Wightman, William et al v. State of MO 1858 St. Louis 397/4
To The Use of Tebbe, John H.

Old Box 595/29

$175.00 for merch. taken as part of debt by attachment & proceeds for W.

Filed 1857
March 1858
Affirmed
A: T.C. Johnson
Richardson

O: ins. good
don't need new trial b/c
what witness forgot
would've been cumulative

State of Missouri }
County of St. Louis } ss. Be it remembered that heretofore to wit on the 20th day of August A.D. 1856 there was filed in the Office of the Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid a certain petition which is in the words and figures following to wit;

(1)

Petition

To the October Term 1856 of the St. Louis Court of Common Pleas

Saint Louis County } to wit;

The State of Missouri who sues to the use of John H. Tebbe Pltff } Plaintiff states as follows;

against

William Wightman and Chas. W. W. Caud & Thomas E. Fox Defts } On the eighth day of August 1856 John T. Tebbe to whose use this action is brought was and still is in good faith the sole owner of the following goods wares and merchandise to wit; Ten barrels of whiskey; half box of tobacco; Eight tubs and twenty three buckets which said goods were and are reasonably worth One hundred and eighty four 75/100 dollars, And being so the sole owner and in the lawful possession of said property the Marshal of Saint Louis County at said County and on or about said day by virtue of a certain writ of attachment issued by the Law Commissioner's Court of St. Louis County in a suit wherein William Wightman is plaintiff and the firm H. A. Layton & Co composed of H. A. Layton & Wm. Hill are defendants returnable to the October Term of said Court 1856 numbered No. 2 at the instance

of said William Wightman with force forcibly took and carried away said goods from said Tebb all of which will more fully be seen by reference to the Record of said Court and the papers in said suit at present in the hands of said Warshal; a certified transcript of all the proceedings in said suit up to said time is herewith filed again exhibit to this suit. In accordance with the law in such case made said Tebbe on the same said day claimed said goods from said Warshal as solely and exclusively and in good faith his own, which claim he made in writing verified by his affidavit and presented the same to said Warshal in accordance with the statute and which claim so made the Warshal has also in his possession as part of the record of said suit of Wightman vs Layton & Hill above referred to and to which reference is also here made. On the same said day in accordance with the statute the defendants Wightman and Chas. H. McCauls & Thomas Epes defendants with him in this suit as securities executed and delivered to said Warshal their certain bond also on file with the record of said suit, and part of such record and to which reference is again had and a true copy of which bond is hereto annexed Marked Exhibit "A" to this petition by which bond the said defend=ants bound themselves to plaintiff in the sum of One hundred and seventy five dollars, which bond so being made in accordance with the statute is conditioned as follows;

That whereas said above mentioned writ of attachment

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had issued from the said Law Commissioner's Court directed to said Marshal, and said Marshal at the request of said Wightman had taken as the property of said Layton & Hill defendants in said attachment the goods wares and merchandize above described of the value as stated and the said John H Tebbe had claimed said property according to the Statute, Now if said Wightman would pay the aforesaid Tebbe claimant all damages which said Tebbe might sustain in consequence of such levy and in consequence of any sale thereof, then said bond to be void otherwise to remain in force,

Now plaintiff states that John H Tebbe has been and is greatly damaged by reason of said levy and by reason of being so deprived of his said property. That he is in good faith the sole owner of the same that the value thereof is as stated and that an action hath accrued to plaintiff to demand and have of said defendants the said sum of One hundred and seventy five dollars, the said Tebbe being greatly damaged by said tortious taking of said property in his business and much harassed delayed and put to expense and outlay in and about claiming said property the said Wightman at the time of such tortubus taking by said Marshal at the request of said Wightman, well knowing that said goods were the property of said Tebbe and constituting part of the stock in trade of said Tebbe yet being so advised of said fact maliciously and without

(4) probable cause taking said property from said Tebbe and ordering the same to be sold by the Marshal, who said Marshal on the eighteenth day of August 1856 did sell the same and appropriate the proceeds to the satisfaction of Wightman's claim against Layton & Hill wherefore plaintiff asks judgment against said defendants for One hundred and seventy five dollars,

Chr Kribben atty.

John H. Tebbe plaintiff makes oath and says the above petition and the statements therein contained are true.

