BEEBE *vs.* DE BAUN.

Malice and want of probable cause, are both essential requisites to the maintenance of an action for false imprisonment.

The averment that the defendant received the property from the plaintiff, or some other person, to be re-delivered on request, in the 30th section of the replevin law, prescribing the form for a declaration in the *detinet*, is a mere fiction of law, like the allegation of finding in trover, and need not be sustained by proof.

To maintain replevin in the *detinet*, it is not necessary that the plaintiff should once have had actual possession of the property, and bailed it, &c—the right of immediate possession on the part of the plaintiff, and an unlawful withholding by the defendant, is sufficient.

Nor is proof of demand necessary in all cases—proof of conversion on the part of defendant, or of acts amounting to conversion, will dispense with proof of demand. *Pirani* v. *Barden*, 5 *Ark. R.* 88, reviewed and extended.

In a contest between the maker of a trust deed, and a purchaser of slaves at a sale under the deed, concerning title to the slaves, the maker cannot question the title of the purchaser upon the ground that the slaves were not present at the sale, when it appears that they were absent by his acts.

Nor can he object that the slaves were sold together and not separately, when it appears he was present at the sale, and made no objection to their being sold in that way.

In selling trust property, trustees must follow the provisions of the trust deed, but the maker and beneficiaries may change the terms of sale.

Great inadequacy of price, is a strong badge of fraud, and in many cases will render a sale void, but it may be explained.

In an action for false imprisonment, proof that defendant sued out replevin with capias clause against plaintiff, knowing the property was not in the sheriff's bailiwick, furnishes no evidence of malice, when it appears that plaintiff resided in the county when the suit was brought, and the property was under his control, and kept out of the county by him.

The voluntary dismissal of the suit in which plaintiff was arrested, raises a presumption of malice where there is no probable cause of action, but where defendant had a complete cause of action, the strength of the presumption is greatly diminished.

In such action the record of the original action is competent evidence for plaintiff.

Any evidence going to show that defendant obtained title to the property for which the original action was brought, by fraud, and that the action was malicious, is competent.

Where plaintiff had made a publication about the matters in controversy, and the defendant admitted that the facts stated in it were true, but denied the inferences, the *facts* were competent evidence for the jury.

A paper constituting defendant an agent for a purpose connected with the matter in controversy, is incompetent evidence for the jury, where it is shown that he refused to accept the agency.

Where admissions of a party are introduced, testimony to show that he made them jocularly, is competent.

A party may prove that a witness has sworn differently on a former trial of the same case, after first interrogating him as to the points of difference in his testimony.

As to the law of replevin—trust sales—fraudulent sales—actions for false imprisonment—abstract instructions to juries, &c., &c., &c., &c.

Writ of Error to the Circuit Court of Pulaski County.

This was an action of trespass on the case, for false imprisonment, by James De Baun against Roswell Beebe, determined in the Pulaski Circuit Court, at the October term, 1845, before the Hon. JOHN J. CLENDENIN, then one of the Circuit Judges.

There were three counts in the declaration: the first alleging, in substance, that on the 24th day of April, 1843, Beebe falsely, maliciously and without probable cause or just pretence of action against plaintiff, but for the purpose of causing his arrest and imprisonment, commenced an action of replevin against him, in the Pulaski Circuit Court, for the recovery of certain slaves, (thirteen in number), and sued out a writ of replevin, with a *capias* clause, directed to the sheriff of Pulaski county, and commanding him to replevy said slaves, and in case they could not be found in his county, to take the body of the plaintiff, &c. That at the time defendant sued out said writ, he knew that said slaves were out of Pulaski county by his direction, advice and consent, that the sheriff could not replevy them by virtue of the writ, and that defendant maliciously designed the writ to arrest and imprison the plaintiff. That defendant caused the sheriff to arrest plaintiff by virtue of said writ, and detain him in custody for twelve hours, and that he was forced to give bail in the sum of ten thousand dollars to obtain his release, &c. That afterwards defendant did not prosecute his said suit, but dismissed it in vacation before the clerk. The other two counts were the same as the first in substance, except that they alleged that defendant dismissed said replevin suit at the return term instead of in vacation.

The declaration concluded by alleging that said arrest and impri-

sonment, &c., had caused plaintiff great anxiety of mind, loss of time, expense, and greatly impaired his credit, business, &c., laying his damages at *twenty thousand dollars.*

The case was submitted to a jury on the plea of not guilty, and they returned a verdict in favor of plaintiff for *twenty-five hundred dollars.* Defendant moved for a new trial, which was refused, and he took a bill of exceptions, setting out the evidence, various exceptions to decisions of the court in relation thereto, and the instructions refused and given to the jury, all of which were reserved in the motion for a new trial. So much of the matter contained in the bill of exceptions, as is deemed necessary to a full understanding of the points decided by this court, follows:

On the trial plaintiff offered to read in evidence to the jury the record and proceedings of the replevin suit referred to in the declaration, consisting of the declaration, affidavits, precipe, bond of plaintiff, writ of replevin, the sheriff's return thereto, the bond given by De Baun to procure his release, and the record of the subsequent dismissal of said action by Beebe; to the introduction of which the defendant objected, but the court overruled the objection and permitted them to go to the jury as evidence. Said record and proceedings are set out in the bill of exceptions. The declaration in said replevin suit is in the *detinet,* and follows the form prescribed by the statute, alleging that De Baun received from Beebe the slaves described therein to be re-delivered on request, &c. The affidavits as follows: "Affiant [Beebe] being first duly sworn, states on oath that he is lawfully entitled to the possession of the negro slaves mentioned in said declaration, that the same are wrongfully detained by James De Baun, the defendant therein named, and that his (affiant's) right of action has accrued within two years. Affiant further states that said slaves are the same slaves embraced in a certain deed of trust executed by said James De Baun and Celeste his wife, on the 4th day of Sept., 1841, to Lambert Reardon, William E. Woodruff and George C. Watkins, as trustees, in trust, with power to sell, &c., to pay certain debts in the State and Real Estate Banks in this State, whereon the said Beebe, among others, is endorser and security for said De Baun to a very large amount, to-wit, between seven and eight thousand dollars; that said trustees, pursuant

to the authority vested in them by said deed of trust, after giving due notice of such sale, did proceed to sell in said county, on the 22d day of April, instant, the said negroes among other property embraced in said deed of trust; and at such sale affiant became the purchaser of said negroes, and the legal and rightful owner thereof; that after the execution of said deed of trust, (the same having been acknowledged and recorded in due time and in due form of law), and shortly before the said day of sale as aforesaid, the said James De Baun, in violation of said deed of trust, did secrete or remove said negro slaves, so that said trustees in making said sale could not deliver the same to the person purchasing the same; whereby in effect the operations of said sales, as a means of indemnity to said endorsers and securities of said De Baun in Bank, is defeated, unless said De Baun is forced by legal process to surrender possession of said slaves or give security in the manner required by law; and that owing to the aforesaid wrongful and fraudulent acts of said De Baun this affiant as such security of said De Baun, and as the purchaser at such trust sale, will be greatly and wrongfully injured and damaged unless a writ of replevin with the clause of *capias* be issued." This affidavit was supported by the affidavit of another person, which is set out. The writ contains a capias clause, and it and the bonds of plaintiff and defendant are in the usual form, under the statute. The record shows that Beebe dismissed the suit at the return term, and that judgment was rendered in favor of De Baun for costs.

Plaintiff proved by the sheriff, his deputy, and other witnesses, that he was arrested under said writ of replevin, and detained in the custody of the sheriff between two and four hours; that he was much distressed in mind by the arrest, and being embarrassed in his business, had some difficulty in procuring bail for the large sum required. Plaintiff was a man of family, was engaged in settling up a mercantile business in which he had been engaged, and there were a good many executions against him at the time of his arrest. The deputy sheriff stated he was satisfied the slaves mentioned in the replevin writ were not in Pulaski county at the time the writ issued, but knew nothing of Beebe's knowledge on the subject.

Plaintiff then proved by Vance, that a card shown to witness, was

posted upon his store; that he had two conversations with Beebe, in reference to the card, in the first of which he jocularly remarked that he admitted the facts stated in the card, but denied the inferences drawn from them. In the other he made a similar admission, and his manner was serious. Mr. Prather was present at the first, but no one at the second conversation. Plaintiff then offered to read the card to the jury, defendant objected, but the court permitted so much of it to be read as purported to be a statement of facts, excluding the balance. The portion admitted is as follows:

"The facts are simply these: a short time since, it was suggested to me by my attorney and confidential adviser, George C. Watkins, esq., that the law in relation to slaves was indefinite, and that it was uncertain whether they would be considered as real or personal property. If the former, they would be held subject to some judgments obtained prior to the execution of the deed of trust; if the latter, they might be levied on by the sheriff, and my intentions towards my securities frustrated. Without offering to advise, he intimated to me, pretty broadly, that the only course left for me was to put the property out of the way. To this I assented, feeling satisfied that the other property levied on by the sheriff, was amply sufficient to cover the previous judgments, and also feeling myself under stronger obligations to my securities than to any other class of creditors."

"Beebe, one of my securities, was consulted in every stage of the proceedings, and made himself exceedingly active on the occasion, riding out to my house, and sending his servant frequently with notes, advising me of the arrival and departure of steam-boats; as it had been decided upon between us to send them by land to Pine Bluffs, and thence by water to New Orleans, in the custody of an agent selected by myself. To facilitate this object, Beebe wrote to a friend of his residing on the lake, not far from the city, to receive and aid in disposing of the negroes, offering also to supply $75 in specie, which he actually borrowed for the occasion, in furtherance of the object; and offering the agent a letter of credit in case he should require additional funds. These letters were returned to Beebe at his request, but the fact can be proven on the return of the individual alluded to."

"In the meantime, to satisfy the most incredulous that Beebe was privy to the whole transaction, I happen to have retained a note addressed to me on the subject, which can be seen on application to me. Previous to leaving with the negroes, the agent was provided with a regular bill of sale, and that no suspicion might be excited by my appearing in the matter, Beebe kindly volunteered to get the certificate of the Secretary of State to the document, to give it greater weight abroad; stating, and I believe truly in this instance, that he understood such matters, and could manage them so that the Secretary should have no insight therein. This offer, of course, was accepted."

"Some few days after the departure of the negroes, and while Beebe thought he had fast hold of them, a sale under the deed of trust previously advertised was to come off."

"This sale was to have been made under a written compact entered into by all the beneficiaries under the deed of trust, by which it was agreed, that should the property not sell for something like its real value, it was to be bought in by some person, as agent for the securities, and still held subject to the objects contemplated by the deed of trust. Beebe was, much against my wish, selected as that agent."

"Under the impression that this arrangement was to be carried into effect, Hon. Judge Johnson left the city, and R. W. Johnson, esq., was, by accident, present, but unprovided with means, being under the same impression with his father that the sale was to take place under the agreement to which he and his father were parties."

"At the moment the sale was to have taken place, and not before, Beebe muttered, rather than expressed to me, his intention of not acting under the agreement—said that he had been working all along for others, and now intended to take care of himself. He stated to me distinctly, that neither Judge Johnson nor R. W. Johnson should derive any benefit from the deed of trust."

"It may be as well to state here that the gentlemen last mentioned are my securities to a greater amount than Beebe, and have never expressed or even intimated any uneasiness in regard to it, feeling satis-

fied that whatever I have done, or may do, in this matter will be for their benefit, and not for my own."

"*Little Rock, April 26th,* 1843."

(Signed) "J. DE BAUN."

Plaintiff next offered to introduce as evidence the following "NOTICE," after proving by B. J. Borden, esq., editor of the ARKANSAS GAZETTE, a newspaper published in Little Rock, Pulaski county, that he published it in said paper, and also in hand-bill form, for, and at the request of, Beebe, *to wit:*

"$500 REWARD:—The following described slaves were conveyed by James De Baun and wife by a regular deed of conveyance, executed on the 4th day of Sept., 1841, and duly recorded in the county of Pulaski, in this State, to Lambert Reardon, William E. Woodruff and Geo. C. Watkins, in trust, for the purpose of securing myself and others for certain liabilities incurred as security for said De Baun, and on the 22d day of April, 1843, said slaves were sold at public auction by said trustees, at which sale I became purchaser thereof, *to-wit:* [*here follows a description of the negroes mentioned in the replevin suit.*] The above reward of five hundred dollars will be paid by me for the apprehension and delivery of said slaves, or in proportion for any part of them, to Gen. Wm. H. Overton, at Alexandria, Louisiana, or to James H. Leverich, esq., in New Orleans. Said negroes were removed from this county about two months since, at which time they were in charge of Joseph Merrill, and are believed to be in his possession at this time as the Agent of said De Baun. He will probably endeavor to dispose of them either in that capacity or under a bill of sale from De Baun to him. Said slaves are believed to be in Texas or on their way there; and all persons are forwarned from purchasing or harboring said slaves, under the severest penalties of the law, as they will be taken possession of as my property wherever they may be found. ROSWELL BEEBE.

Little Rock, Ark's, 24th April, 1843."

To the reading of which notice to the jury, the defendant objected, but the court overruled the objection. The advertisement bears date the day the replevin suit was instituted by Beebe against De Baun.

Plaintiff then introduced Lincoln as a witness, who testified that plaintiff applied to him to become his bail in the replevin suit for $10,000, but he refused, because he considered him insolvent. Plaintiff then offered to prove by witness the circumstances of Beebe, and how much he was worth; to which defendant objected. Witness stated that he had no particular knowledge of defendant's property, nor of the amount of his debts; and plaintiff offered to prove by witness, from his general knowledge of defendant's circumstances, how much he was worth after his debts were paid; to which defendant objected, but the court overruled the objection. Witness then said from his general knowledge of defendant's circumstances, he was worth $100,000 after his debts were paid. Cross-examined, he specified some property owned by defendant, but did not know the amount of his debts.

Reardon, a witness for plaintiff, testified that he, Woodruff and Watkins were trustees in a deed of trust executed in September, 1841, by plaintiff to secure his endorsers in Bank. The trustees advertised, and made a sale under the deed on the 22d April, 1843, at the country residence of De Baun. There were about twenty persons present. Thirteen slaves, embraced in the deed, were put up and sold together "in a lump," and defendant became the purchaser at the sum of *one hundred and ninety-five dollars.* The slaves were worth about five thousand dollars—they were not present at the sale—plaintiff and others bid for them. Witness did not remember that any person protested against the sale—the time of the sale was fixed by consent of plaintiff and the trustees. Defendant had notified the trustees to bring the trust to a close as some of the property was perishable, and was diminishing in value, but fixed no time for the sale. On *cross-examination,* witness stated that the sale on the 22d April was agreed on with the consent of plaintiff and all the trustees—and it was the understanding that all the property was to be forthcoming at that time —plaintiff was suffered to bid, and did bid for the property—plaintiff made no objection to the negroes being sold together—all the property embraced in the deed of trust was heavily encumbered by prior liens—the trustees never expected that much of the property would be available, or that any of it would bring any thing except

the personal property, on account of prior liens. In the summer of 1843, plaintiff called on witness, and requested him to see defendant, and propose to him to purchase his title to the slaves for plaintiff; and witness did so. On *re-examination*, witness stated that plaintiff said nothing about the negroes being sold together—plaintiff bid several times for the negroes. Witness understood that Mr. Nicolay bid for plaintiff.

Fitzgerald, a witness for plaintiff, stated that he was auctioneer at the sale—defendant, Nicolay and Lincoln bid for the negroes—did not recollect that plaintiff bid—there were not more than fifteen or twenty persons present at the sale. The negroes were sold "in a lot as they *ran*," or the interest of the trustees under the deed of trust was sold—thinks the terms of the sale was cash—defendant bought the greater part of the property sold.

Wm. E. Woodruff, witness for the plaintiff, testified (as did Reardon) that a sale was advertised to take place under the deed of trust in February, 1843, but was postponed—witness was one of the trustees in the deed. Several days before the time first fixed for the sale, the beneficiaries in the deed entered into a written agreement that some person should buy the property for them. The name of the person was left blank—Mr. Watkins afterwards inserted the name of Roswell Beebe. But Beebe denied his authority to insert his name, and refused to act. Plaintiff and defendant both objected to the insertion of defendant's name in the agreement. Plaintiff here offered to read to the jury said agreement, defendant objected, but the court overruled the objection. The paper is dated 17th January, 1843, is signed by Watkins, Woodruff, Beebe and Benj. Johnson, beneficiaries in the deed, and is an agreement that Beebe should bid in the property for the mutual benefit of the parties to the agreement. Witness stated, on cross-examination, that this agreement had reference solely to the sale that was to have taken place in February.

