TAYLOR *vs.* SPEARS.

Assumpsit; defendant pleaded a set-off; plaintiff replied the statute of limitation: defendant rejoined that "in six months after the demand set up in the plea accrued, the plaintiff left the county, and by concealing his place of residence from thence forward, prevented defendant from bringing suit upon the demand:" HELD that the rejoinder was bad, on demurrer, because the 26th sec. of chap. 91, Rev. Stat., under which the rejoinder was drawn, contemplates cases only where the debtor absconds, conceals himself, &c., *before* the cause of action accrues, to deprive the creditor of the full benefit of the statute of limitation.

Where one receives money as agent for another, the cause of action accrues from the time of demand and refusal to pay over, and consequently the statute of limitation runs from the time of the demand, and not from the time the money was received by the agent.

Where papers are read in evidence by a party on a trial, and the opposite party takes a bill of exceptions, undertaking to set out the evidence, it is his duty to insert such pa-

pers in his bill of exceptions, and if necessary the court may compel the party who offers them in evidence to produce them for the purpose. If he neglects to insert them, or have them filed so that the clerk may insert them, it is his own fault, and he must suffer the consequences.

Where such papers have been recorded in the recorder's office, the clerk cannot copy them from thence into the bill of exceptions; the originals, used on the trial, must be copied into the bill of exceptions.

Where it appears from the bill of exceptions, that evidence was produced on the trial, which is not included in the bill of exceptions, the court will presume in favor of the judgment of the court below, that if the omitted evidence had been included, it would have sustained the verdict: the rule being that this court will not review the testimony to determine whether the verdict was just or not, unless the whole of it is put upon the record.

Writ of Error to Jefferson Circuit Court.

ASSUMPSIT by William Spears against Creed Taylor, determined in the Jefferson Circuit Court, at the April term, 1847, before the Hon. WM. H. FEILD, Judge.

The cause has been to this court before; *See Taylor* v. *Spears,* 1 *English's Rep.* 381, where the nature of the action, and the pleadings to that time, are stated in the opinion of the court.

After the cause was remanded, the plaintiff filed a further replication to defendant's plea of the statute of limitation, alleging that the cause of action did accrue to plaintiff within three years, &c. To which defendant joined issue.

The defendant, by leave of the court, filed a plea of set-off, alleging that, on the first day of Jan. 1844, the plaintiff was indebted to him in the sum of $2000, for the purchase of the one-half of defendant's saw mill, which he offered to set off against the cause of action sued for, &c. To this plea, plaintiff replied: 1st. That he was not so indebted, &c.; 2d. That the demand set up in the plea, if it accrued at all. accrued to defendant more than three years next before the institution of this suit; 3. That said demand accrued to defendant, if at all, more than three years next before the filing of said plea of set-off.

To these replications defendant filed:

1st. To the *first* replication a similiter.

2d. To the *second,* a rejoinder that the cause of action set up in the plea did not accrue more than three years before the institution of this suit.

3d. A further rejoinder "that since the said cause of action (set up in the plea) accrued, to wit: in six months after as aforesaid, the said plaintiff, by leaving the county of Jefferson aforesaid, and keeping his residence and location unknown to the defendant ever since, has prevented an action for said cause from being brought against him, and this he is ready to verify," &c.

4th. To the 3d replication, a rejoinder that said cause of action (set up in the plea) did not accrue three years before the filing of said plea, &c.

5th. A further rejoinder, "that in six months after said cause of action (set up in the plea) accrued, the said plaintiff left the county of Jefferson, and kept his residence and location from being known to said defendant ever since, and thereby prevented an action on said demand from being brought against him, and this," &c.

To the second rejoinder to the second replication (numbered 3), and to the second rejoinder to the third replication (numbered 5), plaintiff demurred, and took issue to the others. The court sustained the demurrers; and the cause was submitted to the court, sitting as a jury, upon the issues, and finding and judgment for the plaintiff, for $904.23 damages.

Defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, which the court refused, and he excepted, and took a bill of exceptions as follows:

"Be it remembered, that on the trial of this cause, the plaintiff introduced and read in evidence the following power of attorney from Spears to Taylor (*here insert it*); and the following deed from Spears by Taylor, as attorney, to John D. Mosby *(here insert it);* also swore James Mosby, who produced the following note of John D. Mosby to William Spears *(here insert it),* and then stated that all of the said sum of money in said note mentioned, and interest, had been paid by said John D. Mosby, in his life time, to said Creed Taylor, ex-

cept about seven or eight dollars, which was settled by witness with Taylor in the spring of 1842, and after the 10th of February, 1842. That John D. Mosby died in Dec. 1841, and more than three years before the institution of this suit. Taylor held said note in possession until last payment as aforesaid, when the note was surrendered and given up to witness."

"Thos. N. Byers deposed that he had been retained as attorney by Spears, to collect this demand, and by virtue of it, within a year before the commencement of this suit, demanded of said Taylor the said sum of money and interest, which he refused to pay."

"This was all the evidence in the case. The court rendered a verdict for the whole amount of said note, and interest from the 10th January, 1838. The defendant moved for a new trial," &c.

The defendant brought error. On the return of the writ of error to this court, the plaintiff in error suggested a diminution in the transcript, in this, that the documents read in evidence on the trial in the court below, and referred to in the bill of exceptions, were not included in the transcript. This court awarded a certiorari to the clerk of the court below, who returned a transcript in obedience thereto, with the following statement in reference to the documents referred to in the bill of exceptions:

"The following is a true, correct, and complete copy of the record of the power of attorney from Spears to Taylor, and of the deed from Spears, by Taylor, to John D. Mosby; which said record was *exhibited* in court on the trial of this cause. The originals were never filed in my office, but were private papers, and now, as I verily believe, in the possession of James H. Mosby, a resident and citizen of Jefferson county, Arkansas; as, also, the *note* referred to in the foregoing bill of exceptions, and prayed to be inserted herein, which cannot be done, the same being a private paper not in my custody, nor ever filed amongst the papers of said suit."

Then followed the copy of the record of the power of attorney and deed referred to by the clerk, as above.

Cummins filed an affidavit, stating that he was one of the counsel of Spears in the court below; that the original power of attorney and

deed referred to in the bill of exceptions, were read on the trial, and not the record thereof; and prayed the court to disregard the copies from the record, certified up by the clerk.

RINGO & TRAPNALL, for plaintiff.

CUMMINS, contra.

JOHNSON, C. J. The plaintiff below demurred to the defendant's rejoinders numbered three and five, interposed to his second and third replications to the defendant's plea of set-off. The first rejoinder avers in substance, that in six months after the cause of action accrued upon the contract set up in his plea, the plaintiff left the county of Jefferson, and that by concealing his place of residence ever since, he has prevented him from bringing his suit. The second rejoinder demurred to is substantially the same with the first. These rejoinders are both supposed to have been predicated upon the 26th *sec.* of *chap.* 91, of the *Rev. Stat.* This section provides that, "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the time respectively limited after the commencement of such action shall have ceased to be so prevented." The plain and obvious intention of the Legislature was that the debtor should not have it in his power by leaving the county, absconding or concealing himself, or by any other improper act of his own, before the cause of action accrued, to deprive his creditor of the full benefit of the Statute. The fact that the creditor is allowed the entire period prescribed by the Statute, "after the commencement of such action shall have ceased to be so prevented," affords a strong presumption that it was the design of the Legislature to confine its operation to cases alone where the cause of action had not accrued before the debtor left the county or committed such other improper act, as should prevent a commencement of the suit. If this construction be correct, and that it is, we think will scarcely admit of a doubt, then it is manifest that the rejoinders were insufficient in law to take the contract set up in the defendant's plea

of set-off, out of the operation of the Statute of limitations. The court below, therefore, committed no error in sustaining the demurrers.

