WEAVER *vs.* CALDWELL'S EX'R.

The admission by the court of irrelevant evidence, is no cause for new trial, where it could not have influenced the verdict.

The execution of a note raises a strong presumption that pre-existing accounts between the parties have been settled.

But the execution of a note raises no presumption that a bill of exchange of a prior date has been paid.

The presumption of payment does not attach where the opposing evidences of debt are of equal dignity.

By statute, (*Digest, Tit. Assignments, sec.* 7,) where plaintiff sues as assignee by indorsement in blank, defendant is entitled to fix the assignment on such day as will be most to his advantage.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought by Weaver, as assignee of Pitcher, Officer & Co., against James H. Caldwell, as executor of Charles Caldwell, deceased. The suit was commenced in the Saline Circuit Court, in September, 1845; venue afterwards changed to the Pulaski Circuit Court, where it was determined in June, 1847, before the Hon. WILLIAM H. SUTTON, then one of the circuit judges.

The declaration alleged that, on the 6th day of July, 1844, Charles Caldwell, defendant's testator, executed to Pitcher, Officer & Co., a writing obligatory, of that date, for $438.03, payable one day after its date, with interest at eight per cent. per annum until paid; and that afterwards, to wit: on the day and

(*a*) NOTE.—Petition for reconsideration, by Watkins & Curran, counsel for Moss and Stith, overruled.—REPORTER.

year aforesaid, said Pitcher, Officer & Co. assigned the said writing obligatory to plaintiff Weaver.

The defendant filed three pleas: 1st. Payment of $300, part of the debt sued for, by Charles Caldwell, in his lifetime, to Pitcher, Officer & Co., before the assignment of the bond to Weaver, to wit: on the 6th July, 1844:

2d. Payment of the whole debt sued for, by Charles Caldwell, to plaintiff, after the assignment.

3d. A plea of set-off, alleging that Pitcher, Officer & Co., before and at the time of the death of Charles Caldwell, and before the assignment by them of the bond sued on to Weaver, to wit: on the 6th July, 1844, were indebted to said Charles Caldwell in the sum of $300, upon and by virtue of a certain bill of exchange, bearing date of 16th January, 1844, made and drawn by one Lewis Milliner, upon, and then accepted in writing on the face thereof by, said Pitcher, Officer & Co., whereby said Milliner requested them, at sight thereof, to pay to the said Charles Caldwell, or order, $300 for value received, and charge the same to account of said Milliner; also, in the further sum of $300, money loaned, advanced, had, and received, &c., by Charles Caldwell, to, for, and by, Pitcher, Officer & Co., before the assignment, &c.

Plaintiff replied to said pleas in short upon the record, and defendant took issue to the replications. The cause was submitted to the court, sitting as a jury, and the court found for the plaintiff on the issues to the first and second pleas, allowed defendant a credit of $300, on the plea of set-off, and rendered judgment in favor of plaintiff for the balance due on the obligation sued on. Plaintiff moved for a new trial, on the grounds that the court permitted defendant to introduce incompetent and irrevelant evidence, on the trial, against his objections, and that the verdict was contrary to law and evidence. The court refused a new trial, plaintiff excepted, and set out the evidence. It appears, from the plaintiff's bill of exceptions, that, on the trial, the defendant, after proving the genuineness of the signatures of the respective parties thereto, offered to introduce, as evidence, the following instrument:

"PITCHER, OFFICER & Co.: At sight, please pay Charles Caldwell, or order, three hundred dollars, for value received, and charge the same to account of your ob't serv't.

16th Jan'y, 1844. LEWIS MILLINER."

Upon the face of which is written: "*Accepted*—Pitcher, Officer & Co."; which acceptance was proven to be in the handwriting of James Pitcher, then one of the firm of Pitcher, Officer & Co. To the admission of which instrument, as evidence, plaintiff objected, but the court overruled the objection.

Defendant then offered to introduce, as evidence, after proving it to have been made out, and receipted in the handwriting of Officer, one of the firm of Pitcher, Officer & Co., an account made by Charles Caldwell with Pitcher, Officer & Co., for merchandize, &c., &c., composed of various items, commencing 9th October, 1843, and running to 11th March, 1844, at the bottom of which was written: "Little Rock, July 6th, 1844: Received payment by note—Pitcher, Officer & Co." To the introduction of which plaintiff objected, but the court overruled the objection. Defendant then proved that said Charles Caldwell had large dealings with the firm of Pitcher, Officer & Co., and that they were his general agents for shipping cotton in the years 1842, 1843, and 1844; which was all the evidence offered by defendant to sustain the issues on his part.

Plaintiff then proved that said Charles Caldwell executed the writing obligatory, described in the declaration, July 6th, 1844, for the sum, to the persons, payable, and bearing interest, as alleged in the declaration, which obligation was admitted in evidence; and the assignment thereof to the plaintiff was proved. the same having been endorsed by Pitcher, Officer & Co., to plaintiff by blank endorsement. It was also proved, by a witness well acquainted with the late James Pitcher, that he was loose in mercantile business, but had a remarkable memory, and could recollect the run of business that would confuse almost any one else. It was also proved that said James Pitcher died in September, or October, 1844, and said Charles

Caldwell in November of the same year. Also that the bond sued on had been presented to defendant, regularly probated, for allowance before suit brought, and he refused to allow the same unless the amount of the above draft was deducted, which plaintiff refused to do. The above was all the evidence. Plaintiff brought error.

