BELFOUR & SLOAN *vs.* RANEY, AD'R.

The slave of the Administrator's intestate was taken sick: the mother of the slave, who belonged to another, called the physician who attended the intestate in his last illness, to see the slave: he attended him during his illness: the Administrator was several times present, and saw the physician administering medicine to the slave:—HELD that he was liable for the physician's bill—that having been present and witnessed the attendance of the slave by the physician, and made no objection, it did not lie in his mouth to say he was not employed.

Where the value of the services are not proven, the verdict can only be for nominal damages.

Appeal from the Circuit Court of Lawrence County

Sloan & Belfour, partners in the practice of medicine, brought an action of assumpsit against Raney, as administrator *de bonis non* of Thomas McCarroll, in the Lawrence Circuit Court, and the case was determined at the April term, 1848, before the Hon. JOHN T. JONES, Judge.

The first count in the declaration claimed $102.75, for medical services rendered in 1844, by plaintiffs, to defendant's intestate, while living.

The second count claimed a like sum for services and medicine rendered and administered to Orange, a slave of defendant's intestate, at the request of James McCarroll and Elizabeth Steadman, the original administrator and administratrix of said intestate.

And the third count claimed a like sum for professional services, &c., to said slave, at the request of defendant.

The cause was tried on the plea of non-assumpsit, and verdict and judgment for defendant. Plaintiffs moved for a new trial, which the court refused; they excepted, and set out the evidence, substantially, as follows:

Zack. Roberts, witness for plaintiffs, deposed that in February, 1844, Orange, the slave of intestate, was taken very sick with the winter fever, and continued ill for at least a month and a half. That Dr. Belfour, one of the plaintiffs, a practising physician, attended upon said slave during the whole time he was sick. Witness saw him administering medicine to Orange frequently, and once in the presence of Elizabeth Steadman, then administratrix of defendant's intestate. The slave recovered. Witness did not know whether the doctor was employed by intestate's administrator or not, but saw him often with the slave giving him medicine and directions as a physician.

Mrs. Roberts deposed that Orange was taken sick at Mr. Holderman's in Smithville, and was removed thence to the house of his

mother, a negro woman living in the village, where he remained until his recovery, when he was taken out to Mrs. Steadman's, administratrix of intestate, where he lived. He was very sick a long time, and Dr. Belfour attended upon him. On one occasion she saw Mrs. Steadman present with the doctor to see the negro, and heard them talking together about the case.

Thomas Johnson deposed that Orange was taken sick in February, 1844, and continued ill for two and a half months. Also proved the attendance of Dr. Belfour upon him, and once saw Mrs. Steadman present with the doctor.

And. Jeffrey deposed that on the night Orange was taken sick, Dr. Belfour was at his house, and Mary, the mother of Orange, came for the doctor to go and see him. He went, and attended upon Orange during his illness. Witness also once saw Mrs. Steadman present with the doctor.

James McCarroll deposed, that defendant's intestate died 19th January, 1844, and that Dr. Belfour attended upon him during his last illness—he was sick five or six days, and the doctor attended him day and night. He also stated that Mary, the mother of Orange, belonged to Jackson McCarroll, and kept a cake shop in Smithville. Witness was co-administrator of defendant's intestate, while Orange was sick, and he did not employ Dr. Belfour to attend him. After the death of intestate, Orange was left upon his place, by the administrators, to take care of the stock, goods, house, &c.

The above is the substance of all the material evidence given on the trial. No witness proved the value of the services rendered by Dr. Belfour.

Plaintiffs appealed.

FAIRCHILD, for appellants. The verdict was against evidence and the court should have set it aside and granted a new trial; for the finding of the court against the testimony of James McCarroll alone brings the case within the rule laid down in *Hazen* v. *Henry*. 1 *English Rep.* 86. *Lewis* v. *Read, id.* 428, *and Howell* v. *Webb*, 2 *Ark. R.* 360.

That the court should have granted a new trial, see *Benedict* v.

Lawson, 5 *Ark. R.* 514. *United States* v. *Duval, Gilpin R.* 389. *Wait* v. *McNeil*, 7 *Mass. R.* 261. *Curtis* v. *Jackson*, 13 *Mass. R.* 507. *Hart* v. *Hosack*, 1 *Caine's R.* 25. *Jackson* v. *Sternbergh, id.* 162.

If the court below err in the exercise of its discretion and refuse to admit evidence, which in sound discretion it should have admitted, a new trial will be awarded. *Mercer* v. *Sagre*, 7 *John. R.* 306.

OLDHAM, J. The motion for a new trial should have been sustained. The plaintiff fully proved the rendition of the medical services to the negro man Orange. Although there was no express promise, one was clearly implied from the circumstances. The physician was called upon to visit the patient; having attended the intestate in his last sickness, he might reasonably suppose that he was sent for on the present occasion, without stopping to enquire into the fact. The negro was dangerously sick; it was therefore the duty of the administrator to call in a physician. The physician attended the patient for at least a month and a half (some of the witnesses say longer), and administered medicine in the presence of the administratrix. He was authorized to conclude, from these circumstances, that his services were not only desired by the administrators, but that he was called in to attend the negro by their authority. If such was not the fact they should immediately have given him notice; but after having received his services without objection, they will not be permitted to say they were rendered without request.

The evidence was defective in not establishing the value of the services; in consequence of which the jury would not have been warranted in finding more than nominal damages. The judgment is reversed and the cause remanded for a new trial.