HUGHES *vs.* SLOAN.

A plea setting up a defective and insufficient defence, is not cured by verdict. Our statute of amendments is but declaratory of the common law.

An improvement upon the public lands, whether the same proves to be upon the 16th section or not, is a good consideration for a note: In such case the sale is not of the soil, but of the improvement.

Misrepresentation, to avoid a contract upon the ground of fraud, must be of a material fact conducing to the contract and misleading the party; if he knew that it was false, it could have had no influence upon his decision.

In covenant on an obligation to pay to plaintiff a wagon on a particular day, it is not necessary to aver a special demand—the debtor is bound to pay at the day and place, or be there ready to do so.

Writ of Error to the Ouachita Circuit Court.

COVENANT, by Green B. Hughes against Samuel D. Sloan, in the

Ouachita Circuit Court, on two writings obligatory, one of which follows:

"On the first day of November next, I promise to pay unto Green B. Hughes, one first-rate road wagon, to be made of good materials, complete, and both the wood work and iron work to be executed in a good and workmanlike manner; the tire to be not less than five-eighths of an inch in thickness, with a good substance tongue for oxen, well ironed, and the whole to be what is called a well ironed wagon; for which I have received value:

Witness my hand and seal, this December the 25th, 1833.

SAMUEL D. SLOAN, [L. S.]"

The other obligation is similar, differing as to the time of furnishing the wagon only.

The declaration sets out the obligations, and alleges as breaches the failure of defendant to furnish the wagons according to the covenants. No special demand is alleged.

Defendant demurred to the declaration on the ground that no demand of the wagons was alleged in the declaration; the court overruled the demurrer and he filed the following plea:

"Said defendant comes and defends the wrong and injury when, &c., and for plea says that said writings obligatory were executed for and in consideration of an improvement represented by plaintiff to be on public land of U. S.; when in truth and fact said improvement was and is on the sixteenth section land appropriated for the purposes of education, and this he is ready to verify, &c."

"Sworn to in open court.
"PHILLIP AGEE, (*Clerk.*)"
"CONWAY B. & HUBBARD, *Att.*"

The plaintiff replied to the plea in short upon the record, by consent, and defendant took issue. The cause was submitted to a jury, who found for defendant, and judgment was rendered accordingly. The plaintiff moved for a new trial on the grounds that the verdict was contrary to law and evidence, which the court refused, and he excepted. The plaintiff took a bill of exceptions, setting out the motion for a new trial, and the decision of the court overruling it, but the evidence given on the trial is not included in the bill of excep-

tions. There is a paper copied in the transcript, signed by the judge, and marked filed by the clerk, purporting to set out the evidence, but it is not made part of the record in any way.

Hughes brought error, and assigns for errors, that the plea of defendant was defective in substance, and constituted no bar to the action, and that the court overruled the motion for a new trial.

WATKINS & CURRAN, for plaintiff. The plea in this case is so vague and indefinite that it is somewhat difficult to determine whether the defence intended to be made thereby, was fraud or failure of consideration. But the intention of the pleader is unimportant for the reason that no defence known to the law, is either alleged or proved.

1. It is not proved that Hughes made representations to Sloan or any other person that the improvement was not on the 16th section.

2. Conceding that such representations were made, it is neither alleged or proved that Hughes knew them to be false. *Baker* v. *Baker & Cook,* 4 *Bibb Rep.* 346.

3. There is no allegation that Sloan was deceived by, or purchased in faith of, the representations.

4. No interest in the soil, not even a pre-emption right, was conveyed—nothing more than the mere naked possession of the improvement, which of course constituted the only consideration for Sloan's covenants, and having received and continuing to hold and enjoy the possession he cannot object a failure of consideration, and even if he had been subsequently evicted, the failure could not by any means be total.

5. There was no warranty, either express or implied, that the improvement was not upon the 16th section.

6. If there was a warranty, of course it constituted part of the consideration; consequently so long as the obligation created thereby subsists, Sloan is entitled to his action against Hughes, for the breach of warranty, and the consideration cannot therefore be said to have entirely failed. *Young* v. *Triplett,* 5 *Litt. Rep.* 248; *Hook* v. *Hook* 3 *J. J. Marsh. Rep.* 112.

7. To make the defence available at law, the failure must be total. *Peebles* v. *Stephens,* 1 *Bibb Rep.* 500; and since it is shown that

Sloan under his purchase from Hughes obtained possession of the improvement, and has from thence held and enjoyed the use of the same, he has derived some benefit from his purchase and cannot therefore avail himself of the plea of failure of consideration. *Minor* v. *Kelly,* 5 *Monroe Rep.* 273.

8. Independent of all other points, this case is placed beyond cavil from the fact, that, in consequence of the improvement falling upon the 16th section, Sloan obtained a float, which entitled him to a preference in the purchase of any other of the vacant public land.

PIKE & BALDWIN, contra. The paper purporting to set out the evidence is no part of the record. *Lenox* v. *Pike,* 2 *Ark. R.* 14. The verdict will, therefore, be presumed to be correct.

