PORTER ET AL. *vs.* DOE ON DEM. HANLEY ET AL.

Where this Court, in the exercise of its appellate jurisdiction, decided upon the construction of a deed, that the tract of land in controversy, was not embraced in or conveyed by it, and upon a trial *de novo* in the Court below, that court adjudicates the same question in accordance with the opinion and mandate of this court, and the

cause again comes before this court for revision, this court will not review or correct its former decision, however erroneous in point of law, or based upon a misapprehension of the facts disclosed by the record before it on the first appeal.

On this point the decisions of this court in the cases of the *Real Estate Bank vs. Rawdon et al.*, 5 *Arks.* 558, *Fortenbury vs. Frazier et als.*, 5 *Arks.* 202, and *Walker vs. Walker and Faulkner*, 2 *Eng.* 542, are approved and reaffirmed, and the case of *Rutherford use &c. vs. Lafferty*, 2 *Eng.* 402, disapproved and overruled.

The granting of a new trial is mattter of discretion in the court below, and may be abused, and *semble* if abused may be corrected in this court; but where the party who excepts to the granting of a new trial, presents his evidence and reserves his exceptions on the new trial and appeals, this court will not review the correctness of the decision granting the new trial, but will only consider the questions reserved at the new trial.

Where the defendant in ejectment, was allowed by statute in certain cases, to claim compensation for improvements, or to set off their value against the rents and profits, and he files a notice to that effect under the statute, such notice is in the nature of a special plea—and if upon the record reviewed by this court, and unimpeached by its decision, the legal sufficiency of such notice cannot be questioned in the court below when the cause is remanded.

The repeal of such statute could not impair rights acquired under it, and where the repeal is subsequent to the filing of the notice of set-off, the pleadings or the form of the remedy are not affected by such repeal.

Semble that such right of set-off, or compensation for valuable and lasting improvements made by the defendant in ejectment, in good faith and before notice of the adverse claim of the plaintiff, exists at the common law, independent of the statute.

When the jury in ejectment fail to assess the plaintiff damages, they may be assessed by another jury on a writ of enquiry. Such enquiry relates purely to the remedy, and is governed by the statutes in force at the time.

Where, upon the enquiry of damages, after the defendant's notice of set-off for improvements had been stricken out, he offered to prove in mitigation, the value of the improvements, such offer must be restricted to a period anterior to the commencement of the suit and before he had notice of the plaintiff's claim, and unless so restricted it is not error for the court to reject the evidence.

Appeal from Phillips Circuit Court.

This case was before this Court, reported in 3 *Arks. p.* 18. The cause being remanded, there was a trial and judgment for the defendants excepted. Upon the new trial, the evidence was substantially the same, and presented the same question, as report-

ed in 3 *Arks. p.* 18. The plaintiffs claimed as the heirs and the defendants as the grantees of Sylvanus Phillips. The deed from Phillips to Kendrick & Fisher, dated October 1st, 1830, was offered in evidence by the defendants, and excluded. The defendants claimed the fraction in controversy by conveyance from Hendrick & Fisher. The question whether this fraction is embraced in the conveyance from Phillips to Kendrick & Fisher, was passed upon by this Court, when this case was formerly before it, and this Court decided that upon the construction of the deed, the land in controversy was not embraced or conveyed by it. The Court below so instructed the jury and the plaintiffs had judgment for the land, the jury failing to assess the damages. Subsequently, the Court on motion of the plaintiffs, struck out the notice filed by the defendant of set-off, or compensation for the value of improvements made by him on the land in controversy. This notice had been filed before the repeal of the Territorial Statute, allowing compensation in such cases, and was upon the record when this cause was formerly before this Court. On the enquiry of damages, the defendants, offered to reduce such damages by evidence of the value of the improvements; this evidence was rejected and the defendants appealed. The defendants took various exceptions, and the questions arising on them sufficiently appear in the opinion of the Court.

