JOHNSON & HEMBY *vs.* REED.

Where parties agree upon a statement of facts, and submit them to the court for a decision of the law thereon, a writ of error will lie to the decision.—*Campbell vs. Thruston*, 1 *Eng. R.* 441, *is not contra.*

Where one comes into peaceable possession of a barrel of whiskey, and converts the same to his own use, the assumpsit will lie for the value. The defendant will not be permitted to say that he took them by wrong, and not by contract

Writ of Error to Scott Circuit Court.

Appeal from a Justice, tried before Hon. R. C. S. BROWN, one of the Circuit Judges, in October, 1845.

Reed sued Johnson "on an account for $44, for a barrel of whis-"key, left at his house, containing 38 gallons, price per gallon, one "dollar."

The case was tried by a Justice's jury, who found $22.50 for the plaintiff. The defendant appealed, giving Hemby as his security in the recognizance. In the Circuit Court, the matters were submitted to the court, sitting as a jury, who found for the plaintiff, Reed, $18.15, and gave judgment therefor against Johnson and Hemby his security, as well as for all costs in that and the Justice's court. The appellant excepted and brought error. The bill of exceptions is in substance, that the parties agreed to the following facts, to wit: that in November, 1844, Reed had a barrel of whiskey, containing 30¼ gallons, which was left with one Fleming for safe keeping—a short time thereafter, Johnson came into possession of the premises, and without the knowledge or consent of Reed, "disposed of the whiskey to his own use." That at the time Johnson "appropriated the whiskey to his own use," it was worth sixty cents a gallon. After its appropriation by Johnson, Reed demanded pay, and was offered 50 cents a gallon, but declined—Johnson then told him if he could not induce him to take 50 cents, he would pay him 75, and upon these facts alone the opinion of the court was asked, who decided for Reed.

WALKER & GREEN, for plaintiff.

WATKINS & CURRAN, for defendant.

OLDHAM, J. This case is different from that of *Campbell* v. *Thruston*, 1 *Eng. R.* 441. In that case the cause was submitted

to the court sitting as a jury, and the evidence was heard and decided upon by the court; but in the present case the facts were agreed upon and submitted to the court. No evidence was heard and no facts were to be found upon testimony. The case stands in the same position as if a jury had returned a special verdict, finding the same facts, leaving it to the court to determine the law upon the facts. We are, therefore, of opinion that a writ of error will lie to the decision of the court in such a case.

The action was properly brought, and the Justice had jurisdiction. The case of *Jones* v. *Hoar*, 5 *Pick. R.* 285, does not support the position assumed by the plaintiff in error. In that case a trespass had been committed, and it did not appear that the timber, which had been cut and carried away, had been converted into money, and the court held that the plaintiff could not waive the tort and maintain *assumpsit* for the value of the timber. In this case the party came to the possession of the whiskey peaceably. He committed no trespass. The case is precisely similar to that of *Hill* v. *Davis*, 3 *N. Hamp. R.* 384, in which the court said, "The stones belonged to the plaintiff, and that the defendant took them and converted them to his own use. The cases to which we have alluded fully warrant us in holding that the defendant is not to be permitted to say, that he took them by wrong, and not by contract." And so we hold in the case now before the court. Judgment affirmed.