PHELAN *vs.* BONHAM.

The acts and declarations of a party are competent evidence when they afford any presumption against him.

A fact may be proven by secondary evidence if not objected to. *Wallace vs. Collins*, 5 *Ark. R.* 4, cited.

Where competent and incompetent evidence are introduced together without objection, none of it should be excluded by the court in charging the jury: the motion to exclude should be made immediately on its being introduced, and comes too late after other witnesses have been examined. *Johnson vs. Ashley*, 2 *Eng. R.* 473, cited.

To maintain replevin in the detinet, plaintiff need not prove a bailment. *Beebe vs. De Baun*, 3 *Eng. R.* 563, cited, and approved.

The owner of a posted animal cannot maintain replevin therefor, until he has proven his property before a justice, and paid (or tendered) the costs to the taker-up, as required by *sec.* 25, 26, 27, 28, 29, *chap.* 65, *Digest.*

Appeal from the Washington Circuit Court.

REPLEVIN in the detinet, brought by Bonham against Phelan, and determined in the Washington Circuit Court, in November, 1847, before the Hon. SEBRON G. SNEED, then one of the circuit judges.

The action was brought by the plaintiff to recover a grey

mare. The defendant pleaded: 1st, *non detinet*: 2d, a special plea, alleging that defendant came into possession of the mare by posting her as an estray under the statute, *absque hoc,* that he unlawfully detained her, &c.: 3d, property in himself: 4th, property in a stranger. Issues were taken upon the pleas, trial, verdict and judgment for plaintiff.

The defendant excepted to decisions of the court excluding evidence offered by him, and in giving and refusing instructions to the jury, and took a bill of exceptions setting out the evidence and instructions given and refused. The substance of the evidence is stated in the opinion of this court, the instructions follow:

At the request of the plaintiff, and against the objections of defendant, the court instructed the jury, "that if they believed, from the evidence, that plaintiff owned the property in the declaration mentioned at the time of the commencement of the suit, and before, and that he demanded the same from defendant, the same having come to his possession lawfully, and that defendant refused to give the property up, they must find for the plaintiff; that it is not necessary to prove a bailment, but is sufficient for plaintiff to prove that defendant got possession of the property lawfully, and, on demand by plaintiff, refused to surrender it."

The defendant, thereupon, asked the court to instruct the jury:

"1st. That, before plaintiff can recover, it is necessary to prove that the property in the declaration mentioned, was delivered by the plaintiff, or some other person for him, to defendant, with an express or implied contract to return the said property on request.

"2d. That if the jury believe, from the evidence, that defendant came into possession of said property, and held it without the consent of plaintiff, either express or implied, it does not amount to a bailment or delivery, and they must find for the defendant.

"3d. That if they believe that a demand was made, and defendant refused to deliver the property because the fees and dues

of posting and keeping were not paid, this does not amount to a refusal to re-deliver, and they should find for the defendant.

"4th. If they believe defendant came lawfully in possession of said property, and not from said plaintiff, they must find for defendant."

The 5th instruction asked by defendant is copied in the opinion of the court.

Which instructions the court refused to give, but charged the jury, "that nothing that was said, with regard to posting the mare, was evidence before them; that a demand and refusal, before commencement of the suit, must be proven, or the jury should find for defendant; that if the jury do not believe the mare in dispute to be the property of plaintiff, they should find for the defendant." Defendant appealed.

D. WALKER, for the appellant. The admissions of the plaintiff are legal evidence, (2 *Stark. Ev.* 28,) if they conduce to prove the issue, though not conclusive of the fact. 1 *Marsh. Ky. Rep.* 3.

The plaintiff was bound to sustain by proof the bailment as alleged in the declaration; and the court should so have instructed the jury; also, that if the defendant came lawfully in possession of the property, and not through the plaintiff they should find for the defendant. *Trapnall vs. Hattier,* 1 *Eng.* 18. *Town vs. Evans, ib.* 266. *Pirani vs. Barden,* 5 *Ark.* 81. *Ringo vs. Feild,* 1 *Eng.* 47.

The property having come into the possession of the defendant as an estray, the owner was not entitled to demand it until he had proved property and paid the charges in the manner provided for in the *25th, 26th, 27th, sec., chap.* 65, *Digest.*

Secondary evidence, if not objected to, is sufficient legal proof of a fact. *Collins vs. Wallace,* 5 *Ark.* 41.