PIKE & BALDWIN, for the appellant, asked the Court to review the decision heretofore made by this Court in this cause, contending that such decision was open to review, revision and correction so long as the case remains in Court, and citing various additional authorities to show that the former decision is erroneous, viz: *Elliott vs. Thatcher,* 2 *Metc.* 44 *n.* *Melvin vs. Prop. of Locks, &c.,* 5 *Metc.* 15. *Drinkwater vs. Sawyer,* 7 *Greenl.* 366. *Wheeler vs. Randall,* 6 *Metc.* 529. *Dana vs. Middlesex Bank,* 10 *Metc.* 250.

The Court erred in striking out Porter's notice that he would, on the trial, give evidence, in mitigation of damages, of the value of improvements made by him, and in refusing to allow evidence of such improvements, while allowing rent therefor as part of the

damages. *Jackson vs. Loomis*, 4 *Cowen* 168. *Green et al. vs. Biddle*, 8 *Wheat.* 1. *Bright vs. Boyd*, 1 *Story* 478. *Putnam vs. Ritchie*, 8 *Paige* 390, 403, &c. *Hylton vs. Brown*, 2 *Wash. C. C. R.* 165.

A party in possession, after suit commenced, is not necessarily a *malae fidei* possessor, (20 *Martin Rep.* 615,) because he may still have confidence that his title is good.

W. H. RINGO & DANIEL RINGO, also for the appellants. The Circuit Court erred in granting a new trial on the motion of the plaintiffs therein, as the verdict was not contrary to the evidence, or the instructions. 2 *Ark* 360. 1 *Eng.* 86, 428. 1 *J. J. Marsh.* 6. 3 *ib.* 391. 1 *Bibb.* 480. 3 *ib.* 313. 4 *ib.* 195.

The deed from Phillips to Kendrick & Fisher, being part of the *agreed case* was improperly excluded from the jury. Where part of an admission, confession or declaration is admitted in evidence the whole must be taken together, (2 *Stark. Ev.* 28, 29,) and the whole of the agreed case ought to have been before the jury. 5 *Ark.* 252

The notice that the defendant would insist on and claim compensation for the valuable improvements made on the land was improperly stricken out. 1st. The Court having decided against the motion to strike out the notice at a previous term, its judgment became final and conclusive. (2 *Ark.* 66. 5 *ib.* 23. 1 *Eng.* 92. *ib.* 282. 5 *Ark.* 485. *ib.* 424.) 2d. As the rights of parties must be determined by the law under which they accrued, whether the law be repealed at the institution of, or during the pendency of the suit. 17 *J. R.* 477. 5 *Mon.* 125. *ib.* 336. 1 *Eng.* 484. 3 *Call.* 268. 1 *Bay's Rep.* 179,) the defendant was entitled to such compensation. *Steel & McCampbell's Dig.* 293. 2 *Kent* 334. 3 *Blackf. Rep.* 82. 5 *Mon.* 129. *ib.* 97. 4 *Bibb.* 54

The defendant was entitled to compensation for valuable improvements in mitigation of damages independently of the statute. 3 *Atk. Rep.* 134. *Murray vs. Gouverneur*, 2 *John. Cas.* 441. *Addis. Rep.* 215. 4 *Cow.* 168. 2 *Wash. C. C. R.* 165. 20 *Martin Rep.* 609.

CUMMINS, *contra.* Under the Territorial Statute, in force when this suit was instituted, in certain specified cases, the party ejected could claim compensation for permanent and lasting improvements. *Steele & McCamp. Dig.* 293. But only where the defendant held under *color of title* and *bona fide;* not where he was a mere trespasser, or where the improvements were made without the consent and direction of the owner (as in 5 *Ark. Rep.* 220.)—The Court properly struck out the notice of the defendant that he would claim compensation for improvements, because the act under which it was filed had been repealed, and of course the remedy fell, and could not be pursued.