Witness stated further that but few persons were present at the sale under the trust deed in April—about a dozen. Defendant bought the land and negroes—Nicolay bought the furniture—it was the understanding that he was buying for plaintiff. No personal property was sold but what was present except the negroes. The negroes were

in possession of plaintiff from the time the deed was executed until within a few days of the time first fixed for the sale in February—witness did not know in whose possession they were on the day of sale. Witness believed that plaintiff and defendant entered into an agreement to send the negroes off, and have them sold for the benefit of the beneficiaries in the trust deed—from a conversation he had with defendant, he inferred that he agreed to the removal of the negroes—witness and Watkins had no intimation of it until the negroes were gone. The negroes left a few days before the time fixed for the sale in February. Mr. Watkins was defendant's legal adviser in some cases—he was plaintiff's legal adviser a short time before the sale. Defendant offered to transfer his bids to the trustees for the joint benefit of all the beneficiaries in the trust deed. The sale was fixed for the 22d April by consent of all parties, and plaintiff always said the negroes should be forthcoming on the day of sale—he told witness so subsequent to the time the negroes went away. It was understood at the sale that Nicolay was bidding for the plaintiff—witness saw them frequently consulting together at the sale. It was understood that the negroes were in Pulaski county for some time after they left. Defendant's proposition to give the beneficiaries in the deed the benefit of his bid was made a day or two after the sale. It was not excepted by the trustees—they did not wish to have any further trouble about the business. Some of the securities of De Baun for whose benefit the deed of trust was made were not present at the sale—Judge Johnson was not there. No objection was made to the negroes being sold together.

The proposition of defendant, referred to above, to transfer his bids, was read to the jury, and is as follows:

"If the trustees under Mr. De Baun's deed so desire it, they can have the proceeds arising from the sale of each and all the property, negro slaves and real estate, purchased by me at their sale on 22d April, 1843, to be by them divided *pro rata* among the beneficiaries under said deed. This proposition is made, as I conceive, in justice to all, and offered for their acceptance or rejection.

April 24th, 1843. ROSWELL BEEBE."

Woodruff further stated that De Baun always said he would pro-

duce the negroes when the trustees desired him to do so—there was no demand made on him for the negroes, it being understood that they would be at the place of sale—but the trustees were under the impression for several weeks before the sale, that plaintiff would not produce them.

The sheriff (Lawson) was recalled, and stated that about the 20th April, 1843, he had frequent conversations with defendant about the card of which Vance testified, part of which is copied above, and he admitted the facts stated therein but denied the inferences.

Witness further stated that defendant told him that there had been an agreement between him and De Baun that the negroes should be sent off to a friend of defendant's on the lake, to be sold for the benefit of De Baun's securities, and to keep them out of the way of the sheriff; and that he became distrustful of plaintiff, and then took steps to have the negroes sold. Defendant told him that plaintiff had violated his agreement, and sent the negroes off and sold them for his own benefit, and therefore he considered himself released from the agreement, as plaintiff had sent them in another direction.

Plaintiff then proved by Lawson that a note shown to witness, without date or signature, addressed to De Baun, and giving him some information about the arrival and departure of boats, at, and from Little Rock, was in the hand-writing of Beebe, and that Beebe had told witness that he had written the note to De Baun, and gave him as a reason for it, "that such things had to be done sometimes." Plaintiff then offered to read the note to the jury, and was permitted to do so by the court, the defendant objecting.

Lincoln, recalled, stated that he was at the trust sale, and bid for the negroes.

Here the plaintiff closed.

Prather, a witness for defendant, testified that he and Vance were sitting on a box at Vance's store door, and had just read the card or publication of plaintiff when defendant came along, and Vance observed—"there comes Beebe, let us have some fun out of him!" Vance, in a jocular manner, asked defendant, as he was passing, if that was some of his financiering? Defendant made some reply, witness did not recollect what, but whatever it was, was said in a jocular

way. But the court excluded the testimony of Prather, defendant objecting.

Plaintiff offered to prove that on a former trial of the case, Vance had testified that he had but one conversation with defendant about the card, and that defendant had said that he admitted a *portion* of the facts contained in it, but denied the inferences drawn, and that Vance was unable to point out what portion of the card he admitted to be true, but the court excluded the testimony.

Rutherford, deputy clerk of the U. S. District Court for Arkansas, testified that plaintiff had not applied for the benefit of the bankrupt act, nor had his creditors petitioned to have him declared a bankrupt.

Defendant then read in evidence a deed of trust made by De Baun and wife, on the 4th Sept., 1841, to Woodruff, Reardon and Watkins, as trustees, conveying to them, for the indemnity of themselves, Beebe and others, as his securities in sundry debts which are enumerated, a large number of tracts of land, town lots, the thirteen negroes mentioned in the replevin suit, and other personal property, and giving the trustees the power of making a private or public sale of the property, on request of any of the beneficiaries, &c.

Defendant also read to the jury a deed for said slaves (and lands) made to him by the trustees in said deed of trust, reciting a sale under the trust deed in pursuance of its provisions, dated 24th April, 1843.

Defendant next read to the jury the notice given by the trustees of the time, place and terms of the trust sale, after proving by the editor of the Arkansas Gazette, published at Little Rock, that the notice was published in his paper. The editor also testified that the following notice was handed to him by Fowler, the attorney of the parties whose names are signed to it, with instructions to insert it in the Gazette, with the notice of the trust sale, which was done:

"To Lambert Reardon, William E. Woodruff, and George C. Watkins, trustees, and purchasers at their sale advertized in this paper, and to all others concerned in the real estate and slaves of the said James De Baun—TAKE NOTICE—That the records of the Circuit Court of Pulaski county, show that Gray & Bouton recovered a judgment against the said De Baun on the 23d of March, 1840, for

about $2,137.89, and costs; and that Lewis Beach recovered judgment against said De Baun and Thomas Thorn, on 27th of March, 1840, for $1,988.50, and costs; which judgments are a lien upon all the real estate mentioned in said deed of trust. And that on the 13th Feb'y, 1841, said De Baun executed to Whiting and Slark, of New Orleans, a mortgage upon the lots in Little Rock, described in said deed of trust, to secure the payment of a debt of $5,836, and interest; and on the 26th of same month, executed another mortgage upon said lots to Bernie & Burnside, of New Orleans, to secure a debt of $6,290.22, and interest. Now take notice, at your peril, that at the proper time, if necessary, we shall file bills in chancery to compel said trustees, judgment creditors, and purchasers to pay off and satisfy said judgments out of the other real estate mentioned in said deed of trust, and to protect said lots so mortgaged to us, exclusively for the payment of said last mentioned debts in their order, as we have a right so to do by the settled rules of equity in such cases." Signed by Whiting & Slark, Bernie & Burnside, by their attorney, A. Fowler, and dated Little Rock, April 12, 1843.

Defendant then read to the jury a number of mortgages executed by De Baun, and the records of judgments recovered against him, showing a heavy incumbrance of his real estate at the time said deed of trust was executed.

George C. Watkins, witness for defendant, stated that the deed of trust, and the deed from the trustees to defendant, were submitted by defendant, before the replevin suit was brought, to Ashley & Watkins, in their office, and they advised him that upon these papers he could maintain replevin for the negroes in question.

He stated, on cross examination, that he considered defendant a man of strong mind, with but little education. He had, from experience, a good knowledge of the land laws of the United States, but witness did not consider him a good lawyer—he knew but little of the forms of legal proceedings—he was far above the ordinary average of intelligence in his knowledge of the law. Witness was attorney for plaintiff in a majority of his cases up until a short time prior to the 22d April, 1843—from the course plaintiff pursued, he then found it necessary to separate himself from him. Ashley & Watkins

were the attorneys of the trustees, and advised them from time to time in regard to the business—when witness advised defendant that he could maintain the action of replevin in question, he was aware that the trustees had never had actual possession of the negroes, and that defendant had not. He did not know whether the negroes were in the county of Pulaski or not. Witness was aware of the manner in which the negroes had been sold—that they were sold together, and were not present at the sale—of the circumstances attending the sale, and of the price defendant paid for them. The declaration in the replevin suit in question was in the hand-writing of defendant, signed by Ashley & Watkins—defendant copied it from a form in their office, drawn by witness or his clerk. The other papers in the replevin suit were in the hand-writing of witness. Defendant sometimes drew up legal papers from forms in the office of Ashley & Watkins, when they were pressed with business.

Here defendant rested.

The bill of exceptions contains much more testimony introduced by both parties, which might have had some effect with the jury one way or the other, but the above is the substance of all the evidence deemed necessary to an understanding of the points decided by this court.

On motion of the plaintiff, the court instructed the jury as follows:

"1st. That to maintain this action, it is only necessary for the plaintiff to show, first, that there was no reasonable or probable cause for the institution of the replevin suit, and the arrest and imprisonment by virtue thereof; second, that such suit was maliciously instituted; third, that the suit was terminated."

"2. That *prima facie* testimony will suffice to show a want of probable cause."

"3d. That if the jury believe from the evidence that said replevin suit was voluntarily dismissed by Beebe, without any trial thereof, it is *prima facie* evidence of a want of probable or reasonable cause, and must stand good, unless rebutted on the part of said Beebe, by showing affirmatively that there was reasonable or probable cause for the suit."

"4th. That to enable said Beebe to maintain the said replevin suit, it was necessary that there should have been at some previous time, an actual delivery by said Beebe, or some person for him, to said De Baun, of said negroes, and a refusal by De Baun to surrender the same."

"5th. That an action of replevin is designed for the recovery of specific personal property, and the proper action by which the possession of personal property can be obtained."

"6th. That probable or reasonable cause applies to the nature of the suit, and the defendant's knowledge and *bona fide* belief that such suit was well founded, and could be sustained."

"7th. That the advice of an attorney will not furnish any justification to the defendant, in an action for malicious arrest or prosecution, unless the same is asked in good faith and given *bona fide* on a full statement of the facts; and unless such opinion is well founded in point of law, and given with an honest belief that the cause of action was well founded: and that whether such advice was so asked and given, and followed, is a matter of fact for the consideration of the jury."

"8th. That fraud in fact is a question for the consideration for the jury, and may be shown by proof expressly; and that if the jury are satisfied, from the testimony, that the said Beebe purchased said slaves through fraudulent conduct on his part, the deed made by the trustees to Beebe may be disregarded as it regards said negroes."

"9th. That the arrest and detention of a person against his will, by virtue of process in the hands of an officer, amounts, in contemplation of law, to an imprisonment of the person, whether he is actually taken to the jail or not."

"10th. That in assessing the damages in this case, the jury can take into consideration the situation, circumstances, feelings and condition of the plaintiff, at the time of the arrest, the time of imprisonment, the circumstances attending it, the amount of bail required, difficulty in obtaining bail, the expenses and trouble that the plaintiff was put to by reason of such arrest, and give such damages, from one cent to the amount claimed in the declaration,

as the jury, under the circumstances, may think the plaintiff entitled to."

To the giving of each and all of which instructions, the defendant objected, but the court overruled the objection, and defendant excepted.

The defendant moved the following instructions:

"1st. That in order for the plaintiff to maintain this suit, it is necessary for him to have proven, first, the issuing of the original writ of replevin, and the proceedings thereon; second, the arrest of the plaintiff under said writ; third, the termination of that suit of replevin; fourth, malice and want of probable cause on the part of said defendant in causing said arrest; fifth, the damages sustained by said plaintiff by occasion of such arrest; and unless the jury are satisfied from the evidence that all these requisites have been proven and established, they are bound by law to find for the defendant."

"2d. That unless the jury are satisfied, from the evidence, that the want of probable cause in instituting said suit of replevin has been substantially proven by the plaintiff, they are bound to find for the defendant."

"3d. That unless the jury are satisfied from the evidence, that the said defendant was actuated by malicious motives, in instituting said action of replevin, they are bound to find for the defendant."

"4th. That in order to maintain this action, proof of malice alone in instituting the action of replevin will not sustain this action, but want of probable cause for instituting that suit, must also be substantially proved."

"5th. That if the jury believe from the evidence, that the defendant had the legal title to the negroes in question, and the right to the possession of them, and that they were in the possession or custody of the plaintiff, and that defendant was advised by counsel that he could maintain the action, and acted under such advice in good faith, it is sufficient probable cause for the institution of the action of replevin, and the jury are bound to find for the defendant."

"6th. That the deed of trust from De Baun and wife to the trustees, and the deed from the trustees to the defendant, in the absence of any evidence to the contrary, vested the legal title and

ownership of said negroes in the defendant, and authorized him to maintain an action of replevin for said negroes."

"7th. That, in law, proof of inimical feelings between the plaintiff and the defendant is not sufficient for the plaintiff to maintain this action, unless it has been proven that the said action of replevin was instituted from malicious motives."

"8th. That if Beebe had a cause of action for said negroes, and filed the proper declaration and affidavit, and gave the proper bond, he was entitled to a writ of replevin for the negroes, with a *capias* clause therein, whether the negroes were in the county of Pulaski or not."

"9th. That if the jury believe from the evidence, that Beebe was entitled to the negroes at the time he instituted the replevin suit, they should find for defendant in this case, notwithstanding he may have been actuated by malicious motives."

"10th. That in the absence of any proof to the contrary, the sale of the negroes by the trustees to Beebe was valid, notwithstanding the negroes were not present at the sale."

"11th. That if the defendant had a right to maintain the action of replevin for the negroes, it is a sufficient showing of probable cause for bringing the suit, which is not rebutted by the subsequent dismissal of that suit alone."

"12th. That, by law, in order for Beebe to have maintained the action of replevin in question, it was not necessary for him to have been in possession of the negroes in question, at any time before the bringing of that suit, but it was sufficient for him to have had the right to the possession of the negroes at any time within the period of limitations prescribed by law."

"13th. That by law the plaintiff is not entitled to recover any special damages on account of the arrest, if the jury should believe from the evidence that it was malicious and without probable cause, except such damages as are alleged in the declaration, and proven in evidence, to have been sustained by him."

"14th. That if the jury believe from the evidence, that De Baun was injured by the publication of Beebe, that, by law, if that publication be false, plaintiff has an ample remedy therefor by an action

for slander or libel, and he is not entitled to recover damages therefor in this form of action; and if that publication be true, he is not entitled to recover damages therefor in any form of action."

"15th. That under the facts disclosed in this case, the deed of trust from De Baun and wife was not void, or a conveyance to defraud creditors, within the meaning of the bankrupt law, of the 19th of August, 1841, and that even if it was, De Baun could not take advantage of it in this action."

"16th. That the admissions of a party made to a friend, in unguarded circumstances, is the weakest of all testimony; and that admissions shown to have been made by Beebe, are not conclusive upon him, but are liable to be rebutted by other circumstances appearing in evidence."

"17th. That when the witnesses are shown by their own testimony, to have become inimical to Beebe, since the time of the alleged admissions in conversation, it is in law a circumstance which goes to their credibility, and the jury are bound to give it such weight as in their judgment it is entitled to, in connection with other circumstances."

"18th. That if the jury believe, from the evidence, that De Baun was in any manner party or privy to the sending or conveying off the negroes specified in the deed of trust, so as to place them beyond the reach of the trustees, at the sale on the 22d April, 1843, it was an act of fraud of which he can take no advantage in this suit, to invalidate the title of Beebe to the negroes in question, acquired by purchase made under that sale."

"19th. That if the jury should also believe, from the evidence, that Beebe was in any manner party or privy to any agreement with De Baun, to send or carry off the negroes specified in the deed of trust, the effect of which was to place them beyond the reach, or out of the control, of the trustees, at the sale on the 22d April 1843, it was an act of fraud which might vitiate the title of Beebe to the negroes in question, in any contest as between Beebe and any of the other securities or creditors of De Baun, but that it would not, in law, vitiate the title of Beebe to the negroes in question, acquired by purchase at that sale, in any contest as between Beebe

and De Baun, and that De Baun cannot question the title of Beebe so acquired."

"20th. That if the jury believe, from the evidence, that the sale on the 22d April, 1843, was fixed and agreed on, with the consent or approbation of said De Baun, after he had removed said negroes, and at the same time agreed or gave the trustees to understand that the negroes in question should be forthcoming for sale on that day; and that he, either in person or by his agent, or friend for him, bid on the negroes when offered for sale by the trustees on that day, and interposed no objection to the sale of said negroes; or that he subsequently offered to purchase the title of Beebe, acquired by purchase at that sale; all or any one of these acts, would in law amount to a ratification or recognition by De Baun of the title of Beebe so acquired."