The next question raised by the record relates to the sufficiency of the evidence to warrant the verdict. It was held by this court, when the case was here before, (1 *Eng. Rep. p.* 381), that the money having been received by the plaintiff in error as agent and attorney in fact, no cause of action accrued against him until demand made after the receipt of the money and a refusal by him to pay it over.

Thomas N. Byers testified that he had been retained by Spears as attorney to collect the demand, and that by virtue of such retainer, within one year before the commencement of the suit, he demanded the said sum of money with the interest from Taylor, and that he refused to pay it. The cause of action having accrued upon the demand and refusal to pay, the testimony of Byers was fully sufficient to take the case out of the operation of the limitation act. But it is contended that the record affirmatively shows that the evidence was not sufficient to warrant the verdict. The bill of exceptions purports to set out all the evidence adduced upon the trial of the cause, yet it shows upon its face that certain instruments of evidence which are there referred to, are not copied into the bill. Here is an apparent contradiction, and the point to be determined is, whether the defendant in the court below who filed the bill of exceptions and attempted to save the testimony, can now take advantage of this circumstance. We think it clear that it does not lie in his mouth to impeach or question the sufficiency of the testimony in this court. It was his undoubted right, as well as his imperative duty, if he desired to take advantage of any defect in the testimony, to have spread the whole of it upon the record at the time the bill was signed by the judge and incorporated into the record, and if he neglected to do so, but on the contrary, relied upon the clerk to insert it, when he should come to make out his transcript, and that too without having it filed among the papers of the cause, and any thing has since accrued to deprive that officer of the means necessary to enable him to send up a true and perfect copy, he must submit to the consequences of his own negligence. If the documents referred to were actually read upon the trial, and the defendant in the court below discovered any defect

in them and desired to take advantage of it, in this court, he most unquestionably should have spread them out in his bill of exceptions, or at least seen that they were filed with the clerk, and his failure to do so raises a violent presumption that they were all that they purported to be, and that he was willing to rest his case upon some other point in this court. If the defendant below desired to transcribe the instruments referred to, into his bill of exceptions, or to have them put upon the files of the court so as to enable the clerk to do so, he could have easily effected it, during the term of the court at which the judgment was rendered. If the plaintiff read the evidence to the jury and received the benefit of it, the court would upon an application have compelled him to deliver it up to be used in preparing the transcript for this court. This, however, would only apply to such evidence as was capable, in its nature, of being actually filed in the Circuit Court. When the law permits a record either of the same or another court, or of any office, to be used as evidence in a cause, it is not contemplated of course that such records shall be placed upon the files of the court in which the cause is to be tried. In such a case, if the bill of exceptions showed that the record was produced and read upon the trial and that the clerk was directed to insert it into the transcript, it would doubtless be all sufficient for the purposes of the law. The bill of exceptions expressly states that the plaintiff below introduced and read in evidence, a certain power of attorney, a deed and note, and the clerk of the court in his return to the certiorari for a full and perfect record, certifies that the record of the power of attorney and deed were exhibited in court on trial of the cause, and that the originals were never filed in his office, but that they are private papers and that as he believes are now in the possession of James H. Mosby. If the statement in the bill of exceptions be true, and that it is, we are bound to presume, then it is that a copy of the originals themselves should have been sent into this court, and the clerk had no power to send a copy of a copy, which would have been the case had he inserted a copy of the record from the office of the recorder. It is only in cases where the bill of exceptions contains all of the evidence adduced upon the trial that this court is authorized to review it; but where it affirmatively appears that there was other evi-

dence, though the bill may expressly negative the fact, this court is bound to believe that there was other evidence, and that such other evidence was sufficient to warrant the verdict and judgment of the court. The legal presumption in this case is, that had the instruments, which are expressly stated to have been read upon the trial, been inserted in the bill of exceptions, that they would have fully warranted the finding and judgment rendered in the Circuit Court. From this view of the principles governing this case it is clear that the court has no authority to disturb the finding and judgment of the court below. The judgment is, therefore, in all things, affirmed.