## CONWAY & REYBURN *vs.* TURNER & WOODRUFF.

Exceptions to an answer filed to a petition for discovery, will not be sustained, because the answer states a fact totally immaterial; nor because it answers interrogatories that were improperly put and which the party was not bound to answer.

The party filing the petition for discovery in aid of an action at law, is not bound to read in evidence the answer of his adversary: If he decline doing so, he is not precluded from proving his demand by other testimony.

If the party filing the petition declines to read the answer, the opposite party has no right to do so.

*Writ of Error to the Circuit Court of Pulaski county.*

This was an action of *assumpsit,* brought by Turner and Woodruff, against Conway and Reyburn, in the Circuit Court of Pulaski county, and determined at the April term, 1846, before the Hon. JOHN J. CLENDENIN, Judge.

The suit was brought for a bill of goods, sold by the plaintiffs, who were merchants, trading in New-Orleans, to the defendants, and shipped, upon their order, to Little Rock. The defendants filed a petition for discovery, and, upon the answer coming in, they excepted; and their exceptions being sustained, plaintiffs filed an amended answer, to which also the defendants excepted, but their exceptions

were overruled. The plaintiffs then filed a petition for discovery which the defendants answered, and the plaintiffs excepted to the answer, but their exceptions were overruled, and they filed a bill of exceptions to the judgment of the court thereon. The questions arising upon the bills for discovery, the answers thereto and exceptions, and adjudicated by this court, sufficiently appear in the opinion.

The case was submitted to a jury, who found for the plaintiffs; the defendants moved for a new trial, but the court overruled their motion; and they filed a bill of exceptions, setting out the testimony and ruling of the court upon the trial.

The plaintiffs, on the trial, offered to prove their case by parol testimony, to which the defendants objected, on the ground that the plaintiffs having filed a petition for discovery and obtained the answer of the defendants to the same matters, could not resort to any other proof, and also objected to any testimony as to any matters embraced in the petition for discovery; but the court overruled their objections, and they excepted. The witnesses were then sworn and examined, but it is not deemed necessary to set out the testimony. The plaintiffs did not read their petition for discovery, nor the answer thereto of the defendants; but both were read in evidence, notwithstanding the objections of the plaintiffs, by the defendants; who then moved to exclude all the testimony given by the witnesses, but the court overruled their motion, and they excepted.

S. H. HEMPSTEAD, for the plaintiffs. 1st. Discovery in aid of a suit at law is granted upon the principle that the party cannot prove the discovery sought, without resorting to the conscience of the opposite party, and this is of the essence of the right. *Field* v. *Pope*, 5 *Ark.* 71. In the case now at issue, the defendants in error, in their petition for discovery, distinctly alleged their inability to establish the fact that the goods were ordered by, and sold to, the plaintiffs in error, save by discovery from them. Having resorted to the opposite party for that purpose, and obtained an answer, they were bound to use it, if they proceeded in their suit, and could not resort to other proof as to matters embraced in the petition of discovery and the an-

swer responsive to it, and the principle is believed to be fairly inferable from the decision of *Field* v. *Pope,* above cited, and sanctioned by the statute as to discovery.

2d. The exceptions to the amended answer of the defendants ought to have been sustained. One of them is to setting up a particular custom among the merchants of New Orleans, without showing how long it had existed, or whether the plaintiffs were cognizant of it, and dealt with a view to it. A custom, however prevalent it may be among merchants, must be sanctioned by the courts, as reasonable, before it can be considered as a general and legal custom. 2 *Stark. Ev.* 258. *Todd* v. *Reid,* 4 *Barn. & Ald.* 210. 4 *Eng. C. L. Rep.* 404, 1 *Ld. Raym.* 130. *Consequa* v. *Willing,* 1 *Pet. C. C. Rep.* 230. *Smith* v. *Wright,* 1 *Caines Rep.* 43. *Barber* v. *Bruce,* 3 *Conn. Rep.* 9.

WATKINS & CURRAN, contra. The case of *Field* v. *Pope,* 5 *Ark.* 66, not only does not decide that a party cannot contradict an answer by other evidence, but it is not in point, because, in that case the answer was read by the party calling for it; but in this it was not.