"21st. That if the jury believe, from the evidence, that the negroes, specified in the deed of trust, when last heard from, were in the possession of De Baun, or under his control, and that he removed them for any cause, so that the trustees, or any one claiming under them, could not acquire the possession of them; those acts raise the presumption in law, that De Baun has converted the negroes in question to his own use; and unless he rebuts such presumption, by showing in evidence the application of the negroes or the proceeds of them, in accordance with the stipulations of the deed of trust, while any of the debts intended to be secured by it remain unpaid, he is in law guilty of a fraud upon the rights of his securities named in the deed of trust, and he cannot object in this suit to any defect of title in said trustees, or the purchaser of them at said sale, to said negroes, on account of their having been so removed."

"22d. That in the sale of personal property by trustees, or individuals, it is not necessary for the title to pass, that the property should be actually present at the sale; and that the title of Beebe to the negroes in question, is not impaired by that circumstance alone."

"23d. That upon the construction of the deed from the trustees to Beebe for the negroes in question, the legal effect of the power of at-

torney annexed thereto (*a*) is to vest in Beebe a right of action for said negroes, or the value thereof, to the same extent that the trustees may have had such right of action, independent of any question whether the sale itself to Beebe was valid or conferred any title upon him."

"24th. That if the jury believe from the testimony, that De Baun was present at the sale of said negroes on the 22d April, 1843, and did not object to the sale of the negroes, or the title of the trustees to them, because they were not present, or because they were offered for sale together in one lot, and not separately, the title of Beebe as far as De Baun is concerned would not be invalidated by the fact that the negroes were not present at such sale, or by the fact that they were sold together and not separately."

"25th. That the legal effect of the mortgages executed by De Baun to the Real Estate Bank, to Whiting & Slark and Bernie & Burnside, and of the judgments recovered by Gray & Bouton, Lewis Beach, Jessup & Beers and Daniel Ringo, prior to the execution of said deed of trust, was to constitute said mortgages and judgments prior liens upon the real estate conveyed in said deed of trust, and unless said prior liens are shown in evidence to have been extinguished prior to the sale on the 22d of April, 1843, the purchaser of said real estate at such sale will be presumed to have purchased the same charged with said prior incumbrances." (*b*)

"26th. That if the jury believe from the evidence, that Beebe never consented to act under any agreement to purchase in the property for the benefit of the securities, or that De Baun never consented for Beebe to act, such agreement was not binding on Beebe; and if they also believe that such agreement was broken up or abandoned on the 25th of February, 1843, the proceedings at the subsequent sale on the 22d of April, 1843, and the validity of Beebe's title then acquired, will not be impaired thereby."

(*a*) At the end of the deed, it was recited that De Baun had fraudulently removed the slaves beyond the control of the trustees prior to the day of sale, and Beebe was authorized and empowered to do any and every act that the trustees could lawfully do for the recovery of said negroes, and to use their names, if necessary, in his judgment, as such trustees, for that purpose, for his use and benefit. REPORTER.

(*b*) The mortgages and judgments here referred to were read in evidence. Beebe bid off the real estate at one hundred and one dollars. REPORTER.

"27th. That if the jury believe from the evidence, that De Baun was aware of any fraud or mismanagement of the trust prior to the sale on the 22d April, 1843, it was his right and duty to have called upon the interposition of the court of chancery to compel the due execution of the trust."

"28th. That if the jury believe from the evidence, that De Baun removed the negroes in question, and sold or converted them to his own use, beyond the jurisdiction of this State, it was not necessary for the trustees, or Beebe claiming under them, in order to recover in the original action of replevin, to have proven any special demand upon De Baun for the negroes, but that the removal and conversion of them De Baun, would, upon proof thereof, dispense with any proof of special request."

"29th. That if Beebe had a right to the negroes, he had probable cause for instituting the action of replevin, and that that is the legal meaning of the term *probable cause;* that the question is not whether Beebe had probable cause to believe that the negroes were within the county of Pulaski, but it is whether he had title to the negroes, and cause of action against De Baun in respect thereof."

"30th. That transitory actions, such as replevin, may be brought either in the county where the defendant is found, or in the county where the property may be found; and if the jury believe from the evidence, that the action of replevin in question was instituted by Beebe within two years after his right of action had accrued, and that De Baun had had possession of the negroes in question at any time within that period, the right of Beebe to recover said negroes or the value of them in that action of replevin, would not be defeated by the fact that the negroes were not in De Baun's actual possession at the time of the commencement of the suit, or by the fact that the negroes were not in the county of Pulaski at that time, if Beebe had in other respects a cause of action therefor."

The court refused to give the 12th, 13th, and 28th of the foregoing instructions, and gave the others, to which refusal defendant excepted.

Defendant brought error.

WATKINS & CURRAN, for the plaintiff. This is an action of trespass on the *case,* and not *trespass.* This distinction is material to be attended to. *Case,* for a malicious prosecution or malicious arrest, lies for the abuse of valid process; but for an arrest under process void in itself, or issued by a court having no jurisdiction, *trespass* is the proper and only remedy. If the affidavits in the original replevin suit are not sufficient, under the provisions of the act of 3d February, 1843, to abolish imprisonment for debt in civil cases, to authorize the issuance of a writ, by which the defendant could be arrested, then the writ in that case was void, and the present action is misconceived and should have been trespass and not case, and the decision on this writ of error would rest here. 2 *Dev. N. Car.* 370, *Allen* v. *Greenlee.* 2 *Term Rep.* 231, *Morgan* v. *Hughes.* 3 *Serg. & Rawle* 139, *Allison* v. *Rheam.* 12 *Serg. & Rawle* 210, *Berry* v. *Hammill.* 3 *Wilson* 341, *S. C.,* 2 *W. Black.* 845. 11 *Gill & Johnson* 86, *Warfield* v. *Walter.* 3 *Term Rep.* 185, *Belk* v. *Broadbent.* 1 *Chitty Pl.* 152. 2 *Saund. Pl. & Ev.* 651. *Stephen Pl.* 17. 19 *John. Rep.* 375, *King* v. *Pierce.* 3 *Hawk's N. Car.* 545, *Williams* v. *Hunter.* 2 *Con. Rep. (by Day)* 700, *Luddington* v. *Peck.* 1 *Leigh N. P.* 548-9. 6 *Munf. Va. Rep.* 110. 1 *Spear's S. Car.* 238, *Fripp* v. *Martin.* 9 *Dana* 480, *Boyce* v. *Walker.* 8 *Dana* 270, *McIsaacs* v. *Hobbs.* 1 *Petersdorf's Ab.* 194.

The *gist* of the action for malicious arrest or prosecution, is the want of probable cause, and this must be substantially proved. Malice must also be proved, but this may be inferred from circumstances, and sometimes from the entire absence of probable cause, but want of probable cause must be expressly proved, and cannot be inferred from the most express malice, nor will malice be inferred from the mere apparent or *prima facie* want of probable cause. 1 *Greenleaf Ev.* 89. 2 *Phillips Ev.* 256. 2 *Starkie Ev.* 493; *ib.* 488. 4 *Greenleaf Rep.* 226. 5 *Iredel N. Car.* 83. 1 *Wend.* 140; *ib.* 345. 7 *Cowan* 281. 8 *Cowan* 141. 7 *Cowan* 715. 10 *John. R.* 106. 6 *Wendall* 418. 3 *Hawks.* 66, *Plummer* v. *Gheen.* 2 *Leigh N. P.* 1287.

What constitutes probable cause is purely a question of law for the

court to decide; the facts which go to show probable cause, or the want of it, must be ascertained by the jury; where the facts are controverted, it becomes a mixed question of law and fact. Upon the supposition that certain facts are proved as claimed by either party, it is the duty of the court to instruct the jury, whether they do or do not constitute probable cause. Where conflicting testimony is to be weighed, the evidence must go to the jury to be passed upon by them, but still under the instruction of the court as to the law of the case. But where the facts are conceded or clearly ascertained by the evidence, which show probable cause, the court may refuse to submit the cause to the jury, or under our practice instruct them to find for the defendant, as in case of non-suit. And it is error for the court to refer to the jury any question of law, as to what constitutes probable cause. 2 *Wendall* 424, *Masten* v. *Deyo.* 3 *Ben Monroe* 4—8, *Farris* v. *Starke.* 4 *Munford* 59, *Crabtree* v. *Horton; ib.* 462, *Maddox* v. *Jackson. N. Car. Term Rep.* 123, *Leggett* v. *Blount.* 3 *Hawks* 66, *Plummer* v. *Gheen.* 2 *Leigh's N. P.* 1291, *and cases there cited; ib.* 1293. 2 *Selwyn P. P.* 1061. 1 *Peters Ct. Ct. Rep.* 210, *Ray* v. *Law.* 3 *Washington Ct. Ct. Rep.* 31, *Munns* v. *Dupont et al.* 12 *Petersdorf Ab.* 399, *case* 3.

Probable cause, means a probable cause of action, and not a probable cause for any particular *form* of action. The question of probable cause is not affected by any technicality as to the form of the action. If this were not so, a party who had a cause of action against another, and caused him to be arrested in an action of debt, when covenant or assumpsit was his proper remedy, would be precluded from showing probable cause. In this case the question is, had Beebe a cause of action against De Baun in respect of the negroes, and not whether he could or could not, upon technical grounds, have maintained the particular form of action which he adopted. The negroes were never found or replevied under the writ, and the gist of the complaint is, not that Beebe sued De Baun in respect of the negroes, but that he maliciously abused the process of the law, in causing him to be arrested. Beebe had his election to bring replevin, detinue, or trover for the negroes, and upon a similar showing the same arrest of which De Baun complains, might have been made under any of

those forms of action. The case of *Wills* v. *Noyes,* 12 *Pick.* 324, followed in *Stone* v. *Stevens,* 12 *Con.* 231, does not conflict with the principle here contended for. In that case, a vessel was replevied by a party who only claimed to be a part owner, but who in fact failed to show any title whatever, from the possession of the defendant, who was conceded to be a co-owner, and under peculiar circumstances of damage and aggravation. The court justly held that there was no probable cause for replevying the vessel, but when they go beyond the facts of the case, to enunciate a general principle applicable to all cases, that probable cause is confined to the particular form of action, their decision becomes a mere *obiter dictum.* Probable cause, *ex vi termini,* applies to the cause of action and not to the form of action. 2 *Leigh Nisi Prius* 1294. 7 *Carr. & Payne* 511, *Whalley* v. *Pepper.*

We insist that the court below erred in overruling the motion of Beebe for a new trial, and will notice the errors of which he complains, as nearly as practicable, in the order in which they occur in the bill of exceptions:

1. The court below permitted De Baun to read in evidence to the jury, certain portions of his own card or hand-bill, and this upon improbable testimony, that Beebe had, in conversation with the witness, admitted the facts of the publication, but denied the inferences contained in it; whereas in justice to Beebe, the whole of the publication ought to have been read, to explain the portions that were read, and in the portions that were admitted, the facts and inferences were inseparably blended together. That such admissions are the weakest of all testimony, vide *Greenleaf Ev.* 235. 3 *Scammon* 534-5, *Mason* v. *Parke.*

2. The court below permitted De Baun to read in evidence to the jury the printed notice of Beebe, in which he offered a reward of $500.00 for the negroes. This notice had no connection with the arrest, and contained nothing in the nature of a libel against De Baun, and could only have been offered to prejudice the case, and for the purpose of showing that Beebe knew the negroes were not in the county of Pulaski, and was therefore actuated by malice, as it states

that the negroes "are believed to be in Texas or on their way thither." Beebe's right of action for the negroes, did not depend upon whether the negroes were in the county of Pulaski or not. Replevin is not a local action or a proceeding *in rem,* but is a personal and transitory action. 1 *Chitty Pl. p.* 111. In all cases where the Circuit Court has jurisdiction, the action may and must be brought in the county where the defendant is found, and this jurisdiction over the person could not be diverted even by an act of Assembly. *Dillard* v. *Noel,* 2 *Ark.* 456. This court have uniformly held, from *Gilbraith* v. *Kuykendall,* 1 *Ark.* 50, to the present time, that personal service upon the defendant is necessary to vest the Circuit Court with jurisdiction, or authorize a judgment by default; and in *Pirani* v. *Barden,* 5 *Ark.* 90, this was directly decided concerning the action of replevin.

3. The court below admitted testimony as to how much Beebe was worth, offered to enhance the damages, and instructed the jury that they might in their discretion give vindictive or exemplary damages, and the facts of the case show that the damages assessed, by the jury, are in any view of the case excessive and enormous. The testimony of this witness was a mere surmise or estimate, and was inadmissible because he did not profess to have that knowledge of Beebe's circumstances necessary to enable him to speak with the requisite certainty. We submit that the alleged injury to De Baun was neither enhanced or diminished by the wealth or poverty of Beebe, and that in the action on the case for malicious arrest, the weight of authority and reason is, that the party can only recover damages for such consequential injuries as are alleged in the declaration, and shown in evidence to have been sustained by him, and that such damages are, in contemplation of law, a compensation to him, and not designed as a punishment of the defendant, which could only be attained in a criminal proceeding. 2 *Leigh N. P.* 1296, 1298, 1301. 9 *Con. Rep.* 154, *Riley* v. *Gourley. Peake Ev.* 350. *Buller N. P.* 13. 4 *Taunton* 7, *Sinclair* v. *Eldred.* 21 *Eng. Com. Law* 479, *Webber* v. *Nicholas.* 13 *Eng. Com. Law,* 389, *Jenkins* v. *Biddulph.* 1 *Starkie* 306, *Sandbuck v. Thomas.* 1 *Leigh N. P.* 597

et seq. and cases there cited. 1 *Saunders Pl. & Ev.* 352; 2 *ib.* 663. 2 *Starkie Ev.* 499. 2 *Greenleaf Ev.* 219; *ib.* 372. 3 *Mason Ct. Ct. Rep.* 107. 12 *Petersdorf Ab.* 411.

The case of *Tripp* v. *Thomas,* 3 *Barn. & Cress.* 427, the only case cited by Greenleaf and Starkie, in support of the position, that in actions for malicious prosecution, the jury in the absence of proof of special damages, are not confined to nominal damages, does not in any respect sustain the position. That was an action on the case for *words spoken,* imputing *subornation of perjury,* which were actionable *per se,* and imply damages, without proof of special damage, and for that reason, after default and inquiry of damages, assessed to £40, the court refused to set aside the inquiry of damages.

4. The court below permitted De Baun to read in evidence the agreement (among the beneficiaries under the deed of trust) dated 17th January, 1843. The evidence shows that it was signed in blank, and that the name of Beebe was inserted, against the protestations both of himself and De Baun, and never could be obligatory on Beebe.

5. The court below excludes the testimony of Prather, offered by Beebe, to prove that the conversation or one of the conversations between Beebe and the witness who testified as to Beebe's admission of the truth of De Baun's card or hand-bill, was jocular and so understood by that witness, and also excludes the testimony of persons present at a former trial of this cause, offered by Beebe to prove that the same witness produced by De Baun, testified to facts other and different from what he then testified, it being proved that the witness since the date of the alleged conversations had become inimical to Beebe.

6. The court below gave the 2d instruction asked for by De Baun, that *prima facie* testimony would suffice to show a want of probable cause. By this instruction the whole question of law as to what constituted probable cause, and a *prima facie* showing of the want of it, was referred to the jury.