Sworn to & subscribed before J. H. Tebbe, me this 19th day of August 1856,

Bertram Kribben
Notary Public.

Seal

Thereupon issued the following Summons, to wit,

County of St. Louis ss

Summons

The State of Missouri

To the Sheriff of St. Louis County, Greeting;

We command you to summon William Wightman Chs. W McCaul & Thomas Essex to appear before the judge of our Court of Common Pleas on the first day of the next term thereof to be held in the City of St. Louis within and for the County of St. Louis on the Second Monday of October next, then and there to answer the Complaint of The State of Missouri use of John H Tebbe as set forth in the annexed petition; and have you then and there this writ;

(5)

(Seal) Witness Charles H Nicks, Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St. Louis this 20th day of August in the year of our Lord eighteen hundred and fifty six.

C H Nicks clerk.

Thereupon the Sheriff made the following return

Sheff's Return

Executed this writ in the County of St. Louis on the 20th day of August 1856 by delivering to the within named defendant William Wightman a certified copy of the within writ and petition as furnished by the Clerk, Further executed on the same day by delivering to the within named defendants Thomas Esser a certified copy of the writ and by reading the petition to him, Further executed on the 21st day of August 1856 by delivering to Charles H McCaul within named defendant a certified copy of the writ and by offering to read the petition to him, which he refused to hear.

James Castello Shff
by G. P. Doernstein
Dpty.

And afterwards the following answer was filed Oct 13th 1856

Answer.

"Defendants for answer state that on the day and year mentioned in the plaintiffs petition, John H Tebbe was not in good faith the sole owner of the Ten barrels of Whiskey half box tobacco eight tubs and Twenty three buckets mentioned in his petition, They admit that said goods were of the value of $84.76 They admit the fact of a suit being brought by

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Wm Wightman ag.t H A Layton & William Hill that an attachment issued which was levied on the goods mentioned above, that a bond was given to the Marshal, and the goods sold under an order of the Law Comm.rs Court by the Marshal but the proceeds are yet in the Marshal hands and have not been applied to the debt due said Weightman because judgment has not yet been obtained, They deny that said goods were a part of the stock of said Tebbe or his property they deny that they knew that said goods were his property, and on the contrary they allege that said goods were not his property but the property of H A Layton & Co and were subject to their attachment They deny that said Wm Wightman with force tortuously took and carried away said goods but the same were taken by due process of law because they were the property of H A Layton & Co They deny that said Tebbe has legally sustained any damage by the taking away of said goods They say he was not owner or purchaser of the same in good faith without notice, but the same were left with him by H A Layton & Co for the purpose of putting them out of the reach of the creditors of said Layton & Co or if he claims to have purchased them he did so in bad faith knowing that said Layton & Co were endeavouring to commit a fraud on their creditors, And they further allege that said goods were properly subjected to the writ of attachment & property sold and that the obligors in the bond to the Marshal have committed

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no breach of the conditions thereof, and they pray that the suit may be dismissed and the defendants discharged & be permitted to go thereof with day

Thos. C. Johnson
atty for Defts

County of St. Louis ss

Wm. Wightman being sworn says that the foregoing answer and the matters therein as stated he believes to be true

Wm. Wightman

Sworn to & subscribed before me this 29th day of September 1856

Saml. W. Colman Notary Public
St. Louis Co. Mo

(Seal)

And afterwards, the following further proceedings were had in this cause to wit;

Tuesday May 26th 1857

Jury trial

Now at this day come the parties by their respective attorneys and thereupon come a jury to wit; A Kruger; George W Hole William Wamter Saml. Wamter. Patrick Casey, C. C. Weis Wm. Jones Merritt Heaps Henry Hanly W Denny, Chas. Warner & Saml. Gamache twelve good and lawful men who being duly elected tried and sworn the issues herein joined, well and truly to try the trial progressed and being finished the jurors aforesaid retire to consider of their verdict

Wednesday May 27th 1857

Judgment

Now again come the parties as aforesaid and the jurors aforesaid also come, and upon their oaths aforesaid say they find for the plaintiff and assess its damages at the

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sum of One hundred and seventy five dollars Therefore it is considered by the Court that the plaintiff recover of the defendants the damages aforesaid as assessed by the jury and also its costs and charges herein expended and have execution therefor,

And afterwards the following further proceedings were had in this cause to wit;

Friday June 26th 1857

Mo for New trial Overruled

The defendants motion for a new trial herein being heard and by the Court fully understood, it is ordered by the Court that said motion be overruled,

And afterwards the following further proceedings were had in this cause to wit;

Friday July 3d 1857

Affidavit filed and appeal granted.

