FINLEY AS ADM'R *vs.* WOODRUFF.

When the inducement to a special traverse contains a direct denial of the breaches assigned in the declaration, the plea would be bad upon demurrer at common law; but the objection is one of form and not of substance: and the inducement, being a direct denial, would be a good plea without the addition of the *absque hoc.*

(The office of a special traverse; and the nature and object of the inducement, stated and defined.)

Where the declaration sets out, as breaches of a covenant for the sale of a donation claim, that the vendor was not justly and lawfully entitled to it; that the same was not lawfully proven up; that the claim was not a legal and valid one; and the pleas aver that he was justly and lawfully entitled to it, &c., the onus of proof is upon the defendant.

The original affidavits and proceedings thereon before the Register and Receiver, in proof of the donation claim, and an extract from the abstract of settlers' claims, showing the confirmation and allowance of the claim, is good evidence in support of such plea, though such proof was not made upon an application to locate any particular lands.

The submission of the proof of the claim gives to the officers, jurisdiction to decide upon the claim; and an application to locate is unnecessary to give them authority to adjudicate thereon.

The action of the Land-officers upon the proof adduced in support of a donation claim, and their allowance thereof, is sufficient to show that the statement, which purports to be sworn to before, but not signed by them, was made on oath; and their omission to sign it is a mere irregularity, not affecting the validity of their acts or their jurisdiction.

Proof of a donation claim may be sufficient without the affidavit of the claimant, when it is shown that, in consequence of age and disease, he was unable to attend.

The judgment of the Land-officers, who are clothed with exclusive jurisdiction to determine the rights of claimants to donations, are final, unless reversed by an appellate tribunal: and their endorsement upon the application is sufficient evidence of their decision.

Under our statute, *Rev. Stat. ch.* 59, *sec.* 6, copies of the entries made in the books of the Land-office, and of papers filed therein, are primary, not secondary, evidence.

Covenants, on the sale of donation claims, that such claims are legal and valid, &c. —such claims being then proven and allowed at one Land-office, and there being no law to authorize the entry, upon such proof, at another office—are not broken, because the officers of the other Land-office refuse to permit the location of the claims upon the proof already taken. The covenants extend only to the entry at the Land-office, in such case, where the proof has been taken and the claims allowed.

Writ of Error to the Circuit Court of Pulaski county.

This was an action of covenant, instituted by James W. Finley, as adm'r of Allen M. Oakley, against William E. Woodruff, and determined in the Pulaski Circuit Court, on the 18th Nov. 1848, before the Hon. JOHN J. CLENDENIN, Judge.

The declaration contains two counts: The first sets out a covenant entered into on the 26th day of August, 1834, between the plaintiff's intestate, and the defendant, which recites, that William Neal is entitled, under an act of Congress, to a donation of land not exceeding two quarter sections; that he has proved his right to the donation at the Land-office at Little Rock; that he has, by his bond or covenant, obligated himself to convey such lands as may be located by virtue of his right to a donation to Woodruff, his heirs and assigns, (and to do other matters in relation thereto, as by reference to the bond or covenant will appear), and that Woodruff obligates himself to convey a title to said lands to Oakley; and Woodruff, in consideration of four hundred dollars paid to him by Oakley, binds himself, his heirs, &c. that Neal shall well and truly do and perform every article and clause of said covenant, to Oakley, his heirs, &c.; and covenants further, that a patent shall issue on the lands to be located by the donation to Neal, and that Neal shall convey to Oakley a complete and perfect fee simple title to the lands that may be located; and further covenants that the donation claim is a legal and valid one, and that he is lawfully entitled to locate therewith the quantity of three hundred and twenty acres; and further covenants, that if any further proof be necessary to establish said donation, that he will furnish the same at his own expense. The declaration then proceeds to assign as breaches of the covenant of the defendant, that Neal did not well and truly perform and do each and every article and clause of his covenant, but hath violated the same in this: that he was not justly and lawfully entitled to said donation; and in this: that said claim for donation was not lawfully proven before the Land-officers at Little Rock; nor hath the said defendant kept and performed his said covenant, but hath violated the same in this: that the said donation claim of the said William

Neal was not a legal and valid one, and that he was not entitled therewith to locate the quantity of 320 acres of land as aforesaid; and in this: that although additional proof was necessary to establish said donation claim, and was furnished by Oakley, and taken at the expense of two hundred and eighty dollars, of which the defendant had notice, yet he had not paid the same, but wholly failed to do so. The second count sets out a similar covenant and breaches, in every particular, except that the donation claim was purchased by the defendant of John Smoot.