7. The court below gave the 3d instruction asked for by De Baun, that the dismissal of the original replevin suit by Beebe, without a trial, is *prima facie* evidence of want of probable cause, unless rebut-

ted by him. The negroes not having been replevied, and De Baun being utterly insolvent, the fair inference from the testimony is, that Beebe had no motive to incur further costs in the prosecution of the replevin suit. The security given by De Baun upon his arrest under the writ of replevin, was nothing more in effect than a mere bail bond, for his personal appearance, according to the decision of this court, in *Chandler* v. *Byrd,* 1 *Ark.* 155, and for all practical purposes this security was unavailing, as held in *Newton* v. *Tibbetts,* 2 *Eng.* 151. Upon the instruction abstractly considered we submit the true rule to be, that the *nol. pros.* or dismissal (which is not like a retraxit, or confession of no cause of action, that might preclude any further suit for the same cause) are evidence that the original suit or prosecution has terminated, but not alone sufficient to show a want of probable cause. 4 *Taunton* 7, *Sinclair* v. *Eldred.* 4 *Barn. & Cress.* 21 *Nicholson* v. *Coghill.* 1 *Starkie N. P. Case* 50, *Bristow* v. *Hayward.* 6 *Wendall* 418. *Littell Sel. cases* 7, *Frowman* v. *Smith.* 2 *Wendall,* 427, *Masten* v. *Deyo.* 3 *Espinasse* 7, *Smith* v. *McDonald; ib.* 165, *Leigh* v. *Webb.* 1 *Peters Ct. Ct. Rep.* 210, *Ray* v. *Law.*

8. The court below gave the 4th instruction asked for by De Baun, that in order for Beebe to have maintained the replevin suit, it was necessary there should have been an *actual delivery* of the negroes by Beebe, or some person for him, to De Baun, and a refusal by De Baun to surrender them, and refused the 12th instruction asked for by Beebe, that in order to have maintained his action of replevin it was not necessary for him to have been in possession of the negroes, before the bringing of that suit, but it was sufficient for him to have the right to the possession, at any time within the period of limitation. It is clear that for the plaintiff to maintain replevin it is not necessary that he should have had actual possession of the property. 2 *Ark.* 323—326, *Wilson* v. *Royston.* 7 *John. Rep.* 142, *Pangburn* v. *Patridge.* 3 *Wendall* 280, *Dunham* v. *Wycoff.* 1 *Wendall* 109, *Marshall* v. *Davis.* 4 *Scammon* 449, *Amos* v. *Sinnott.* 15 *Maine Rep.* 48, *Pickard* v. *Low; ib.* 373, *Ingraham* v. *Martin.* 4 *Mo. Rep.* 95, *Skinner* v. *Stone.* 1 *Term Rep.* 480, *Smith* v. *Miller.* 19 *Maine Rep.* 281, *Ayeres* v. *Hewit.* 4 *Bibb.* 518, *Smart* v. *Clift.*

2 *Saunders Rep.* 47, *a. n.* 1, *Wilbraham* v. *Snow.* 2 *Murphy* 357, *Cummings* v. *McGill.* 8 *Gill & John.* 399, *Clary* v. *Frayer.* 3 *New Hamp.* 184, *Kimball* v. *Adams.*

9. The court below gave the 5th instruction asked for by De Baun, that replevin is the *proper action* by which the possession of specific personal property can be obtained, and also the 6th instruction asked for by him, that probable cause applies *to the nature of the suit* and the plaintiff's knowledge and bona fide belief that such suit was well founded and could be maintained. The 5th instruction is not law unless we do away with the action of detinue, and the two taken together, if meant to convey the idea that Beebe had not probable cause, unless he could have recovered in that particular action or *form* of action without reference to his *cause* of action or *title* to the negroes, are opposed to one of the fundamental rules which govern this action.

10. The court below gave the 7th instruction asked for by De Baun, that the advice of counsel was no justification to Beebe, unless it was asked and given in good faith, on a full statement of the facts, and unless such opinion *was well founded in point of law,* and that whether *such advice* was so asked and given, and followed, *is a question of fact for the jury.* The inquiry whether the advice was asked and followed in good faith is a question of fact for the jury; and so it may be for the jury to inquire whether a full and fair statement of the facts of the case was submitted to counsel, but the jury cannot consider as a question of fact, whether the opinion of counsel is well founded in law. The principle asserted by this instruction, that the opinion of counsel must be well founded in point of law, is not law. No such question can be presented for the court, much less the jury to determine. When it is shown that a party acted in good faith under the advice of counsel, his justification rests there and is made out. It is the opinion and not the correctness of it, which establishes probable cause. 2 *Starkie Ev.* 499-500. 2 *Greenleaf Ev.* 374-5. 9 *Eng. Com. Law Rep.* 225, *Ravenger* v. *McIntosh.* 2 *Eng. Com. Law* 485, *Snow* v. *Allen.* 1 *Eng. Com. Law* 107, *Hewlett* v. *Crutchly.* 3 *Mason Ct. Ct. Rep.* 107. 12 *Petersdorf Ab.* 403, *case* 12.

11. The court below gave the 8th instruction asked for by De Baun, that fraud in fact is a question for the consideration of the jury, and if the jury are satisfied from the testimony that Beebe purchased the slaves *through fraudulent conduct on his part,* the deed made by the trustees to him may be disregarded, and considered as conveying no title as it regards the negroes. So far as this instruction referred to the consideration of the jury the whole question of law as to what *fraudulent conduct* consisted in, it is a violation of the rules of law, and the rights of suitors. It is impossible to ascertain what view the jury took of the law, or to reverse their judgment if they erred. But we insist that there is not in the whole case any proof upon which such, or any instruction, as to fraudulent conduct on the part of Beebe, in the purchase of the negroes, could be based. Upon the facts disclosed in the bill of exceptions, Beebe acquired good title to the negroes certainly as against De Baun. To show that Beebe's purchase was valid, and conferred a cause of action not only against De Baun, but his vendees, in case he had sold the negroes, we refer to 5 *Ala. Rep. (New Series)* 424, *Foster & Goree, and cases there cited.* 7 *Ala. Rep.* 190, *Haynes* v. *Crutchfield.* 8 *Gill & Johnson* 399, 420, *Clary* v. *Frayer.* 3 *Haywood Tenn. Rep.* 10, *Russel* v. *Stinson.* 5 *Blackford* 137, *McClure* v. *McCormick.* 3 *Smedes & Marshall* 515, *Tooley* v. *Gridley.* 1 *Gilman* 446, *Day* v. *Graham.* 11 *Johnson* 566, *Livingston* v. *Byrne.* 1 *Baldwin Ct. Ct. Rep.* 164, *Burr* v. *McEwen.* 2 *Sumner Rep.* 211, 214, 217, *The Brig Sarah Anne.*

The deed of trust was not void under the policy of the bankrupt act of 1841, because it was executed before the act went into operation (but decisions as to this conflicting, collected in 5 *Law Reporter)* and because De Baun did not apply and was not petitioned against in bankruptcy, *Proctor's trustees* v. *Wadsworth,* 3 *Ben. Monroe* 403, and because De Baun himself could not in any event take advantage of the fraud, *Ewbanks* v. *Dobbs,* 4 *Ark.* 173.

All the authorities cited for De Baun to show that the sale made by the trustees was void, because the property was not present at the sale, apply to sales of personal property under *execution.* The provision intended for his benefit may be waived by the defendant.

As to mere inadequacy of price, see Livingstone v. Byrne, 11 John. 566. Story's Equity 206-7-8, 241, 249.

Every case cited for De Baun, to show that fraud can be taken advantage of to vitiate a title, are cases where the fraud was relied upon by an innocent or third party upon whom or against whom the fraud had been practiced, except the case of *Nellis* v. *Clark,* 20 *Wend.* 24, and we might rely upon that case to show that the maxim contended for by De Baun, *in pari delictu, melior est conditio defendentis,* does not apply in this case. Because, tested by the opinion of the majority of the court in that case (aside from the dissenting opinion of *Bronson, C. J.),* Beebe's purchase of the negroes was an executed and not an executory contract. He had paid the consideration and received the bill of sale, and we might refer to every work on contracts to show that the contract was executed. Beebe's purchase was of the negroes and not of a chose in action, 2 *Sumner Rep.* 211. In such case he had a right of action against De Baun not to enforce an executory contract, but to gain the possession of property, as a mere incident to an executed contract. De Baun himself is utterly precluded, by his acts before, at and after the sale, from objecting to the title acquired by Beebe.

The trustees in this case had a power coupled with an interest, because they were themselves beneficiaries under the deed, and even supposing Beebe to have been a trustee, he would have had a right to bid at the sale; see *Prevost* v. *Gratz,* 1 *Peters Ct. Ct. Rep.* 373.

12. The court refused to give the 28th instruction asked for by Beebe, that if the jury believed from the evidence that De Baun removed the negroes in question, and sold or converted them to his own use, beyond the jurisdiction of this State, it was not necessary for the trustees, or Beebe claiming under them, in order to recover in the original action of replevin, to have proven any special demand upon De Baun for the negroes; but the removal and conversion of them by De Baun would, upon proof thereof, dispense with any proof of special request.

The refusal of the court below to give this instruction was doubtless predicated upon the opinion of this court, in the case of *Piranı* v. *Barden,* 5 *Ark.* 81. The court in that case held that in the action

of replevin in the *detinet* the declaration must contain the allegations prescribed in the *form* laid down in the Revised Statutes, and that that *form* is not a mere fictitious mode of stating the complaint or cause of action, like the bailment in detinue or the casual finding in trover, but are material averments and must be substantially proved; in other words, the court decide that replevin in the *detinet,* under the Revised Statutes, will only lie in cases of *"actual or constructive bailment."*

We submit that even under this decision, Beebe was entitled to recover, as De Baun was the bailee of Beebe, and the possession of De Baun was consistent with and not adverse to the deed of trust, *Foster* v. *Goree,* 5 *Ala. Rep.* 424. And although the court, in *Pirani* v. *Barden,* hold that the formal allegation of *request* or *demand,* in replevin in the *detinet* must be proved, yet when it appeared in evidence that De Baun had removed the negroes beyond the jurisdiction of the court, and sold or converted them to his own use, it dispensed with proof of demand, because the law does not require any man to do a fruitless or unavailing act, as in trover, or the notice to the drawer or endorser under the law merchant.

But we contend that Pirani v. Barden, so far as it decides that under our statutes, replevin in the detinet only lies in cases of actual or *constructive* (?) bailment, and that the plaintiff must prove a *special* request, is not law. And first, we say, that after the court ascertained (the judgment being by *default*), that there was no personal service upon *Pirani,* and under the repeated decisions of this court, a *void* judgment for want of jurisdiction, the decision should have rested there, and the disquisition beyond that was mere *obiter dicta.*

The court in Pirani v. Barden (decided in 1843) rely mainly upon the case of *Marshall* v. *Davis,* 1 *Wendall* 109, (decided in 1828), for an exposition of the New York Statute. It is true, that our Revised Statutes (of 1839) relative to this action are a literal copy of the New York Revised Statutes (of 1836), but Marshall v. Davis was decided with reference to the Statute then in force. That was an action in the *cepit,* and the defendant pleaded *non cepit,* and the plea was held good because his possession was peaceable from the bailee of the plaintiff, and therefore not tortious. The court in that case concede the

doctrine laid down in the authorities there cited, that there may be a tortious taking to sustain replevin as well from the *constructive* as from the *actual* possession of the plaintiff, but their decision turns upon the ground that the defendant acquired the property from the bailee of the plaintiff, and in ignorance of his right "the bailee pro-"fessing to be the owner of the horse, and to have the right of dis-"posing of him," and in such case the court say that the plaintiff's remedy is in detinue or trover, and that replevin or trespass will not lie; and this is the distinction taken by this court in the case of *Trapnall* v. *Hattier,* 1 *Eng.* 18, to the extent that replevin in the *cepit,* will not lie in such case, under our Statute. But the court in *Marshall* v. *Davis, p.* 114, *per Savage, C. J.,* say they approve the doctrine in *Massachusetts,* "that as a general principle the owner of a "chattel may take it by replevin from any person whose possession "is unlawful, unless it is in the custody of the law, or unless it has "been taken by replevin from him by the party in possession, *per* "*Parsons, C. J., in Bailey* v. *Stubbs,* 5 *Mass.* 284. And if the ques-"tion were new in this State, I should be strongly inclined to hold "the doctrine of the Massachusetts Court, correct, particularly under "our statute to prevent abuses and delays in actions of replevin (1 "Rev. L. 91), by which it is enacted 'that if any beasts, goods and "'chattels of any person at any time hereafter be taken *and* wrong-"'fully detained, the sheriff, by writ of replevin, &c. shall cause the "'same to be replevied.'"

Our statute of replevin, (Rev. Stat. p. 659), sec. 1, provides that, "whenever any goods or chattels are *wrongfully taken or wrongfully* "*detained,* an action of replevin may be brought by the party hav-"ing *the right of possession,* and for the recovery of damages sus-"tained by reason of the unjust caption *or* detention;" and if the court in Pirani v. Barden had referred to the later decisions in New York, they might have discovered the construction given to their statute, of which ours is a copy. In *Holbrook* v. *Wright,* 24 *Wend.* 178, (decided in 1840), the court say, "although this is "an action of replevin in the detinet, we have chosen to follow the "counsel on the argument, and treat it as an action of trover. We "have therefore looked to see whether enough was proved to estab-

"lish a conversion. In this sort of action, however, which merely "goes for a wrongful detention, 2 R. S. 430, sec. 1, ib. 435, sec. "36, the ground of action may not always be precisely the same, as "if trover had been brought. It seems to bear a nearer resem- "blance to detinue, where the requisite evidence may not, in every "case, be so strong as would be necessary to make out a conversion. "All three of the actions, however, depend on very nearly the "same evidence, both for the prosecution and defence, where "the receipt of the goods was originally lawful." And the court say, p. 179, "Again, the sale or pledging of goods by a bailee is "in itself a conversion. No demand would be necessary in trover, "nor do I believe it would in replevin, although the declaration "must, by sec. 36, of the statute, aver a request in all cases of "wrongful detainer. A request is considered as made, by bringing "an action where there is a precedent duty to deliver." See also, *Cummings* v. *Vorce,* 3 *Hill* 282. *Barrett* v. *Warren, ib.* 348. *Pattison* v. *Adams,* 7 *Hill* 127. In Pirani v. Barden, this court say, "The 30th section of our statute is intended to embrace the "whole class of bailments, where the defendant holds possession "after request. And * * * * not only should there be an averment "of such delivery, but also of a *special* request or demand for the "return of the property. A different rule of construction would "involve the absurdity of subjecting every bailee to an action of "replevin before demand of the property or refusal to deliver the "possession." The form given in the 30th section of the statute, is not of a special but a general request. As every man is liable to be unjustly sued, we presume the court must have meant, that in such a case it would be an absurdity for the plaintiff to recover. In *Pierce* v. *Van Dyke,* 6 *Hill* 614, which was replevin in the *detinet* for a note, the court, *per Bronson, J.,* say, "The demand of the "note was of no avail, for the reason that it was made after the "suit had been commenced, by delivering the writ to the sheriff to "be served. This presents the question whether the action could "be maintained without a previous demand. It is settled that re- "plevin in the *detinet* as well as the *cepit* will lie for a wrongful "taking; and in that case no demand is necessary. *Cummings* v.

"*Vorce,* 3 *Hill* 282. Hannah Sharpe took the note tortiously and "delivered it to the defendant. Trespass or replevin in either form "might have been brought against her. Will it lie against the "defendant? In *Barrett* v. *Warren,* 3 *Hill* 348, we held that a "demand was necessary before an action could be maintained "against one who purchased the goods *bona fide,* or received them "as a bailee without any fault on his part from a wrong doer. "But it is enough for the plaintiff to show his title and the original "tortious taking. The burden then lies on the purchaser or bailee "to show that he came to the possession of the property for a lawful "purpose, and in perfect good faith." This brings us to the true rule laid down in numerous cases cited below. And that is, that in replevin in the *detinet,* the *gist* of the action is, the plaintiff's right to the property, and his right to the immediate possession, and this he must prove. If it turns out in evidence to be a case of bailment, undetermined, then the plaintiff is not entitled to the immediate possession, and must fail. If it be a case of bailment which could only be determined by a special demand before suit brought, the plaintiff must prove such demand. In all other cases the judicial demand by suit is sufficient. As it regards the previous decisions of this court, the case of Pirani v. Barden is in the face of all of them. *Gray* v. *Nations,* 1 *Ark.* 557. *Wilson* v. *Royston,* 2 *Ark.* 326. *Robinson* v. *Calloway,* 4 *Ark.* 100. *Conway et al. ex parte,* 4 *Ark.* 338; *ib.* 386. The authority of *Gray* v. *Nations* and *Wilson* v. *Royston,* in our favor, is strengthened by the fact, that they originated before the adoption of our Revised Statutes, and were actions in the cepit, as replevin in the detinet was unknown to our territorial statutes. The elaborate case of *Conway et al. ex parte,* was a bill brought by the assignees in trust of the central board of the Real Estate Bank, seeking to be put in possession of the assets of the Principal Bank at Little Rock, and turned upon the point now under consideration, whether if replevin would lie, the trustees had an adequate remedy at law. The possession of the assets of the bank by the local board of directors, was not only peaceable but lawful, and they never were in any sense the bailees of the trustees. *Ringo, C. J.,* in his dissenting opinion, page 386,

says, "By the action of replevin they (the trustees) could obtain the "immediate possession of the books, and perhaps of the various choses "in action and other papers." And he bases this right upon the naked legal title, vested in them by the deed of assignment, supposing it to be valid. And the majority of the court, on page 338, broadly admit that replevin would lie in such a case, but argue that chancery still had jurisdiction, because owing to the multiplicity of the notes, books, and papers, replevin would not afford them an easy or adequate remedy.

