11/270. Explnd. in Snapp v. Stanwood, 65/224, 45 S. W. 546.

HUTCHINSON AD. *vs.* PHILLIPS ET AL. AD.

The attorney of record in a cause, is not, on that account, an incompetent witness for his client.

To maintain assumpsit for money had and received, plaintiff must show that defendant has actually received his money, or prove such facts as to raise a fair presumption that he has received it.

Where a party may bring trespass, trover or replevin, a mere demand and refusal will not enable him to maintain assumpsit for the value of the goods.

In assumpsit for goods, wares &c., it was proven that defendant said he had purchased the goods of plaintiff &c.—there being a verdict against defendant, the court would not disturb it, as to this point, because the admission of defendant that he had purchased the goods of plaintiff did not necessarily imply that he had paid him for them.

Where defendant is sued for the value of notes, and undertakes to show title in the notes by assignment from plaintiff, the latter may show that the assignment is a forgery.

On the trial of a cause, plaintiff cannot prove what the attorney of defendant said to the jury on a previous trial, as to the sum proven to be due the plaintiff by defendant.

In an action for goods, wares &c., plaintiff is not bound to show actual title to the goods—it is sufficient for him to show that he had possession of the goods, exercised acts of ownership over them, and that defendant purchased them of him.

Possession of personal property is *prima facia* evidence of title.

In an action by an administrator for the value of goods, he cannot introduce the declarations of his intestate as to the title to the goods.

Appeal from the Fulton Circuit Court.

In April, 1843, Willis Phillips as administrator, and Rachael Brown as administratrix of James S. Brown deceased, brought an action of assumpsit against Arthur C. Welch, in the Lawrence circuit court.

Declaration contained the following counts:

1. That on the 5th April, 1842, defendant Welch was indebted to plaintiff's intestate in the sum of $2,000 for money had and received by defendant to and for the use of said James S. Brown &c.

2. And also in the like sum for work and labor &c.

3. And in the further sum of $500 for divers goods and chattles, wares and merchandize, before then sold and deliverd to defendant by said James S. Brown &c.

4. And also in the further sum of $1,000, for money by the said James S. Brown, before then advanced to, and paid, laid out and expended for the said defendant.

5. And in the further sum of $1,000 for money before then had and received to and for the use of said James S. Brown &c.

Defendant pleaded non-assumpsit, to which issue was taken. After issue Welch died, and the case was revived against John Hutchinson as his administrator.

At the April term, 1847, there was a trial, and verdict in favor of plaintiffs for $950.97. The court granted defendant a new trial, upon his paying all costs of the suit up to that time.

On application of defendant, the case was then removed, by change of venue, to the Fulton circuit court, where it was tried, at the October term, 1848, and verdict in favor of plaintiffs for

$1,183.13. Motion for new trial overruled, and bill of exceptions setting out the evidence, and points reserved during the trial, and made grounds of the motion.

The bill of exceptions shows that, on the trial, plaintiffs offered to introduce Wm. Byers as a witness in their behalf. Defendant objected to his competency on the ground that he was the attorney of record of the plaintiffs, and had been from the institution of the suit, but the court overruled the objection, and permitted the witness to testify.

Byers stated that he, as agent and attorney of plaintiffs, in January, 1843, made a demand of Arthur C. Welch of certain notes, property and county scrip, which plaintiffs alleged were the property of James S. Brown. Welch claimed the property as his own, and refused to give it up, saying he had purchased it of Brown, and that if they got it, they would get it according to law. Before making the demand of Welch, witness took a memorandum of notes from a notice set up by Welch claiming to be entitled to the money due upon said notes drawn payable to Brown. He did not recollect the number of cattle but Welch supposed them to be worth $75. Horses, Welch supposed to be worth $200: corn $66: county scrip $520, which witness supposed to be worth half price, $260. The notes above demanded were as follows:

Marshal & Buster's note, $50. Note on Houghton, $45; G. W. Purtle, $920; J. Ross and J. Loyd, $20; Gibson & Rickman, $21.25; B. B. Gibson, $45; Wm. Berry, two notes, $50 each; A. J. Rainey, $7.37; John Spots, $31.50; James Underwood, $73.25; Sloan, $4.87; J. Job, $5; W. Black, $8.37; J. Ogden, $5; Brandon, $25; N. Pead & McKnight, $25; J. B. Witmoth, two notes, $35.75; C. Shaw, $5; A. W. & J. S. Shaw, $50; Wear, & Shots, $30.41; Simpson & Huelson, $30; T. Martin, $5.48; E. Steadman, $155; J. Lucewell, $10; Wm. Morgan, $6.50; J. McCarroll, $8.50; Wm. Berry, $12; D. & J. Williams, $14; Newton & Pain, $100; H. G. Tucker, $51.73; Thos. McCarroll, two notes, $47.71; Simmons & McCarroll, $20; John Milligan, $6.68; Briant Kellett, receipt, $31.13.

Plaintiffs asked the witness to state the value of said notes, to which defendant objected, but the court overruled the objection.

Byers said the notes were worth five or six hundred dollars.

Cross-examined: When witness called on Welch to make the demand, he stated that the notes and property were his, that he had purchased them of Brown, and that they were then in his possession. Witness asked him how he had purchased them or paid for them, but he gave witness no satisfaction.

Bryant Kellett, a witness for plaintiff, testified that whilst he was acting as deputy sheriff of Lawrence county, he received of James Brown, for collection, certain fee bills due said Brown as clerk of the court, amounting to $31.13, which he collected and paid over to the sheriff, and the sheriff paid the same over to Arthur C. Welch, before the commencement of this suit.

Plaintiffs' counsel then asked Kellett if he knew the handwriting of James S. Brown? He said he did. The counsel then showed him two notes for $50 each, made by Wm. Berry to James S. Brown, upon each of which was an assignment purporting to have been made by Brown to Welch; and asked the witness if he believed the assignments to be in the handwriting of Brown.

Defendant objected to the question, but the court overruled the objection.

Witness answered that he did not believe the assignments to be in the handwriting of Brown.

Hamilton Harlow, called by plaintiffs, testified that he was one of the jury that tried this case in Lawrence county—that after the jury went out they were at a loss to know how to make calculation about some accounts, and the amounts attempted to be proven up—they sent him in to enquire of the court. Mr. Byers, attorney for plaintiffs, and Mr. Cook, attorney for defendant, then came out to where the jury were, Mr. Cook said they had agreed to come out together, so that each could hear what the other said to the jury. They chatted to the jury concerning

the information they wanted: and Mr. Cook then said there was about $400 proven, and he did not think the jury could find for less or more, and that that sum was just.

Which testimony, of Harlow, the defendant moved to exclude from the jury, but the court overruled the motion.

Booker Burnett testified that James S. Brown died in April, 1842, at the house of Arthur C. Welch. Which was all the evidence.

The defendant asked the court to instruct the jury as follows:

"1. Before the jury can find for the plaintiffs upon the money counts, in the plaintiffs' declaration, they must be satisfied from the evidence that money came to the hands of Welch, or legal representatives, for the use of Brown, and that before the commencement of the suit.

"2. Before the jury can find for the plaintiffs, upon the counts for goods and chattles, they must prove property in Brown in the articles, and that the defendant applied them to his own use.

"3. Unless the jury are satisfied from the evidence that previous to the commencement of this suit, Welch or his administrators collected the money on notes of Brown, they are bound to find for the defendant.

"4. Possession of personal property is evidence *prima facia* of title in the holder.

"5. It is incumbent on the plaintiffs to prove that money or property belonging to Brown came to the hands of defendant, and was used by him.

"6. Any declarations made by plaintiffs as to the title to notes or property in controversy, are not evidence against defendant, and are not to be regarded by the jury."

The court refused the *first* and *third* instructions, and gave the others, with an additional one as follows:

"7. That before the jury could find for the plaintiffs on the money counts in the declaration, they must be satisfied from the testimony that money or its equivalent came to the hands of

Welch, or his legal representatives, for the use of Brown prior to the commencement of this suit."

To the refusal of the *first* and *third,* and giving the seventh instruction, defendant excepted.

Plaintiffs then asked one instruction, which is copied in the opinion of this court.