The defendant appeared and filed eight pleas—four to each count:

1st. As to the first breach of the covenant, in the first count of the declaration, the defendant "says, that William Neal was justly and lawfully entitled to said donation, without this, that said William Neal was not justly and lawfully entitled to said donation," &c.

2d. As to the second breach of the covenant, in the first count of the declaration, he says, "that said donation claim was lawfully proven up before the Land-officers in Little Rock, without this, that said donation claim was not lawfully proven up before said Land-officers at Little Rock," &c.

3d. As to the third breach in the first count, he says "that the donation claim of William Neal was a legal and valid one, and that he was entitled to locate therewith three hundred and twenty acres of land, without this, that said donation claim was not a legal and valid one, and that he was not entitled therewith to locate three hundred and twenty acres of land," &c.

4th. As to the fourth breach in the first count, he says "that no additional proof was necessary to establish said donation claim, nor was the same furnished by said Oakley, and taken at the expense of two hundred and eighty dollars, whereof the defendant had notice, without this, that any additional proof was necessary to establish said donation claim, and that the same was furnished by said Oakley," &c.

The 5th, 6th, and 7th pleas were similar to the 1st, 2d, and 3d; and applied to the breaches of the covenant set out in the second count. The 8th, is a denial that further proof was taken to establish the fourth breach of the covenant in the second count.

The plaintiff entered his demurrer, by consent, in short upon the record, but the court overruled his demurrer, and he then joined issue. The case was then submitted to the court, sitting as a jury; who found for the defendant, and rendered judgment accordingly.

Pending the trial, the court decided that, under the issue joined to the first, second, and third pleas, to the first, second, and third breaches, of the covenants set out in each count of the declaration, the onus of proof was upon the defendant, who was bound to prove the validity of the donation claims, and that they had been proven up and allowed. The defendant excepted, and tendered his bill of exceptions, which was signed, and sealed by the court, and made a part of the record.

The plaintiff moved for judgment *non abstante veredicto,* but the court overruled his motion; he then filed his motion for a new trial, on the grounds: 1, That the court found contrary to law; 2, contrary to evidence; and, 3, that the court admitted incompetent testimony on the part of the defendant. The court overruled his motion, and he excepted, and obtained leave to file his bill of exceptions at a future day. He then filed a motion in arrest of judgment, and sets out for cause: 1st, That the pleading of the defendant admits the action of the plaintiff, and fails to set forth, and show any matter sufficient in law to bar said action; 2d, That, in the record of this cause, nothing in bar of the action aforesaid of said plaintiff appears; 3d, That upon the matters appearing by the record of this case, the defendant is not in law entitled to judgment, &c. The court overruled his motion, and he excepted. The defendant thereupon filed his bill of exceptions to the order overruling his motion for a new trial, and set out all the testimony given on the trial.

The testimony set out in the bill of exceptions, is in substance: That the defendant, to prove the issues on his part, offered to read in evidence the original affidavit and proceedings thereon of the Register and Receiver of the Land-office at Little Rock, in regard to the donation claims, first proving that they were the original papers. The proof of the donation claim of Neal, is the affidavit of two persons, as to the settlement, &c., of Neal, and they also state that Neal is aged and diseased, which renders him unable to travel and attend in per-

son. The affidavit purports to have been made before the Register and Receiver, both of whom sign the certificate thereof, and the endorsement, "confirmed 11th April, 1829." The proof in relation to the donation of Smoot, was an affidavit of Smoot himself, and of one witness, and an affidavit as to the credibility of the witness. These affidavits purport to have been taken before the Register and Receiver, but the certificate is signed by the Register only; the endorsement, however, "examined and confirmed, the 2d of Feb'y, 1832," is signed by both. The plaintiff objected to the reading of the affidavits and proceedings; but the court overruled his objection, and he excepted. The defendant then read in evidence a duly certified copy of "an extract of the abstract of settlers' claims adjudicated at the Land-office at Little Rock, A. T., under the act of Congress of May, 1828, and January, 1829," by which it appeared that both claims were "confirmed and allowed." The plaintiff objected to this testimony also.