Where a deseizor or trespasser is turned out of lands by judicial proceedings, he must yield the lands with all improvements thereon. *Russell vs. Blake,* 2 *Pick.* 506. 5 *Cond. Rep.* 384.

The verdict in ejectment is evidence of trespass; and the defendant then was a trespasser without deed or color of title.

The time when the improvements, of which the defendant offered to give evidence, were made, is not stated. If they were made in the life time of the ancestor with his consent, his personal representatives and not the heir is responsible. (*Van Alen vs. Rogers,* 1 *J. Cas.* 283.) If after notice of title or suit brought, he is not entitled to redress in law or equity. *Russell vs. Blake,* 2 *Pick. Rep.* 506. 1 *John. Ch. Rep.* 385.

The deed from Phillips to Kendrick & Fisher was held by this Court to have no application to the lands in controversy and was properly excluded.

Mr. Justice WALKER, delivered the opinion of the court.

This case is a second time before us upon appeal. Its earlier history and the decision of the Court upon it will be found in 3 Arkansas Rep. 18.

The counsel for the appellant has argued at some length, the main question decided by this Court upon the first appeal, and asks that we review that decision for the purpose of correcting what he assumes as error in the decision. We have duly considered this proposition (for the question is not raised by the as-

signment of errors) and inasmuch as the decisions of this Court have not been altogether uniform on this point, we will proceed to review them and determine whether, in the after adjudications of this Court upon the same case, its decisions can, under any circumstances, be modified or overruled. The cases of *The Real Estate Bank vs. Rawdon et al.,* 5 *Ark.* 558. *Fortenbury vs. Frazier et al.,* 5 *Ark.* 202 and *Walker & Faulkner vs. Walker,* 2 *Eng.* 542. expressly decide that after the term has expired at which the decision is made, it is final and conclusive between the parties; that the Circuit Court is bound by the decision of this Court and must carry it into execution; that the inferior court cannot vary the decision, nor can it give further relief as to any matter decided, not even when it is apparent that this Court has mistaken a material fact. In the case of *Fortenbury vs. Frazier et al.,* the court says "After a case has been decided by the Supreme Court and remanded to the inferior Court and is again brought before the Supreme Court, nothing is before the Court for adjudication but the proceedings subsequent to the mandate." In the case of *The Real Estate Bank vs. Rawdon et al.,* 5 *Ark.* 558, upon a question as to whether the Court had power to reconsider its decisions at the close of the term at which they were made, although the Court were divided, a majority being of opinion that even though the motion is made at the same term, it must be decided also at that term or the judgment will be conclusive, still they were unanimously of the opinion, that where no motion for a reconsideration is interposed, the decisions at the close of its term, became final and conclusive upon the parties.

In a more recent case, (*Rutherford, use, &c. vs. Lafferty,* 2 *Eng.* 402,) this court seems to have departed from the rule laid down in these cases, whilst their authority is not questioned. On the contrary, it would seem that the court recognized the general principle, but based its decision upon the fact that the Supreme Court, in its former decision, had overlooked an important fact in the case. This was doubtless true; but then the question recurs, can the decision be held as conclusive between the parties and yet subject to correction and revision as to a misappre-

hension of facts? If for these, why not for errors as to the law also? We are at a loss for any satisfactory reason for the distinction, and are unwilling to concede that it should exist. It would not only authorize the appeal made to the court in this instance, but in all cases where the counsel, in their zeal for the success of their clients, might and doubtless would, where there was a hope of success, ask that the whole case be reviewed. The uncertainty and confusion which would result from such a practice, would strike vitally that progressive principle which lies at the foundation of all judicial proceedings so happily illustrated in the order and system of pleading and practice, which make each definite step in the progress of the cause conclusive upon the parties, and point them prospectively to an ultimate and final decision of the case. These rules of pleading have their origin in the same common principle alike applicable to the judgments of courts, where litigation ceases, and the judgment of each court is final and conclusive in the inferior courts unless set aside or reversed by an appellate tribunal; in the superior court, unconditionally so. If the propriety of this rule could need illustration, it is abundantly to be found in the case of *Rutherford, use, &c. vs. Lafferty.* There the Supreme Court decided that the plaintiff had no right of action whatever in the matter in controversy, and reversed the decision of the Circuit Court. When the case returned to the Circuit Court, in obedience to the decision of this court it decided that the plaintiff had no right of action, and rendered judgment against him for costs. The plaintiff appealed to this court again, and this court reversed the decision of the Circuit Court which had been rendered on the mandate of this court, for the reason that this court had mistaken an important fact in the case. So that, in fact, there are two decisions on the point totally different. We think the cases of *Fortenbury vs. Frazier et al.,* and the *R. E. Bank vs. Rawdon et al.,* well sustained, both upon authority and principle, and give them our full approbation.