The defendants by their attorney file a Bill of Exceptions herein, and also an affidavit for an appeal, and on their motion an appeal is allowed them to the Supreme Court from the judgment herein, whereupon said defendants file an appeal bond with William Wightman as principal and Thomas Johnson and George Arnold as sureties which bond is acknowledged by the obligors and approved by the Court,

The Bill of Exceptions is in the words and figures following to wit;

B. 10 of Exceptions

Be it remembered that on the trial of this cause the plaintiff to sustain the issue on his part offered the following evidence,

(9) 1 Record containing the writ of attachment in the Law Comrs Court return of the Marshal the claim of Tebbe and the bond to the Marshal.

Record from Law Comrs Court,

Law Commissioners Court of St. Louis County Missouri
William Wightman
vs
H A Layton and William Hill

No. 2 October Term 1856

The State of Missouri
To the Marshal of St. Louis County; Greeting;

Attachment

We command you to attach H A Layton & William Hill partners under the name of H. A. Layton & Co by all and singular their lands and tenements goods chattels rights moneys credits evidences of debt and effects or so much thereof as shall be sufficient to secure the sum of Eighty four dollars and seventy six cents with interest and costs of suit in whose hands or possession soever the same may be found in your bailwick and that you summon H A Layton and William Hill to appear at the next term of the Law Commissioner's Court of St. Louis County on the first day of the said term to be holden at the City of St. Louis within and for the County of St. Louis on the first Monday of October next, then and there to answer the complaint of William Wightman as set forth in the annexed petition and also that you might summon all and every person in whose hands or possession soever any personal property, rights, credits evidences of debt or effects or money of the defendant may be ~~found~~ and particularly ~~[illegible]~~ that they be and appear before the Law

10 Commissioners Court of said County on the first day of the term aforesaid, then and there to answer unto what may be objected against them and have you then and there this writ; Witness John W Colvin the Law Commissioner of St. Louis County with the seal of said Court hereto affixed at Office in the City of St. Louis this 31st day of July in the year of our Lord eighteen hundred and fifty Six

Seal John W. Colvin,
The Law Commissioner of St. Louis County

Return Executed this writ by delivering a true copy of the same and of the petition to the within named defendant William Hill. The within named Henry A Dayton not found in my County and further executed this writ by attaching the following described property 10 Barrels Whiskey half Box Tobacco 8 Tubs 23 Buckets St. Louis County August 7th 1856 Wm H. Timberlake Warshal
Robt. Peyinghaus Deputy

By order of Court the following described property was sold according to law on the 18th day of August 1856 wz 10 Barrels of Whiskey half Box Tobacco. 8 Tubs 23 Buckets Amt. of sale $144.44. St. Louis August 18th 1856
Wm H Timberlake Warshal

William Wightman Pltff
vs
H A Dayton and Wm Hill partners under the name of H. A. Dayton & Co Defts

In the Law Commissioners Court October Term 1856
J H Tibbs this day comes and claims

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the property levied upon and seized by the Marshal of St. Louis County by virtue of the writ of attachment in the above suit; which property is as follows Ten Barrels of Whiskey half Box Tobacco Eight Tubs Twenty three Buckets, which property Claimant says is worth One hundred and twenty 52½/100 dollars. Claimant says that all of said property is exclusively his own and he is in good faith the lawful owner of the whole Defendants in said attachment have no right or title directly or indirectly in said property or in claimants interest therein, and claiming the same now in accordance with the statute in such case made ~~[illegible]~~ Claimant says that this his claim is not made in collusion with the defendants for the purpose of varying hindering or delaying the plaintiff in said attachment in obtaining his just rights but in sincerity for obtaining his own just rights

John H. Tebbe Claimant

makes oath and says the above statements he believes to be true

J. H. Tebbe

Sworn to & Subscribed before me this 12th day of August 1856

Bertram Krubber
Notary Public

Seal

Return

Executed this notice by reading the same to the within named William Wightman done in St. Louis County August 13th 1856

William H. Timberlake Marshal
Per Peyninghaus Deputy.

