Fowler Vs. Merrill

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Appellant : Fowler

Respondent : Merrill

Judgement :

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Fowler v. Merrill

52 U.S. (11 How.) 375

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF ARKANSAS

SYLLABUS

The Act of Congress passed on 24 September, 1789 1 Stat. 88, 89, provides that *ex parte* depositions may be taken before a judge of a county court.

Where a probate court is organized for each county in a state, is a court of record, and has a seal, it is sufficient if a deposition under that act be taken before a judge of the probate court.

Although the day when a mortgage was executed was not stated, yet where it bore a date in its commencement, and its acknowledgment and date of record were both given, and both of them preceded a sheriff's sale of the mortgaged property, it was certain that the mortgage was executed before the sale under execution.

Although, when the mortgage was recorded, the laws of the state did not make the mere recording convey the title when the personal property thus mortgaged remained in the possession of the mortgagor, yet they sanctioned the mortgage unless it was made without good consideration and opposed by a *bona fide* subsequent purchaser who had no notice of its existence.

But the fact of recording the mortgage tended to give notice of its existence, and in the present case the evidence shows that the purchasers at the sheriff's sale had notice of the mortgage.

Such purchasers must allege that their want of notice continued up to the time of making actual payment; a want of notice merely extending to the time of making the purchase is not enough. Payment might have been refused, and then they would not have been injured.

Moreover, between the time when the mortgage was in fact recorded and the time of the sheriff's sale, the state passed a law making such recorded mortgages valid.

The increase or offspring of slaves belong to the owner of the mother.

The decree of the circuit court being that the purchasers at the sheriff's sale should either surrender the property to the prior mortgagee or pay the value thereof, such value was properly computed as it was at the time of rendering the decree.

The hire of the slaves was properly charged as commencing when the prior mortgagee filed his bill for a foreclosure.

This action was a bill filed by Merrill, the appellee, against Fowler

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and Badgett and other persons, under the following circumstances.

In April and June, 1837, N. L. Williams made the following notes:

"$11,428 22/100 Natchez, 1 April, 1837"

"Two years after date I promise to pay J. L. Dawson or order the sum of eleven thousand four hundred and twenty-eight dollars and twenty-two cents, value received. Negotiable and payable at the Planters' Bank of Mississippi, Natchez."

"[Signed] N. L. WILLIAMS"

"$1,150 Natchez, 1 June, 1837"

"Twelve months after date, I promise to pay J. L. Dawson, or order, eleven hundred and fifty dollars, value received, negotiable and payable at the Planters' Bank of Mississippi, Natchez."

"[Signed] N. L. WILLIAMS"

Making together the sum of $12,578.22.

These notes, endorsed by Dawson, were also endorsed by Merrill, and discounted for Dawson's use by the Planters' Bank of Mississippi at Natchez.

In order to secure Merrill, Dawson executed a mortgage to him of certain negroes then on the plantation of Dawson in Arkansas. There were nine negro men, six women, and three boys included in the mortgage. As this mortgage was much discussed in the argument, it is proper to give its commencement and acknowledgment:

"This indenture, made this 25 November in the year of our Lord 1837, between James L. Dawson, of the County of Jefferson, State of Arkansas, of the one part,

and A. P. Merrill, of the City of Natchez, State of Mississippi, of the other part, witnesseth that the said James L. Dawson, in consideration of the debt to be secured, hereinafter mentioned, and of one dollar to him in hand paid by the said A. P. Merrill, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell, and convey unto the said A. P. Merrill, the following-described negroes, now on the plantation of the said James L. Dawson, known by the name of Woodstock, lying in the County of Jefferson, State of Arkansas, *viz.,* "

&c.;

"To have and to hold the said negroes unto the said A. P. Merrill, his heirs and assigns, to the only proper use of the said A. P. Merrill, his heirs and assigns forever. Provided that if the said James L. Dawson, his executors and administrators