It would follow, from *Pirani* v. *Barden,* that replevin in the detinet could only be maintained where there is a privity of contract by bailment between the plaintiff and defendant. And as replevin in the *cepit* will only lie where there is a tortious taking, in all cases where the chattel comes peaceably into the possession of a third party, for a valuable consideration, real or pretended, the owner can only resort to detinue or trover, a remedy wholly inadequate (he may, indeed, bring a bill in chancery), where the specific chattel is peculiarly valuable to him, or the defendant irresponsible. Such a rule, if established, would nullify the universal maxim of *caveat emptor* in the acquisition of personal property, and establish the doctrine that the title is changed by the *tort,* and force the owner to the sale of his property by giving him no other election than to recover its value in damages.

On the contrary, it was clearly the intention of the statute, after guarding the action of replevin, by the affidavit of the plaintiff, his bond with security, and a short period of limitation, to extend it as a beneficial remedy to all cases where the owner of a chattel can show that he is entitled to the immediate possession of it. The action of replevin, as a common law remedy, has been so enlarged in *Massachusetts, Pennsylvania* and *Maine,* without the aid of any statute, and in other states by statutes similar to ours; and in every State where such a statute has been passed, it has uniformly received the construction for which we now contend. 3 *Scammon* 582, *Hudson* v. *Maize; ib.* 566, *Updike* v. *Armstrong.* 2 *Blackford* 174, *Chinn* v. *Russell.* 4 *Scammon* 440, *Amos* v. *Sinnott.* 8 *Metcalf* 278, *Walpole* v. *Smith; ib.* 550, *Thayer* v. *Turner.*

16 *Mass.* 147, *Baker* v. *Fales.* 3 *New Hampshire* 184, *Kimball* v. *Adams.* 4 *Greenleaf* 315, *Seaver* v. *Dingley.* 16 *Serg. & Rawle* 301, *Reile, adm'r.* v. *Boyd.* 8 *Gill & John.* 398, *Clary* v. *Thayer.* 13 *New Hamp.* 286, *Brown* v. *Fitz.* 14 *Maine Rep.* 415, *Lathrop* v. *Cook.* 15 *Maine Rep.* 373, *Ingraham* v. *Martin.* 19 *Maine Rep.* 281, *Ayeres* v. *Hewitt.* 20 *Maine Rep.* 288, *Wingate* v. *Smith.* 3 *Mo. Rep.* 333.

13. Upon the evidence and the various instructions which the court below did give on behalf of Beebe, the jury were bound to have returned a verdict in his favor. In this State, following the decision in *Danley* v. *Robinson's Heirs,* 3 *Ark.* 144, the settled practice is, to bring up all the errors of law upon a motion for new trial; consequently the whole record is before the court, not merely to determine whether the verdict could be justified by the testimony, but whether the court below erred in any matter of law, as to the improper admission or rejection of testimony, or the improper giving or refusing instructions.

S. H. HEMPSTEAD, contra. 1. Trustees are bound to act with the same discretion, as in their own affairs, and the very nature of the office demands that the trust property should be sold under every possible advantage, and with a fair and impartial attention to the interests of all parties concerned. *Lewin on Trusts* 367. *Ord* v. *Noel,* 5 *Mad. Chy. R.* 440. *Anonymous,* 6 *Mad.* 11. *Mortlock* v. *Bullock,* 10 *Ves.* 292. *Hill* v. *Buckley,* 17 *Ves.* 394.

And the more necessary is it, in a case like this, where the trustees were unrestricted, and possessed the power to sell the trust property at public or private sale. They seem to have acted as if Beebe was sole beneficiary, and authorized to speculate on the misfortunes of De Baun, and sacrifice the other beneficiaries. The execution of the trust is a proper subject of inquiry, as it regards the title of Beebe, and if he was guilty of fraudulent conduct, he acquired no title.

In sales of personal property, it is absolutely necessary that the property should be at the place of sale, so that it may be inspected and examined, and bidders enabled to form an estimate of its value.

And where it is not present, no title passes by the sale, and the sale is utterly void, because to sanction such sales would open a door to innumerable frauds. *Sheldon* v. *Soper,* 14 *J. R.* 353; *Jackson* v. *Striker,* 1 *J. C.* 287; *Cresson* v. *Stout,* 17 *J. R.* 116; *Linnendoll* v. *Doe,* 14 *J. R.* 222; *Woods* v. *Monell,* 1 *J. C. R.* 503; *Green* v. *Green,* 9 *Cow.* 46; *Allen on Sheriffs* 171; *Smith* v. *Pope's Heirs,* 5 *B. Mon.* 337; *Greenleaf* v. *Queen,* 1 *Peters* 138.

And, upon a like principle of public policy, sales of personal property, in the gross or lump, when susceptible of division, are void, and especially when attended with other suspicious circumstances. *Lawrence* v. *Speed,* 2 *Bibb* 404; *Allen on Sheriffs* 171; *Rowley* v. *Brown,* 1 *Bin.* 62; *Sheldon* v. *Soper,* 14 *J. R.* 353; *Groff* v. *Jones,* 6 *Wen.* 522.

The object of all sales is to obtain for property the best market price, and when it is not present to be pointed out to, and examined by bidders, or when present and sold in a lump, when it can be sold separately, must necessarily produce such shameful sacrifices and open such a wide door to fraud, that courts and jurists have well held such sales void, as being in contravention of justice, fair dealing and public policy.

The sale in question, forcibly illustrates the necessity of this doctrine. THIRTEEN NEGROES UNINCUMBERED, PROVED BY THE OATH OF ONE OF THE TRUSTEES TO HAVE BEEN WORTH FIVE THOUSAND DOLLARS, WERE SOLD IN A LUMP, AND WHEN THEY WERE NOT EVEN IN THE STATE, FOR THE PITIFUL SUM OF ONE HUNDRED AND NINETY-FOUR DOLLARS, NOT FIVE PER CENT. ON THEIR VALUE, AND BEEBE WAS THE PURCHASER! Surely it is a case without parallel in the annals of jurisprudence, and to give it the slightest sanction would be to invade the first principles of justice. It is a case of fraud without the possibility of explanation: the circumstances prove it so conclusively, that they would outweigh, as in *The Short Staple,* 1 *Gallison* 104, positive testimony against it. It was a contract that no just man could accept, and if it is adjudged valid, I cannot conceive any transaction that would be vitiated by fraud.

Fraud is a proper matter to be submitted to a court of law and in-

vestigated by a jury, and may be, and, indeed, generally is, proved by circumstances. Fraud will invalidate in a court of law as well as in a court of equity, and annul every contract, conveyance, or act infected with it. *Gregg* v. *The Lessee of Sayre,* 8 *Peters* 244; *Lessee of Swayze v. Burke,* 12 *Peters* 11; *Shackleford* v. *Purket,* 1 *Marsh.* 425; *Jackson* v. *Burgott,* 10 *J. R.* 457. These were all actions of ejectment. Lord MANSFIELD said, in *Cadogan* v. *Kennet, Cowp.* 434, that the principles and intent of the common law as now universally known and understood, were so strong against fraud in every shape, that the common law could have attained every end effectuated by the statutes of Elizabeth. And in *Bright* v. *Eynon,* 1 *Burr,* 395, the same eminent judge declared, that fraud or covin will, in judgment of law, avoid every kind of act. *Boyden* v. *Hubbard,* 7 *Mass.* 112; *Fermor's Case,* 3 *Co.* 77; *Fleming* v. *Slocum,* 18 *J. R.* 403; *Ridell* v. *Murphy,* 7 *Serg. & R.* 230; *Lazarus* v. *Bryson,* 3 *Bing.* 53; *Gilbert* v. *Hoffman,* 2 *Watts* 66; *Stevens* v. *Sinclair,* 1 *Hill* 143; *Crary* v. *Sprague,* 21 *Wend.* 41; *Jackson* v. *Crafts,* 18 *J. R.* 111; *Babcock* v. *Booth,* 2 *Hill* 181; *Hall* v. *Perkins,* 3 *Wend.* 626; *Stutson* v. *Brown,* 7 *Cow.* 732; *Gist* v. *Frazier,* 2 *Lit.* 119; *Deatly's Heirs* v. *Murphy,* 3 *Marsh.* 479; 1 *Story's Eq.* 199; *Lessee of Rhodes* v. *Selin,* 4 *Wash.* 715; *McPherson* v. *Cunliffe,* 11 *Serg. & R.* 422.

But even if the negroes had been sold in the usual manner, the gross inadequacy of the price would alone be sufficient to destroy the validity of the sale. Where peculiar relations exist between the parties, such inadequacy must necessarily furnish the most vehement evidence of fraud. 1 *Story's Eq.* 250; *Wright* v. *Stanard,* 2 *Brock.* 314; *Newland on Contracts* 357; 1 *Story's Eq.* 198; 2 *Littell* 118; 5 *Ben. Monroe* 590; 2 *Marsh.* 125; 2 *Ves. Senr.* 155-516; 2 *J. C. R.* 23. The civil law annuls sales of property where less than one half of the value is given. *Nott* v. *Hill,* 2 *Ch. Cas.* 120; 1 *Story's Eq.* 251; 2 *Kent's Com.* 477.

2. But it is said that if Beebe was guilty of fraud, De Baun was just as deeply involved in it. Now, allowing this to be as true as it is unfounded, I reply by saying that it will not help Beebe at all, but rather injure his case, since a *particeps criminis* may retain as

against his equally guilty companion, any advantage he has acquired, or which his situation affords him. *He may not only hold money unjustly obtained, but retain in absolute right, property which would otherwise be subject to redemption.* In both cases, right is out of the question, and he stands not on any merit of his own, but derives a negative protection from the *incompetency of his adversary,* to be heard or countenanced in a court of justice. The law leaves the parties to a fraudulent contract where it found them, and will not afford either any kind of remedy against the other, to shift the loss; change the condition of the parties, or equalize benefits or burthens. *Austin* v. *Winston,* 1 *Hen. & Munf.* 42. *Bartle* v. *Coleman,* 4 *Pet.* 189. *Armstrong* v. *Toler,* 11 *Wheat.* 258. *Jackson* v. *Garnsey,* 16 *J. R.* 192. *Bolt* v. *Rogers,* 3 *Wend.* 157. *Holman* v. *Johnson, Cowp.* 341. *Willes* v. *Baldwin, Doug.* 433. *Briggs* v. *Lawrence,* 3 *T. R.* 341. *Wiggin* v. *Bush,* 12 *J. R.* 309. *Cockshot* v. *Bennett,* 2 *T. R.* 763. *Jones* v. *Read,* 3 *Dana* 540. *Waller* v. *Niles,* 3 *Dev.* 519. *Wright* v. *Wright,* 2 *Litt.* 8-12. *Deatly* v. *Murphy,* 3 *Marsh.* 476. *Nellis* v. *Clark,* 20 *Wen.* 26. *Greenwood* v. *Curtis,* 6 *Mass.* 381. *Collins* v. *Blantern,* 2 *Wils.* 347.

There can be no difference, *in point of remedy,* between an *executory* and an *executed* contract, which is fraudulent, as it respects the parties to it. The law will not allow the former to be executed, through the intervention of courts of justice, nor will it render any aid to change the condition of the parties under the latter, so as to give a particeps criminis any right or advantage over his companion. *"Both, it will be perceived,"* says Justice COWEN, in *Nellis* v. *Clark,* 20 *Wen.* 29, *"depend on the principle laid down in several books from which I have cited, and others to be noticed, that the law will not lend itself to aid either party: such is the common law."* And this doctrine is most fully sustained by Lord MANFIELD, in *Holman* v. *Johnson, Cowp.* 343. "If, from the plain-"tiff's own stating or otherwise," says he, "the cause of action "appears to arise *ex turpi causa,* or the transgression of a positive "law of this country, there the court says he has no right to "be assisted. It is upon that ground the court goes; not for the

"sake of the defendant, but because they will not lend their aid to "such a plaintiff. So, if the plaintiff and defendant were to change "sides, and the defendant were to bring his action against the plain- "tiff, the latter would then have the advantage of it, for where both "are equally in fault, *potior est conditio defendentis.*"

Smith v. *Hubbs,* 1 *Fairf.* 71. *De Groot* v. *Van Duzer,* 20 *Wen.* 393-400-404-405.

All contracts and agreements made in contravention of the common law, or in opposition to the provisions of statute law, or which have for their object any thing repugnant to justice, are void. *Comyn on Contracts* 53. 4 *J. R.* 434.

Contracts which are infected with fraud are void, both at law and in equity, for the basis of all dealings ought to be good faith. *ib.* 57. And no matter whether the object be to deceive the public or third persons, or one party endeavors to cheat or take some advantage of the other, the effect is the same, since the law will not sanction dishonest views and practices, by enabling an individual to acquire, through the medium of fraudulent conduct, any right or interest. *Chitty on Contracts* 678 *(a).* Nor can a fraudulent agreement be confirmed by any subsequent declarations or acts by which its fairness is acknowledged. *Duncan* v. *McCullough,* 4 *Serg. & R.* 483. *Dingley* v. *Robinson,* 5 *Greenleaf* 127.

"A confirmation of a void thing avails nothing." 3 *Com. Dig., title Confirmation, D.* 1.

CHITTY, in his Treatise on Contracts, page 680, lays down the following pertinent rule on this subject, viz:

"Where the contract has for its object and condition, a fraud on a third person, and both the parties to the agreement are guilty of the fraudulent intention, it is not permitted to either of them to *found* a claim on such contract in a court of law." *Jones* v. *Yates,* 9 *Barn. & Cress.* 538. 4 *Man. & Ry.* 621.

It follows, inevitably, that even conceding what is not true, that De Baun was a particeps criminis, instead of the dupe of Beebe, still the latter would not be allowed any remedy whatever against him, in any court, or in *any form of action.* De Baun *was in possession of the negroes, and was defendant;* and it was not in the

power of Beebe to change that possession from De Baun to himself, or recover the value of the negroes, or compel De Baun to account to him in any manner whatever. *The law left him where it found him;* he was utterly without remedy—he could not sue at all, and it would have been competent for De Baun, in any suit, to set up the fraud for the purpose of showing that it was a case in which the law ought not and could not move at all. *Wiggins* v. *Bush,* 12 *J. R.* 307. *Nellis* v. *Clark,* 20 *Wen.* 31. Supposing De Baun to have been a particeps criminis, the only advantage he could have, was derived from the principle, *in pari delicto potior est conditio defendentis,* and if Beebe had obtained the possession of the negroes from the trustees at the sale, the condition of the parties would have been changed, and he would have been protected by the same principle of law, if De Baun had been the plaintiff in the replevin suit instead of himself. No sophistry can evade the force of the argument—it is conclusive of the question, that the replevin suit and the arrest were without probable cause, and aggravated by the deepest malice.

I feel confident there is no case on record, of an injury perpetrated with so little semblance of justification.

But the counsel on the other side, while they are obliged to admit that a fraudulent *executory* contract will not be enforced, yet contend that one that is *executed,* entitles a party to all necessary legal remedies against a particeps criminis. It is sufficient to say, that all the elementary treatises on contracts, numberless adjudged cases in the highest courts upon the precise point, as well as the principles of morality, have incontrovertibly established a different doctrine.

If the argument is worth anything, it amounts to this, that an executed contract by some kind of incomprehensible agency, is freed from the taint of fraud, and authorizes either party to demand all the remedies which belong to honest suitors who approach the temple of justice with clean hands. As long as the taint of fraud is upon it, no court will touch it. On their argument, what becomes of the maxim, *in pari delicto potior est conditio defendentis?* What becomes of the numerous decisions, as old as the common law itself, that no right can be derived through fraud, and that it will vitiate the

most solemn contracts and judgments, and, further, that courts will deny all remedy and withhold all aid from either party, no matter whether the contract is executory or executed? The object of the law is to suppress fraud; but to allow a party to avail himself of legal remedies to obtain the fruits of his iniquity, would strike me as a novel mode to effect that object!

I say in point of remedy there is no distinction between executory and executed contracts which are fraudulent or illegal. In both, the hands of the parties are tied, and the indignation of courts of justice falls alike upon both. This is fully shown in the cases of *Nellis* v. *Clark,* 20 *Wen.* 26, and *Smith* v. *Hubbs,* 1 *Fairf.* 71. In the latter the court said—"Whatever the parties to a contract have *executed* "for fraudulent or illegal purposes, the law refuses to lend its aid to "enable either party to disturb. Whatever the parties have fraudu- "lently or illegally contracted to execute, the law refuses to compel "the contractor to execute or pay damages for not executing, but in "both cases leaves the parties where it finds them. The object of the "law in the latter case is as far as possible to prevent the contem- "plated wrong, and in the former to punish the wrong-doer by leav- "ing him to the consequences of his own folly or misconduct."