The defendant assigns for error that the Circuit Court improperly granted to the plaintiffs a new trial. As the verdict was

in favor of the defendants, they cannot complain of either the misdirections of the judge, or improper evidence admitted, or like cause. A verdict was all that they could ask, and when it was set aside they could only complain that the Circuit Court had exercised its discretion to their prejudice. The Supreme Court has already extended its revising control over the discretionary powers of the Circuit Court as far as the most liberal practice will warrant upon the subject of new trials. This is a new case and must be predicated solely upon the ground of abuse of the discretionary power of the Circuit Court. Whether this power was exercised prudently or not there was offered the defendants another opportunity for presenting their defence, and if they had injustice done them in that trial, this court is open to hear their complaint. We will not permit them, however, to avail themselves of a defence at both trials: such a course has not been sanctioned, as we are aware, by precedent or authority.

We will next proceed to examine such errors as are connected with the assessment of damages.

This suit was brought in 1837; at that time our Territorial statute was in force. *Steel & McCampbell's Digest, p.* 293. It is enacted that "any person claiming land in this Territory by virtue of any grant, deed, warrant, concession, settlement right, or survey, and to which the title of the United States has been or may be hereafter relinquished by said claim being confirmed or granted by the board of commissioners, or by an act of Congress, and such person being in possession or actual cultivation of the same, and shall hereafter have judgment of dispossession against him recovered in an action of ejectment, or any other action brought by any person having better title, such person being so possessed as aforesaid shall be entitled to compensation for all valuable and lasting improvements which may be hereafter made on such land." Under this act there can be no question of the right of defendants to compensation. The state of case disclosed bring them within the provisions and meaning of the act; they were residents and claimants, such as were contemplated by the act, nor does the ground assumed by the

plaintiffs affect this right. Whatever may ultimately have been determined to be the true limits of his purchase, the location and improvement of the appellant Porter, was, no doubt from the case stated, made in good faith. The fact that this act was subsequently repealed, cannot affect the rights of the defendants. This act gave a right to set off the lasting valuable improvements made by him on the land against damages. Indeed it goes further, and says, in unqualified terms, that he shall have compensation for all valuable and lasting improvements made by him on the land without reference to the amount of damages. And this legal right must be determined by the laws in force at the time the right accrues, and when once acquired is not to be affected by subsequent legislation. (5 *Mon. R.* 336. *Id.* 129. 1 *Bay's Rep.* 179. 1 *Eng.* 484.) Independent of our statute the authorities go far to decide that improvements made in good faith under a supposed valid title may be set off against rents and profits. 8 *Wheat. R.* 1. 4 *Cowen* 168.

The same act required the defendant at the same time that he filed his pleas to file a notice that he would claim a compensation for the improvements made on the land. This notice was in effect a special plea without which the defendant could not offer evidence on that point. A motion had been made to strike it out at a previous term of the court, which was overruled. The judgment of the court at that term was conclusive with regard to its legal sufficiency. It was part of the record of the case when first before this court, and remained unimpaired by that decision. The subsequent order of the Circuit Court striking the notice out was clearly erroneous: its legal effect was to preclude the defendants from introducing evidence of the value of improvements made by them on the land.