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or either of them do pay or cause to be paid unto the said A. P. Merrill, his executors, administrators, or assigns, the just and full sum of $12,578.22, as mentioned in two certain notes of the following tenor, *viz.,* No. 1, drawn by N. L. Williams, dated 1 April, 1837, at two years, for $11,428.22; 2 do. do., 1 June, 1837, twelve months, $1,150, endorsed by J. L. Dawson and A. P. Merrill, and payable at the Planter's Bank of Mississippi, Natchez, then these presents to be void, and the said James L. Dawson doth covenant with the said A. P. Merrill that he, the said James L. Dawson, his executors, administrators, or assigns, shall and will pay or cause to be paid to the said A. P. Merrill, his executors, administrators, or assigns, the said sum of $12,578.22 as aforesaid on the day above limited for the payment thereof."

"In testimony whereof the said James L. Dawson has hereunto set his hand and seal the day and year above written."

"[Signed] JAMES L. DAWSON"

"Signed, sealed, and delivered in the presence of _____."

" *State of Mississippi, Adams County* "

"Personally came before me, judge of the probate court in and for the county aforesaid, the within-named James L. Dawson, who acknowledged that he signed, sealed, and delivered the within instrument in writing, as his act and deed for the purposes and intents and on the day and year therein mentioned."

"Given under my hand and seal, this 24 November, A.D. 1837."

"C. RAWLING, *Judge of Probate* "

On 29 December, 1837, this mortgage was recorded in Arkansas.

On 12 March, 1841, the President and Directors and Company of the Commercial Railroad Bank at Vicksburg, suing for the use of William W. Frazier, Thomas E. Robbins, and William S. Bodley, obtained a judgment against Dawson in the Circuit Court of Pulaski County (state court) of Arkansas. The amount of the judgment was:

Debt . . . . . $ 9.688.00

Damages. 1,065.00

Costs. 8.95

$10,761.95

On 24 April, 1841, a *fieri facias* was issued upon

this judgment, and levied upon certain lands and eleven of the negroes mentioned in the mortgage.

After an alias writ, the property was exposed to sale on 11 October, 1841. Fowler became the purchaser of some of the negroes, and on the next day the sheriff

executed a deed to him, reciting the judgment and execution, and concluding thus:

"Now know all men by these presents, that I, John J. Hammett, as such sheriff as aforesaid, for and in consideration of the premises, and for and in consideration of the said aggregate sum of $2,966.66 2/3, to him, the said John J. Hammett, as such sheriff, in hand paid by the said Absalom Fowler, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered, and do hereby grant, bargain, sell, and deliver, all of said slaves above described to the said Absalom Fowler, hereby conveying to him, and to his heirs and assigns forever, all of the right, title, estate, interest, claim, and demand of the said James L. Dawson, of, in, and to the same. Not making myself hereby responsible for the title of said slaves, but only conveying, as such sheriff, the title of the said James L. Dawson in and to the same."

"Signed, sealed, and delivered, this 12 October, A.D. 1841. Interlined on second and third pages before signed."

"JOHN J. HAMMETT"

" *Sheriff of Jefferson County, Arkansas* "

Badgett subsequently purchased some of these slaves from Fowler, and other persons, who were made defendants in the bill filed by Merrill, were purchasers at the sale.

On 4 March, 1842, Merrill paid the notes of Williams, which had been discounted for Dawson's use by the Planters' Bank of Mississippi.

On 7 September, 1842, Merrill filed his bill in the Circuit Court of the United States for Arkansas, against the following persons -- *viz.,*

"James L. Dawson, who is a citizen of the State of Arkansas, but now temporarily residing in the Indian country west of the State of Arkansas, James Smith of Arkansas County, William Dawson of Jefferson County, Samuel C. Roane of Jefferson County, Samuel Taylor of Jefferson County, Nathaniel H. Fish of Jefferson County, Garland Hardwick of Jefferson County, Absalom Fowler of

Pulaski County, Noah H. Badgett of Pulaski County, and all of whom are citizens of the State of Arkansas, and Sophia M. Baylor, who is a citizen of the State of Arkansas, but now

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temporarily residing at Fort Gibson, in the Indian country, west of the State of Arkansas."