The voluntary dismissal or discontinuance of a suit is *prima facie* evidence of the want of probable cause. *Burhans* v. *Sanford,* 19 *Wen.* 417. The dismissal of a warrant by a magistrate in a criminal prosecution has the same effect. *Williams* v. *Norwood,* 2 *Yerg.* 336. *Johnson* v. *Martin,* 3 *Murph. R.* 348. 2 *Murph. Rep.* 248. *Secor* v. *Babcock,* 2 *J. R.* 203. *Morris* v. *Corson,* 7 *Cow.* 281. In *Nicholson* v. *Coghill,* 4 *Barn. & Cress.* 21. 10 *Eng. C. L. Rep.* 269, it was held that *malice and the absence of probable cause* might be inferred from the voluntary discontinuance of a suit, and the reason assigned was that the plaintiff *was an actor in putting an end to it.* And it was said that a judgment of *non pros* did not have the same effect because a plaintiff might by mistake suffer that to be signed, even though he was desirous of continuing the suit, and that the case of *Sinclair* v. *Elder,* 4 *Taunt.* 7, was decided on that ground. *Wilkinson* v. *Howell,* 22 *Eng. C. L. Rep.* 368. As the plaintiff is an actor in dismissing his suit, it must necessarily furnish a strong presumption

that the suit was groundless, and cast upon him the onus of showing probable cause to rebut the presumption, as was expressly ruled in *Burhans* v. *Sanford,* 19 *Wen.* 417. This case is amply sustained by the authorities cited by the court, and overrules *Masten* v. *Deyo,* 2 *Wen.* 424, so far as there is a conflict in the principles laid down in the two cases. *Nicholson* v. *Coghill,* 6 *Dow & Ry.* 12. *Webb* v. *Hill,* 3 *Car. & Payne* 495. *S. C. Moody & Malkin* 253.

In *Hunter* v. *French, Willes' Rep.* 520, it is said that where a person is acquitted by a jury, malice need not be proved at first on the part of the plaintiff, but it is incumbent on the part of the defendant to show that there was probable cause. *Crozer* v. *Pilling,* 10 *Eng. C. L. Rep.* 271. *Fletcher* v. *Webb,* 11 *Price* 381. *Bull. N. P.* 14. *Purcel* v. *Macnarama,* 9 *East* 362 (*note b.*) *Brookes* v. *Warwick,* 2 *Stark. R.* 389. *Johnson* v. *Browning,* 6 *Modern Rep.* 216.

In 2 *Esp. N. P.* 529, this rule applied to malicious prosecution, is thus illustrated—"In trials therefore in this action, if the plaintiff "can prove, either from the circumstances of the case *as from having "a verdict, an acquittal, &c.* that the action or prosecution was ground- "less, and so that there was *no probable cause,* it shall be sufficient, "unless the defendant can show *satisfactorily* to the court that *there "was probable cause."*

The correctness of this doctrine is sustained by the soundest rules of evidence, by the highest sanctions of judicial authority, and by the principles of reason. It is intrinsically just, for surely when one man has perverted the process of the law, to the injury and oppression of his neighbor, it is neither unprecedented nor extraordinary, to allow the injured party the poor privilege of requiring of the other, proof of the right to commence suit, which he did not choose to prosecute to a termination. If he has any lawful excuse it is alone competent for him to make it: it is within his power and he is armed with the means to do it if any exist: he must make it in the right place, and not bring forward for the first time, some flimsy pretext in an appellate court, as has been attempted in this instance. As he alone is cognizant of the reasons and motives of his conduct, it is far more reasonable that he should account for it and affirmatively establish probable cause, than that the injured party, in addition to his wrongs, should be compelled

to undertake the hard and almost impossible duty of proving a pure negative. The language of Lord MANSFIELD, in *Parrott* v. *Fishwick*, is emphatically applicable to Beebe. *"In this case,"* said his Lordship, *"all the facts lay in the defendant's own knowledge, and "if there was the least foundation for the prosecution, it was in his "power and incumbent on him to prove it."*

"I think;" says HOLROYD, J., *in Nicholson* v. *Coghill, "that malice "and the absence of probable cause may be inferred from the dis- "continuance, that being the act of the present defendant and not "having been explained by him."*

4. It has been very uniformally adjudged that slight and *prima facie* testimony will suffice to show the want of probable cause and cast the *onus* on the defendant, who may prove that there was a reasonable ground for the prosecution. This is only an unimportant modification of the rule above laid down. *Turner* v. *Turner*, 5 *Eng. C. L. R.* 144. 2 *Chitty's Precedents* 562, (note d). *Purcel* v. *McNamara*, 1 *Campb.* 199 *and notes. Incledon* v. *Berry, id.* 203. *Kerr* v. *Workman, Addison R.* 270. *Secor* v. *Babcock*, 2 *J. R.* 203. *Williams* v. *Taylor*, 6 *Bing.* 183. *Reed* v. *Taylor*, 4 *Taunt.* 616.

5. In this action malice may be and usually is implied from the want of probable cause. *Johnstone* v. *Sutton*, 1 *T. R.* 545. *Blunt* v. *Little*, 3 *Mason* 102. *Williams* v. *Norwood*, 2 *Yerg.* 329. *Wilder* v. *Holden*, 24 *Pick.* 11. *Farmer v. Darling*, 4 *Burr.* 1971. *Stone* v. *Stevens*, 12 *Conn.* 219. *Kelton* v. *Bevins, Cooke's Rep.* 90. *Marshall* v. *Maddock*, 4 *Litt.* 335. *Carrico* v. *Meldrum*, 1 *Marsh.* 224. *Nicholson* v. *Coghill*, 4 *Barn. & C.* 21. 10 *Eng. C. L. R.* 269. 2 *Stark. Ev.* 495. 2 *Saund. Pl. & Ev.* 662. *Burley* v. *Bethune*, 5 *Taunt.* 583.

6. Beebe offered no excuse in the inferior court of any kind, and in this court has ventured to suggest for the first time, that De Baun was hopelessly insolvent, and that therefore the prosecution of the suit would have been unavailing. There is proof that De Baun was embarrassed, but there is none that he was hopelessly insolvent; but if it were strictly true, it is indisputable, that Beebe was as fully apprised of the circumstances of De Baun when he commenced, as when he

discontinued the suit. The special application for a capias clause—his publication offering a reward for the negroes—the fact that he was one of the persons who advised and aided De Baun to remove them out of the State of Arkansas, proves conclusively that he could not obtain the negroes when he sued, and that he well knew, that the operation of the writ would be to imprison De Baun until he gave security as required by law. There could not be any stronger evidence of malice, for if the bond given by De Baun to procure his release from imprisonment, is to have no other effect than a mere appearance bond, as contended by the counsel, it follows as an inevitable consequence, that the suit was commenced against an insolvent man, without any hope of ever reaping the fruits of a judgment provided one could be obtained, or of deriving any real benefit from the proceeding.

In replevin, where the property has not been replevied and delivered to the plaintiff, he shall, upon the recovery of judgment upon the record, be entitled to damages and costs, and to a further judgment that the property be replevied and delivered to him without delay; or in default thereof, the value, which is required to be assessed and found by the jury. If Beebe had been a bona fide, instead of a fraudulent purchaser, and could have maintained his suit, this would have been the kind of order and judgment applicable thereto, and as the condition of the bond was, that De Baun should *"abide the order and the judgment of the court in such action,"* there are but two modes by which that condition could have been complied with: 1st. by surrendering the negroes in execution to be delivered to the plaintiff, and paying the damages and costs; or, 2d. by paying the value of the property as assessed by the jury, and damages and costs. A judgment of this kind could not be "abided" in any other way; and to hold that the surrender of the body of the defendant in execution, would discharge his bond, would overturn the plain intention of the law-maker, convert the action of replevin into a mere personal action, and compel the plaintiff *"to trust to the solvency of the defendant as in trespass, trover, and other actions of like character."* *Trapnall* v. *Hattier,* 1 *Eng. Rep.* 22.

The case of *Chandler* v. *Byrd,* 1 *Ark.* 155, is referred to by the counsel as a conclusive authority upon this point. The record showed a compliance with the condition of the bond, by the principal, (page 163), and most of the opinion is mere *obiter dicta,* upon laws entirely different from that under consideration. I am quite willing, however, to take that opinion, *obiter dicta,* as it is, for it shows that where specific property is required by the writ to be taken, the sureties would necessarily become liable for the delivery thereof, or its value.

The court held, at page 160, the following language: "That, in "an action of detinue, it was the intention and object of the legis- "lature only to hold the bail personally responsible, for the principle "is obvious, from the fact that the law directs the sheriff to take "the body of the defendant, *and not the property or specific thing* "*sued for.* Had it been intended to make the sureties *answerable in* "*all events for the delivery of the property,* it would have directed "that *the property itself be taken into custody,* and not the body of "the defendant. Should the defendant refuse to give security, accord- "ing to the requisitions of the act, has the sheriff *any authority of* "*right to seize and retain possession of the property?* Certainly not. "*The liability of the defendant is then wholly personal.*"

7. Unquestionably De Baun could have relied upon the well established principle, that where there is no probable cause, malice may be implied; but it so happened that the same facts and circumstances which proved the malice, also related to the question of probable cause: thus complying literally on his part with the vital requisites to maintain an action for malicious arrest or prosecution, viz.: proving malice and the want of probable causes. It may be proper to observe, that in common acceptation, malice means ill will or hatred towards a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. *Bromage* v. *Prosser,* 4 *Barn & C.* 217; *King* v. *Harvey,* 2 *Barn. & C.* 257; *Mitchell* v. *Jenkins,* 5 *Barn & Adol.* 588; *Ives* v. *Bartholomew,* 9 *Conn.* 309; *Wills* v. *Noyes,* 12 *Pick.* 224.

8. It is contended by the counsel on the other side, that probable cause is not referable or limited to the *particular suit instituted,*

but that the inquiry is whether there is a cause for *any* action, and that if there is, it is a sufficient justification, although there might be no ground for that particular suit.

The correct rule on this subject, was asserted by SHAW, C. J., in *Wills* v. *Noyes,* 12 *Pick.* 324. "The question of probable cause," says he, "applies to the *nature* of the suit, and the defendant's knowledge and belief, and the point of inquiry is, whether he had probable cause to maintain *the particular suit upon the existing facts known to him.*" This doctrine was cited and approved in *Stone* v. *Stevens,* 12 *Conn.* 231, and the same principle was substantially asserted in *Ives* v. *Bartholomew,* 9 *Conn.* 309. *Vide* 5 *Ben. Monroe* 544.

This doctrine is sensible, and amounts to this, that if a person has a right to institute a proceeding in chancery, he is not therefore warranted in imprisoning the other party in a suit at law; or if his cause of action is *ex contractu,* he shall not ruin a defendant by the prosecution of a malicious suit *ex delicto,* and then say he was justified, because he might have maintained *some kind of action.* Even if there is probable cause for a suit, yet, if an illegal, oppressive, and vexatious order is procured, from malicious motives, by the attorney or client, without probable cause or excuse for such order, and by which the defendant is damaged, an action will lie against them both. *Wood* v. *Weir,* 5 *Ben. Monroe* 546. And so an action lies where a person is arrested for a greater sum than is due. *Austin* v. *Debuam,* 3 *Barn. & C.* 139; 10 *Eng. C. L. Rep.* 37; *Wentworth* v. *Bullen,* 9 *Barn. & C.* 840; 17 *Eng. C. L. Rep.* 503; *Dronefield* v. *Archer,* 5 *Barn. & Ald.* 513; 7 *Eng. C. L. Rep.* 177.

In point of fact, there was no conceivable action, which Beebe, under the circumstances, could have maintained against De Baun, either at law or in equity, to recover the negroes or their value; because the purchase being attended with fraudulent conduct on his part, no tribunal would lend him any aid for any purpose whatever. *Nellis* v. *Clark,* 20 *Wend.* 24; 3 *Marsh.* 476.

9. The true inquiry then is, whether Beebe, upon the facts as they existed, believed that he was entitled to the negroes, and could

maintain the replevin suit complained of for their recovery, or for their value, in that suit, in case they could not be replevied; and what is still more important, whether the suit was warranted by law. If it was not, he is responsible, whatever his belief may have been, because ignorance of the law can never excuse or justify an injury to another, although doubtless it would have an important bearing upon the question of damages. *Wells* v. *Noyes,* 12 *Pick.* 326; *Stone* v. *Stevens,* 12 *Conn.* 219; *Wilder* v. *Holden,* 24 *Pick.* 8; *Stone* v. *Crocker, id.* 81; *Hewlet* v. *Cruchley,* 5 *Taunt.* 277; 1 *Eng. C. L. Rep.* 107; *Johnstone* v. *Sutton,* 1 *Term Rep.* 544; *Blunt* v. *Little,* 3 *Mason* 102; *Pangburn* v. *Bull,* 1 *Wend.* 345; *Nicholson* v. *Coghill,* 6 *Dorr & Ry.* 12; 5 *B. Mon.* 544.

That the suit was maliciously commenced, is manifest from circumstances, and that he did not believe in his title, is fully evinced by the voluntary dismissal of it without a trial. There was no compromise or adjustment of it; nor had the negroes or their value been obtained, and yet the suit is dismissed—dismissed when a bond of ten thousand dollars, with unexceptionable security, guaranteed to Beebe the full value of the negroes, in case he was entitled to them. Rev. Stat. 661-665-666. I do not contend that the dismissal of a suit may not be explained, but I am justified in asserting, that, without explanation, both malice and the absence of probable cause may be inferred, and that inference must stand until overthrown by proof from the opposite party. *Nicholson* v. *Coghill,* 4 *Barn. & C.* 21; 10 *Eng. C. L.* 269; *Buller's Nisi Prius* 14; *Sinclair* v. *Eldred,* 4 *Taunt.* 7; 2 *Chitty's Precedents* 562, *notes;* 1 *Campb.* 199 *and notes.* No explanation was attempted—no excuse offered, and nothing proved in extenuation, and the doctrine contended for by me applies fully and pointedly.

10. The plaintiff in error attempted to exonerate himself, by showing that he obtained legal advice. This kind of evidence is sometimes admitted in suits of this character, but always with great caution and with many qualifications. The opinion must be based upon a full statement of all the facts, and must be given by a person skillful and competent in his profession, and must be well founded in point of law. It must be asked and followed in good faith, and

if it appears that the legal adviser has an interest, and a deep one too, in the question submitted to him, (as it did in this case), it would be little short of insanity, to affirm that an opinion, under such circumstances, would justify a malicious and illegal proceeding; and especially, when that interest was known to the client. These principles are sustained by high authorities, but better still, they rest upon reason and justice. *Wills* v. *Noyes,* 12 *Pick.* 324; *Hewlet* v. *Cruchley,* 5 *Taunt.* 277; 2 *Starkie on Ev.* 495; 1 *Eng. C. L. Rep.* 107: *Ravenga* v. *Mackintosh,* 2 *Barn. & C.* 693; 9 *Eng. C. L. Rep.* 225; *Blunt* v. *Little,* 3 *Mason C. C. Rep.* 102. A contrary doctrine would amount to this, that although in every well regulated government the law is paramount and boasts of affording a remedy for wrongs through the medium of courts of justice, yet that after all, that remedy may be practically destroyed by the mere opinion of some briefless tyro of the profession—paralized, if the position of the opposite counsel be correct, without any regard to the honesty or dishonesty—capacity or incapacity—interestedness or disinterestedness, of the legal adviser, and without regard to the correctness or incorrectness of his opinion. We see that there must be exceptions, and when they are admitted, it follows necessarily, that the jury may rightfully judge whether an opinion is worth any thing at all. In this case the jury determined that question negatively, and thus put it to rest. *Ravenga* v. *Mackintosh,* 3 *Barn & C.* 693.

11. Granting, however, for the present, that the purchase by Beebe was fair and regular in all respects, still he was destitute of any legal right to maintain the replevin suit in question, or arrest De Baun under it. It was based upon the thirtieth section of the replevin law, and of course was in the *detinet.* To avail himself of this remedy, Beebe was obliged to allege, in *substance,* that De Baun *received* the negroes *from him* and *refused* to deliver them on request.

