HUMPHRIES *vs.* MCCRAW.

Where a father sells a slave to a son, who is a member of his family, and so continues, and the slave remains in the family, in contemplation of law, he is in the possession of the son, and if the father sometimes controls the slave, it raises no presumption of fraud.

The acts and declarations of the vendor after the sale, in the absence of the vendee, are not competent evidence to impeach the title of the latter, but if done or made in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions of the vendee inconsistent with his title.

A notice that depositions will be taken on the 4th, 5th and 6th days of May, 1846, or any one or more of said days, is indefinite and insufficient.

Writ of Error to the Pulaski Circuit Court.

REPLEVIN, by Carroll B. Humphries and John B. Humphries, against Pleasant McCraw, determined in the Pulaski circuit court, at the October Term, 1846, before the Hon. WM. H. FEILD, judge. The action was commenced in White, and venue changed to Pulaski county.

Declaration alleges that on the 14th April, 1845, at White county, defendant took, and unlawfully detained, from plaintiffs, a slave, named Bannister, the property of plaintiffs, &c.

Defendant pleaded, 1st, property in himself: 2d, property in John Humphries: and 3d, *non cepit*. Plaintiffs took issue to the hird plea, and replied to the first and second pleas, property in themselves; to which the defendant took issue. The cause was submitted to the jury, and verdict and judgment for defendant.

Pending the trial, plaintiffs excepted to several decisions of the court, and took a bill of exceptions, setting out the points reserved, from which it appears, plaintiffs (reserving all exceptions to the relevancy or competency thereof) read to the jury the deposition of Milton Sanders; to which was appended a bill of sale by John Humphries, bearing date, the 25th day of March, 1843, by which he conveyed to the plaintiffs in this suit, the said slave, Bannister, and three others for the sum of one thousand dollars; which was duly acknowledged, and filed for record with the register of White county on the day after its date.

Deponant Sanders, a subscribing witness to said bill of sale, states that he was present, at the house of John Humphries in White county, and saw him execute said bill of sale to plaintiffs. Plaintiffs paid John Humphries $330 in cash, and execu-

ted their note to him for the balance of the purchase money named in the bill of sale. The slaves were in the yard at the time of the sale, and were delivered by John Humphries to plaintiffs—that is, he pointed the negroes out to them, and told them they were at their disposal. The slaves were afterwards claimed by plaintiffs, and considered their property. Deponent afterwards saw plaintiffs taking the boy Bannister to Independence county to pledge him for corn to Morgan Magness.

Cross Examined.—Did you not hear John Humphries say that he was going to Independence county to purchase corn, or to mortgage the boy Bannister for corn?

Ans.—Mr. Humphries passed my house by himself, and said he was going to Independence to buy corn, but do not recollect that he said anything about mortgaging Bannister for corn.

Did you, or not, see John Humphries hauling corn from Independence, and did you not understand that it was corn he bought of Magness?

Ans.—I saw John Humphries' team hauling corn, which I understood was bought in Independence of Magness, but do not know who bought it.

Was said corn hauled to the residence of John Humphries, and did or did not he use it for the support of his family?

Ans.—The corn was hauled to the dwelling of John Humphries, and cribbed there, but I do not know how it was used, or what become of it.

Did not John Humphries take to New Orleans, or somewhere below, and sell all the negroes named in said bill of sale, except Bannister, who was mortgaged for corn?

Ans.—John Humphries and Carroll B. Humphries took some negroes below for sale, and when they returned, John Humphries said they had sold the negroes pretty well.—The negroes spoken of were at the dwelling of John Humphries: I do not know to whom they belonged.

Did, or did not, John Humphries control said negroes and exercise acts of ownership over them?

Ans.—I do not know whether he did or not.

Was there not an execution sent to you from the clerk of the Pulaski circuit court, issued on a judgment in favor of McCraw against John Humphries and returnable to the March Term of said court, 1843?

Ans—There was such an execution sent to me, I believe.

Did you not go to John Humphries to levy on his negroes, and if so what arrangement did you make with him about the matter?