The case was determined before the Hon. W. C. SCOTT, Judge. Defendant appealed.

S. H. HEMPSTEAD, for the appellant. Allowing that this form of action could be adopted, there is no proof showing property in Brown, or any right in his administrators, to recover the value. On the contrary, it was proved that Welch had the actual possession, which is *prima facie* evidence of ownership, (1 *Salk.* 290. 2 *Leigh's N. P.* 1476. 11 *Wend.* 54,) and his statement that he had purchased the property was made evidence in the cause, upon the principle that the whole statement must be taken together. 1 *Greenl. Ev., sec.* 201, *p.* 305. 1 *Eng.* 90.

The owner of property may waive the tort, and recover the value in assumpsit only where the wrong-doer sells the property and receives the money. (*Jones vs. Hoar,* 5 *Pick.* 285. *Lucket vs. Bohannon,* 3 *Bibb.* 378. *Willet vs. Willet,* 3 *Watts* 277. 3 *Dana* 552. 2 *Gill & J.* 326.) Assumpsit for money had and received will only lie where money has been received. 3 *Bibb.* 378. 1 *Gill & J.* 433. 11 *J. R.* 464. 7 *J. J. Marsh.* 100. 7 *J. R.* 132. 8 *J. R.* 202. 1 *Har. & J.* 339.

The first and third instructions asked for by Hutchinson should have been given as they are well sustained by adjudged cases, and were pertinent to the issue. There was no evidence of the value of the property which could possibly warrant the verdict.

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

The objection to William Byers as a witness was not well taken. It was not sufficient to exclude him, simply to show that he was the attorney of the plaintiffs. His testimony, however,

as to the value of the property described by him was not admissible under the money counts. In order to have authorized this testimony under these counts, it was first necessary that it should have been shown that the title to the property was in the plaintiff's intestate, and that it had either been reduced to money by Welch, or that he had done such acts as to amount to a receipt of money.

The plaintiffs having elected to sue in assumpsit, they will necessarily be held to the rules and principles which are applicable to that form of action. Where a party has such a cause of action as would support trespass, trover or replevin, he cannot, by simply making a demand of the property and receiving a refusal, enable himself to maintain assumpsit a mere demand and refusal cannot of themselves amount to a conversion of the goods into money, nor can they alone constitute such facts as will raise a legal presumption of the receipt of money. The court of appeals of Kentucky, in the case of *Lucket vs. Bohannon,* (3 *Bibb.* 379,) said: "If then we are correct in the construction of the nature of Bohannon's demand, it is clear the evidence produced by him does not maintain the issue on his part; for it is clear an action for money had and received, or for money laid out and expended, cannot be maintained where no money has been received or paid, and in this case the evidence proves property and not money was received by Lucket." The rule laid down in this case is correct, so far as it goes, but it does not cover the whole ground occupied by the same court at a more recent period. For, in the case of *Madison's exs. vs. Wallace's exs.,* (7 *J. J. Marsh.,*) the same court held this language, to wit: "The authorities use the terms, actually received or advanced money. There are cases where money is considered as received or advanced when it is not actually done. The same doctrine is held by the New York cases. It was said, in *Washburn vs. McInvoy,* (7 *John.* 134,) that, "It is not necessary in all cases to give positive evidence that the defendant had received money belonging to the plaintiff. Where, from the facts found, it may be fairly

presumed he has received the plaintiff's money, the action for money had and received is maintainable." See, also, *Beardsley vs. Root,* (11 *John. R.* 469.) It was not in proof that Welch had collected the money due upon the notes, county scrip, &c., or that he had sold any of the property; nor was it shown that he had done such acts as to raise a fair presumption of the receipt of the money. We consider it clear, therefore, that the evidence was not competent, under the money counts.