The party seeking a discovery, may read the answer or not, as he thinks proper; but if he read a part, he must read the whole. *Lawrence* v. *Ocean Insurance Co.,* 11 *John R.* 260. An answer to a petition for discovery stands as a deposition, and belongs to the party calling for it: it is not in the possession of the court, nor is it evidence until he reads it. 1 *Story's Eq.* 90. Moreover, the evidence introduced in this case is of a different character, and does not conflict with the answer.

As to reading an answer to a petition for discovery, *vide* 3 *Phil. Ev.,* by *Cowen & Hill* 926. An answer in chancery is not in law evidence for the party in any event, unless his antagonist choose to use it, even though it was called out on a bill for discovery, for the purpose of the very suit at law in which it was offered. It is, therefore, entirely in the election of the party calling for it, whether he will use it or not. He may refuse, and prove his entire case by other evi-

dence; or he may use it, and disprove by other evidence, all allegations in it detrimental to his cause. *Nourse* v. *Gregory,* 3 *Lit. Rep.* 378. *Phillips* v. *Thompson,* 1 *John. Ch. Rep.* 131.

The exceptions to the amended answer of Woodruff and Turner, upon the ground that they set forth the custom of merchants and usage of trade in regard to effecting insurance, were properly overruled, and the answers sustained. 6 *Porter* 123. 8 *Serg & R.* 551. 9 *Wheat.* 585. 4 *Mass.* 252. 9 *Mass.* 155. 3 *Cond. R.* 13. *Peters C. C.* 225. 1 *Gallison* 443. 3 *Day* 346. 7 *John. Rep.* 385. 6 *Term Rep.* 320. *Dougl.* 511. 6 *East* 202. *Dougl.* 518. 11 *Wheat.* 431. 1 *Caine* 43.

But the most remarkable feature in this case is, that the defendants below actually claimed the right, and were allowed, to read their own answer in evidence to the jury.

The evidence would have warranted a verdict for much more than was returned.

OLDHAM, J. The first question to be determined is, whether the Circuit Court properly overruled the exceptions of the plaintiffs in error, to the answer of the defendants in error to the plaintiffs' petition for discovery.

The petition charges, that Conway and Reyburn, from time to time, purchased various goods, wares, merchandize and groceries, from Turner & Woodruff, who were merchants in the City of New Orleans, and had given them special instructions, to insure all goods or groceries purchased of them, or that might be purchased of them thereafter, and by them to be shipped to Conway and Reyburn. That in all their shipments, made to the order of the petitioners, prior to the shipment of the goods constituting the foundation of the present action, said Turner and Woodruff had uniformly obeyed said special instructions to insure. That the shipment of the goods and groceries which were the subject matter of the action as aforesaid, was without any insurance whatever against the dangers and risks of the river; that they were shipped from New Orleans to Little Rock, and, through the dangers and risks of the river, were totally lost, from the loss of the vessel in which they were shipped. That the said special instruc-

tions to insure was a fact lying peculiarly within the knowledge of the plaintiffs below, except the defendant Conway. The petition propounds six interrogatories, and calls upon the plaintiffs below to answer them: 1. What instructions did they receive from the defendants, or either of them, in relation to the insurance of all goods and groceries sold by the plaintiffs to defendants?

2. Were not all goods and groceries purchased of the plaintiffs by the defendants, insured when shipped under special instructions to insure in all cases, &c.?

3. Were the goods and groceries which were the subject matter of the action then pending, insured at all?

4. If there was no insurance on the same, state the reason why insurance was not effected on them, as upon previous shipments?

5. In what vessel or steam-boat were they shipped?

6. When was said vessel or steam-boat lost or sunk, and where?

The amended answer filed by the plaintiffs to the petition, states, that, on the first day of April, 1837, the defendants purchased of the plaintiffs the several articles mentioned in the bill of particulars in this suit, amounting, altogether, including drayage, to $398.18, that on the 8th day of April, 1837, the plaintiffs shipped the goods to Messrs. Pitcher & Walters, at Little Rock, for the defendants, on board the steam-boat "Compromise," which boat, as the respondents were informed and believe, shortly afterwards, on her passage up to Little Rock, was sunk some where in the Arkansas river. The answer admits that the plaintiffs had received general instructions to insure in all cases of sale and shipment to the defendants. That the reason why insurance upon the goods and groceries was not effected, was, that under general instructions, it was not the custom among merchants in New Orleans, to effect insurance where the amount was under five hundred dollars; that, under such general instructions, and in the absence of any special instructions to insure in all cases, or to insure any particular shipments, it was customary to insure where the amount of the shipment was five hundred dollars and over. That, when instructed generally to insure, that the respondents would understand it to mean that they should observe the rule established by the above custom. That the respondents had effected insurance up-

on goods and groceries, sold by them previous to the first day of April, 1837, as charged in the petition, was true, but expressly denies that it was in obedience to any such special instructions.

