NOLAND *vs.* LEECH, EX., &C.

Issues made up, and cause called for trial: both parties in Court: plaintiff presented a petition for change of venue, defendant objected to the entertaining of the application, for the want of previous notice, and insisted on the immediate trial of the cause; but the Court took the application under advisement until a future day of the term, to which he excepted: HELD, That, as the exception of the defendant only went to the entertaining of the application for the change of venue, and not to the granting of it, there was nothing in it.

On the death of the plaintiff in a cause, his executor may voluntarily appear at the first term thereafter, and make himself plaintiff, and proceed with the cause and the defendant, being in Court, is bound to take notice of such substitution.

Since the passage of *sec.* 62, *ch.* 4, *Digest,* on the death of the plaintiff in replevin for slaves, the cause should be revived in the name of the plaintiff's executor or administrator, and not of his heirs: *Dixon vs. Thatcher's heirs,* (3 *Eng.* 137,) was decided upon the previous law.

In replevin for several slaves, where the property has not been replevied and delivered to plaintiff, and the verdict is in his favor, the jury should find the separate value of each slave, otherwise a *venire de novo* should be awarded. *Dig., sec.* 39, *ch.* 136.

Writ of Error to Lawrence Circuit Court.

On the 16th June, A. D. 1847, William Robinson brought an action of replevin, in the Independence Circuit Court, against C. F. M. Noland, for two slaves, *Phill* and *Jackson.* The sheriff returned upon the writ, that, not finding the slaves, he took into custody the body of defendant, and released him on his giving bond as required by law. Defendant appeared at the return term, and plead: 1st. *Non cepit:* 2d. Property in himself: and 3d. Property in a third person. To which pleas issues were taken. The cause was then continued, and continued again at the next term on the application of defendant.

At the June term, 1848, the parties appeared by their attorneys, and plaintiff filed a petition and affidavit for a change of venue, to which motion and application the defendant, by attorney, objected, on the ground that no previous notice had been

given to defendant, or his attorney of record, of such intended application; and insisted upon an immediate trial of the cause, (the cause being called for trial on the last call of the docket, when the petition for change of venue was presented,) but the Court refused to permit an immediate trial, or to act immediately upon the application for change of venue, but took the matter under advisement until a subsequent day of the term, to which decision of the Court the defendant excepted, and took a bill of exceptions setting out the facts as stated above. On the next day, the Court ordered a change of venue to Lawrence county.

At the October term (1848) of the Lawrence Circuit Court, the first term after change of venue, the case was continued by consent of parties.

At the next term, (May, 1849,) the following entry appears of record:

"And now, on this day, came the attorneys for the plaintiff, and suggested and showed to the Court here that, since the last continuance of this cause, the said William Robinson, plaintiff, departed this life testate, leaving a last will, &c., and that Francis M. Leech has been duly appointed executor of said last will, &c.; and moved the Court that said Leech, as such executor, be substituted as plaintiff in this suit in the stead of the said William Robinson, deceased; and the premises being seen and fully understood by the Court, it is considered, ordered, and adjudged, by the Court here that the said Francis M. Leech, as such executor, &c., be substituted, and he is hereby substituted as plaintiff in this suit in the stead of the said William Robinson, deceased; and that this suit proceed to final determination thereof in the name of the said Francis M. Leech as such executor plaintiff against the said defendant."

On the next day, the following entry appears:

"And now, on this day, came the plaintiff by his attorneys, and thereupon came a jury, to wit: John Willams, &c., &c., twelve good and lawful men, &c., who were elected, &c., &c., and after hearing the evidence, &c., &c., returned into Court the following verdict: "We, the jury, find for the plaintiff, and

assess his damages, which he has sustained by the unjust taking and detention of the property in the plaintiff's declaration mentioned, to the sum of $420; and also find the value of the two slaves in the plaintiff's declaration mentioned to be $900.(*a*)

"And it appearing to the Court here, from the return of the Sheirff endorsed upon the writ of replevin in this case, that the property specified in the declaration has not been replevied and delivered to the plaintiff, it is ordered by the Court that judgment be given therefor under the 39*th sec.* 136*th ch.* English's revised *Digest* of the statutes of this State. It is, therefore, by the Court considered and adjudged that the said plaintiff herein, as executor of the last will, &c., of William Robinson, do have and recover of the defendant the sum of $420, assessed by the jury as damages, &c.

"And it is also further considered that the property mentioned in the declaration, to wit: the slaves Phill and Jackson, be replevied and delivered to the said plaintiff as executor as aforesaid without delay, or, in default thereof, he do have and recover of the said defendant the said sum of $900, the value of the said negroes, Phill and Jackson, as assessed by the jury as aforesaid," together with costs, &c.

