

distance of time, that the sale shall be treated as a nullity, because the property was not present in view of the bidders, and the witness did not see the purchaser pay the money. That there was a sale of negro James, is unquestionable, because he was resold by the purchaser, Jesse Hughes, and the theory of the complainant's counsel is, that it was with the money received for James, and the proceeds of a slave sold by Josiah Hughes, that the judgments upon which the executions issued, were satisfied.

I think there can be no doubt upon the proof, of the fact of the sale, and I am also satisfied, that the purchase money was paid by Jesse Hughes, and that he intended to claim the negro Isaac as his property, the estimated value of Isaac at that time, and the money received for James, being about equal to the money due upon the judgments.

But it is insisted by the defendant, that though the subject matter in issue, in the action of detinue, may be the same as is involved in this case, still, as the parties are not the same, the record of the recovery in that case, cannot be used in this, for any purpose, and the case of *Fishwick vs. Sewell*, 4 *Har. & Johns.*, 393, is relied upon, as affording ground for the objection. In that case, in the sixth exception, the defendant, Sewell, offered evidence that Darnall, under whom it was supposed he claimed, had paid various sums of money on account of the plaintiff's intestate, Fishwick, and prayed the court to instruct the jury, that it was competent to him to recoupe, in damages, the amount of such payments made by Darnall, to the creditors of Fishwick. This the County Court refused to do, and the Court of Appeals approved of this refusal, inasmuch as the defendant claimed the property in his own right, and in opposition and disclaimer of the trust under which it was transmitted to him. But no such disclaimer is shown in this case, it being apparent from the pleadings, and evidence, in the case in this court, that the question in the County Court, in the detinue case, was upon the title of Jesse Hughes, and that Marcellus Jones, his administrator, did not set up a claim to the slaves in his own right.