Deft's Bond

Know all men by these presents, that we

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William Wightman as principal and Charles W. McCord and Thomas Epps as sureties are held and firmly bound unto the State of Missouri in the sum of One hundred and seventy five dollars to the payment whereof well and truly to be made we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated at St. Louis this fourteenth day of August 1854.

The Condition of the above obligation is such that whereas a writ of attachment has issued from the Office of the St. Louis Law Commissioners Court being No. 2 returnable to the October Term 1854 of said Court in favor of William Wightman and against N A Dayton & William Hill directed to the Marshal of the County of St. Louis and has been delivered to William N Timberlake as such Marshall, to be executed by him, and the said Timberlake has executed the said writ at the request of said plaintiff by taking as the property of the said N A Dayton & Wm. Hill the following described personal property to wit; Two barrels of whiskey half a box of Tobacco Eight Tubs, twenty three Buckets of the value of eighty four $\frac{76}{100}$ dollars and John A Tebb has claimed the whole of said property according to the third section of the act of the General assembly of the State of Missouri entitled "An act concerning the duties of Sheriff & Marshal in the County of St. Louis in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons Approved March

13. 3d 1855, And in the manner therein mentioned
Now if the aforesaid plaintiff will pay to the aforesaid claimant all damages that the said claimant may sustain in consequence of any such levy and in consequence of any sale which may be made under or in virtue of such, then this obligation shall be mill & void; otherwise it shall remain in full force and virtue

W Wightman (Seal)
C H McCaul (Seal)
Thomas Epex, (Seal)

State of Missouri
County of St. Louis } p I Matthew Williams
Clerk of the Law Commissioner's Court of St. Louis County certify that the foregoing is a true copy of the writ of attachment the Marshal's return thereon, The notice and affidavit of J H Tebbe and the plaintiffs bond in a suit lately pending in said Court between Wm Wightman plaintiff and H A Layton & Wm Hill defendants as fully as the same remains in the Office of said Court.

Seal 3. In Testimony Whereof I hereby set my hand and affix the seal of said Court at Office in St. Louis this 25th May 1857

Matthew Williams &c

Testimony of Robert Peyinghans

Robert Peyinghans testified that he was deputy Marshal of St. Louis Co in July 1856 that he served a writ of attachment in favor of Tebbe agt. H A Layton & Wm Hill doing business in the name H A Layton & Co Tebbe was a grocer

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on the corner of 6th & Franklin Avenue and Dayton & Co were grocers right on the opposite corner of the same street. Found the goods in a back building, back of Tebbe's store, was told of the goods being there by Wightman & Essex and he & Robert Chapman another deputy Marshal went into the warehouse which was open and afterwards Wrightman & Essex & Mr. Caul came in. He sent for Tebbe & read the writ to him. Tebbe claimed the goods as his property. He made his levy, removed them to the State Tobacco Warehouse & afterwards sold them under an order of the Law Court. Court, the particulars of sale are stated in the return just read.

On Cross Examination, he stated that he did not recollect at what stage of proceedings the claim was first made, that being called upon without previous reflection, and at this distance from the transaction he could not recollect all that was said & done. He was asked, if he recollected that Tebbe stretched out his hands over certain goods and said these are not my goods, and he said the matter had escaped him now. He was asked if he recollected that Mr. Caul asked Tebbe if he had a bill of the goods and if he had they would not levy, and he said he could not call it to mind. He was further asked if he recollected taking an inventory of the goods to make his levy & when they came to a barrel of sugar Tebbe remarked, that did not come from across the way I bought it from Mr. ——, and paid for it. And he shook his head. He was asked what facts he did recollect, and he said he recollected that Tebbe

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went out after he came, but whether more than once or how long he stayed he cannot say & he recollects that Tebbe claimed the goods. Being just called up out of the Criminal Court Room from the discharge of his duties and no time for reflection he could not state all that occurred. The house where the goods were found was separated by an alley from the store, the back building was partly used as a carpenter's shop.