The bill stated circumstances mentioned above, and then averred that the defendants purchased the slaves with notice of the mortgage. It then specially interrogated Fowler and Badgett, among other things, as to whether they ever had actual notice of the mortgage, and if so, when; and also as to the value of the slaves at the time they came into their possession, and their value at the time of filing the bill; and as to the worth of their services or hire after they came into defendants' possession, and whether Jackson and other children were the issue of the mortgaged slaves; also as to the identity of the slaves themselves.

Defendants answered, setting up a *bona fide* purchase, without notice, at the sheriff's sale, and denying, as far as they knew or believed, all of the material allegations of the bill, and alleging that the mortgage was fraudulent; that Dawson had remained continuously in possession of the slaves, contrary to the terms of the deed; that they did not know whether the slaves were the same, and denied positively that Jackson was the issue of anyone of the mortgaged slaves. In response to the interrogatories as to the value, hire &c.;, Fowler answered, that Eliza, one purchased by him, and sold to Badgett, died before the commencement of the suit; that at the time he purchased them, they were worth about what he gave for them, to-wit: Tom, $533.33 1/3; Phoebe and Jackson, $666.66 2/3; Mary and Henry, $500; Maria and her child, $600; Eliza, $466.66 2/3; and that, since the sale, the value of slaves generally, and these also, had depreciated at least one-fourth; and that their hire, deducting necessary expenses, was worth, per annum, for Tom $70, Maria $50, Mary $40, Phoebe $40; and for the others, nothing. Badgett answers also that Phoebe was worth $400, Eliza $350, Jackson $65, and that Eliza had died &c.;, and that their hire was not worth more than $40 per

annum.

The valuation preparatory to the sheriff's sale was as follows:

Valued at Sold for

Tom . . . . . $ 800 $533.33

Phoebe and Jackson. 1,000 666.66

Mary and Henry. 750 500.00

Maria and her child 700 600.00

Eliza 700 466.66

It is not necessary to trace the progress of the suit through

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its various steps. Many depositions were taken under a commission and otherwise, and exceptions to their admissibility filed. One of them, which is the subject of a part of the opinion of this Court, will be particularly mentioned for that reason. The point, as raised and decided in the circuit court was as follows:

"The fourth exception is"

"that the deposition of Henry D. Mandeville, taken at Natchez, on 8 March, 1845, was taken without any sufficient notice having been served on said defendants of the time and place of taking the same."

"The answer to this exception is that where a deposition is taken, according to the acts of Congress, at greater distance from the place of trial than one hundred miles, no notice is required. By the certificate of the magistrate before whom the deposition was taken, it appears that the witness lives more than one hundred miles from this place; that his certificate is competent evidence of the fact is established by the adjudication of the Supreme Court in the case of *Patapsco*

Insurance Company v. Southgate, 5 Pet. 604, 30 U. S. 617 . The Court said:"

" It was sufficiently shown, at least *prima facie,* that the witness lived at a greater distance than one hundred miles from the place of trial. This is fact proper for the inquiry of the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of *Bell v. Morrison,* 1 Pet. 356, it is decided that the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury."

"This exception is overruled."

"The fifth exception is to the competency of the evidence contained in the deposition of Mandeville. The decision of this exception will be reserved to the final hearing."

"The sixth exception is to the authority of the magistrate before whom Mandeville's deposition was taken. It was taken before Thomas Fletcher, Judge of the Probate Court within and for the County of Adams and State of Mississippi, and the inquiry is whether he is authorized by the acts of Congress to take depositions. By the 30th section of the Judiciary Act of 1789, depositions *de bene esse* may be taken before any judge of a county court of any of the United States. Is Thomas Fletcher a judge of a county court of any of the United States? In order to decide this question, we must look into the laws of the State of Mississippi. That this court is bound to take notice of the laws of Mississippi is clearly settled by the Supreme Court of the United States in the case of *Owings v. Hull,* 9 Pet. 625. The Court said that the laws of all the states in the Union are to be judicially taken notice of, in the

same manner as the laws of the United States are to be taken notice of, by the circuit courts of the United States. Looking, then, into the laws of Mississippi, we find a court of probates established in each county of the state, with jurisdiction in all matters testamentary and of administration of orphans' business, in the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos*

mentis, see 18 of the 4th article of the Constitution, and the acts of the Legislature of 1833, law 444. By the fourth section of the act it is provided that the court of probate in each county shall procure a seal for said court, thereby constituting it a court of record."