Ans.—I went to the residence of John Humphries to levy said execution on the negroes there as his negroes, and he claimed the privilege of showing me other property in lands, which I levied upon: also upon a stallion.

Did not John Humphries say to you that he had a right to show you other property besides his negroes, on which you should levy?

Ans.—I went to John Humphries to levy on the negroes there as his property, but he told me he had a right to show me other property to levy on, and did, as I have above stated.

Did, or did not, you hear John Humphries say he never would pay the judgment on which said execution issued?

Ans.—I have heard John Humphries say that said judgment was unjust, but do not recollect whether I ever heard him say that he never intended to pay it.

On re-examination, deponant stated that during the times of which he had been speaking, plaintiffs lived with their father, John Humphries, as part of his family. Said execution came to his hands after the execution of said bill of sale. He also stated that defendant, McCraw, instructed him to levy said execution on said negroes as the property of John Humphries.

After said deposition was read, plaintiffs moved the court to exclude from the jury all the testimony of deponant in relation to the acts, declarations and conduct of John Humphries, subsequent to the said sale by him to plaintiffs, but the court overruled the motion, and plaintiffs excepted.

Thomas J. Lindsay, witness for plaintiffs, testified, that as sheriff of White county, by direction of the defendant, McCraw, he

levied upon the boy Bannister, and sold him on the 14th April, 1845, under two *venditioni exponases* against John Humphries, one of which was in favor of McCraw, and the other in favor of Pace, for the use of Stone; and that McCraw purchased him at said sale.

On Cross examination, witness testified that plaintiffs were the sons of John Humphries, and had lived with him ever since he knew them. He supposed the older of the two, was twenty-five years of age. When witness levied on the negro, he was on the farm where plaintiffs, and their father lived, though neither of them was at home—they were in Searcy, a mile and a half from the farm. When witness first received said executions, he called on old man Humphries in relation to them, and after talking to him about them, Carroll B. Humphries, who was present, observed to his father that they had better pay up the executions—"that it had better be settled—that it had already been more trouble and expense than it was worth—that he had rather be shut of the trouble and expense of the matter." Witness was not much about old man Humphrie's, but supposed said negro worked on the farm. Plaintiffs had a store in Searcy, but lived on the farm with their father. When witness levied on the negro, plaintiffs claimed a trial of the right of property. Plaintiffs and the old man Humphries were present, and the old man seemed to take a deep interest in the trial—He took the most active part in it—seemed to suggest questions to plaintiffs' attorney, and to take a leading part in the trial. At the time Sanders had executions against old man Humphries, witness heard one of the plaintiffs say, that if the negroes had remained one day longer the sheriff would have levied on them to satisfy said executions. It was a general talk that negroes were taken off to avoid executions. One of plaintiffs, told witness that the negroes were taken off by Carroll B. Humphries and the old man Humphries, and they had a bad night of it; but witness did not know that the negroes taken off by them, were the same mentioned in said bill of sale—Bannister was not taken. The negroes were taken off in March, 1844. Witness did not know

whether there were, or were not, other negroes at Humphries than those named in said bill of sale. Carroll B. and the old man took some negroes to the lower country, and sold them, and Carroll B. brought back another negro with him; also a stock of goods, marked in the name of plaintiffs. Witness had heard the old man say he had no interest in the store. Plaintiffs were never engaged in merchandizing in Searcy until after Carroll B. took said negroes off and sold them as above stated.

On re-examination, by plaintiffs, witness stated that plaintiffs were both present at the said trial of the right of property, as was McCraw—that both parties had attorneys present, who managed the trial—that plaintiffs claimed the property—that old man Humphries said on the day of said trial, that the boy Bannister did not belong to him, but belonged to plaintiffs. Old man Humphries and plaintiffs all sat by plaintiffs' attorney at the trial, and seemed to be advising as to what questions to propound—the old man sat next to the attorney and seemed to do most of the whispering. When witness offered Bannister for sale under said executions, John B. Humphries, one of the plaintiffs, forbid the sale, and claimed the negro as the property of plaintiffs.

The above is the substance of so much of Lindsay's testimony as is deemed material to a proper understanding of this case.