Testimony of Dubring

Dubring testified that he saw the goods taken out of the warehouse, that the house had been used as a store house by Tebbe for a year & a half previous. He states that at the date of the levy Whiskey was selling at from 30 to 35 cts per Gallon ½ box Tobacco was worth $18 or 20$ Buckets worth $2.50 per Dozen tubs 2.50 per nest.

On Cross Examination stated that he lived with Pulker tending store, Tobacco varied from 10 to 40$ per half box. Didnt Know the quality of the Tobacco.

This was all the evidence offered by plaintiff to sustain the issues on his part thereupon the defendant to sustain the issue on his part introduced the following evidence.

Testimony of James C Epex.

James C. Epex stated that he was Clerk for Mr. Caul & Epex who also had a writ of attachment against Dayton ~~[illegible]~~ & Co that hearing from the drayman that goods had been sent over to Tebbe very early in the Morning they informed the Marshal Mr. Peyninghaus, That Peyninghaus Chapman & Mr. Caul in the latter part of July 1856

went up to the back building, back of Tebbe's store, they got there first, shortly afterwards he and Weightman went in. The Marshal sent for Tebbe and read his writ, Tebbe said, Gentlemen you are too late. I have got some papers, He went out and came back again directly & brot two papers which were notices of Garnishment left by the Sheriff calling upon him in the cases of Derby v Day & Humphreys Tull & Terry to answer his indebtedness to Dayton & Hill, Mr. Poyngham remarked Mr. Tebbe this does not effect the goods it only effects your indebtedness to Dayton & Hill Mr. Mc. Caul said Mr. Tebbe have you a bill of those goods from Dayton & Hill for if you have we will not levy and he said he had no bill I saw there the very boxes of Tobacco that Dayton & Hill had bot of Mc. Caul & Essex two days before. There was the tubs and buckets & brooms and other articles that Weightman had sold Dayton & Hill. After the conversation about the Garnishee Mr. Poyngham said he must go on & make the levy, Tebbe stretched out his hands over some of the goods then levied on & says Gentlemen I do not claim these goods. The Marshal went on making his list & finally came to a barrel of sugar Tebbe says this is mine I bought it from Mr. mm paid for it. The Marshal said if this did not come across the way we will not take it Tebbe went out and was gone some 10 or 15 minutes and came in and said he claimed the goods.

Testimony of F. Bergesch

Frederick Bergesch being sworn testified on the part of plaintiff Tebbe's warehouse back of the

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house has been used by him as a warehouse for several years past he keeps his heavy goods in that warehouse always.

This was all the evidence offered by Defts.

(C & D)

Plaintiff's Instructions given. "C"

At the instance of the plaintiff the Court gave the following instructions marked as in margin.

If the jury believe from the evidence that the property in question at the time of the levy was the property of Tebbe then the plaintiff is entitled to recover the value thereof within the limit of the bond sued on together with six per cent interest from the time of bringing this suit:

"D"

The jury are instructed that possession of personal property is prima facie evidence of ownership thereof and if the jury believe from the evidence that the property in question was at the time of the levy in the possession and control of and claimed by Tebbe as his own then such possession will be construed into ownership of Tebbe unless the contrary is shown.

The defendant asked the four following instructions: marked E F G. H. The Court refused E F & G giving only instruction marked H. To the action of the Court in refusing instructions E F & G the defendant by his counsel objects & excepts.

Defendants Instructions Refused "E"

If the jury are satisfied from any evidence offered that Tebbe had not bought in good faith from Layton & Co the property levied on by the Marshal then then they

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will find for defendants.

"F" That in order to sustain this action which is a contest between the creditors of Layton & Tebbe the plaintiff must satisfy the jury that he is a purchaser for value and in good faith.

"G" That altho the law makes possession of personal property prima facie evidence of ownership in a case free from fraud, yet in a case where fraud by creditors is charged the party claiming to hold the property should show that he is a purchaser for value & in good faith.

Defendants Instruction Given "H." That mere possession of personal property is only presumptive evidence of ownership thereof but it may be repelled by evidence sufficient to satisfy the jury who in fact is the real owner; and if the jury are satisfied from the evidence offered that Tebbe was not the real & bona fide owner of the property mentioned they will find for the defendants.