This court has held that this is a new remedy, resting alone upon the statute for its support, dependent upon it for its existence, and when adopted must be strictly pursued. *Trapnall* v. *Hattier,* 1 *Eng.* 23. The allegations in the declaration were therefore matters of substance to be proved as laid, for it is an universal rule in

pleading, that, whenever it is necessary to make an averment, it is necessary to prove it. It certainly cannot be doubted, that the requisites of a declaration, as prescribed by the statute, are of the very essence of the remedy, and matters of substance which must be adopted.

Anterior to the commencement of the replevin suit, this court, in *Pirani* v. *Bardin,* 5 *Ark.* 83, established the principle that replevin for the detention of property, extended only to cases of bailment, where there was *actual delivery* by the plaintiff, or some person for him, to the defendant, with an express or implied contract to return the property on request, as in cases of hiring, lending, pawn, and pledge. It was also held that the declaration must not only conform to the 30th section, but also aver a special request or demand for the return of the property. *Ringo* v. *Field,* 1 *Eng.* 47; *Town* v. *Evans, id.* 263.

In these cases, and that of *Trapnall* v. *Hattier,* 1 *Eng.* 20, the doctrine asserted in *Pirani* v. *Bardin,* seems to be adopted, and all of them proceed upon or recognize the principle, that the action of replevin is to be restricted to peculiar cases, and cannot be "brought to try every species of title to personal property, regardless of the manner of obtaining possession by the defendant." The fourth instruction asked by De Baun, asserts a correct proposition, when it places the right of Beebe to maintain his replevin suit, on the ground that it was necessary that there should have been at some previous time an actual delivery by Beebe, or some person for him, to De Baun, and a refusal to deliver on request. This was only asking what the law itself required, and what the decisions of this court required. It was what he had averred in his declaration, and unless we are prepared to go to the absurd length of saying that it is not necessary to prove what it is absolutely essential to allege, the conclusion is irresistible that he could not, upon his own showing, maintain the action. It would be strange indeed, to contend that the legislature, in prescribing the *substance* of the declaration in the *detinet,* only meant, after all, to establish a *fiction* analagous to the ridiculous nonsense of a "casual loss and finding" in trover. If that had been the intention, it would have been far easier to have given the writ in detinet or trover the effect of a writ

in replevin. I repeat, that the receipt of the property is an essential averment in the declaration, and must therefore be proved: if it need not be proved, it need not be alleged, and to concede that it must be stated, is to concede that it must be proved, and so it is obvious that Beebe, in this view of the question, had no probable cause.

12. In an action for malicious arrest, the plaintiff may prove, in aggravation of damages, the length of imprisonment, the expenses, situation, and circumstances, of the party arrested at the time the suit was brought. *Nichols* v. *Bronson,* 2 *Day* 211; 2 *Esp. N. P.* 128-535. And may likewise give in evidence the circumstances of the defendant, to increase the damages, and malice may enhance, as the absence of it may reduce, the damages. *Farmer* v. *Darling,* 4 *Burr.* 1972; *Clayton* v. *Nelson, Pasch.* 1712; *Buller's Nisi Prius* 13; 2 *Caine's Rep.* 202; 2 *Saund. Pl. & Ev.* 662.

The peril and jeopardy in which a man's life or liberty are placed, or prejudice to his fame or reputation, constitute a sufficient ground of action. 2 *Stark. Ev.* 496; 3 *Mass.* 546; 1 *J. R.* 46; 2 *Leigh's N. P.* 1301; *Williams* v. *Norwood,* 2 *Yerg.* 331.

In this action, malice has an important bearing upon the question of damages; and hence it may be established by facts and circumstances. And to that end evidence may be given of the conduct of the defendant in the course of the transaction; his declarations on the subject, and his forwardness and activity in the matter, and publications by him, may be given in evidence. All those varied facts which tend to show malice, are admissible. *Chambers* v. *Robinson, Stra.* 691; *Guerrant* v. *Tinder, Gilmer* 36; *Watt* v. *Greenlee,* 2 *Murph.* 246; *Caddy* v. *Barlow,* 1 *M. & Ry.* 275; 17 *Eng. C. L.* 252; 1 *Swanston* 23; *Fletcher* v. *Webb,* 11 *Price* 381; *Wilder* v. *Holden,* 24 *Pick.* 12; 1 *Saund. Pl. & Ev.* 401; 10 *Mod.* 214; 1 *Salk.* 15; *Gilb* 185; *Duberly* v. *Gunning,* 4 *Term Rep.* 651.

13. As a general rule, courts will not interfere with verdicts for excessive damages, in cases where such damages rest in the sound discretion of a jury, and not upon calculation. To justify interference, the case must be very gross, and the recovery so enormous as to shock the sense of justice in all men. *Tillotson* v. *Cheetham,*

2 *J. R.* 63; *Hewlett* v. *Cruchley,* 5 *Taunt.* 277; *Wilford* v. *Berkley,* 1 *Burr.* 609; 2 *Wilson* 405; 3 *Wilson* 61; 2 *Wilson* 206; 1 *Term Rep.* 277; 4 *Term Rep.* 651; 6 *East.* 244; 2 *Term Rep.* 166; *Harden's Rep.* 586; *Lit. Sel. Cases* 138; 2 *Bibb* 543; 3 *Bibb* 34.

Without any probable cause, and with so many multiplied evidences of malice on the part of Beebe, can any one say that the damages are excessive? If so, by what nice standard will this court measure the damages, and determine how much personal liberty is worth, and how much gold is required as a compensation for blasted prospects and mental agony.

JOHNSON, C. J., delivered the opinion of the court.

It is contended by the counsel for the defendant in error, that the plaintiff instituted his action of replevin, and procured his arrest, from malice and without probable cause. It is conceded that malice and want of probable cause are both essential requisites to the maintenance of the present suit. A distinction has been taken between the particular form of action adopted, and an action in general terms. The argument is, that the term, probable cause, has an exclusive application to the particular action in which the party is arrested, and that although he may have a clear and unquestionable right of recovery in another form of action, that it will not protect him in a suit for a malicious arrest.

The first point that arises in this cause, and the one that meets us at the threshhold, is, whether the plaintiff had a probable cause of action upon which to maintain his replevin suit. The 30th section of the replevin law provides that, "when the original taking of the property in any action of replevin is not complained of, but the action is founded on the wrongful detention of such property, it may be alleged in the declaration, with requisite certainty of time, place, and value, that the defendant received the property, which may be set forth in the declaration, from the plaintiff or some other person, naming him, to be delivered to the plaintiff when thereto afterwards requested; but the defendant, although requested to do so, has not delivered the same to the plaintiff, but refuses to deliver the same,

and unlawfully detains such property, to the damage of the plaintiffs." And the 34th section also declares, that, "where the action is founded on the unlawful detention of the property, and the original taking is not complained of, the plea of the general issue shall be, that the defendant does not detain the goods and chattels specified in the declaration, or any part thereof, in manner and form as therein alleged; and such plea shall put in issue, not only the wrongful detention of such goods and chattels, but also the property of the plaintiffs therein." Under the 30th section two distinct points are presented: The first is, whether the averment in the declaration, that the defendant received the property from the plaintiff, or some other person, is a mere legal fiction or a substantive and traversable averment. And, secondly, whether, under the breach, that the defendant had not delivered the property, although requested so to do, it is essential to show a special demand. This court, in the case of *Pirani* v. *Barden,* (5 *A. R. p.* 88), said that, "The 30th section of our statute is intended to embrace the whole class of bailments, where the defendant holds possession after request. And without deciding whether or not this objection, where there had been a good service of the writ, can be taken advantage of by error, after judgment by default and writ of inquiry found, we think it proper to remark, that not only should there be an averment of such delivery, but also of a special request or demand, for the return of the property. A different rule of construction would involve the absurdity of subjecting every bailee to an action of replevin, before demand of the property or refusal to deliver possession." That case, to the extent that it goes, is doubtless correct; but the question recurs, does it go the whole extent of the statute? Upon this subject we think that there is much reason to doubt. We think that the court in this case, misconceived the use and object of the averments which the statute requires to be inserted in the declaration. The statute does not require that the plaintiff, in all cases in the detinet, should prove an actual receipt of the property by the defendant from the plaintiff, or some other person for him, but the intention was to extend the remedy to all cases where the plaintiff had the legal title, and is also entitled to the immediate possession. The receipt of the pro-

perty, though an essential allegation in the declaration, is like the finding in trover, which is a mere fiction of law, and not necessary to be sustained by proof. It is insisted that replevin will not lie even in the detinet, unless the plaintiff has once had actual possession of the property and bailed it, either by himself or some person for him, to the defendant. The replevin statute of New York is the original of which ours is a literal copy. This being the case, the adjudications of the highest court of that State, involving the construction of that statute, are surely entitled to great consideration. The Supreme Court of New York, in the case of *Dunham* v. *Wycoff,* (3 *Wend.* 281), by SAVAGE, C. J., said that, "By the pleadings, it is admitted that at the time of the taking, the property was in the plaintiff, and the possession in Griswold, the defendant in the execution; and the question is, whether replevin lies? Since the case of Pangburn v. Patridge, (7 J. R. 142), it has been settled, that replevin lies where *trespass de bonis asportatis will lie.* The plaintiff must have property, general or special, and possession, either actual or constructive. In *Thompson* v. *Button,* (14 *John. Rep.* 84), Chief Justice THOMPSON lays down the broad proposition that, as a general principle, it is undoubtedly true, that goods taken in execution are in the custody of the law, and cannot be taken out of such custody, when the officer has found them in and taken them out of the possession of the defendant in the execution. In *Clarke* v. *Skinner,* (20 *John. R.* 467), Mr. Justice PLATT has shown very conclusively, that that proposition is correct only as between the defendant in such execution and the officer; and in such a case it was applied in *Gardner* v. *Campbell,* (15 *John. R.* 401). A variety of cases are stated by Mr. Justice PLATT, in which an action of trespass would be a very inadequate remedy. The case of Thompson v. Button was decided upon the principle of Pangburn v. Patridge, and was a case where the property taken by virtue of the execution, was taken from the possession of the plaintiff in the replevin, and not from the possession of the defendant in the execution. The same principle laid down in Pangburn v. Patridge, was recognized in the late cases of *Marshall* v. *Davis,* (1 *Wend.* 109), and *Hall* v. *Tuttle,* (2 *Wend.* 475). The plaintiff having the proper-

ty in the goods in question, had the constructive possession, for the property draws to it the posssession. The plaintiff, therefore, had the right to take possession at pleasure, and could have sustained trespass; and replevin and trespass in such cases are concurrent remedies." This was replevin in the *cepit,* and the doctrine laid down is, that the plaintiff having the property in the goods in question, had the constructive possession; and that the goods having been taken out of such constructive possession, the action in the cepit would clearly lie. The same court, in the case of *Barrett* v. *Warren,* (3 *Hill's Rep.* 351), by BROMAN, J., said that, "In the case at bar, the sheriff took the property and sold it to Townsend. As Townsend was the plaintiff in the execution, he was probably in no better condition than the sheriff, and might have been treated as a trespasser. But as to the defendant, if he innocently purchased the mare from Townsend, or from any one else, into whose hands the property had passed, I think there is no principle upon which he can be treated as a trespasser. The plaintiff must bring trover or replevin in the detinet." This decision was pronounced subsequently to the adoption of the Revised Statutes of New York; which, so far as relates to the action of replevin, is a perfect counterpart of our own.

In the case of *Crocker* v. *Mann.* (*Missouri Rep.,* re-publication, Vol. 1, 2 and 3, p. 383), the Supreme Court of Missouri said, that, "By the act to regulate replevin, R. C. 659, which provides 'that in all cases, where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof, without his or her consent, it shall be lawful for such person to bring an action of replevin therefor, against any person in whose hands the same may be found.' This statute was intended to put the action of replevin on a useful footing. All that is necessary to be done to comply with this statute is, to show the plaintiff possessed the property actually, or had the right to immediate possession, and that the same was found in the hands of another, that other must account for such possession."

But, it is urged that in case the circumstances here are such as to authorize replevin in the detinet, yet the party would not be enti-

tled to recover, unless he had demanded the property before he brought the action. We think, that under a fair construction of our statute, where a party innocently purchases property, supposing he should acquire a good title, he ought not to be subjected to an action, until he has an opportunity to restore the goods to the true owner. If replevin in the detinet would lie to recover property from a party, who had purchased it innocently, and who supposed at the time that he was acquiring a good title, for a much stronger reason would it lie in a case where the defendant made no pretence of title. It is not pretended that De Baun had any title whatever to the property, for which the replevin suit was instituted. He held it by the permission of the trustees, in whom the legal title vested upon the execution of the deed of trust, and that without any pretence of right on his part. But, as De Baun's possession was by permission, and consequently lawful, he could not be subjected to the consequences of an action, until he had an opportunity to restore the property to the true owner, unless he had sold or otherwise converted it. The law dispenses with the necessity of a demand, where the defendant has committed acts inconsistent with the title of the plaintiff, and conducted himself in such a way as to render a demand wholly unavailing. It is perfectly evident, from the testimony, that De Baun had done such acts as would amount to a conversion, and would have superseded the necessity of a demand in a suit brought by the trustees for the same property. The question here is, whether his conduct at and subsequent to the purchase of Beebe amounted to a conversion as against him: because, if so, he was under no legal obligation to demand the property. He engaged, that in case the trustees would postpone the sale from February to April, he would produce the negroes. The sale was postponed to the time indicated, but he failed to comply with his promise. It is evident, from all the testimony touching that matter, that had Beebe made a formal demand of the negroes, before the institution of his suit, it could not have availed any thing; and, indeed, he was not bound to make a demand, as De Baun was still acting in regard to the property in a way that was wholly inconsistent with his title.

In the case of *Conway, ex parte,* it was admitted by this court that

replevin would lie, but the ground then assumed was, that it would not afford the trustees a plain, direct, adequate and complete remedy. That decision was not based upon the principle that they had once possessed the property and had bailed it to the defendants. The facts show the reverse to have been the state of case. In the case of *Robinson* v. *Calloway* (4 *A. R. p.* 100), which was an action of replevin in the detinet, this court said that "It is perfectly clear, under our Revised Statutes, page 659, that this action may be maintained for an unlawful taking, or a wrongful detention of a personal chattel. The plaintiff to support the action must show title; he has no right to a recovery unless he has been injured, either by an invasion of his right of property or his right of possession. Numerous other cases might be cited, as well of this court as of the courts of other States, which have more or less application to this case, but we deem the question too plain to require further comment or authority." If this doctrine be correct, and that it is we think there can be no doubt, it is clear that the plaintiff was not required to show an actual bailment of the property in controversy in order to entitle him to recover in his action of replevin.

This brings us to the question of probable cause. It is insisted that this applies exclusively to the particular action, upon which the party is arrested, and not to a cause of action in general terms. If the plaintiff in error had a clear legal right of action, or even a probable cause of action, upon which to maintain his replevin suit against the defendant, that question is fully at rest. It appears from the testimony that the defendant executed a regular deed of trust to William E. Woodruff, Lambert Reardon and George C. Watkins, by which he conveyed the identical property claimed in the action of replevin to them, as trustees, and empowered them to dispose of said property either at private or public sale for the benefit of themselves and others, who were beneficiaries in the deed. In pursuance of their authority as such trustees, they advertised a sale to take place on the twenty-second day of April, 1843, at which sale the plaintiff became the purchaser. But it is insisted that as the negroes were not present, the sale was absolutely void, and that the plaintiff derived no title under it. The trustees executed a regular bill of sale to the plaintiff, conveying all their right and title to the negroes, which they were ex-

pressly authorized to do by the deed of trust. It is conceded that the negroes were not present on the day of sale, and also that they were not separated, but sold all together. These are some of the circumstances upon which the defendant relies to vitiate the sale and to deprive the plaintiff of his cause of action. In the case of *Foster* v. *Goree* (5 *Ala. Rep.* 428), the court said that, "It was however strenuously urged that on principles of public policy sales by trustees in the absence of the property ought not to be tolerated. The trustee derives his power to act from the deed and is bound to conform to its provisions. In the language of the court, in *Greenleaf* v. *Queen* (1 *Peters* 138), where the deed required the trustee to sell at public auction, 'This was the test of value which the grantor thought proper to require, and it was not competent to the trustee to establish any other, although by doing so he might in reality promote the interest of those for whom he acted.' Nor can it admit of controversy that the power delegated to the trustee is a special power, and that he cannot protect himself from liability, or vest a title to the property he sells but by acting in strict conformity with it. But these well established principles must be considered in connection with others equally clear. The limitations on the power of the trustee, are for the benefit of those interested in the trust—the maker of the deed and the *cestui que trust;* and it cannot be doubted that they may waive the performance of conditions designed for their benefit: it is equally certain that neither party can object that a duty has not been performed, the performance of which has been prevented by his own act. The deed does not in express terms require that the property should be present at the time of the sale, but such must be the legal inference, as otherwise the property could not be expected to bring its fair value. But if the maker of the deed, who by its terms was entitled to the possession until default of payment, voluntarily retains the possession and refuses to produce the property on the day of sale, he cannot object that it is sold in its absence. To allow him to prevent the sale by voluntarily withholding the property, would be to permit him to take advantage of his own wrong, and by his own act to defeat the provisions of the deed. Doubtless the cestui que trust might refuse to permit the sale to proceed in the absence of the property; but if he

waives this right, no one else can object to it. Thus, in the cases cited from 1 Peters 138, the purchaser objected that the property had not been sold by the trustee in the manner prescribed by the deed, but the court replied that as the maker of the deed and the cestui que trust waived all objections to the regularity of the sale, no one else could complain. In this case the defendant, who has succeeded by his purchase of the trust property to all the rights and liabilities of Miller & Addison, is precluded from objecting that the slave sued for was sold in his absence and greatly below his value, because he voluntarily refused to produce him, and thus by his own act caused the result which he now complains of. This point was thus ruled in the case of *Echols* v. *Dinick* (2 Stewart 144), a case which, in all its material features, is precisely analogous to this."

It is also urged as an additional reason why the plaintiff should not derive any benefit from the sale, that he was, to say the least of it, particeps criminis, he having previously attempted, in conjunction with defendant, to run off the negroes and to appropriate the proceeds in violation of the provisions of the deed of trust, and further that the price for which they were struck off to him was wholly inadequate. It appears from the testimony that the plaintiff and defendant, entertaining a doubt whether the negroes would not be subjugated to the payment of judgments existing against the defendant at the time and prior to the execution of the deed of trust, agreed to take them to New Orleans and sell them for the benefit of the beneficiaries in the deed. This was the express purpose for which the arrangement was made, and if the plaintiff was guilty of any fraud in that transaction, it was not upon the rights of the defendant or of the beneficiaries under the deed of trust. It could only have affected the rights of the judgment creditors of the defendant, and as it has turned out, even they could not have been injured under the construction that has since been given to the statute, by which it was declared that slaves should be held and descend as real estate. The defendant had possession of the negroes at the time the arrangement was entered into, and wholly failed on his part to carry it out according to the terms agreed upon by the parties. This all transpired before the time fixed for the sale in February, and from that time all communication and connection

ceased between them. It was at the request of the defendant that the first sale was postponed until the April following, and then it was that he promised that the negroes should be forthcoming. It certainly cannot be true that the plaintiff contributed in the remotest degree to prevent the actual presence of the property on the day of sale in April, 1843. But it is said that the sum for which the property sold was so utterly inadequate, that that itself ought to vitiate the sale. Great inadequacy of price, when wholly unexplained, is a strong badge of fraud, and in many cases will render a sale absolutely void. But we ask, how is it to be ascertained whether the negroes would have brought more had they been personally present? It is in evidence that the defendant was deeply indebted, and that numerous judgments were outstanding against him, and that a doubt existed in the public mind whether those judgments would operate as a lien upon that species of property from the day of their rendition. Is it a matter of surprise under such circumstances that the property should have sold for a reduced price? We think not; and we also think this a full and satisfactory explanation of that circumstance.

We will now proceed to apply these principles to the case under consideration. True, it is, that the deed of trust contained no express stipulation that the defendant, who was the maker, should retain the possession of the negroes; but the proof is, that he was permitted to retain them, and that he promised the trustees that they should be forthcoming on the day of sale. The sale that was first advertised by the trustees, and which was to have taken place in February, 1843, was at his request postponed until April following; at which time he promised to produce the negroes. He failed to produce them on that day, and they were sold in their absence. He was present at the sale, and made no objection to it, but acquiesced in it, and actually, either in person or by his agent, bid for the property. We consider it perfectly clear, under these circumstances, both from reason and authority, that it does not lie in his mouth to object to the sale on account of any irregularity. From this view of the law, as applicable to the facts involved in the replevin suit, we entertain no doubt but that the plaintiff's title to the negroes was full and complete, and that he had a perfect right of

action at the time of its institution. The question of probable cause is therefore entirely at rest.

But, it is insisted that the plaintiff was actuated by motives of malice, and several circumstances are adverted to in support of the charge. Malice is either expressed or implied. The plaintiff has used no expression in relation to the defendant, indicating a disposition to harrass and oppress him. But it is said that the suit was commenced in Pulaski county, when it was well known that the negroes were not in that county; and this circumstance, amongst others, is relied upon to establish malice. It would be difficult to perceive how this could raise the slightest presumption of malice, when the defendant actually resided in the county, and the property, if not in it, was under his control and kept out of the way by him. The dismissal of the suit is also urged as a circumstance tending to evince a want of probable cause, and also a malicious intent. This of itself could only afford a presumption of malice where there is a want of probable cause; but when it is shown that the plaintiff had a complete cause of action, the strength of that presumption is greatly diminished, as he would then be presumed to have been actuated by other and nobler motives. The defendant having failed in the establishment of both of the first and essential requisites to the maintenance of his action, it is clear that he was not entitled to a recovery.

During the progress of the trial in the court below, numerous exceptions were taken to the introduction of testimony. The first objection urged by the plaintiff in error is, that the court permitted the defendant to introduce, as evidence to the jury, the record and proceedings in the action of replevin, which he had described in his declaration, and also the record of the dismissal of that suit. The defendant most unquestionably was authorized to introduce the evidence thus offered, as it was strictly pertinent and wholly indispensable, to enable him to make out his cause of action. It was upon that proceeding that he was arrested, and it is that of which he now complains.

He next objected to the reading of a certain card or hand-bill, which purported to have been prepared and posted up by the de-

fendant. It is clear, that that paper contained matter pertinent to the issue between the parties, and having been identified, it was properly permitted to go to the jury. Vance stated that the plaintiff admitted the facts, but denied the inferences. If he admitted the facts, and they were legitimate as evidence in the case, the moment their identity was established, they were fit matter to be submitted to the jury. The notice of the plaintiff, in which he offered a reward for the apprehension and delivery of the negroes, was also properly admitted, as it had a direct connection with the facts charged in the publication of the defendant. Those papers are supposed to have been offered for the purpose of raising a presumption of fraud and malice against the plaintiff, and if left alone and unexplained by other facts and circumstances, such would undoubtedly have been the result. It appears that some of the beneficiaries entered into an agreement, a short time before the first sale was to have taken place, that some one of them should buy in the property, and afterwards dispose of it for the benefit of all concerned. A blank was left for the name of the party who was to act as the agent of the rest, and which was filled up with the name of the plaintiff. To the insertion of his name he objected, and finally refused to act, and also to recognize the act. When this agreement was offered in evidence against him, he objected to it, but the court overruled his objection, and permitted it to be read to the jury. In this particular the court most clearly erred. He could not be compelled to act as the agent of the rest against his inclination; and, consequently, the contract was incomplete and not binding upon him. The next piece of evidence offered by the defendant, was an anonymous letter, supposed to have been written by the plaintiff. The letter was fully identified, by the admission of the plaintiff; and though it was framed with great caution, and carefully avoided the mention of the real object for which it was doubtless designed, yet it carried upon its face such a connection with previous transactions, as to make it legitimate evidence. The court, therefore, did right in admitting it.

The plaintiff then offered certain testimony. The testimony of Prather was improperly excluded, as it is the province of the jury

to give such construction as they shall see fit, upon the manner in which any thing may be spoken. He stated that the response of the plaintiff was not in a serious but in a jocular manner.

The court also erred in refusing to permit the plaintiff to introduce testimony in regard to the statements of Vance on a former trial. He was particularly interrogated upon the point, and expressly denied that he had stated upon the previous trial that the plaintiff admitted a portion of the facts, but denied the inferences. It was certainly competent for the plaintiff to introduce proof to establish what he did testify upon the trial at a previous term of the court.

This disposes of all the points raised upon the testimony offered of either party, and the only questions now remaining to be adjudicated relate to the instructions given and refused by the court.

The defendant asked for ten several instructions, each of which was given by the court. We will now proceed to determine upon the propriety of the decision of the court in thus giving the defendant's instructions. The first, second, third, eighth, ninth and tenth, were properly given, as they have a direct application to the facts developed upon the trial of the cause, and are strictly in accordance with the principles of law. The fourth is "That to enable said Beebe to maintain said replevin suit, it was necessary that there should have been at some previous time an actual delivery by said Beebe or some person for him, to said De Baun, of said negroes, and a refusal by De Baun to surrender the same." The principle asserted by this instruction is not sustained by a just and legitimate construction of our replevin statute. To restrict the statute to this limit would be to say that replevin in the detinet would lie alone in cases of actual bailment, and thereby, as we think, defeat the very object of the Legislature. This instruction therefore should not have been given.

The fifth is that an action of replevin is designed for the recovery of specific personal property, and is the proper action by which the possession of personal property can be obtained. It will not be denied that the principle here asserted is perfectly sound in the abstract. It was not controverted either in the argument or attempted to be impugned by the evidence, and therefore was merely and simply an abstract proposition, the truth of which was even admitted by the pleadings.

The sixth is, "That probable or reasonable cause applies to the nature of the suit, and the defendant's knowledge and bona fide belief that such suit was well founded and could be sustained." Had the plaintiff not had a complete cause and right of action against the defendant at the time of the institution of his replevin suit, this instruction would have been appropriate and strictly applicable; but the facts and circumstances of the case, showing a complete cause and right of action, there is no ground left upon which to base such an instruction.

The seventh is, "That the advice of an attorney will not furnish any justification to the defendant in an action for malicious arrest or prosecution, unless the same is asked in good faith and given bona fide on a full statement of the facts; and unless such opinion is well founded in point of law and given with an honest belief that the cause of action was well founded: And that whether such advice was so asked and given and followed is a matter of fact for the consideration of the jury." The reasons assigned why the sixth instruction should not have been given are strictly applicable to this, and therefore it is unnecessary to repeat them here.

The plaintiff at the same time submitted thirty instructions, the twelfth, thirteenth and twenty-eighth of which were given, and the residue refused. The twelfth, thirteenth and twenty-eighth were correctly given. The 1st, 2d, 3d, 4th, 5th, 6th, 7th, 11th, 14th, 16th, 17th, 18th, 20th, 21st, 24th, 25th and 26th, should also have been given to the jury. The reasons why most of these instructions should have been given, have already been assigned, either in the discussion of the principles involved in the cause, or in passing upon the instructions submitted by the defendant in error.

The eight instruction is, "That if Beebe had a cause of action for said negroes, and filed the proper declaration and affidavit, and gave the proper bond, he was entitled to a writ of replevin for the negroes, with a capias clause therein, whether the negroes were in the county of Pulaski or not." It would be difficult to conceive how this instruction could be material upon a trial before the jury. The right of the plaintiff to the capias clause had not been put in issue by the

pleadings: and consequently the court was not bound to instruct the jury in relation to it.

The tenth is, "That in the absence of any proof to the contrary, the sale of the negroes by the trustees to Beebe was valid, notwithstanding the negroes were not present at the sale." This instruction the court properly refused. It did not follow that the sale would have been valid in the absence of the property, in case the defendant had had no agency in keeping it away. This instruction, therefore, to have covered the whole ground of the testimony, should have gone to that extent, and not having done so, it could not be said to apply to the case.

The nineteenth is, "That if the jury should also believe from the evidence that Beebe was in any manner party or privy to any agreement with De Baun to send or carry off the negroes specified in the deed of trust, the effect of which was to place them beyond the reach or out of the control of the trustees at the sale on the 22d of April, 1843, it was an act of fraud which might vitiate the title of Beebe to the negroes in question, in any contest as between Beebe and any of the other securities or creditors of De Baun, but that it would not in law, vitiate the title of Beebe to the negroes in question acquired by purchase at that sale, in any contest as between Beebe and De Baun, and that De Baun cannot question the title of Beebe so acquired. The court certainly was not required to inform the jury how the sale in question would be regarded as between Beebe and the other securities of De Baun. That question was not before the court, and the instruction in that particular was purely abstract and consequently should not have been given.

The twenty-second is, "That in the sale of personal property, by trustees or individuals, it is not necessary for the title to pass that the property should be actually present at the sale; and that the title of Beebe to the negroes in question is not impaired by that circumstance alone." The general principle asserted by this instruction, so far as it relates to sales by trustees, is not warranted by the law, nor was it necessary for the court to adjudicate upon it in this case, as the facts were such as to take it out of the operation of the general principle.

The instruction did not proceed upon the case made, and consequently should not have been given.

The twenty-third is, "That upon the construction of the deed from the trustees to Beebe for the negroes in question, the legal effect of the power of attorney annexed thereto is to vest in Beebe a right of action for said negroes, or the value thereof, to the same extent that the trustees may have had such right of action, independent of any question whether the sale itself to Beebe was valid or conferred any title upon him." How the power of attorney annexed to the deed executed by the trustees to Beebe operated upon Beebe's rights, was a matter wholly immaterial. The testimony showed a full and complete title in Beebe, and consequently the power of attorney was mere surplussage, and had no effect whatever upon his own legal title.

The twenty-seventh is, "That if the jury believe from the evidence that De Baun was aware of any fraud or mismanagement of the trust prior to the sale on the 22d of April, 1843, it was his right and duty to have called upon the interposition of the court of chancery to compel the due execution of the trust." The powers of a court of chancery to compel the trustees to execute their trust in a proper manner certainly were not involved in the investigation of this cause. The grounds upon which this instruction is based, are merely hypothetical, and consequently it should not have been given.

The ninth instruction asked is, "That if the jury believe from the evidence that Beebe was entitled to the negroes at the time he instituted the replevin suit, they should find for the defendant in this case, notwithstanding he may have been actuated by malicious motives." This was properly refused. It was not sufficient that Beebe should have had a legal title to the property, but it was also necessary that he should have been entitled to the possession and that De Baun should have wrongfully detained it.

The fifteenth is, "That under the facts disclosed in this case, the deed of trust from De Baun and wife was not void, or a conveyance to defraud creditors, within the meaning of the bankrupt law of the 19th of August, 1841, and that even if it was, De Baun could not take advantage of it in this action." Whether the deed of trust was in violation of the provisions of the bankrupt law or not, could not

legitimately arise in this case. It is not in evidence that De Baun had applied for the benefit of that law, or that his creditors had taken any steps to force him into bankruptcy. The principle asserted by the instruction was therefore merely abstract and should not have been given.

The twenty-ninth is, "That if Beebe had a right to the negroes, he had probable cause for instituting the action of replevin, and that, that is the legal meaning of the term probable cause; that the question is not whether Beebe had probable cause to believe that the negroes were within the county of Pulaski, but it is whether he had title to the negroes and cause of action against De Baun in respect thereof." This should also have been refused. It did not follow that the plaintiff in error had a probable cause of action against the defendant, though his title to the negroes may have been clear and unquestionable, unless he also had a right to the possession.

The thirtieth is, "That transitory actions, such as replevins, may be brought either in the county where the defendant is found or in the county where the property may be found: and if the jury believe from the evidence that the action of replevin in question was instituted by Beebe within two years after his right of action had accrued, and that De Baun had had possession of the negroes in question, at any time within that period, the right of Beebe to recover said negroes or the value of them in that action of replevin would not be defeated by the fact that the negroes were not in De Baun's actual possession at the time of the commencement of the suit, or by the fact that the negroes were not in the county of Pulaski at that time, if Beebe had in other respects a cause of action therefor." This instruction is believed to advance the notion that in case the defendant in replevin has had possession at any time within two years after the right of action accrued, though that possession should not continue up to the time of the commencement of the action, yet the plaintiff would be entitled to recover. This doctrine we do not feel prepared to sanction. The affidavit required of the plaintiff is that the plaintiff is lawfully entitled to the possession of the property mentioned in the declaration, and that the same was wrongfully taken or is wrongfully detained. In order to enable the party to maintain replevin in

the detinet, he must be prepared to show that the defendant had possession, either actual or constructive, at the time of the institution of the suit. This instruction was therefore properly refused.

We consider it clear, from these principles, that the Circuit Court erred in overruling the motion for a new trial, and that therefore the judgment of said court ought to be reversed. Judgment reversed.