The bill of exception states that while said witness was testifying, plaintiffs objected to his testifying about what John Humphries did and said in relation to said negroes after his sale to the plaintiffs, and moved the court to exclude all such testimony, but the court overruled said motion, and permitted said witness to testify in relation to the acts and statements of John Humphries after the date of plaintiffs' bill of sale, and up to, and at the sale, to the defendant by the sheriff, to which decision of the court, plaintiffs excepted. Also that plaintiffs, upon re-examining said witness, asked him to state every thing he knew of John Humphries saying or doing, subsequent to the sale to plaintiffs, and up to the time of the sheriff's sale, disaffirming title in himself, and confirmatory of plaintiffs' title; but the court only per-

mitted said witness to testify in regard to such acts and statements as occurred before the levy of the execution upon the negro; and only permitted plaintiffs to examine witness in relation to such declarations and acts subsequent to the levy, as he had spoken of on his cross examination; or other witnesses had spoken of in their testimony in this cause: to which decision of the court, plaintiffs excepted. Here plaintiffs closed.

Defendant, to sustain the issues, on his part, proved by the record, that on the 16th May, 1842, he recovered a judgment in Pulaski circuit court against John Humphries for $311.14 with costs. That on the 23d June, 1842, an execution issued thereon to the sheriff of said county, returnable to the September term, 1842, which was levied on land, and returned without sale.—That on the 9th September, 1843, a *ven. ex.* was issued to the sheriff of Pulaski county, returnable to the November term, 1843, and said land sold, and the proceeds applied to older executions. That on the 28th November, 1843, a *fi. fa.* was issued on said judgment to the sheriff of White County, returnable to the May term, 1844, which came to the hands of the sheriff of said county on the 2d December, 1843, and was levied on lands and a stallion, and returned without sale. That on the 18th December, 1843, Pace, for the use of Stone, recovered judgment in the Pulaski circuit court against said John Humphries, for $217, with costs. That an execution issued upon said last named judgment to the sheriff of White county, returnable to the May term, 1844, which was levied on certain lands and a stallion, and returned without sale. That on the 14th June, 1841, Pitcher and Walters recovered a judgment in the Pulaski circuit court against said John Humphries for $1150, with costs; and that on the 14th May, 1842, Reardon and son recovered a judgment in said court against said Humphries for $188.41, with costs.

Defendant then offered to read to the jury the two executions spoken of by the witness Lindsay, together with the returns thereon, to which plaintiffs objected generally, but the court permitted them to go to the jury.

The first is a *ven. ex.* with a *fi. fa.* clause, issued upon said

judgment in favor of McCraw against John Humphries to the sheriff of White county, on the 2nd day of January, 1845, returnable to the May term 1845. The other is a similar writ, on the said judgment in favor of Pace, issued on the same day, and returnable to the same term. The returns of the sheriff upon these writs show that he levied them upon the said boy Bannister, plaintiffs claimed a trial of the right of property, a jury summoned for that purpose by the sheriff found a verdict in their favor, but the sheriff notwithstanding sold the negro on the 14th April, 1845, and McCraw became the purchaser, at the sum of $300.

Defendant also read the sheriff's bill of sale to him for the negro, dated 16th April, 1845, the plaintiffs objecting.

George C. Watkins testified that John Humphries became embarassed about the year 1842, since which time he had considered him *"broke."* He received a claim against him in 1840, from Georgia for $1800, and had other claims in his hands for collection, part of which had been paid. In 1843 or 1844, executions against him were returned *nulla bona.*

Pleasant Jordan testified that he attended said trial of the right of property; that old man Humphries sat by the plaintiffs' attorney and prompted—managed the trial entirely—plaintiffs were present. After the trial, all hands got mad and quarreled—McCraw threatened to whip one of the negroes, but old man Humphries swore he should not do it.

Defendant offered to read the deposition of Morgan Magness, plaintiffs objected, but the court overruled the objection. The notice given by defendant to plaintiffs, of the time of taking said deposition, was in these words: "I will, on the 4th, 5th and 6th days of May next (1846) or on any one or more of said days, at, &c., take the deposition" &c. Deponant states that in November or December, 1843, old man Humphries came to his house, contracted with him for a boat load of corn, and stated that it was for his son. In February, 1844, the old man and plaintiffs came and received the corn, and plaintiffs gave deponant a mortgage on the boy Bannister to secure the payment of the

debt. In July following, the old man and one of the sons paid the debt, and took the negro. The old man made the trade, and paid over the money, but stated that he was doing business for his sons, the plaintiffs.