The plaintiff then read in evidence the obligations upon which the suit was instituted, and the covenants of Neal and Smoot, referred to therein, and mentioned in the declaration. He then read in evidence duly certified transcripts of certain papers on file in the Land-office at Washington, in the State of Arkansas, whereby it appears that application had been made in due form of law to locate the claims at that Land-office, and that such application had been refused by the officers, and their reasons endorsed upon the application, which were "because they were unwilling to act upon copies, when the originals were in existence, because they were not satisfied with the proof; because they had no acquaintance with the claimants; and because they had no knowledge whether the claims were founded in fraud or not." He then read in evidence two letters of the defendant, in relation to the claims, and the causes of their rejection by the Land-officers at Washington; one dated 24th March, 1838, and directed to the plaintiff's intestate; the other dated 31st August, 1840, directed to the plaintiff; by which it appeared that the defendant had notice of the rejection of the claims by the Land-officers at Washington, and that they had not sufficient proof of the claims to authorize the location of the lands at that office. He also read the testimony of the then Register of the Land-office at Washington, showing that application had

been made to locate the lands, at such office; and that the application had been refused for the reasons above stated, as endorsed upon the application.

The plaintiff sued out a writ of error, and brought the case into this court for revision, and assigns for error the overruling of his objections to the testimony offered by the defendant; the refusal of the court to render judgment for the plaintiff, notwithstanding the verdict; the overruling his motion for a new trial, and his motion in arrest of judgment.

RINGO & TRAPNALL, for the plaintiff. The plaintiff submits the following statement of points presented by the record and assignment of errors, and authorities upon which they rely for the reversal of the judgment in this case, to wit:

Upon the issues joined the onus of proving the validity of the donation claims in question, and that Oakley could locate them on lands in the Red River Land District at the Land-office at Washington, was upon the defendant; who, to prove their validity, produced only certain affidavits and the endorsement thereon, and an "extract from the abstract of settlers' claims, adjudicated at the Little Rock Land-office, A. T., under the act of Congress of May, 1828, and Jan'y, 1829," without proving, or offering to prove, that any application had been made at the Land-office at Little Rock to enter or locate lands in the Arkansas Land District; without which, said Register and Receiver were not authorized by law to administer any oath, or take any affidavit, touching the said claims to donations of land; nor any jurisdiction to adjudicate as to the right of either Neal or Smoot to a donation of lands, so as to confer upon them the right to enter or locate lands situated in any other Land District, by virtue of such illegal adjudication. But the whole proceeding as proven, was coram non judice, and void. *Act* 10 *May,* 1800, *Land Laws, U. S., Vol.* 1, *p.* 456, s. 4, 7; *Act* 26 *March,* 1804, *ib.* 496, *s.* 2; *ib.* 720, *s.* 1, 3; *ib.* 770, *s.* 2, 6. *Matthews* v. *Zane's Lessee,* 5 *Cranch* 92. *Matthews* v. *Zane et al.,* 7 *Wheat.* 164. *Act* 29 *May,* 1830, as to the proof of pre-emption, *s.* 3. *Land Laws, U. S., Vol.* 2, 272; also *ib.* 364. *Act, May* 24, 1828, *s.* 8, 9, *ib.* 233, expressly

in point to this question, authority to take proof expressly confined to officers to whom application is made to enter land.

The testimony respecting the claim of Smoot, purports to have been sworn to before the Register only; which is wholly unauthorized by law. *Act, 24 May,* 1828, *s.* 9, *Land Laws, U. S.* 233. *Fulton, Robb et al.* v. *Doe ex dem. McAfee, 5 Howard (Miss.) R.* 751.

The testimony respecting the claim of Neal purports to have been sworn to before the Register and Receiver both. There was no affidavit of the claimant as required by law, and the instructions issued to the Land-officers in pursuance of law. *Vol. of Opinions, &c.* 527.

