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the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavored to prove, by circumstantial evidence, that the defendants granted a license to Marsteller, as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the *324] demurrer could be considered as being exclusively taken to the *plaintiff's evidence, it ought not to have been allowed, without a distinct admission of the facts which that evidence conducted on prove. But when the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, what is the proper duty of this court, sitting in error. It is, undoubtedly, to reverse the judgment, and award a *venire facias de novo*. We may say, as was said by the judges in *Gibson v. Hunter*, that this demurrer has been so incautiously framed, that there is no manner of certainty, in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried.

Judgment reversed, and a *venire facias de novo* awarded. (a)

*325] *PILES and others, Plaintiffs in error, v. BOULDIN and others, Defendants in error.

Statute of limitations.

Under the statute of limitations of Tennessee, of 1797, c. 43, § 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession.

ERROR to the Circuit Court of West Tennessee.

February 15th, 1826. This cause was argued by *Isaacs*, for the plaintiffs in error; no counsel appearing for the defendants in error.

March 10th. DUVALL, Justice, delivered the opinion of the court.—This cause is brought up by writ of error from the judgment of the circuit court for the district of West Tennessee. The lessee of Bouldin and others, who were plaintiffs in the court below, brought an ejectment against Conrad Piles and others, for a tract of land, containing 2500 acres, lying in Overton county, on Wolf river, granted by the state of North Carolina, by patent dated July 10th, 1788, to Thomas and Robert King, who, by deed bearing

(a) See *United States Bank v. Smith*, ante, p. 171.

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date 25th of March 1793, for a valuable consideration, conveyed the same to David Ross, of Virginia. Ross, by his last will and testament, *duly [326 proved and recorded, devised the same to his four children, namely, Eliza Myers, wife of Jacob Myers, Amanda A. Duffield, wife of John Duffield, Frederick A. Ross and David Ross, jun., the lessors of the plaintiff, as tenants in common in fee.

The defendant, Piles, rested his defence on the location of several grants which were offered in evidence on the trial: 1. A grant, dated 24th of December 1798, founded on a warrant dated 10th of March 1780, by the state of North Carolina, to Henry Rowan, for a tract containing 320 acres, called Walnut Grove, lying in Hawkins county, on Spring creek. 2. A grant, bearing the same date, and founded on the same warrant, by the state of North Carolina to Henry Rowan, for another tract, containing 320 acres, adjoining Walnut Grove, and having the same beginning. This tract was conveyed by deed dated 22d of September 1800, for a valuable consideration, to Conrad Piles, and is described to include a cabin known by the name of Livingston's cabin. 3. A grant bearing date on the 15th of August 1808, to Conrad Piles, by the state of Tennessee, for a tract lying in Overton county, on Rotton's fork of Wolf river, containing 200 acres. 4. Another tract adjoining the former, containing the like quantity, granted by patent, of the same date, to Conrad Piles. Piles possessed both the tracts granted to Rowan; one by purchase, the other by a parol lease for years. All these tracts are located on the plat exhibited on the trial, and none of the locations were contested. The title *of the plaintiffs is admitted to be regularly [327 deduced from the first patentee.

The defendants read in evidence the two grants before mentioned, from the state of North Carolina to Henry Rowan, for 320 acres each; the first is described as lying in Hawkins county, "beginning on two hickories, an ash, and a Spanish oak, on the north side of Spring creek; running north, 50 poles, to a stake; west, 335 poles, to a stake; south, 167 poles, to a stake, crossing Spring creek; east, 335 poles, to a stake; and thence to the beginning." The second tract has the same beginning, calls "to adjoin the first, running east, 335 poles, to a stake; north, 167 poles, to a stake; west, 335 poles, to a stake; then to the beginning." Also, two grants from the state of Tennessee to himself, for 200 acres each, dated 15th of August 1808. These grants interfere with the plaintiff's grant of 2500 acres, and cover all the land of which the defendant was in possession, within the bounds of the plaintiff's grant, at the commencement of the suit, viz., the 17th of October 1817. Nearly one-half of Rowan's tract, called Walnut Grove, is included within the tract for which the ejectment is brought; the settlement called Livingston's cabin lies principally in that part of Walnut Grove, thus running foul of the tract owned by the lessors of the plaintiff. Helm's improvement is contained partly in Walnut Grove, and within one of the tracts of 200 acres granted to Piles, which is included almost wholly in the tract of the lessors of the plaintiff, and includes both Livingston's cabin and Helm's *settlement. Piles has made another settlement, [328 included in the tract called Walnut Grove, a part of which is contained within the lines of the tract for which the ejectment is brought.

