DRENNEN *vs.* BROWN.

New trials are never granted on the ground that the verdict is contrary to evidence, unless the evidence is clearly insufficient to sustain the verdict.

This court will adhere to the rule, heretofore laid down, that the verdict must be not only against the weight of evidence, but so much so as at first blush to shock our sense of justice and right.

This court will not grant a new trial upon a mere question of weight of evidence.

In this case a slave was attached; the nephew of the defendant in attachment claimed the slave by interpleading; the evidence was that the defendant in the attachment sold the slave to the claimant, but continued in possession, but this was explained by proof that the vendee resided with the vendor; verdict for the interpleader, and motion for new trial overruled. This court refused to reverse the judgment of the court below overruling the motion because, the evidence was not clearly insufficient to sustain the verdict.

Writ of Error to the Crawford Circuit Court.

This case was determined in the Crawford Circuit Court, at the August term, 1848, before the Hon. WM. W. FLOYD, Judge. The facts are stated in the opinion of this court.

PIKE, for the appellant, contended, 1st: That the continued possession of the vendor after sale, was prima facie evidence of fraud, although the possession was concurrent, (17 *Vern.* 276. 6 *id.* 521. 14 *id.* 423,) and required proof to explain the transaction so as to relieve it from the legal presumption, not because no consideration passed from the vendee to the vendor, but because the sale was really *bona fide* and for a valuable consideration—the fraud consisting in permitting the vendor to retain the apparent ownership of the property, and acquire credit on account of property belonging to another. (14 *Conn.* 225. 9 *id.* 63. 5 *id.* 196. 7 *id.* 271. 14 *id.* 235. 14 *id.* 537. 9 *J. R.* 337. 3 *Day* 364. 10 *N. Hamp.* 80. 8 *id.* 288. 12 *Wend.* 297. 16 *id.* 253. 21 *id.* 169. 23 *id.* 653. 1 *Hill.* 438. 4 *id.* 271.) 2d: That

on a question of collusion and fraud between the vendor and the vendee, the declarations of the vendor, made whilst the property was in his possession, after sale, being part of the *res gestae*, are admissible in evidence to establish the fraud—fraud being a question of fact which may be established by words as well as acts and circumstances and rarely by direct evidence. (*Highlander vs. Fluke*, 5 *Martin* (1*st series*) 442. *Martin vs. Reeves*, 3 *Mar. La. R. N. S.* 22. 2 *Cowen's Phill.* 653. *Den vs. Pickering*, 3 *Dev.* 6. *Coale vs. Harrington*, 7 *Harr. & John.* 147. *Willies vs. Farley*, 3 *Carr. & P.* 395. *Babb vs. Clemson*, 10 *Serg. & R.* 410. 1 *Rawle* 458. 12 *Serg. & R.* 828. *Clayton vs. Anthony*, 6 *Rand.* 285,) and this although the vendor is a competent witness and present in court. *Gibblehouse vs. Stong*, 3 *Rawle* 437. *Waring vs. Warren*, 1 *J. R.* 342. 2 *Cow. Phil.* 658 *&c.* 667. 3 *Murphy* 150. 11 *Wend.* 537.

W. WALKER, contra. The declarations of the vendor are not admissible in evidence against the vendee, when they are not a part of the *res gestae; (West vs. Price's heirs*, 2 *J. J. Marsh.* 380,) and cannot be considered as part of the *res gestae* when made long after the execution of the bill of sale to vendee, (*Cocke vs. Chapman*, 2 *Eng. R.* 197,) nor can they be admitted when made after the vendor has parted with his interest, to divest a right which he himself has created, or, at least, a right over which he has no control and could not touch at the time. *Phoenix vs. The Assignee of Ingraham*, 5 *J. R.* 412, 426. *Perry vs. Smith*, 323. *Elbank's ex. vs. Butt*, 2 *Hays* 330. *Robinson's ad. vs. Devone, id.* 154. *Arnold vs. Bell*, 1 *id.* 396 *note. Babb vs. Clemson*, 12 *Serg. & R.* 328. *Sprague vs. Kneeland*, 12 *Wend.* 164. *Wolf vs. Caruthers*, 3 *Serg. & R.* 245. 11 *id.* 328. 5 *Paige* 104. 2 *Hill* 109. 2 *Phill. Ev. (Cowen & Hill's) n.* 481, *p.* 662.