Defendant read the deposition of David Royster, plaintiffs objecting to its competency, and the court overruling the objection.

Royster states that in the spring of 1843, or 1844, he went with old man Humphries on White river, about 40 miles below where he lives—the old man said he was taking some negroes down below to sell—Witness did not see the negroes—he said he had started them on ahead to overtake and get on board a flat boat—he said he was taking them off to avoid an unjust debt—witness thought he told him that one of his sons was with him. Witness understood the old man to say, that he meant McCraw's debt.

Defendant read other depositions, but it is not deemed material to state their contents, there being no motion for a new trial.

Plaintiffs proved by a witness, Brown, that they had been doing business for themselves for seven or eight years, and had some means—other witnesses stated that plaintiffs were men of property.

After the testimony was closed plaintiffs moved the court to exclude all the evidence as to the conduct and declarations of old man Humphries, subsequent to the sale of the negroes by him to the plaintiffs; also, the evidence in relation to his insolvency, which the court refused to do.

Plaintiffs moved the court to instruct the jury as follows:

"1st, That if the jury believe, from the evidence, that plaintiffs and John Humphries lived together after the execution of the bill of sale, and that the negro in question was employed in the family, subject to the occasional orders of each member, the presumption of law is, that he was in possession of the person having title; and that if plaintiffs had title, the law presumes that the negro was in their possession; and, that if they all lived together, no fraudulent presumption arises from the fact that John Humphries sometimes controlled the negro: and,

"2d, That if the plaintiffs and John Humphries lived together, and the negro was employed in the same family; and if the plaintiffs had title, the possession of him would be presumed to be in the plaintiffs and not in John Humphries; and consequently that the acts and declarations of said John Humphries, during that time, in relation to the negro are not competent evidence against the plaintiffs."

The court refused to give the said instructions as asked by plaintiffs, and proceeded to instruct the jury generally, and said:

"The plaintiffs claim, under a bill of sale, dated 25th March, 1843; you are to look to that bill of sale, and if it was executed for a valuable consideration, and the property sued for, a portion of the property included therein, so far the plaintiffs have made out their case, and unless the bill of sale is avoided by other evidence appearing in the case, the plaintiffs have established a right of property; but the defendant, to avoid the effect of this bill of sale, contends, and has introduced evidence conducing to show that the bill of sale to the plaintiffs was made to hinder, delay and defraud the creditors of the vendor, John Humphries. —Is there fraud, or was it the intention of these three persons, the plaintiffs and John Humphries, to defraud the creditors of John Humphries? The law does not allow a person to convey his property, even for a valuable consideration, to another who knows that he intends to defraud his creditors. If John Humphries, by making this conveyance, intended to defraud McCraw, or any other of his creditors thereby, and the plaintiffs knew that he made the same with that intent, the sale is void, even though they paid a valuable consideration. If it was a *bona fide* sale, the plaintiffs have established a right to the property. In considering the question, whether the sale was *bona fide* or fraudulent, the jury should take into consideration the acts, conduct and declarations of John Humphries, subsequent to the sale to the plaintiffs; his insolvency at the time of, prior to and since the sale—that an execution was then out against him—his acts declarations and conduct in relation to the property subsequen to the sale—these are all circumstances for the consideration of

the jury. And if the sale is fraudulent, you are bound by law to find in this case for the defendant. All the testimony which the court has permitted to go to the jury is competent and legitimate evidence for their consideration, and from which they may either infer that the sale was fraudulent or not fraudulent."

The plaintiffs excepted to the decision of the court, refusing the instructions so asked by them, and charging the jury generally as above. Plaintiffs brought error.