"The question then is is this a county court? It is a court of record established in each county in the state, and styled 'the Probate court of the County of _____.' I am clearly of opinion that it is such a county court as is contemplated by the act of Congress, and that depositions may be taken before the judge thereof. The deposition of Mandeville is a deposition taken *de bene esse,* and may be read on the final hearing unless the defendant shall show that the witness has removed within the reach of a subpoena after the deposition was taken and that fact was known to the party, according to the decision of the Supreme Court in the case of *Patapsco Insurance Company v. Southgate,* 5 Pet. 617. This exception is therefore overruled."

Roane and others of the defendants made a compromise with Merrill, which was sanctioned by the court, and the bill was dismissed as to Sophia M. Baylor.

On 23 August, 1847, the circuit court made a long explanatory decree, of which the following is the conclusion:

"This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to-wit: that the bill as to the defendant Sophia M. Baylor be and the same is hereby dismissed with her costs, to be paid by her to the said complainant. And it is further ordered and decreed that unless the sum of $18,934 shall be paid or tendered to the said complainant or his solicitor by the remaining defendants, or any or either of them, on or before the first day of the next term of this court, they, the said defendants, are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged property in the bill mentioned, and a sale of said mortgaged property decreed, if a sale thereof shall be deemed expedient by this Court. And the question of hire of the mortgaged property, of costs, and all other questions in

the

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cause not now decided, are reserved to the further decree of this Court."

"And it is further ordered that this cause be and the same is hereby continued until the next term of this Court."

"At the next term of the court a final decree was passed, fixing the value of the slaves and their hire, sanctioning the compromise made by some of the defendants, ordering a restitution of the slaves held by the rest, or, in case of neglect or refusal to restore, holding them responsible for the assessed value of such slaves."

Fowler and Badgett appealed from this decree to this Court.

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MR. JUSTICE WOODBURY delivered the opinion of the Court.

This was an appeal from a decree of the Circuit Court of the United States for the District of Arkansas.

The decree was in favor of Merrill, on a bill in chancery to foreclose a mortgage of certain negroes, described therein and executed to him, November 25, 1837, to secure him for endorsing two notes made in April and June, 1837, the first payable in one year and the other in two years, for $12,578.42 in the aggregate. These notes run to F. L. Dawson or order, and were by him endorsed to the plaintiff, Merrill, and by him to the Planters' Bank for Dawson, who obtained the money thereon for himself. This mortgage was recorded December 29, 1837.

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The notes not being taken up by Dawson, Merrill was compelled to pay their amount and interest, on 4 March, 1842.

The bill then proceeded to aver, that the defendants below, *viz.,* James L. Dawson, James Smith, William Dawson, and others, had since got possession of these negroes, some of one portion of them and some of another. And that, although they were bought with full notice of Merrill's prior rights to them under the above mortgage, yet the respondents all refuse to deliver them to him, or pay their value and hire towards the discharge of the mortgage. Whereupon he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire or to pay their value.

The court below decided, that $18,934 be paid to Merrill by the respondents, excepting Mrs. Bayler, and, on failure to do it, that the redemption of them be barred, and other proceedings had, so as eventually to restore the slaves or their value to the mortgagee.

Several objections to this decree and other rulings below were made, which will be considered in the order in which they were presented.

Some of the depositions which were offered to prove important facts had been taken before "a judge of the Probate court" in Mississippi, when the act of Congress allows it in such cases before "a judge of a county court." 1 Stat. 88, 89.

But we think, for such a purpose, a judge of probate is usually very competent, and is a county judge within the description of the law.