S. H. HEMPSTEAD, for plaintiff, contended, that the writing obligatory executed to Pitcher, Officer & Co., apparently in settlement of all transactions between them and Caldwell, after the acceptance of the bill of exchange by Pitcher, Officer & Co., implied an indebtedness on the part of Caldwell, and the extinguishment of the bill, for that it could not be reasonably supposed that Caldwell would give his note without first bringing forward all the credits to which he was entitled, (2 *Stark. Ev.* 688,) and that this presumption must stand until overthrown by proof from the opposite party, which had not been done. He contended that it was like the case where a receipt in full was given, which might be explained it was true; but without satisfactory explanation the demand was presumed to be satisfied. *Sheehy vs. Mandeville,* 6 *Cranch R.* 253. 2 *Cond. R.* 363. *Alvoord vs. Cooper,* 9 *Wen.* 323. And so in this case, it must be presumed that all indebtedness, on both sides, whether by bill, open account, or otherwise was stated and brought forward, the balance struck, and the obligation of Caldwell given in adjustment of it, and that the bill of exchange claimed by way of set-off had been paid.

WATKINS & CURRAN, contra. The blank endorsement to Weaver of the note sued on, will be taken as may be most advantageous to the defendant below; and as made after the acceptance by Pitcher, Officer & Co., of the bill of exchange pleaded as an off-set. *Digest, Title, Assignments, sec.* 3, 7.

Giving a bond and mortgage furnishes a presumption of a liquidation of all accounts before their dates between the parties, (*Chewning vs. Proctor,* 2 *McCord Ch. Rep.* 11, 15,) but this

presumption may be repelled by proof. The giving of a note raises no presumption that a prior note or acceptance of the payee had been paid. If the fact of payment be doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied. *Brembridge vs. Osborne,* 1 *Stak. Cas.* 374. *S. C.* 2 *Eng. Com. Law Rep.* 433. 1 *Green. Ev.* 43, 44.

If a presumption existed that the bill was settled by the giving of the note, the presumption was repelled by the production of the account between the parties at the time of making the note, —the settlement of the account showing that the bill was not included.

JOHNSON, C. J. The point first raised in the progress of the trial below, relates to the propriety of permitting the defendant to use, as evidence, an account of Pitcher, Officer & Co. against him. The account most assuredly could neither prove nor tend to prove either of the issues tendered by the pleas. The plaintiff did not count upon it, nor had he made such a showing as called for it, or even authorized the defendent to use it. It was, therefore, wholly irrevelant under the issues, and, consequently, the court should have excluded it. The court therefore clearly erred upon this point; yet, as the account could have had no possible influence upon the verdict, it is not sufficient cause for a reversal of the judgment.

The next and main question involves the correctness of the decision in admitting a bill of exchange, purporting to have been drawn by Lewis Milliner, upon Pitcher, Officer & Co., and in favor of the testator of the defendant. The argument is, that the execution of the instrument sued upon, it being subsequent, in point of time, to the date of the bill of exchange, raises a presumption of its payment. We cannot recognize the correctness of this doctrine. It is conceded that the execution of a note furnishes a strong presumption in favor of a liquidation of all accounts, before its date, between the parties. This legal presumption is predicated upon the fact that the note is higher in

grade as evidence; and such being the case, it is entirely reasonable that it should be regarded as a final settlement of all prior accounts, and that such presumption should prevail unless rebutted and overturned by competent proof. The presumption of payment cannot attach where the opposing evidences are of equal dignity. We do not conceive it necessary to examine the doctrine of presumptions any further as it is not necessary to the decision of this case.

The present plaintiff rests his claim upon a blank assignment, and under our statute the defendant is entitled to fix the assignment on such day as shall be most to his advantage. The bill, it is admitted, was drawn before the execution of the note, and, consequently, before the endorsement to the plaintiff; yet it does not follow that the acceptance, which fixed the liability of the assignors was prior in point of time to the date of the note or subsequent to that of the endorsement. It would be manifestly to the advantage of the defendant to suppose that the endorsement was made subsequent to the acceptance of the bill, and there is nothing in the record that conflicts in the least with that supposition. Upon this hypothesis the bill would have been good as a set-off in an action by the assignors of the note, and as a matter of course is equally available against the plaintiff, as it was passed to him subject to every legal defence that then existed against it.

But a still stronger view of the case, in favor of the defendant, is easily conceivable. We will suppose that the testator, who was the payee of the bill, did not long retain the possession, but that he parted with it in the course of trade, and even remained out of the possession until the execution of the note, which is now the subject of this suit. This might all have taken place, and yet he might again have possessed himself of it before the endorsement of the note, and thereby placed himself in the same state and condition that he occupied before he parted with it. Upon the supposition of either state of case there can be no doubt of his right to use the bill as a set-off to the note. We are clear, therefore, that there is no error in this branch of the

case; and that therefore the judgment of the circuit court ought to be affirmed.