The cause was tried in the Court below before the Hon. WILLIAM C. SCOTT, Judge.

FOWLER, for the plaintiff. The change of venue was irregular —no notice having been given and the application coming too late. *Dig.* 983, *sec.* 3

The appearance and substitution of the executor of the plaintiff under the statute, (*Dig., ch.* 1, *sec.* 6,) without a *scire facias* or notice to the defendant, did not bind him to appear. Nor was the executor of the plaintiff the proper party. *Dixon vs. Thatcher's heirs,* 3 *Eng.* 137.

As the judgment is that the plaintiff recover the property, if to be had, and if not, then its value, the verdict should have

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NOTE(*a*).—The declaration alleged the two slaves to be worth $1000. The separate value of each was not alleged. REPORTER.

found the separate value of each slave, and not the aggregate value—as in actions of detinue. 1 *Saund. Pl. & Ev.* 436. *Bull. N. P.* 51. 1 *Ch. Pl.* 141, 142. 2 *Stark. Ev.* 281. 1 *Tomlin Law Dic.* 551. 8 *Petersdorff C. L.* 85. 1 *How.* (*Miss.*) *R.* 229. 2 *Bl. R.* 853. 2 *Selw. N. P.* 595, 596.

BYERS & PATTERSON, contra. The defendant below did not except to the order granting the change of venue; and cannot complain of it in this Court.

The defendant was in Court, and bound to take notice of the application of the executor to be substituted as plaintiff: and therefore no *scire facias* was necessary. This principle was decided in the case of *Wilson vs. Codman's ex.*, 3 *Cranch* 193. 1 *Pet. Cond. R.* 493.

At the time of the death of Robinson, and the substitution of his executor as plaintiff, slaves were, by express statute, made assets in the hands of the administrator or executor.

If the jury should have found the separate value of the property replevied, the general verdict in favor of the plaintiff ought not to be set aside; but a jury ought to be called simply to asses the separate value of the slaves.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

Numerous points are raised and assigned for error, which we will examine in the order in which they arise upon the record The first relates to the ruling of the Circuit Court in respect to the entertaining of the application for a change of venue without a previous notice to the defendant below. The exception taken was not to the decision of the Court in granting the change of venue, but simply to the entertaining the motion and refusal to proceed forthwith to the trial of the cause. If any error intervened in respect to that matter, it was necessarily in awarding a change of venue and not in entertaining the motion without previous notice of the intended application. The mere act of entertaining the motion without granting it could not

possibly affect the rights of the defendant, and consequently could afford no cause of complaint.

The next question presented relates to the propriety of the action of the Court in permitting Leech to substitute himself in the place of William Robinson, deceased, and to proceed to trial and judgment without having first notified Noland of the intended substitution. The *7th sec. ch.* 1, *Dig.*, declares that "when there is but one plaintiff in an action, and he shall die before final judgment, such action shall not thereby abate, if the cause of action survive to the heirs, devisees, executor or administrator of such plaintiff, but such of them as might prosecute the same cause of action may continue such suit by an order of the Court substituting them as plaintiff therein." The death of Robinson, the original plaintiff, could not have the effect to abate the suit, and, as a necessary consequence, the defendant could not claim to be released from his obligation to be in Court or to take the consequences of his default. It appears, from the recital in the record, that Leech availed himself of the earliest opportunity that presented itself to come in and substitute himself as a party in the place of the original plaintiff. He came in at the first term after the death of the original plaintiff, and the defendant, being in Court, was bound, at his peril, to take notice of the proceeding, and, as he is not shown to have opposed it, the presumption is that he had no good ground upon which to rest a resistance to it. This doctrine we consider fully borne out and sustained by the *16th section* of the chapter referred to. By it, provision is made that, "when any person is made co-plaintiff, or co-defendant, or is substituted as plaintiff, or defendant, in the place of the original party, in any of these cases, for which provision is made in this act, such new party shall, on his application, be entitled to a continuance of the suit until the next term of the Court; but nothing in this section contained shall be so construed as to give the opposite party a right to a continuance of the suit on account of such substitution." We think it clear, from the whole statute, that the substitution having been made at the first term after the death of the original

plaintiff, there can be no doubt but the defendant was bound to take notice of it, and that having then failed to make any resistance, he is forever precluded from so doing.