WATKINS & CURRAN, for the plaintiffs. 1st, The circuit court erred in permitting evidence to be given of the conduct and declarations of John Humphries subsequent to the sale to the plaintiffs. Even if John Humphries could be said to have remained in possession, that was only prima facie evidence of fraud, subject to be explained. *Field vs. Simco, 2 Eng. R.* 269. But in no event could his declaration be given in evidence to destroy the title he had conveyed. He should have been called as a witness himself. *Field vs. Simco, ub. sup. Hurd vs. West, 7 Cowen Rep.* 752.

The declarations of a father, that a conveyance by him to his child was fraudulent, made subsequent to the conveyance, are inadmissible against the child. *Arnold vs. Bell,* 1 *Haywood Rep.* 396. *Gray vs. Harrison,* 2 *Hay. Rep.* 292. *Eubanks' Exr. vs. Bent,* 2 *Hay. Rep.* 330.

All the cases agree that declarations made by a person under whom the party claims, after the declarant has parted with his title, are utterly inadmissible to effect any one claiming under him. *Weidman vs. Kohn,* 4 *Serg. & R.* 174. *Patten vs. Goldsborough,* 9 *Serg. & Rawle* 47. *Jackson ex dem. Watson vs. Cris.* 11 *J. R.* 437. *Brillard vs. Billings,* 2 *Vern. Rep.* 309.

2d, The presumption of fraud arising from the fact that the negro remained in the same family, is explained by the evidence that plaintiffs and John Humphries lived together; and, although the father may have controlled the negro as usual, the possession in law is deemed to have been in the person having title, consequently the court erred in refusing to give the instruc-

tion asked by the plaintiff. *Orr et al. vs. Pickett et al.,* 3 *J. J. Marsh.* 269. *Kenningham vs. McLaughlin,* 3 *Monroe Rep.* 30. Nor can the admission of the vendor's subsequent acts or declarations be placed upon the ground that he remained in possession because these authorities show that he was not in possession. If the possession was not changed in this instance, it would be impossible, where two persons lived together, for one to make a valid sale of property to the other.

3d, The deposition of Magness should have been excluded. The notice was to take depositions on three different days. *Reardon vs. Farrington,* 2 *Eng. Rep.* The court cannot avoid the objection by coming to the conclusion that the testimony of Magness was immaterial and could not have affected or changed the result of the verdict. If there was a motion for a new trial, the court might, if upon the whole case the verdict was correct, sustain the judgment notwithstanding this error; but in this case there was no motion for a new trial.

4th, The court instructed the jury that they should take into consideration the fact, that there was an execution in the hands of the sheriff at the time he executed the bill of sale, when there is no evidence whatever showing any such fact.

5th, The declarations and acts of John Humphries after the sale to the plaintiffs and before McCraw's purchase, are competent evidence to support plaintiff's title, and to defeat the defendant's. *Coale vs. Harrington,* 7 *Har. & John. Rep.* 147. *Guy vs. Hall,* 3 *Murphy,* 150.

FOWLER, contra. The verdict not having been assailed, the evidence upon which it rests, whether legally or illegally admitted, sustaining McCraw's pleas and deciding that the sale from old man Humphries to his sons was fraudulent, must be taken as sufficient to warrant the finding.

Plaintiffs' first exception is to their own evidence—a deposition, which they offered with a reservation—and after they had read it to the jury, moved to exclude certain parts of it which the court refused to do. If this deposition (that of Sanders)

contained any thing improper, it was the act of the plaintiffs, and neither that court or this should permit them to take an advantage or benefit of their own wrong. It reminds of a perjury in fact with a mental reservation. 5 *Pet. Rep.* 137, *Greenleaf vs. Borth.*

Independent of the fact of Sanders' deposition being the plaintiffs' own evidence, the refusal of the court to exclude all the testimony of the witness "in relation to the acts, declarations and conduct of John Humphries subsequent" to his sale to the plaintiffs was strictly legal. And,

1st, As to his acts and conduct, whether at, before or after the pretended sale to his sons, especially as they showed that he and Carroll, one of the plaintiffs, in conjunction ran some of the slaves off to the low country, they tended to prove the fraudulent sale, and were strictly legitimate. 2 *St. Ev.* 26.