The paper purporting to be an "extract from the abstract of settlers' claims adjudicated at the Land-office at Little Rock, A. T., under the act of Congress of May, 1828, and Jan'y, 1829," was incompetent to establish the validity of said donation claims, because: 1st, It is not the best evidence of the adjudication (if there ever was one) in favor of Smoot and Neal, for it does not show how much or what lands they claimed or were entitled to take from the public domain; 2d, Said abstract is but secondary evidence of the facts stated in it, is founded upon an adjudication of Land-officers at Little Rock, whose sale, if ever made, is necessarily of record in their offices, and their record constitutes the primary and best evidence of the fact; 3d, This paper, on its face, is but an extract from and part of a record; therefore, by law, inadmissible for any purpose whatsoever.

The Register and Receiver of the several Land-offices of the United States have jurisdiction to sell and appropriate, in the manner prescribed by law, any of the public lands of the United States situated within the territorial limits of their respective Land Districts—and, upon application made to them, to purchase or appropriate any specified portion of said lands, are bound to adjudicate upon the application, and, if the party is lawfully entitled, to sell or allow him to take them. But, without such application, they have no jurisdiction whatever to receive any proof whatever, nor to make any adjudication as to the right of any party to purchase or locate any of the public lands. Nor can the Register and Receiver for one Land District sell or appropriate any lands situated in another district, or receive the

application for the sale or purchase of lands in another district, or take any testimony or adjudicate any question in relation thereto, so as to bind the Land-officers in any other district. *Matthews* v. *Zane et al.*, 7 *Wheat.* 164.

The motion for a new trial ought to have been sustained, the record showing affirmatively: 1st. That the court received illegal testimony on the part of the defendant, and upon such illegal testimony, and no other, found for the defendant upon the issues joined upon the pleas to the 1st, 2d, and 3d, breaches; 2d. That application was made to the Register and Receiver of the Land-office at Washington, to locate certain lands situated in the Red River Land District, with said claims, and that, upon such application, said Land-officers adjudicated upon said claims, denied their right, and refused to allow any lands in virtue of said claims, and thus adjudicated said claims invalid, which adjudication remains in full force, and establishes the fact that Neal and Smoot were not entitled to a donation of the public land upon said claims; wherefore the finding of said court, upon the issues, was contrary to and unwarranted by the testimony; And, 3d. That the court, on the trial, admitted illegal and incompetent testimony on the part of the defendant, as shown above, wherefore the court erred in overruling and refusing the motion for a new trial filed by the plaintiff in error. *Mays & Meeks* v. *Johnson & Clark*, 4 *Ark. Rep.* 613. *Logan* v. *Moulder*, 1 *Ark. Rep.* 313.

The court erred in not rendering judgment for the plaintiff, notwithstanding the finding a verdict for the defendant, because no issue capable of trial was formed by the pleadings. Neal and Smoot respectively covenant "that they are justly and lawfully entitled to a donation of 320 acres of land, that their said claim was lawfully proven before the Land-officers at Little Rock," &c. The principal breach assigned by the plaintiff, is to the effect that neither Neal or Smoot were justly and lawfully entitled to a donation, &c.; that their respective claim was not lawfully proven up before the Land-officers at Little Rock; that their respective claim is and was not a legal and valid one; nor were they respectively entitled lawfully to locate therewith the quantity of 320 acres each of land, &c. The pleas assert, in substance, as inducement to the supposed traverse, that said Neal

and Smoot respectively were "justly and lawfully entitled to said donation, without this, that they were not justly and lawfully entitled to said donation, as is in said first breach alleged," &c., concluding to the country. All the pleas being constructed in like manner—opposing a negative to the negative assigned in the declaration—that is, the plaintiff alleges that Neal (for instance) had no valid donation claim —and the defendant alleges by way of inducement that Neal had a valid donation claim, and makes his traverse "that Neal was not justly and lawfully entitled to said donation claim," &c., which manifestly opposes the negative, "that Neal was not justly entitled," to the negative in the declaration that Neal had no valid donation claim, and was not justly and lawfully entitled to a donation claim," &c., and forms no issue triable. So that, the breach of covenant assigned in the declaration stands unanswered, unavoided, and without negative or traverse; and judgment for the plaintiff ought to have been given upon the declaration, as if there had been no attempt to plead to or answer it. *Stephens' Pl.* 97, 385, 386, 218, 230, 233 to 236, 169, 184 to 189, 175, 176.