The answer positively denies that the goods and groceries were totally lost, through the dangers and risks of the river, and the loss of the vessel in which they were shipped, but that the defendants actually received the whole of them, at the hands of Messrs. Pitcher & Walters, the consignees, at Little Rock, in all convenient season after the sinking of the "Compromise;" that the only articles materially injured, and which are specified in the answer, amounted, in all, to the value of $37.68—leaving the residue of the bill, amounting to $360.50, either wholly uninjured or not materially damaged by the loss of the boat.

The first exception to the answer, is, that the respondents, without being interrogated thereto, state that said goods were shipped to Pitcher & Walters for said defendants. That statement was wholly immaterial. We do not perceive that the liability of the defendants would at all be changed, or that any advantage or disadvantage would result to them, from the fact that the goods were consigned to Pitcher & Walters, for them.

The second exception taken is, that the respondents set up their own usage, and the custom of merchants in New Orleans, as an excuse for not insuring said goods, without showing whether said Conway and Reyburn knew of such usage before any dealings with the respondents. This statement in the answer, is a direct response to the fourth interrogatory propounded by the petition, and is given as the reason why the goods were not insured. Whether such a custom afforded any excuse or defence to the plaintiffs, for failing to procure insurance on the goods, is not raised by the exceptions to the answer. Being called upon for the reason why they did not effect insurance, it was legitimate for the respondents to give it; but it was the province of the court to charge the jury as to its legal effect, upon the answer being read to them as evidence. The third and last exception is, that the answer is argumentative, irresponsive, and uncertain. The statements of the answer are directly responsive to the allegations and interrogatories in the petition, and are explicit, positive and certain. It

is true, that the petition sets up several facts which the respondents might have excused themselves from answering, because they were in the knowledge of witnesses, and confined their answer to that part of the petition alleged to have been within their own knowledge; but having answered fully, it is not for the party who called upon them for such an answer, to object that it was given. But, had the answer gone on to set up independent facts not responsive to the allegations and interrogations in the petition, for the purpose of making evidence for the respondents, the case would be different. But, were the decision in the court below wrong, in point of law, in overruling the exceptions to the answer, the plaintiffs in error were not injured by that decision, because they had the advantage of every statement contained in their petition, by improperly reading their own answer as evidence for themselves to the petition of discovery filed by the defendants in error.

The remaining question is, whether the court properly overruled the motion for a new trial. The first ground assumed in favor of the motion is, "that the plaintiffs having filed a petition for discovery, and obtained an answer, should be required to read it to the jury:" and failing to read it to the jury, their verdict in his favor should be set aside and a new trial granted to the opposite party; and that, too, after the defendants themselves had been permitted to read the answer as evidence in their own behalf. The defendants could not testify for themselves, unless at the instance and on the call of the plaintiffs, and it was for the plaintiffs to determine whether the answer was to be admitted as evidence in the cause, or not. *Philips* v. *Thompson,* 1 *J. C. R.* 141. The only error committed upon this point was, that the court permitted the defendants to read the answer as evidence in their own behalf. In *Cox et al.* v. *Cox,* 2 *Port R.* 533, it was held, that when a bill is filed for discovery of testimony, the party may use the answer, or not, as he chooses; see *Lawrence* v. *Ocean Ins. Co.,* 11 *J. R.* 260.

The case of *Field* v. *Pope,* 5 *Ark. R.* 66, does not establish a different rule upon that point; for the question was not at issue in the cause. In that case the defendant having obtained the plaintiff's answer, and read it to the jury, did thereby make him his witness.

The mere act of filing the petition and obtaining the answer, did not any more make the plaintiff his witness than if he had caused any other person to be summoned as a witness, and declined to use him.

The plaintiffs below having declined using the answer of the defendants as evidence, were not precluded from establishing their demand by other testimony. A calculation based upon the evidence, shows the verdict is not excessive. We do not consider that there is any error in the judgment, and it is therefore, affirmed.