The question now is, whether it was competent, and, if so, whether it was sufficient to support the count for goods sold and delivered. The admission of Welch, as to the purchase of the goods, was unquestionably competent under the count for goods sold and delivered. It is true that, at the same time that Welch admitted the purchase, he asserted his right of property, and further said that the plaintiffs could not have it unless they should get it according to law. It will be remarked that, in the conversation with Byers, he did not state the sum that he had paid for the property, nor did he say that he had paid for it. He merely asserted that he had purchased the property, that he claimed it as his own, and that if the plaintiffs got it they would get it according to law. This assertion of right, although it may have been understood by the jury, in the exercise of their discretion, as including the idea that he had also paid for it, yet it did not necessarily, by the mere force of the language, exclude a contrary conclusion. He may have purchased the property, and the title may actually have vested in him and become complete by delivery, and yet he may not have paid one solitary cent of the purchase money. Admitting the rule, therefore, in its fullest extent, that all he said in the same conversation shall be received as well for as against him, and still the jury were authorized to say that the purchase money had never been paid, and of course to find accordingly.

This view of the case is strengthened by the further testimony of Byers, on cross examination, when he said he enquired of Welch how he had purchased or paid for the property, and that he gave him no satisfaction as to that matter. The sale having

been established by the admission of Welch, in the absence of proof as to the price stipulated by the parties, and no evidence tending to show payment, the law would necessarily allow a fair and reasonable value. The testimony of Byers, therefore, when he testified from his own knowledge was clearly competent, but what he spoke of as to the opinion of others in relation to the value of property, was wholly incompetent, and should have been excluded.

The testimony of Kellet was properly received. What he said in relation to the moneys that had been collected and paid over to Welch was competent under the count for money had and received; and if the defendant offered to show the assignment upon the notes as evidence of his title, and also to raise a presumption of payment, it was fully competent for the plaintiff to rebut such presumption by evidence tending to show that such assignment had not in reality been made by the party by whom it purported to have been made, but that on the contrary it was a mere forgery. There can be no doubt but that it was perfectly competent for the jury to pass upon the evidence offered upon that point.

The plaintiffs were not entitled to the evidence sought from the witness Harlow. His knowledge of the state of case, as derived from a former trial, was entitled to no weight upon this, nor indeed competent in any point of view; and if Mr. Cook knew any thing which would result in the advantage of the plaintiff, he was the best witness to testify as to that matter.

We are of opinion, however, that, upon a full view of the testimony, there was not sufficient, which was relevant and competent, to authorize the amount found by the jury, and that for that reason a new trial ought to have been awarded.

We now come to comment upon the instructions. The first asked by the defendant below was properly excluded, as it was too much restricted to satisfy the rule. The plaintiffs were not necessarily required to show the actual receipt of money under the money counts, as we have already seen from the authorities that it is perfectly legitimate to show such a state of facts as are

calculated to raise a presumption of the receipt of money. The second was improperly given, as it was not essential, under the count for goods sold and delivered, that the plaintiffs should have shown actual title. If it appeared that the plaintiff's intestate had the possession and exercised acts of ownership over the property, and that Welch purchased it from him, it was all sufficient to warrant a recovery. The third is substantially the same with the first, and consequently was properly excluded. The fourth was properly given. It is undeniable that possession of personal property is evidence *prima facie* of title. The fifth was not technically correct, as it contemplated that, before the plaintiffs could recover under the count for goods sold and delivered, they should show that the intestate had the actual title to the property, and that the same went into the hands of the defendant and were also actually used by him. We have already seen that possession in the plaintiffs' intestate and a purchase by the defendant, are all that would be required by law to fix the liability of the latter. The sixth should have been excluded, as it is manifest that the plaintiffs could not be permitted to make evidence for themselves. The seventh instruction, we have already ruled, was strictly and technically correct. The plaintiffs were not required to show positively that the defendant had actually received money under the money counts, but it was all-sufficient if it appeared that such facts existed as to satisfy the jury that he had received an equivalent.

After the court had disposed of the instructions asked by the defendant, the plaintiff submitted the following, to wit: "A party has a right, where another has taken possession of his property and refuses to give it up, to waive the tort and sue in assumpsit and recover the value of the property." This instruction asserts a mere abstract principle, and consequently is not entitled to our consideration. From the admission of Welch, which is the only evidence going to show possession in him, there was no tort to waive, but that, on the contrary, he became possessed of the property lawfully and by virtue of a purchase from the plaintiffs' intestate.

The judgment of the court below must therefore be reversed, and the cause remanded.