In Mississippi, where these depositions were taken, a probate court is organized for each county, and is a court of record, having a seal. Hutch.Dig. 719, 721. Under these circumstances, were the competency of a probate judge more doubtful, the objection is waived by the depositions having been taken over again in substance before the Mayor of Natchez.

The other objections to the depositions are in part overruled by the cases of *Bell v. Morrison,* 1 Pet. 356, and *Patapsco Ins. Co. v. Southgate,* 5 Pet. 617.

On the rest of them not so settled, we are satisfied with the views expressed below, without going into further details.

The next exception for our consideration is that the time of the execution of the mortgage is not shown, and hence that it may have been after the rights of the respondents commenced.

But it must be presumed to have been executed at its date

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till the contrary is shown; and its date was long before. Besides this, it was acknowledged probably the same day, being certified as done 24 November, 1837. And though this was done out of the state, yet, if not good for some purposes, it tends to establish the true time of executing the mortgage. It must also have been executed before recorded, and that was December 29 of the same year, and long before the sale in October, 1841, under which the respondents claim.

The objection, that the handwriting of the record is Dawson's, does not impair this fact, or the legality of the record as a record, it having doubtless been allowed by the register, and being in the appropriate place in the book of records.

It is next insisted, that, as the negroes were left in the possession of Dawson after the mortgage, and were seized and sold to the respondents in October, 1841, to pay a debt due from Dawson to the Commercial Bank of Vicksburg, and as the respondents were innocent purchasers, and without notice of the mortgage, the latter was consequently void. This is the substance of several of the answers. Now whether a sale or mortgage, without changing the possession of the property, is in most cases only *prima facie* evidence of fraud, or is *per se* fraud, whether in England or in some of the states, or in Arkansas where this mortgage and the sale took place, may not be fully settled in some of them, though it is clear enough in others. *See* cases cited in 2 Kent's Com. 406-412. So whether a sound distinction may not exist at times between a mortgage and a sale, need not be examined, though it is more customary in all mortgages for the mortgager honestly

to retain the possession, than to pass it to the mortgagee. *United States v. Hoe,* 3 Cranch 88; *Haven v. Low,* 2 N.H. 15. *See* 1 Smith's Leading Cases 48, note; *Brooks v. Marbury,* 11 Wheat. 82, *24 U. S. 83* ; *Bank of Georgia v. Higginbottom,* 9 Pet. 60; *Hawkins v. Ingolls,* 4 Blackf. 35. And in conditional sales, especially on a condition precedent *bona fide,* the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled. *See* in 9 Johns. 337, 340; 2 Wend. 599. *See* most of the cases collected in 2 Kent's Com. 406.

But it is unnecessary to decide any of these points here, as, in order to prevent any injury or fraud by the possession not being changed, a record of the mortgage is in most of the states required, and was made here within four or five weeks of the date of the mortgage, whereas the seizure and sale of the negroes to the respondents did not take place till nearly four years after.

Yet it is urged in answer to this that the statute of Arkansas

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making a mortgage, acknowledged and recorded, good without any change of possession of the articles did not take effect till March 11, 1839, over a year after this record.

Such a registry, however, still tended to give publicity and notice of the mortgage and to prevent as well as repel fraud, and it would, under the statute of frauds in Arkansas, make the sale valid if *bona fide* and for a good consideration, unless against subsequent purchasers without notice. Rev.Stat., ch. 65, 7, 415.

There is no sufficient proof here of actual fraud or *mala fides* or want of a full and valuable consideration. And hence the objection is reduced to the mere question of the want of notice in the respondents. In relation to that fact, beside what has already been stated, evidence was offered to show that the existence of the mortgage was known and talked of in the neighborhood, and proclaimed publicly at the sale.

Indeed some of the evidence goes so far as to state, that after the notice of the mortgage at the sale, the sheriff proceeded to sell only the equity of redemption, or to sell the negroes subject to any encumbrances. His own deed says expressly

"hereby conveying all of the right, title, estate, interest, claim, and demand of the said James L. Dawson, of, in, and to the same, not making myself hereby responsible for the title of said slaves, but only conveying, as such sheriff, the title of said James L. Dawson in and to the same."