The argument of the plaintiffs that the repeal of the Territorial statute affected the pleadings already filed under it is untenable. Suppose a plea impeaching the consideration of an instrument sued on had been filed prior to the passage of the act requiring an affidavit to be filed verifying the truth of such plea, could it be contended that the plea, which was once a legal de-

fence under the law in force at the time it was filed, could be subsequently stricken out because that law is afterwards repealed? We think not. The true distinction is this: Rights conferred by statute are determined according to the law which was in force when the right accrued, and are not in any manner affected by subsequent legislation. Remedies are governed by the laws in force at the time the remedy is sought. The particular act done, the filing of the notice, applied to the manner of enforcing this legal right given for compensation for improvements. This was done under the Territorial law, and was governed by it: that law having, during the pendency of the suit, been repealed, all further pleading or proceedings must depend on the law in force at the particular time the act is done: for instance if the late law had changed the manner of assessing the value of the improvements, they would be assessed under the law in force at the time the assessment was made.

The appellant has also assigned for error that the Circuit Court erred in refusing to permit him to introduce evidence of the value of the improvements made on the land in dispute. Upon looking into the bill of exceptions we find a mere proposition to prove certain facts, to wit: "The value of permanent and lasting improvements made by defendants on the ground in controversy by way of mitigation of damages for rents." There is no evidence disclosed which preceded this, or to which it could attach; therefore the proposition itself must be as such, independent of other evidence, would, when answered, be legal competent evidence. This was a proposition to prove the value of improvements irrespective of time. The same act which gives the right to claim the value of improvements limits the right to such improvements as were made prior to receiving notice of the adverse claim of plaintiffs. This is a reasonable and just restriction of the right of defendant's claim to compensation for improvements. From the time he is chargeable with notice he improves the land at his own risk, and can assert no just claim to tax the true owner for improvements, such perhaps as he does not desire to be made. The notice served upon the defendants

by the sheriff, which consisted of a copy of the declaration and a notice of the plaintiff's claim, which, by the sheriff's return, appears to have been done on the 15th of April, 1837, we think amply sufficient. From that date the defendants were not entitled to compensation for improvements made on the land, and consequently the defendants should have qualified their proposition and limited it to the improvements made by the defendants prior to the 15th of April, 1837. Having been presented to the court as an entire proposition, the court did not err in rejecting it. Evidence should correspond with the allegation and be confined to the point in issue. (*Greenl. Ev.* 51.) It is very questionable whether the evidence, had it been restricted to improvements made prior to the 15th of April, 1837, should have been received unless by consent of parties. The principle involved is strikingly similar to that of an officer or one acting under his authority, who is by statute (*Digest, sec.* 72, *p.* 807) allowed to plead the general issue and give notice of special matter in evidence. In a case under this statute (*Pryor vs. Clay,* 2 *Eng. R.* 97) this court decided that evidence of special matter was properly excluded because notice had not been given as required by the statute; and we can see no reason why the rule should not apply with equal force in this case. The right in each instance was made to depend on giving the necessary notice, nor could it be exercised in either without it.

It is objected that the jury empanneled and sworn to assess the damages were not summoned upon a *venire facias* issued for that purpose. This, at most, is a mere irregularity of practice to which no objection was taken at the time, and must be considered as waived by the defendants. Nor is it error that the same jury who tried the ejectment issue did not also assess the damages. *Digest* 456, *sec.* 15 expressly provides for calling a second jury to inquire of damages. In such case the law in force at the time the jury is called governs the practice.

The Circuit Court should not have excluded any portion of the evidence referred to in the agreed case between the parties; but inasmuch as the former decision of this court substantially de-

termined the question to which it referred, the judgment will not for that reason be disturbed.

But because the Circuit Court erred in striking out the notice of the defendant, and thereby precluding him from the legal right to introduce evidence of the value of the improvements made by him on the land in controversy, the judgment of the Circuit Court must be reversed, and the cause remanded.