The Supreme Court of the United States, in the case of *Wilson vs. Codman's ex.*, by MARSHALL, C. J., said: "It is contended, on the part of the defendant, that, on the suggestion of the death of either plaintiff or defendant, a *scire facias* ought to issue in order to bring in his representative: or if a *scire facias* shall not be required, yet that the opposite party should have the same time to plead and make a proper defence as if such process had been actually sued. The words of the act of Congress do not seem to countenance this opinion. They contemplate the coming in of the executor as a voluntary act, and give the *scire facias* to bring him in, if it shall be necessary, and to enable the Court "to render such judgment against the estate of the deceased party" "as if the executor or administrator had voluntarily made himself a party to the suit." From the language of the act, this may be done instanter. The opinion that it is to be done on motion, and that the party may immediately proceed to trial, derives strength from the provision that the executor or administrator so becoming a party may have one continuance. This provision shows that the legislature supposed the circumstance of making the executor a party to the suit to be no cause of delay. But, as the executor might require time to inform himself of the proper evidence, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him. There is, then, nothing in the act, nor is there any thing in the nature of the provision, which should induce an opinion that any delay is to be occasioned where the executor makes himself a party and is ready to go to trial. Unquestionably he must show himself to be executor unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary before he shall be permitted to prosecute; but if the order for his admission as a party be made, it is too late to contest the fact of his being an executor." The act of Congress referred to in the opinion is substan-

tially the same as our statute, and the argument of the Court in that case is conclusive of the question raised in this.

It is also objected, against the revivor, that the executor is not the proper party, but the heirs should have been substituted in the place of the original plaintiff. In support of this position, we are referred to the case of *Dixon vs. Thatcher's heirs,* (3 *Eng.* 137.) That case cannot govern the decision in this, as the legislature have since passed an act expressly placing slaves in the hands of the executor or administrator as assets, and emphatically declaring that they shall be deemed in their possession and under their control in like manner as personal estate. See *sec.* 62, *ch.* 4, *Digest.*) This statute was in force at the time of the institution of this suit, and also at the time of substitution of the present plaintiff, and consequently the executor was he proper party.

The next and last ground taken is, that the jury failed to find the separate value of each slave mentioned in the declaration. This objection is doubtless well taken. The 39*th sec. ch.* 136, *Digest,* declares that "If the goods and chattels specified in the declaration shall not have been replevied and delivered to the plaintiff, such plaintiff, in case he shall recover judgment upon the whole record, shall be entitled, in addition to his judgment for damages and costs, to a further judgment that such goods and chattels be replevied and delivered to him without delay, or, in default thereof, that such plaintiff recover from the defendant the value of such goods and chattels, as the same shall have been assessed by the jury on the trial or upon the writ of inquiry." The judgment is in the alternative precisely as it is in detinue, and consequently the same rule is applicable to each.

Judge Tucker, in his Commentaries, when discoursing upon the action of detinue, said: "The verdict of the jury should find as to all the articles of property claimed in the declaration; and formerly, when this was not done, a *venire de novo* was awarded. (1 *Wash.* 76.) But now the plaintiff is barred as to the things omitted. (1 *R. C. ch.* 128, *sec.* 105.) But, where several articles are demanded, the verdict may find for the plaintiff as to some,

and for the defendant as to others. The jury must also ascertain the price or value of the property demanded: but if this be omitted, the Court may direct a writ of inquiry to ascertain it. (1 *R. C. ch.* 128, *sec.* 105.) This value ought not to be assessed of several articles. Separate values should be found, or there must be a writ of inquiry to ascertain them, (2 *Call* 313. 2 *Mun.* 539.) But the jury may find general or joint damages for detaining several slaves. (2 *Mun.* 539.) The diversity arises from the consideration that the judgment is so entered that if any article of the property cannot be had in specie, the plaintiff will be entitled to the alternative value. The value of each article should, of course, be ascertained, since the plaintiff may be able to get one part of the property in specie though he cannot get the other. As to the damages, no such reason exists." In a note to this subject, it is said "that 1 *R. S. ch.* 128, *sec.* 105, provides the writ of inquiry whenever the price or value is omitted. But that a *venire de novo* would seem to be the regular course according to ordinary principles when the values of several things are improperly joined." It will be perceived, from this authority, that, in the State of Virginia, the statute expressly provides for the issuance of a writ of inquiry where the price or value is omitted in the finding upon the issues. No such authority is given by our replevin statute, and, as a necessary consequence, this case must be governed by ordinary principles. The defect complained of, therefore, can be cured only by a *venire de novo*. The cause will, therefore, for this error, be reversed, and remanded to the Circuit Court of Lawrence county, to be proceeded in according to law and not inconsistent with this opinion.