The defendant, Piles, proved, that the grants before mentioned, to Rowan and to himself, covered all the lands of which he was possessed, within the

grant of the plaintiffs ; he also proved, that the grant of Walnut Grove to Rowan, included Livingston's cabin, as represented on the plat, and that he had been in the peaceable possession thereof, for more than eight years before the commencement of this suit ; and that he had also been in possession of a piece of ground within one of the grants to himself, and which is also within the plaintiff's grant, and which he had held and cultivated more than eight years before the commencement of this suit ; and relied on the statute of limitations. It was also proved, that Rowan, in 1806, had made a parol lease of the tract called Walnut Grove, to one Helm, for six years, in consideration of certain improvements ; that Helm took possession, built a cabin, and cleared a few acres of land ; that in the fall of 1807, Piles bought his lease, and agreed to make the further improvements stipulated, and return the possession to Rowan ; that he took possession immediately, and continued in possession, claiming for himself, and not as tenant for Rowan, though he did not mention his claim, until after he had bought Helm's lease.

Under these circumstances, the defendant, Piles, by his counsel, moved the court to instruct *the jury, that if the deed from Rowan to Piles
 *329] contained, in its first part, a sufficiently certain description, according to the evidence, of the land included in Rowan's first grant, that then they should disregard any subsequent description therein which should be repugnant to said first description. And also, to charge the jury, that if the deed from Rowan to the defendant did not cover said land, yet, that if they believed the defendant went into possession of the land contained in the said first grant to Rowan, under the lease from Rowan to Helm, as stated in the evidence, the defendant could defend himself in this action of ejectment, as tenant of Rowan, without making his landlord a defendant ; that, as between Rowan and the defendant, he, the defendant, could not change the nature of his possession, but that the same would operate for Rowan's benefit, to perfect his title under the statute of limitations, as against the plaintiff and persons claiming under adversary grants ; and that, if the defendant's possession had perfected Rowan's title, and made it a better title than the plaintiff's, then, the defendant having shown a better outstanding title, the plaintiff would not be entitled to recover. Which instructions the court refused to give, but instructed the jury, that Piles could not avail himself of the statute, and that his deed from Rowan, by legal construction, did not cover the land included in Rowan's first grant. From this opinion of the court, an exception was taken, and the cause is now before this court for
 *330] revision. *The counsel for the plaintiffs in error insists, that the circuit court erred on both points.

The two grants to Rowan begin at the same place, have the same form and dimensions, and contain the same quantity of land. The deed from Rowan to Piles adopts the courses and distances of the second grant precisely, and proceeds to describe it, as including the cabin commonly called Livingston's cabin ; but Livingston's cabin is included in the first grant called Walnut Grove. The counsel for the plaintiffs in error contends, that if the first grant is not conveyed by the deed, it is, at least, doubtful which of the two tracts was intended to be conveyed ; and that, therefore, it was a question of location, to be settled by the jury, not a question of law to be decided by the court. But this court is of a different opinion. Admitting

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the universality of the maxim, *de jure respondent judices, de facto juratores*, it will not be denied, that it is the province of the court to decide upon the force and legal effect of a sealed instrument. The deed conveys, by metes and bounds, the land contained in the second grant to Rowan, corresponding precisely, in courses and distances, from the beginning to the given line inclusive; and will not admit of the construction, that the first tract, called Walnut Grove, was conveyed, merely because it includes Livingston's cabin. The description in the deed was full and complete, without reference to Livingston's cabin; the mention of which appears evidently to be a mistake, from inattention in the writer of the deed, and *conveyed no right or interest whatever in the first grant. And it is conclusive in the construction of this deed, that it could not have been the intention of either party, that the tract called Walnut Grove was intended to be conveyed, that it calls to begin "on the corner of the Walnut Grove tract." There is no error in the judgment of the circuit court in refusing to instruct the jury according to the first prayer of the counsel for the defendant.

The second question arises upon the plea of the statute of limitations. By the 4th section of the act of the state of Tennessee, passed in the year 1797, ch. 43, peaceable possession, for seven years, by any person, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession; and all persons who neglect, for that period, to prosecute their claims, are declared to be for ever barred. There is the usual saving to infants, &c. In this case, the record affords abundant proof, which is uncontradicted, that Piles had peaceable and uninterrupted possession of all the settlements made by him, comprehended within the lines of the plaintiff's grant, and claimed to hold the same as his own, adverse to the claims of all persons whatever. The settlement called Livingston's cabin, and that made by Helm, and transferred by Helm to Piles, are included in his own grant for two hundred acres, dated August 15th, 1808, and also within the plaintiff's grant, and principally within that part of Rowan's first *grant, which interferes with that of the plaintiffs. His third possession is contained within Rowan's first grant, which interferes with the plaintiff's grant, as has already been stated. All these possessions, being founded on grants, are protected by the act of limitations, the provisions of which are too plain to be misunderstood.

On this point, the opinion of the circuit court is reversed, and a *venire facias de novo* awarded. (a)

Judgment reversed.

(a) See *Somerville v. Hamilton*, 4 Wheat. 230; *Patton v. Easton*, 1 Ibid. 476; *McIver v. Ragan*, 2 Id. 25; *McClung v. Ross*, 5 Id. 116; *Walker v. Turner*, 9 Id. 541.