If the plea is bad in form or substance, the plaintiff should have demurred, or taken judgment for want of a plea. 1 *Chit. Plead.* 551, 711-2, 724. The verdict cured the plea, if defective. *Rev. Stat.* 635, *sec.* 118, *5th, 8th, and 9th div.*

E. CUMMINS, likewise. Where the main object of the purchase fails in consequence of defect of title, or partial defect, or lack of quantity or quality, in an action for purchase money, the sale will be rescinded at law. *Pringle* v. *Ex'rs. of Witten,* 1 *Bay's S. C. Rep.* 256. *Gray* v. *Ex'rs. of Hadkinson,* 1 *Bay,* 278. 4 *Kent. Com.* 470-2-3-4-5. *Hills* v. *Banister,* 8 *Cow. R.* 31.

As to place of delivery of personal effects of cumbersome nature, and effect of failure, and duty of creditor to make demand and appoint place of delivery, 2 *Bibb* 280. 1 *Stewart (Ala.) R.* 272. 2 *N. H. Rep.* 75. 1 *ib.* 285.

OLDHAM, Judge. This was an action of covenant upon two writings obligatory, executed on the 25th day of December, 1833, each for a road wagon, payable on the days specified, by Sloan to Hughes. The plea filed avers that the covenants sued upon were executed for and in consideration of an improvement, represented by the plaintiff to be on the public land of the United States, when in truth and in fact the said improvement was on the sixteenth section land appropriated for the purposes of education.

The first question presented is, whether this plea interposes a sufficient defence to defeat the plaintiff's action. It does not in any manner whatever, show a want or failure of consideration, but on the other hand, shows a good and sufficient consideration to uphold each of the covenants. Settlers upon the public lands often make valuable improvements thereon, and which frequently become the subject of barter and sale. The occupant cannot transfer the right of soil, which is in the government, but only the improvement upon the land, with the right to occupy the improvement, disconnected from any right to the soil, and subject to the paramount rights of the United States. In this case, whether the improvement was upon the lands of the United States, or upon the lands appropriated for the purposes of schools, is wholly immaterial. The improvements, and not the land, constituted the object of the purchase, and the title to the fee was equally adverse to the occupant, whether in the United States, or the inhabitants of the township.

The facts set up by the plea cannot be regarded as impeaching the covenants, upon the ground of fraud. A misrepresentation, which will avoid a contract upon the ground of fraud, must be in respect to a material fact, operating as an inducement or consideration to the contract, and must have operated actually to mislead, to his injury, the party trusting to it: for if he knew, at the time that it was made, that it was false, it could have had no influence upon his decision. *Foster* v. *Charles*, 6 *Bing.* 396, *S. C.* 7 *Bing.* 105. 2 *Kent Com.* 39. 1 *Sto. Eq. Juris. secs.* 202, 203.

The plea does not show that the representation, in any respect, operated as an inducement to the contract, or that Sloan placed any reliance upon it, and consequently he was not mislead by it to his injury. The plea does not show whether or not Sloan knew, at the time the contract was made, that the improvement was upon the sixteenth section. It is to be presumed that he did know, for it is a rule that every pleading will be construed most strongly against the party pleading. Knowing the fact, he was not injured by the misrepresentation.

If at the time of the purchase the land had been surveyed, and the improvement was situated on the sixteenth section, that fact was

equally accessible to both parties, equally within their reach, and therefore, if Sloan relied upon the opinion of Hughes, upon the subject, when he had an equal opportunity to ascertain for himself, it was at his peril. "The law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly; or a careless indifference to the ordinary and accessible means of information. It is the duty of the purchaser to apply his attention to those particulars, which may be supposed to be within the reach of his observation and judgment, and if he be wanting in attention to those points, when attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor,* ought to apply." 2 *Kent's Com.* 485.

If at the time of the sale of the improvement, the land, upon which it was situated, was unsurveyed, a fact which does not appear from the plea, but was assumed in argument at the bar, then the representation was true and not false, for the land was public land of the United States, and the title remained in the United States until the sixteenth section was ascertained by actual survey, when by virtue of the act of Congress it vested in the inhabitants of the township for the use of schools. We consider the plea manifestly defective either as alleging a want or failure of consideration or averring fraud. The defendant in error insists that under the *Rev. Statutes, ch.* 116, *sec.* 118, 5, 8 and 9 *divisions,* the defects of the plea are cured by verdict. The statute cited but asserts a principle of the common law, and is not more extensive in its application. The doctrine of the common law, as to defects cured by intendment after verdict, is thus laid down by 1 *Chit. P.* 712 "the general principal, upon which it depends, appears to be, that when there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue proved be such as necessarily required, on the trial, proof of the facts, so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the Judge would have directed the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict." The plea in this case is too palpably

defective to be cured by verdict. The objection to the plea is not, that it contains a defective statement of a good defence to the action, but that the defence set up is defective and insufficient.

It is insisted for the defendant that the declaration is defective, in not averring a special demand of payment of the wagons. A specific time was fixed for payment. It was the duty of the debtor to pay upon the day, or be ready to pay at such place as the law would designate as the place of payment; otherwise a right of action accrued against him to the creditors without any special demand.

Other questions have been argued by counsel, but we do not conceive them to be legitimately before us for determination.

The judgment must be reversed and the cause remanded, with leave to the defendant to plead *de novo* if it shall be desired.