And for the same reasons judgment on the verdict or finding for said defendant—as upon issues answering the action, when in fact there were no such issues—ought to have been arrested on the motion of the plaintiff.

WATKINS & CURRAN, contra. A motion for judgment *non obstante veredicto* upon a *traverse* is something new in the law! such a motion can be sustained only where the plea *confesses* the cause of action, and wholly fails to show an avoidance. A judgment of that kind is entered only in *very clear cases*, where there can be no doubt that the party against whom the issue was found, is, upon the whole record, entitled to judgment; for example, where a plea in bar *confessing* a good declaration is clearly *frivolous*, or so totally destitute of substance as to constitute no *semblance* of a legal defence. The judgment in such case is given as upon confession (the right of action being in law confessed by the plea), without regard to the verdict. *Gould's Pl. ch. X, sec.* 46, *and the authorities there cited; Stephens' Pl. p.* 97; 1 *Saund. Rep.* 319, *c. n. c.;* 2 *Tidd's Prac.* 828.

These authorities conclusively show that such a judgment can only be rendered in cases where the plea is by way of *confession and avoidance,* and that, in the very nature of the thing, it is utterly impossible that such a judgment could be entered in case of a *traverse.* It may be objected, that the pleas are negatives pregnant, but still the motion cannot prevail, because, on issue joined, a negative pregnant is aided after the verdict by *Stat.* 32, *Hen.* 8, *c.* 30. 3 *Saund. R. p.* 319, *note* 6; *Gould's Pl. ch.* 6, *sec.* 34; and it has been repeatedly held by this court, that our statute of jeofails is equally as broad as, and cures all defects cured by, the several statutes of England. *Martin & Van Horn* v. *Webb,* 5 *Ark. Rep.* 73.

It may be urged, that the pleas are argumentative; that the defendant, instead of denying that the claim was not lawfully proved, &c., should have affirmed that it was lawfully proved. This objection, if taken *at the proper time,* would have been tenable. *Stephens' Pl. p.* 387, but the objection comes too late, and has been waived. Argumentativeness in pleading is cured by verdict, or on general demurrer; for such defectiveness is not in the matter pleaded, but in the *manner* of pleading it, and is therefore only a fault in *form. Gould's Pl. ch.* 3, *sec.* 30. *Com. Dig. tit. Pleader* (*E.* 3); 1 *Saund. R.* 274 (*n.* 1.) *J. John. R.* 314.

The last proposition disposes of the motion in arrest of judgment, because, if the defects are aided by verdict, the motion in arrest comes too late. Did not the motion in arrest waive the motion for a new trial? *Danley* v. *Robbins' heirs,* 3 *Ark. R.* 114; *Cunningham et al.* v. *Bell et al.,* 5 *Mason's C. C. R.* 173; *Corlies* v. *Cummins,* 5 *Cowen* 415; 1 *J. R.* 192; *Wilson* v. *Fowler,* 3 *Ark. Rep.* 463; *Bedford's Ad'r* v. *Ingram,* 5 *Haywood* (*Tenn.*) *Rep.* 160; 2 *Tenn. Rep.* 240.

There can be no question in this case but what the Register and Receiver at Little Rock actually allowed and confirmed both of these claims. If the act of Congress conferred this power upon them, and they acted within their proper sphere, and did not exceed the jurisdiction thus given, their acts are conclusive upon all parties, and cannot be questioned collaterally, either by a co-ordinate tribunal or by any court of justice. *Wilcox* v. *Jackson,* 13 *Peters' R.* 490.

The act of the 24th May, 1828, gives the Register and Receiver power, and establishes them to be the proper tribunal, to decide upon these claims, 1 *Land Laws, p.* 450; and having such power, their decisions are conclusive. *Nicks' heirs et al.* v. *Rector,* 4 *Ark. Rep.* 490. When we establish that they had jurisdiction of the subject matter, it is enough for our purpose, because, although their proceedings may be irregular, and they may have grossly erred, still their decision is conclusive until reversed. *Elliott* v. *Perisoll et al.,* 1 *Peters Rep.* 340. The act of Congress conferred the *jurisdiction,* and the Commissioner prescribed the *mode or manner* in which that jurisdiction should be exercised. A disregard or departure from the instructions might render the decision erroneous, but not void. For example, our constitution defines the powers of the several courts, and the legislature prescribes the mode of proceeding, but if a court has jurisdiction over the person and subject matter, the judgment will not be void, although the mode of proceeding prescribed by statute may be disregarded. No adjudication, unless absolutely void, can be questioned collaterally.