SCOTT, J. We find several errors in the proceedings of the court below and will proceed to point them out.

The suit was instituted for the recovery of an animal, which

the plaintiff described in his declaration as a "grey mare," and to show property in himself he introduced several witnesses, who testified in substance on this point, that, some years before, the plaintiff had a sorrel mare colt foalded with a white spot in her face shaped like the letter Y: that the colt had remained of this description until it was something over a year old, when it then commenced at the ears and head to turn grey, and that before it strayed off, which was not until it was two years old, it had become to be no longer a sorrel, but of "a grey color formed of a mixture of white and sorrel hairs," and that the white had disappeared from its forehead, and that the witnesses believed the animal in controversy to be the foal. Afterwards, in the progress of the trial, when the defendant was producing his testimony, "he offered and proposed to prove by a witness that the plaintiff, on the day that he found the mare in dispute in possession of the defendant, inquired of the witness if he had seen his mare, representing her as having strayed away from him, and described her as being a sorrel mare with white in her face resembling the letter Y, and that the plaintiff, upon hearing of the mare in dispute being at defendant's, on the same day went there and claimed her as his;" but the court refused to allow him to make this proof.

Under the rule, "that all a man's acts and declarations shall be admitted in evidence when they afford any presumption against him," (2 *Stark. Ev.* 28,) it was certainly competent for the defendant to make the proof he proposed, for although it did not directly disprove, it certainly tended to disprove the plaintiff's pretensions to property—directly at issue—by furnishing the ground of a fair presumption, which the plaintiff might or might not have repelled, and it was therefore error to refuse to allow its production to the jury.

In another particular, touching the testimony, both in the instruction given in regard to it, and in the instructions asked and refused there was manifest error.

The plaintiff, in the course of making out his case, proving demand of the animal in controversy, and the refusal of the

defendant to deliver her, and in his endeavor to fix a bailment on the defendant, introduced parol evidence (to which no objection was interposed) tending to show that the defendant held possession of the mare as an estray, posted by him as such, and afterwards one of the defendant's witnesses also referred to this posting, and no objection was interposed. Now, although all this was secondary evidence of facts that, according to the rules of law, could have been proven, if objection had been interposed, only by the appropriate evidence of higher grade, yet having been produced to the jury without objection made, it could not be complained of by the plaintiff, as held in *Wallace vs. Collins,* 5 *Ark.* 41; and as some of the testimony accompanying and connected with this secondary evidence was strictly competent, none of it should have been rejected by the court after other witnesses had been examined, as no motion had been made to exclude it so soon as it was produced, as held in *Johnson vs. Ashley,* 2 *Eng.* 473, consequently the court erred in instructing "the jury that nothing that was said with regard to the posting of the mare was evidence before the jury." And also erred in refusing to instruct the jury as asked by the defendant, "that if they find from the evidence, that the mare in dispute was posted by the defendant and held by him as an estray, before he was bound to deliver the same, it was necessary for the plaintiff to prove said property before a justice of the peace, and to procure an order from said justice, requiring the said defendant to deliver the same to said plaintiff, and also that he should then and there tender the fees for posting and keeping the said animal, and if the plaintiff fails to produce this proof, the defendant was not bound to deliver the property, to the plaintiff, and they should find for the defendant," as there was testimony properly before the jury on which this latter instruction would have been based.

The other instructions given to the jury, although in some degree inaccurate, were substantially correct.

The court properly refused to give the first and second instructions asked by the defendant. The third, although with some

modification it might have been properly given, nevertheless, in the terms asked, was properly refused. Most of the instructions refused, were doubtless based on the construction given to the 5th section of the Replevin statute, *Digest*, 842. (*sec.* 30 *of Rev. St.*,) by this court in the cases of *Pirani vs. Barden*, 5 *Ark.* 81. *Trapnall vs. Hattier*, 1 *Eng.* 18, and *Town vs. Evans, ib.* 266. But in the more recent case of *Beebe vs. DeBaun*, 3 *Eng.* 563, where the proper construction of this section was fully before this court, and was more deliberately examined, that favored in the three cases cited so far as replevin in the detinet is concerned has been in a great degree overturned, and the remedy in cases of unlawful detention much untrammeled, and the field of its operation greatly enlarged, and with this latter construction we are satisfied.

For the errors which we have pointed out in the case at bar, the judgment of the circuit court must be reversed, and the cause remanded to be proceeded in, not inconsistent with this opinion.