The jury brot in the following verdict;

Verdict "We the jurors find for the plaintiff the sum of One hundred and seventy five dolars G. W. Hake, Foreman"

On the 29th May 1857 the defendant filed his motion & reasons for a New trial and also an affidavit in aid thereof.

Motion for New Trial. The defendant by Thos Johnson his attorney comes and moves the Court to grant

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him a new trial in this cause for the following reasons.

1 Because defendant was surprised in the evidence given by Mr. Peyninghaus.

2d Because the witness Peyninghaus committed a mistake not recollecting at the time what his subsequent reflections supplied.

3d That the Verdict of the jury was improper & in opposition to the evidence adduced.

4 Because the defendant has a just ground of defence.

5. Because the verdict is contrary to the evidence & the law and is for plaintiff when by the law of the land it should have been for defendants

Johnston, P. D.

Affidavit of ~~Thomas~~ ~~Johnson~~ Wightman

William Wightman being duly sworn states that on the trial of this cause he was surprised by the evidence given by Mr. Peyninghaus the Warshap, that relying upon Mr. Peyninghaus to prove that Tebbe did not claim the ownership of the goods until after he had left the building a second time, that when Tebbe was asked if he had a bill of the goods he said no, he did not use any extra exertions to procure the attendance of Robert E Chapman, showing that he could prove these and other facts by James E Fox his other witness That he was surprised that at that time Mr. Peyninghaus only recollected that Tebbe claimed the goods without remembering at what stage of the proceedings the claim was made and in fact the testimony of said Peyninghaus as given in had the appearance of contradicting the evidence of James E Fox.

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That after said witness testified he had no time to procure the evidence of Robert E Chapman the other person present at the levy whose evidence corresponds with Essex's That had he known that Mr. Peyinghaus would have forgotten so important facts he would have secured the attendance of Chapman but fully expecting that the Marshal & Essex would state the same & not supposing that the Marshal would not recollect the facts he did not think it necessary to increase costs by multiplying evidence on the same points. He further states that the Marshal testified in the case of State use of Tebbe vs Mc Caul & Essex tried two days after this case and upon reflection he recollected facts that he could not call to mind when testifying in the above cause, that his recollection now corresponds very nearly with Essex & Chapman who are identical in their evidence He states that he has a good ground of defence and he asks the Court to grant him a new trial that he may establish his defence before another jury

Sworn to & subscribed before me this — day of May 1837

Wm Wightman.

Liberty Waite Just of the Peace.

On consideration whereof the Court overruled said motion for a new trial, To which ruling of the Court the defendant objects and excepts and here tenders his bill of exceptions embodying the evidence and prays that the same may be signed & sealed & made a part of the record in this cause which is here done

Saml. Reber Judge &c

The affidavit and appeal bond are in the words and figures following to wit;

Affidavit for appeal

Wm. Wightman being sworn states that the appeal in this case is not made for vexation or delay but because the affiant believes that the appellants is aggrieved by the judgment or decision of the Court.

Sworn to & subscribed before me Wm. Wightman, this 3d day of July 1837

C. W. Nicks Clk.

Appeal Bond.

Know all Men by These Presents, that we William Wightman as principal and Thomas C. Johnson & George Arnold as sureties are held and firmly bound unto the State of Missouri to the use of John H. Tebbe in the sum of Three Hundred and fifty dollars for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents sealed with our seals and dated at St. Louis this 3d day of July AD 1837 The Condition of the above obligation is such that whereas William Wightman Charles H. McCord & Thos. O. Fox have appealed from the judgment rendered against them and in favor of the State of Missouri to the use of John H. Tebbe in the St. Louis Court of Common Pleas for the sum of One hundred and seventy five dollars and —— cents together with costs,

Now if the said appellants will pay all costs and damages that may be awarded against them occasioned by such appeal and shall pro=

secute their appeal and shall perform such judgment as shall be given by the Supreme Court and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give, and if the judgment or any part thereof be affirmed, that they will comply with and perform the same so far as it may be affirmed and will pay all damages & costs which may be awarded against them by the Supreme Court then this obligation to be void otherwise to remain in full force and effect.