OLDHAM, J. The pleas of the defendant, to which exceptions are taken, are pleaded in the form of special traverses, but do not possess the essential requisites of that class of pleas. The use and object of a special traverse are explained and defined in *Stephens' Pleading,* 199 *et seq.* It is adopted, *first,* when a simple or positive denial may be improper by its opposition to some general rule of law; and, *secondly,* when the issue of *fact,* upon a common traverse, might also involve an issue of law which it would be desirable to develope and submit to the judgment of the court. The inducement of the special traverse always contains either new affirmative matter, inconsistent with the facts pleaded by the opposite party, or a repetition of the allegations antecedently made by the same party, in some previous stage of the pleading, and confessed and avoided by his opponent. The facts contained in the inducement are pleaded as an argumentative denial of the allegations to which they are opposed, and hence, to avoid the rule against argumentative pleading, the *absque hoc* is introduced for the purpose of a direct and positive denial. If

the inducement be faulty in any respect, as for example, in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse.

The inducement in each of the pleas under consideration contains a direct denial of the breaches assigned in the declaration, and, according to the rule above laid down, would be held bad upon demurrer at common law. The objection, however, we conceive goes to the form and not to the substance of the plea. The inducement being a direct denial, would be a good plea, without the addition of the *absque hoc*. The latter, which is always used for the purpose of direct denial is but a repetition in other words of the inducement. Substantially, the plea twice denies the averment in the declaration, and is bad in point of form, but in substance is a common traverse. We are, therefore, of opinion, that the Circuit Court did not err in refusing the motion for judgment *non abstante veredicto,* and in arrest of judgment.

The Court below properly ruled, that the *onus* of proof under the issues upon the pleas to the first, second, and third breaches assigned in each count of the declaration, was upon the defendant. So this court held in *Logan* v. *Moulder,* 1 *Ark. Rep.,* upon a similar covenant to those declared upon in the present case.

The next question to be considered, is, whether the Circuit Court properly refused the plaintiff's motion for a new trial. Three grounds are assumed in the motion: that the finding of the court was contrary to law; 2, that it was contrary to the evidence; and, 3, that the defendant was permitted to introduce incompetent and illegal testimony. The testimony objected to, consisted of the original affidavits, and the proceedings thereon of the Register and Receiver of the Land-office at Little Rock, in regard to the Lovely claims of Neal and Smoot, referred to in the covenants sued upon, and an extract from the abstract of settlers' claims adjudicated at the Land-office at Little Rock, showing the confirmation and allowance of the claims. The objection made to this testimony is, that, inasmuch as no application is shown to have been made by Neal and Smoot, or any person for them, to enter or locate lands in the Arkansas Land District, the Register and

Receiver at Little Rock were not authorized to administer any oath, or take any affidavit, touching the claims, and had no authority to adjudicate upon them. That to give them jurisdiction, a specific application to locate some particular lands in the district, by virtue of the claims, was necessary.

The act of Congress under which the donations were claimed, provides "that the Register and Receiver of the Land-office to which application may be made to enter the lands, shall be authorized to take the proper testimony of such actual settlement, and subsequent removal, as in cases of pre-emption heretofore granted to actual settlers," &c. This statute does not contemplate a formal written application, designating the particular lands to be located, as a necessary prerequiste to authorize the Register and Receiver to take the proof and adjudicate the claim. The production of witnesses by the claimant, with the request that their testimony be taken, and the claim allowed, was certainly a sufficient application to enter the lands to which the claimant might be entitled in the particular Land District. The claimant had no right to enter any lands until the Register and Receiver should, upon the testimony which he might adduce to them, decide that he was entitled to the benefits of the act of Congress, in consequence of having complied with its requisitions. His right of entry, before a decision by the Register and Receiver, was inchoate, but, upon their adjudication in his favor, became complete, and fully authorized him to make an entry or location of the land claimed according to the provisions of the law under which his interest accrued. It was surely a very useless act, to make an application to locate a particular tract of land as a prerequisite to the jurisdiction of the Register and Receiver, to take the necessary testimony and determine whether the claimant came within the provisions of the act of Congress, and entitled to the land granted by the act. Such, we conceive, was never the practice. We are well satisfied that the Register and Receiver of the Land-office at Little Rock, upon the submission of the proof to them by the claimants, did have jurisdiction, and were fully authorized by law to decide whether they were entitled to the land claimed by them.

It is objected, that the testimony respecting the claim of Smoot,

purports to have been sworn to before the Register only. This objection is not sustained by the record. It purports to have been taken before both the Register and Receiver, but it is not signed by either of them. The proof was taken for the satisfaction of the Land-officers themselves; their action upon it and allowance are fully satisfactory that it was sworn to. The omission to sign it, by the officers, was a mere irregularity, not affecting the validity of their acts or their jurisdiction.

It is also objected to the claim of Neal, that the affidavit of the claimant himself was not taken. The act of Congress does not designate what proof shall be necessary to support the claim, or require the affidavit of the claimant. That is a matter of practice left to the judgment and discretion of the Commissioner of the General Land-office for regulation. Congress, by the act, conferred the right to the claimant, and established a tribunal for its determination, leaving the rules of practice to be prescribed by the Commissioner. The instructions which he issued to the Land-officers, by which they were required to conform their action, could be modified or changed, or portions dispensed with, at his pleasure, to meet the exigencies of particular cases. As a means for the prevention of fraud and imposition upon the government, the Commissioner "advised the Register and Receiver to require of each settler claiming a donation, a detailed statement of all the facts upon which his claim was founded." *Instructions, &c. vol.* 2., 413. But this statement was frequently dispensed with, "when it was found impracticable to procure the settler's affidavit and satisfactory evidence was produced of such impracticability," and, on the 25th of June, 1832, the instructions were so modified, *ib.*, 464. It appears from the proof given in Neal's case, that he was an aged man, and afflicted with disease, and consequently unable to attend the Land-office in person.

The two last objections are, even if well taken, mere irregularities in the proceedings of the Land-officers, not affecting their jurisdiction over the subject matter. By the act of Congress, they were clothed with exclusive authority to determine the rights of claimants to donations under the law. The judgments of a court of exclusive jurisdic-

tion, if within their jurisdiction, are binding everywhere, and cannot be collaterally questioned, however erroneously they may have proceeded. Such judgments are impeachable only in an appellate and revising tribunal, having supervising control over the inferior court. It is not for this court to say that the acts of the Land-officers are void, when within their jurisdiction, because they may have failed to sign an affidavit taken and sworn to before them, or allowed a claim upon testimony which we may conceive was insufficient.

The instructions of the Commissioner, to the Register and Receiver, *vol.* 2, 414, required that the decision in each application should be endorsed under their signatures. In the cases now before us, the Land-officers have endorsed one, "confirmed 11th April, 1829," and the other "examined and confirmed, the 2d of Feb'y, 1832," and signed them officially. These endorsements were made under the directions of the Commissioner of the General Land-office, *Instructions, &c., vol.* 2, 414, and are satisfactory evidence that the decisions were in favor of the right of claimants to the donation granted by the act of Congress to the persons coming within the provision of the act.

The objection urged to the paper purporting to be an extract from the abstract of settlers' claims adjudicated at the Land-office at Little Rock, A. T., under the act of Congress of May, 1828, and Jan., 1829, is, that it is not the best evidence, being but secondary, the records of the Land-office being the primary and best evidence. The *Rev. Stat., chap.* 59, *sec.* 6, enacts that "copies of entries made in the books of any Land-office of the State, or papers filed therein, certified by the Register and Receiver, shall be evidence to the same extent as the original books or papers would be, if produced." The object of this Statute is so obvious that it need not be stated. Under its provisions, such copies are made primary, and not secondary, evidence.

Under our views of the law above expressed, as applicable to the testimony introduced by the defendant, we are of opinion that the evidence offered by him established the issues on his part under the pleas to the first, second and third breaches assigned in each count of the

declaration, and that he was entitled to a verdict upon those issues, unless his proof so given was met and overturned by that on the part of the plaintiff.

It does not appear, from the testimony, that Oakley ever made any application or offer to locate the claims in the Arkansas Land District, in which they had been adjudicated, or that the allowance of the claims, by the Register and Receiver for that office, had ever been set aside. On the 16th of March, 1837, he made a written application, as attorney for Smoot, to locate his claim at the Land-office at Washington, in the Red River Land District; and, on the 23d day of May, 1838, he made a similar application, in the same Land-office, to locate Neal's claim. Action on both applications was suspended, by the Register and Receiver, until the 20th of Nov. 1840, when the applications were refused, and the reasons endorsed by the officers, which were as follows: 1st. Because they were unwilling to act upon copies when the originals were in existence; 2d. Because they were not satisfied with the proof; 3d. Because they had no acquaintance with the claimants or witnesses; 4th. Because they had no knowledge whether the claims were founded in fraud or not.

One of the covenants declared upon, was dated August the 26th, 1834, and the other August the 27th, 1834. At that time the act of Congress and instructions under it most clearly did not authorize the location of a claim in one Land District, upon the proof taken before, and an adjudication made by, the officers of another. The question whether the law authorized the Commissioner to permit such a location, does not arise. The first authority given for such a location, is a letter from the Commissioner, to the Register and Receiver at Washington, dated October 4th, 1836, and induced by a letter received by him from the plaintiff's intestate, upon the subject, perhaps in reference to the claims now under consideration. In that letter, the Commissioner says: "A claim having been proved at any other Land District, will not prevent the location of that claim in your district, if you are satisfied with the testimony already taken; if you are not satisfied with the testimony, additional proof must be made, until you are satisfied." *Instructions, &c., 2 vol.* 527. The claimant, then, by attempt-

ing such a location, waives the decision already pronounced in his favor and submits his claim to a new forum, which is not bound by the previous adjudication upon the proof taken at the first Land-office, which testimony thereby becomes, and has only the force and effect of depositions taken in support of the claim.

Did Woodruff covenant that, should the Commissioner of the General Land-office, at any subsequent time, by instructions, permit locations at one office upon proof taken at another, that Oakley should have the privilege of waiving the adjudications already made in favor of the claimants at the Land-office at Little Rock, withdraw the proof from that office, submit it to another, for a new decision, and that he would be responsible in case it should be rejected? Most certainly not. Woodruff covenanted in reference to the facts, law and instructions, as they stood at the dates of the contracts. His rights are not to be impaired, or his liability extended, by instructions subsequently given, which were not in contemplation between the parties at the time. In the recitals of his bonds, he states that the claims had been proven up at the Land-office at Little Rock; the testimony establishes that fact. He covenants that the donation claims were legal and valid, and that each of the claimants were lawfully entitled to enter therewith the quantity of three hundred and twenty acres of land. The decisions of the Register and Receiver of the Land-office at Little Rock are conclusive upon these points, until annulled and set aside by competent authority. He did not covenant that Oakley might withdraw the testimony from the Land-office at Little Rock, and submit it to the Register and Receiver at Washington, and, in case it should prove unsatisfactory, that he would supply any additional proof necessary to establish the claim in that office. The Land-officers at Little Rock having already acquired jurisdiction of the claims, and decided them in favor of the claimants, his covenants to furnish further proof, should any be necessary, can only be construed to extend to the action of that Land-office. For instance, if the Commissioner should deem the testimony insufficient to warrant the decisions, and require the officers to take additional testimony, that he would furnish it. The decisions made by the Register and Receiver at Little Rock

still remain in full force, have never been reversed, nor has additional proof been required to sustain them. These facts are conclusive upon the issues made up by the pleadings.

There is no doubt, from the testimony, that, had Oakley made application to locate the claims in the Arkansas Land District, it would have been permitted upon the adjudications made in the office for that district. Therefore, when he took the claims to the Land-office at Washington, and applied to enter them in the Red River District, he did so upon his own responsibility, and at his own peril.

We are of opinion that there is no error in the judgment of the Circuit Court, and the same is therefore affirmed.