The proof likewise brings this actual notice home to each of the respondents, before the purchase, independent of the public record of the mortgage and the public declaration forbidding the sale at the time, on the ground that the mortgage existed and was in full force.

According to some cases, this conduct of theirs under such circumstances would seem more fraudulent than any by Merrill. *Le Neve v. Le Neve,* 3 Atk. 646; 1 Stor.Eq. 395; 21 U. S. 8 Wheat. 449. Beside this, the answer should have averred the want of notice not only before the sale, but before the payment of the purchase money. Till the actual payment the buyer is not injured, and it is voluntary to go on or not when informed that the title is in another. *Wormley v. Wormley,* 8 Wheat. 449; *Hardingham v. Nicholls,* 3 Atk. 304; *Jewett v. Palmer,* 7 Johns.Ch. 68. *See Le Neve v. Le Neve,* 3 Atk. 651.

There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded, passed February 20, 1838 Rev.Stat. 580. This mortgage was on record then, and since, and had been from December, 1837, thus covering both the time when the law took effect

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and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi, and in most states, the acknowledgment may be before a magistrate out of the state as well as in, if he is authorized to take acknowledgments of such instruments.

Nothing appears in the record here against his power to do this. Some complaint is next made of the delay by Merrill to enforce his mortgage against Dawson.

But it will be seen on examining the evidence, that he was not compelled to pay Dawson's notes to the bank till March 4, 1842, and that these negroes were sold to the respondents and removed some months before, *viz.,* October 11, 1841, so that no delay whatever occurred on his part to mislead the respondents.

It was next objected, that two or three children, born since the mortgage, should not be accounted for, and one woman, who is supposed to have died after the sale and before this bill in chancery.

But it seems to accord with principle, that the increase or offspring should belong to the owner of the mother 2 Bl.Com. 404; *Backhouse's Admr. v. Jetts' Admr.,* 1 Brock.C.C. 511, and the evidence is so uncertain whether the death of Eliza occurred after this bill or before that the doubt must operate against the respondents, whose duty it was to prove satisfactorily that it happened before in order to be exonerated.

It is argued further against the decree that the respondents were made to account below for a boy not proved clearly to have been born of one of the mortgaged women. But there seem circumstances in the case from which it might be inferred that he was so born. He was brought up among them, he was under the care chiefly of one, and no other person is shown to have been his parent.

We do not see enough, therefore, to justify us in differing from the judge below on this point.

The rules adopted in the circuit court for fixing the value to be paid for the negroes are also objected to, but seem to us proper. 1 Brock.C.C. 500.

The mortgaged property is given up or taken possession of by the mortgagee usually at the time of the decree, and if not surrendered then, its value at that time, instead of the specific property mortgaged, must be and was regarded as the rule of damages.

The injury is in not giving it up when called for then, or in not then paying the mortgage, and not in receiving it some years before and not paying its value at that time.

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This is not trover or trespass for the taking of it originally, but a bill in chancery to foreclose the redemption of it by a decree, and hence its value at the time of the decree is the test of what the mortgagee loses, if the property is not then surrendered.

There is another exception to the estimate made of the value of the hire of the slaves. Their hire or use was charged only from the institution of this bill in chancery. This surely does not go back too far. 1 Brock.C.C. 515.

And some analogies would carry it back further, and in a case like this charge it from the period of their going into the possession of the respondents. But they object to the hire allowed, because it is said that clothing, medicine &c.;, during this time should have been deducted. 1 Dana 286; 3 J.J.Marshall 109.

We entertain no doubt, however, that in fact the hire here was estimated as the net, rather than gross, hire, and all proper deduction made. It is only a hundred dollars in one case, and seventy in others, which manifestly might not equal their gross earnings, while nothing is charged for the children. Testimony, too, was put in as to the proper amount for hire, and the judge as well as witnesses belonging to the country, and being acquainted with its usages, doubtless made all suitable deductions.

There is no evidence whatever to the contrary.

And on the whole case, we think the judgment below should be

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Arkansas and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs.