facias to the sheriff did not desire that it might be executed, the sheriff might rightly execute the last fieri facias, and such execution shall not be avoided." All the reports of this case agree, that although, in general, the sheriff was bound to execute that writ first, that was first delivered; yet that if he do otherwise, and execute the last delivered first, that the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered, but may have his remedy against the sheriff. And the reason given in *Ld. Raym.* 252, is, "For sales made by the sheriff ought not to be defeated; for if they are, no man will buy goods levied upon a writ of execution." Other cases to the same effect are to be found in 10 *Vin. Abr.*, 369, *tit. Execution, A.* and also *Comb* 145, where it is said by HOLT, C. J. and DOLHAM, J. "That the Statute of frauds, which says, that the property of goods taken in execution shall be bound only from the delivery of the writ to the sheriff, and not from the *teste* thereof, is to be understood only in respect of purchasers of them." And in *Lowthal* v. *Tompkins*, 2 *Eq. Cas. Abr.* 381, LORD HARDWICK construes the meaning of the words, "bound from the delivery of the writ to the sheriff," in the same manner, for he says "The meaning of the words, that the goods shall be bound from the delivery of the writ to the sheriff is, that after the writ delivered and the defendant makes an assignment of them, except in market overt, the sheriff may take them in execution." And in a former part of the same case, LORD HARDWICK says, "neither before this Statute nor since, is the property of the goods altered, but continues in the defendant till the execution executed." We consider the expressions in the two Statutes to be substantially the same. The English Statute provides that the goods shall only be bound from the delivery of the execution to the sheriff, and that no execution shall be a lien on the property, but from the time such writ shall be delivered to the officer in the proper county to be executed. The construction given in the cases cited, is conceived to be conclusive upon the question. If the receipt of an execution by the sheriff does not operate so to divest the title as to

defeat a sale made under one subsequently received, *a fortiori* it could not destroy a right consummated by the mere act and operation of the law itself. We think it clear, therefore, that the mere delivery of the execution to the sheriff, did not arrest the operation of the Statute, but that it continued its course until the actual seizure. This being the case, Dodd's title became fixed and perfect, and the levy and sale, afterwards, cannot affect his legal rights. Under this construction of the Statute it is manifest that the plaintiff was entitled to the benefit of the second instruction, and the court, having refused to give it, consequently erred. The defendant's first instruction is in strict accordance with the law, and, therefore, was properly given. The second asked for him may be said, in some respect, to be correct, but it is believed, from its peculiar phraseology, to be well calculated to mislead the jury in regard to the law arising upon the facts of this case. The law of this instruction is sound in the abstract, but in order to meet the facts, it should further have stated that the lien created by the delivery of the execution could be defeated or destroyed by the running of the Statute of limitations, and the consummation of a title to the same property in another, after the delivery of the execution and before actual seizure by the sheriff. This instruction was, therefore, improperly given. The third instruction asked by the defendant, should not have been given. The Statute does not avoid every gift, where the possession does not accompany it. It is only in cases where the gift is not founded upon a consideration deemed good in law, that it shall be void against all creditors and purchasers. The third error assigned is, that the Circuit Court erred in overruling the motion for a new trial. In order to test the correctness of the decision in this respect, it will become necessary to review the evidence adduced upon the trial, and to ascertain whether the verdict is warranted by it. The validity of the gift to the plaintiff's wife has been inpugned solely upon the ground of fraud, and the Statute of frauds is relied upon to defeat it. The second section of the Statute (*R. S. chap.* 65), declares that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and

profits thereof, and every bond, suit, judgment, decree, or execution made or contrived, with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers, prior, and subsequent, shall be void:" and the 4th *section* of the same act, also declares that "every gift of goods, chattels, and slaves, and all other conveyances of the same, not on consideration deemed good in law, shall be void as against all creditors and purchasers, and all such gifts, grants, and conveyances, shall be void even against the grantors, unless possession really and *bona fide* accompany such gift or conveyance." The first question presented here is, whether the facts and circumstances, detailed in evidence, and under which the gift was made, were such as to constitute fraud *per se,* or even to raise a presumption against the fairness of the transaction. The mere fact of an existing indebtedness, does not render a voluntary conveyance absolutely fraudulent, or void in law, as against the creditors whose debts were previously contracted, if there was no intention on the part of the grantor to delay or defraud his creditors. In the case of *Van Wyck* v. *Seward,* 6 *Paige* 67, the chancellor said, "I presume it cannot be seriously urged that where a parent makes an advancement to his child, honestly and fairly retaining in his own hands, at the same time, property sufficient to pay all his debts, such child will be bound to refund the advancement for the benefit of creditors if it afterwards happens that the parent, either by misfortune or fraud, does not actually pay all his debts, which existed at the time of the advancement." This doctrine is much stronger and goes to a much greater extent, than would be requisite to sustain the gift in this case. It does not appear from the testimony to what extent the donor was indebted at the time, or that in truth he owed any thing; but it appears, on the contrary, that he was unembarrassed and worth twenty thousand dollars. In the case of *Salmon* v. *Bennet,* 1 *Con. Rep.* 525, SWIFT, CH. J., gives the opinion of the court as follows:— "Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor, and strangers. Mere indebtedness at the time will not in all cases render a voluntary conveyance void as to

creditors, when it is a provision for a child in consideration of love and affection: for if all gifts, by way of settlement to children by men in affluent and prosperous circumstances were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied. Nor will all such conveyances be valid, for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved, for this would be impracticable in many instances, where the conveyance ought not to be established. But in all cases where such intent can be shown, the conveyance would be void, whether the grantor was indebted, or not. In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of a bankruptcy, or if the nature of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts, then such conveyance will be void as to creditors." Now if we apply these principles to the facts in the case under consideration, we cannot but see that those facts afford no ground for presumption of fraud in John Humphries, the donor, at the time he made the gift to his daughter, Eliza. For at that time Humphries was in prosperous circumstances, he then paid taxes on thirty-five negroes, and was worth twenty thousand dollars, independent of his debts. This gift to his daughter was a negro child, whose value could not have exceeded one or two hundred

dollars. The gift was, therefore, not unreasonable, and affords no presumption that it was made to injure or defraud creditors. If the gift to the daughter was not fraudulent in the beginning, it could not become so by subsequent events. We consider this sufficient for this branch of the case, and will, therefore, discontinue the discussion upon it. It is also objected as a circumstance against the validity of this gift, that the donee did not take immediate possession of the property. The proof is, that the gift was made some twenty years before the trial in the Circuit Court; that the donee was then an infant; that she then lived with her father, and continued to live with him until her marriage, which took place on the 13th of February, A. D. 1840. Where there are many persons living together, constituting one family, and there are slaves in the service of the family, subject to the occasional order of each, the possession in law is considered and regarded as in those of the family, who have right to the property, and if in such case an infant be the real owner and have right to the slaves, the infant will be regarded as in the possession, although the father controls and causes them to work as he pleases; and where many persons are in the enjoyment of property, be these adults or infants, in part, those who trust upon the faith of the property are bound to discriminate and ascertain at their peril, who has title among those using it. Where the gift is made to an infant, and the father takes possession, he holds as natural guardian, and the possession is the infant's, and such a case is not within the Statute of frauds, so as to subject the property to the creditors of the father. This doctrine is well settled by the authorities. If the possession of the father, of property given to his child by a stranger, is the possession of the child, it is equally so, where the gift is directly made by the father himself. There can be no difference in principle. So that, upon the supposition that this was a gift without a consideration deemed good in law, and actual possession were absolutely necessary, the fact of the possession of the slave is fully established by the testimony in the case. We have looked carefully through the entire evidence adduced upon the trial, and if any of the badges of fraud recognized by the law, are brought to light, it must be confessed that we have not been able to detect them. All the circumstances surrounding the parties at the time of the gift tend most strongly to rebut any presump-

tion of fraud, and nothing is discernable in subsequent events to give rise to it. We conceive that the title of the plaintiff, by virtue of the gift to his wife, is, therefore, full and complete. But this is not the only ground upon which he is entitled to recover; for his title, as his been shown in a previous part of this opinion, arising from his own possession since his marriage, is equally clear and indisputable. But it has been contended that fraud is a question of fact, and that it falls peculiarly within the province of the jury. To this, we answer that it is a mixed question of law and of fact to be submitted to the jury: yet like all other questions of fact, it can only be established by competent proof. Whenever a jury shall find fraud and that without such evidence as shall be sufficient to establish it, or without any evidence whatever indicating it, we consider it not only within the province, but even the imperative duty of this court, to set it aside. We do not conceive that we are called upon to set aside the verdict in this case for a mere preponderance of testimony, but for the fact that it is so manifestly against the evidence as, at first blush, to shock our sense of justice and right. But it is contended by the defendant, that, although the merits of the case should be in favor of the plaintiff, yet he cannot recover, as the facts are not such as to enable him to support the form of action which he has adopted. It has been held in Pennsylvania, that, although replevin was prohibited by a Statute of the Legislature to be brought against a sheriff, who has taken goods in execution, yet, that after the sale, a person claiming property in the goods might maintain this action against the sheriff's vendee. 6 *Binn.* 2. It was also held in New York, that, although the defendant in the execution could not himself maintain replevin, yet, that the action might be brought by a third person against the sheriff; for if an officer having an execution against A., undertook to execute it upon goods in the possession of B., he assumes upon himself the responsibility of showing that such goods were the property of A., and if he fail to do this, he is a trespasser by taking them. *Thompson* v. *Button,* 14 *Johns. Rep.* 84. We are clear, therefore, from a full and patient investigation of the whole case, that the Circuit Court erred in overruling the plaintiff's motion for a new trial. Judgment reversed.