PELHAM AS AD. *vs.* FLOYD AS AD. ET AL.

If there be an irregularity in the taking of testimony, the party must except to it at the time it is offered to be read, or he will be considered as having waived the objection, and cannot make it in this court.

Where facts are charged in the bill, and admitted, or, charged, and not denied, but other facts set up to avoid the consequences of them, it is not necessary that the facts charged be proven.

An objection to the bill, founded upon a want of equity and jurisdiction in the court, will not be considered, when the case is brought into this court a second time for revision—the first adjudication having admitted the equity and jurisdiction of the court.

Where the testimony shows clearly that one party sold, and the other understood that he was purchasing, a pre-emption right, the court will decree a perpetual injunction against a judgment obtained for the purchase money if the party selling was not entitled to a pre-emption.

Appeal from Johnson Circuit Court in Chancery.

This case was before this court at the January term, 1842. (See 4 *Ark. Rep.* 292.) Upon its return to the circuit court, it was suggested that Cravens and Wilson had resigned the administration of the estate of Joseph Cravens, and that Wm. W. Floyd had been appointed administrator *de bonis non* of said estate; thereupon, Floyd, as administrator, &c., appeared, and the cause progressed.

The testimony of Alpheus Erwin, James McGee, William McGee, and James A. Erwin, was taken and read at the hearing without objection. They all concurred in proving that they were present at the sale: that the administrator first offered the improvement for sale, and there were no bidders: that, after a private conversation between the administrator and the crier at the sale, he offered to sell a pre-emption, affirming that he was entitled to a pre-emption, and would prove it up and assign it, or make it good.

The court decreed a perpetual injunction, and the defendant

applied to one of the judges of this court, and obtained an order granting him an appeal from the decree of the circuit court.

CUMMINS argued the case in this court for the appellant, but his brief is not now on file.

RINGO & TRAPNALL, for the appellees, contended that, as no objection was taken to the reading of the testimony in the court below, none could be taken on the appeal. *Edwards vs. Morris et al.,* 2 *Marsh.* 66. *Brand vs. Webb's heirs, ib.* 576. *Field vs. Simco,* 2 *Eng.* 269. *Johnson vs. Ashley, ib.* 470. *Peel & Pelham vs. Ringgold & Williams,* 2 *Eng.* 546.

As to the equity of the bill, the jurisdiction of the court, and the regularity of the proceedings prior to the former decree, the court and parties are concluded by the previous adjudication. *Rutherford, use, &c. vs. Lafferty,* 2 *Eng. R.* 402. *Walker et al. vs. Walker, ib.* 544. *Ex parte Sibbald,* 12 *Pet.* 488, 495. *Skiller's ex. vs. Mays' exrs.* 2 *Cond. R.* 366.

The fact that neither Ryan nor his administrator, had a pre-emption right, is not denied by the answer; and the only question put in issue is, whether the administrator offered a pre-emption for sale, and this is clearly proved by the testimony.

JOHNSON, C. J. The main question involved in this case was decided by this court when it was here before. (See 4 *Ark. Rep.* 292.) It was then held that if the administrator of Ryan sold, and Cravens understood that he was purchasing, a pre-emption right, and that fact had been substantiated by the testimony, Cravens would have been entitled to relief. But if, on the contrary, the improvement alone was sold, he purchased at his peril, and must comply with his contract. The legal question having been settled, it only remains to be determined whether the fact, upon which it is made to depend, has been established by the proof in the case.

The objection to the testimony for irregularity comes too late,

as, if such irregularity in fact existed, it was virtually waived in the court below by the failure of the appellant to take his exception at the time it was offered. It is contended, by the appellant's counsel, that there is no proof which shows that the note sought to be canceled was executed in consideration of the improvement, or that no right of pre-emption in fact existed. These facts were expressly charged in the bill. The defendant below admitted the first and did not deny the last, but endeavored to escape the consequences by setting up and alleging that he did not pretend to sell any thing more than the improvement, and denied that he gave any assurances whatever of a pre-emption right. It was wholly unnecessary, therefore, that the testimony should have established that fact, as it was fully admitted by the answer. The objection to the bill, founded upon a want of equity and jurisdiction in the court, also came too late, as all such questions are thrown out of this case by the former adjudication of this court.

The only question, therefore, that remains for our determination is, whether the administrator of Ryan sold, and Cravens understood that he was purchasing, a pre-emption right. Upon this point the proof is full and conclusive. The testimony adduced upon the first trial, in the circuit court, we consider greatly in favor of the complainant; but when that which was introduced upon the last is taken in connection with it, it is utterly impossible to doubt but that the administrator of Ryan sold, and that Cravens understood that he was purchasing, a pre-emption right.. We are, therefore, of the opinion that the decree of the Johnson circuit court ought, in all things, to be affirmed. The decree is affirmed.