2d, Even if such declarations were incompetent evidence, the plaintiffs, in order to have them excluded, should have asked their exclusion alone, and not coupled it with his acts and conduct, which were clearly good evidence: as the whole was asked to be excluded in mass, the court properly refused.

3d, Such deposition does not show that any such declarations were made after his sale to his sons; and if made before, they were good evidence, and should not have been excluded, unless the plaintiffs showed clearly that they were afterwards.

4th, Such declarations and the substance of them were wholly immaterial to the issue; and could not possibly have had any influence on the minds of the jury: and therefore the refusal was right.

To the documentary evidence of McCraw, the plaintiffs also objected in mass. An objection made to a mass of evidence should not be sustained in law: the objection should be made to each particular part deemed objectionable. See 5 *Missouri Rep.* 393, *Walds vs. Russell.* 13 *Pet. Rep.* 319, *Moore vs. The Bank of the Metropolis.* 2 *Eng. Rep.* 473, *Johnston vs. Ashley. ib.* 524, *Camp et al. vs. Gullett & wife.*

The insolvency and embarrassments of old man Humphries,

and the conduct of himself and his sons, the plaintiffs, clearly establish the conveyance from him to them to have been fraudulent, and fully sufficient to sustain the verdict of the jury, had a new trial been moved for.

The admission of Morgan Magness' deposition, though the defect of the notice may bring it within the rule laid down in the case of *Reardon vs. Farrington,* will not entitle the plaintiffs to a reversal of the judgment in this case: because the substance of the deposition is wholly immaterial, could not have influenced the jury, and therefore could not possibly prejudice the plaintiffs.

Royster's evidence, as to what Humphries, the elder, said and did, while engaged in running off the negroes, in conjunction with one of the plaintiffs, (which conjunction had been previously proved by Lindsay) was competent evidence to establish fraud in the sale of the slaves to his sons.

The instructions given by the court were legitimate and proper as based upon the facts in evidence.

John Humphries' admissions were competent evidence on the ground of his interest and authority being identical with that of his sons. 2 *St. Ev.* 23, 24. The admissions of one of the plaintiffs below, their interest being joint, must be taken as against both, and so taken, tend clearly to prove that the sale was merely colorable and fraudulent. *Greenleaf on Ev., part* 2, *sec.* 172 *et seq. p.* 203 *et seq.* 1 *Espm. N. P. C., Gray et al. vs. Palmer et al.* And fraud being a mixed question of law and fact, it is the province of the jury to draw a conclusion from equivocal facts and suspicious circumstances. 7 *Cowen's Rep.* 304, 305, *Jackson vs. Mather.* 4 *Smed. & Marsh. Rep.* 310, *Bogard vs. Gardley.* And the jury had a perfect right to find the sale fraudulent, if from the circumstances they believed it was made for the purpose of defeating, hindering or delaying creditors, although a full and fair price might have been given for the slaves. 4 *Kent. Com.* (5 *Ed.*) 464 *in note.* 1 *Burr Rep.* 474, *Worseley et al. vs. DeMattos et al.* And where a conveyance is made to a son by an embarrassed father, it is a material and

important circumstance to be submitted to the jury to establish the fraud. 2 *Saund. Pl. Ev.* 530.

OLDHAM, J. This was an action of replevin brought by the plaintiffs in error against the defendant in error in the circuit court of White county for the recovery of a negro boy named Bannister. Upon the application of the defendant for a change of venue the cause was removed to the circuit court of Pulaski county, in which the same was tried.

Upon the trial the plaintiffs claimed title to the boy in controversy under a bill of sale executed to them by John Humphries, on the 25th day of March, 1843, for the boy and three other negroes, the same purporting to have been for the consideration of one thousand dollars. They proved that they paid $330 of the consideration money down and gave their note for the balance. The defendant claimed title by virtue of his purchase at a sale made by the sheriff of White county on the 15th day of April, 1845, under an execution issued from the office of the clerk of the circuit court of Pulaski county, upon a judgment recovered by the defendant against John Humphries on the 16th day of May, 1842. Upon the trial a verdict was found for the defendant. During the progress of the trial, the plaintiffs excepted to sundry rulings of the court, in admitting evidence offered by the defendant, and in rejecting evidence offered by them, and also the charge of the court to the jury. The points saved by the exceptions are assigned for error in this court.