Whenever several seem to be enjoying in common the use of property the possession is in the owner. 3 *J. J. Marsh.* 278. 2 *Am. Ch. Dig.* 388.

If fraud is doubtful, innocence will be presumed; (2 *Phill. Ev. (Cowen & Hill)* 298, *note* 298.) As to setting aside a verdict, see *Hazen vs. Henry*, 1 *Eng.* 86.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of debt by attachment, brought by Drennen against James Brown, Sen. Amongst other property attached was a negro boy, Jerry, to which James Brown, Jr., set up claim, and filed his interplea, under the provisions of the statute, upon which issue was taken, and a trial had before the court sitting as a jury. The court, after hearing the evidence, decided the issue in favor of the interpleader (James Brown, Jr.,) upon which judgment was rendered for him. The appellant thereupon filed his motion for a new trial, for the reason that the court, so sitting as a jury, decided contrary to law and evidence; which motion the court overruled, and the appellants appealed to this court.

There was no exception to the evidence, and the record presents the single enquiry whether the court erred in refusing to grant a new trial upon the ground that the finding was contrary to evidence. New trials are never granted for this cause unless the evidence is clearly insufficient to sustain the verdict; indeed it has been a matter of doubt upon high authority whether the decision of the Circuit Court ought ever to be disturbed for refusing a new trial, upon the ground that the verdict is contrary to evidence. Such doctrine approximates very nearly to interfering with the right of trial by jury, whose peculiar province it is to weigh the evidence and determine the facts. The rule laid down by this court, and to which we will adhere, is that the verdict must be not only against the weight of evidence, but so much so as at first blush to shock our sense of justice and right. *Webb vs. Howell,* 2 *Ark.* 364. This court will not grant a new trial upon a mere question of weight of evidence. *Mayers vs. The State,* 2 *Eng.* 174. We have, upon a former occasion during the present term, intimated that our decisions had already extended as far in reviewing the discretionary powers of the circuit courts in regard to new trials as is warranted by authority; and whilst we do not feel disposed to recede from the position assumed, we will not indulge in its extension.

In the case before us there was offered in evidence a bill of

sale for the slave claimed in the interplea, which was read without objection. This bill of sale was of itself evidence of title. The plaintiff then proved by a witness that he was present when the bill of sale was executed, subscribed it as a witness, and saw the consideration, $250, paid. The claimant was the nephew of the defendant in the attachment suit, lived with him, made his house a home, but was frequently absent. The nephew but seldom assumed control over the boy; he remained in the possession of the uncle, and worked for him with his other slaves, eight in number.

Appellant proved by two witnesses that they were acquainted with the witness who deposed to the payment of the money, and were acquainted with his general character amongst his neighbors, and that, from their knowledge of his character for veracity, they would not believe him on oath in a case where a white man and Cherokee were opposed: whilst other witnesses proved that they were and had long been his neighbors and knew nothing against his character. It was also proved that James Brown, Sr. when the boy was attached, said the boy was his.

This is substantially the proof, which was, no doubt, on the part of the appellant, designed for the double purpose of discrediting the sale itself and attaching fraud to the transaction. These circumstances it was the province of the jury or court representing a jury to weigh and determine, and of which they are the peculiar judges. Witnesses are brought before them, when they can scan their whole deportment and bearing, by which they not unfrequently derive the most important aid in arriving at the truth, and from circumstances which are never brought upon the record or before this court. It is not for us to decide whether we would have made a like decision or believe the evidence properly weighed. The court, who heard it and rendered the verdict, was far better qualified to pass upon the credit and weight to be given to it than we could be, and in its discretion have refused to disturb the decision. And, upon examination of the evidence before us, we are not prepared to say that the decision was so decidedly against the weight of evidence

as to bring it within the rule which has been repeatedly recognized by this court, and which we have adopted as our guide in this case.

The judgment of the Circuit Court is, in all things, affirmed.