The first exception taken by the plaintiffs, was to the decision of the court overruling their motion to exclude from the jury all the testimony contained in the deposition of Milton Sanders, in relation to the acts, declarations and conduct of John Humphries, subsequent to the sale by him to the plaintiffs. The witness in his cross examination, stated that John Humphries passed his house by himself, and said that he was going to Independence county to buy corn. Witness also stated, that John Humphries and Carroll Humphries took some negroes below for sale, and when they returned, John Humphries said they

sold the negroes pretty well. That when witness, who was sheriff and to whom an execution had been sent against John Humphries in favor of the defendant, went to levy on the negroes, Humphries claimed the right to show other property.

These are the only points in the deposition to which the exceptions apply. The testimony as it stood in the deposition was certainly irrelevant, as it neither tended to establish the title of the defendant or affect that of the plaintiffs for fraud. There does not appear to be any act or conduct on the part of John Humphries inconsistent with the title of the plaintiffs, nor is there any declaration made by him having such a tendency.

The second exception was taken to the witness Lindsay's testimony, about what John Humphries did and said in relation to the negroes after the sale to the plaintiffs. This witness stated that John Humphries and Carroll Humphries carried off certain negroes and sold them: that upon the trial of the right of property, John Humphries set by with the plaintiffs, suggested questions to their counsel, and on the day of the trial, said the boy in controversy did not belong to him. There is nothing in this testimony going to show an avowal on the part of Humphries senior, inconsistent with the title set up by his sons, but rather in affirmance of it. His conduct in connexion with that of the plaintiffs in reference to the property after the sale was legitimate testimony. If by their consent, he performed acts of ownership inconsistent with the title claimed by them under him, and by their consent and concurrence, such a circumstance would be valid as tending to show the character of the transaction between them and that it was merely colorable. But nothing of that kind can reasonably be deduced from the statements of the witnesses to which exceptions were taken. The declaration made by John Humphries, that he had no title to the boy, was in favor of the plaintiffs' title. The fact that he and Carroll Humphries carried off negroes together was a circumstance, very slight in its character, to prove that the negroes so carried off and sold, belonged to either the one or the other.

We cannot perceive upon what ground the plaintiffs objected to the execution, sheriff's return and bill of sale to McCraw under which he claimed title, as those papers all appear to be regular, and no question as to their regularity has been made in the argument in this court.

The deposition of Magness should have been excluded for want of sufficient notice, according to *Reardon vs. Farrington*, 2 *Eng. R.*

The evidence of Royster should have been excluded. In the case of *Gullett et ux. vs. Lamberton*, 1 *Eng. R.* 109, this court held that "the title of the purchaser cannot be impaired or in anywise affected by the mere statements or admissions of the vendor in his absence." This rule is based upon a series of authorities.

The next question is, whether the court properly rejected the instructions asked by the plaintiffs. The correctness of the first instruction was decided at the last term of this court in *Dodd vs. McCraw*. According to the principle decided in that case, the court erred in refusing the instruction.

The second instruction asked and refused was similar to the first, with this addition that the acts and declarations of John Humphries, during the time the negro was employed in the family, in relation to the negroes, are not competent evidence against the plaintiffs. This instruction was properly rejected. The acts and declarations of the vendor after the sale, in the absence of the vendee, are not competent evidence to affect the vendee's title, but if done or made in his presence, and not disaffirmed by him, they become legal evidence, not as the mere acts or declarations of the vendor, but as indirect admissions by the vendee inconsistent with his title.

The principles already decided, determine that the circuit court erred in instructing the jury that "in considering the question whether the sale was bona fide or fraudulent, the jury should take into consideration the acts, conduct and declarations of John Humphries subsequent to the sale to the plaintiffs—his acts, declarations and conduct in relation to the other

property subsequent to the sale—these are circumstances for the consideration of the jury; all the testimony which the court has permitted to go to the jury is competent and legitimate evidence for their consideration." The judgment must be reversed and the cause be remanded.