Acknowledged and approved July 3d 1857
C H Nicks
Clk

Wm Highlman (Seal)
Thos C Johnson (Seal)
Geo Arnold (Seal)

State of Missouri }
County of St. Louis } ss. I Charles H Nicks Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid certify the above and foregoing to be a full true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remains in my Office

In Testimony Whereof I hereto set my hand and affix the seal of said Court at Office in the City of St. Louis this 25th day of July AD 1857

C. H. Nicks
Clerk.

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March. T. 1858

The State of Missouri
use of John H. Tebbs
resp.

Transcript

William Wightman
Charles W. McCaul &
Thomas Epox. apt.

Appeal from St. Louis Court
of Common Pleas

Filed 3d October 1857
Wm. S. Glanville
Clk
Thos. C. Johnson

Exd

$8.75 paid by atty Johnson

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Assigt of / sub. for apt / apts brief & stat filed / res brief / apts brief /
Affirmed May 26th 1858 — Rec. B. p. 443.

The State use of Tebbe Respondent
agt. Appeal from Common pleas St Louis Co.
Wm Wightman et al. Appellants

In Supreme Court of Mo
Oct. T. 1857.

And now at this day comes the appellants and says that there is manifest error in the records and proceedings of the Court below and he assigns here in Court the following errors.

1. The Court erred in refusing to give to the jury three instructions asked by defendants.

2. The Court erred in refusing to set aside the verdict and grant a new trial to defendants, the verdict being against the evidence and the weight of evidence. And secondly a new trial should have been granted because the defendants were surprised by the evidence of a witness and thirdly the defendants had shewn a good ground for a new trial.

3. The judgement is for the wrong party. It is for the plaintiff whereby the law of the land it should have been for defendants.

Wherefore for these assignments the defendants pray that the judgement of the Court below be reversed.

T. C. Johnson Atty for
Wightman et al

The Respondent joins error with the appellant and denies that there was any error in the Court's refusing to give the instructions asked for by appellant. - The Court should not have granted a new Trial for the reasons stated, and the judgment is as it should be.

Kribben atty for Resp.

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In Supreme Court
No 193

State use of Tebbe
Respondent

v. Appeal from
Com. pleas

Wm Weightman et al
appellants.

Assignment of errors
Johnson atty for
appellants.

Filed 24 Oct. 1857
W S Glanville
Cl.

The State use of John H Tebbe
agt.
William Wightman principal
McCaul & Essex Securities.

Respondent
Appeal from St Louis Court of Common pleas.
Appellants

In the Supreme Court of Mo.
Oct. Term 1857.

Statement of the case.

In the month of July 1856 Layton & Hill retail grocers on the Corner of 6th St & Franklin Avenue, within a day or two after making their purchases, commenced running off their goods in various directions. The creditors finding that they were about being swindled, took out attachments, some suing in the Court of Common pleas whose process is served by the Sheriff and others in the Law Commissioners Court whose process is served by the County Marshall. Among their creditors were McCaul & Essex who had sold them manufactured tobacco, and Wm Wightman the real defendant below (appellant here) who had sold them some wooden ware brooms &c. The demand of Wightman was near $90.— and he & McCaul & Essex brot their suits in the Law Comr's Court. These latter ascertaining from a drayman that certain goods had been sent over to Tebbe's back warehouse, who lived diagonally across the street from Layton & Co's very early in the morning & believing the goods were intended to be secreted from their creditors, they informed the Marshall who levied upon them. The attachment was served on the 31st July 1857 & a claim for them was made in writing by the relator Tebbe on the 12th August. The Law Comr's Court on petition of the Marshall ordered the goods to be sold and they brought $144.44. There is a special act applicable to St Louis Co. which authorizes the Marshall where goods are claimed by third persons to demand of the plaintiff in the execution or attachment a bond of indemnity. A bond was given by Wightman & upon this bond Tebbe brings suit in the Court of Common pleas claiming the goods to be his. The defendants answer claiming the goods to be the property of Layton & Co — that they were run off to put them out of the reach of their creditors and that if Tebbe claims to be purchaser

he is not a purchaser in good faith & for value.

A trial was had on the 26 May 1857. The plaintiff to sustain the issue on his part offered in evidence — the writ of Attachment issued by the Law Comr. — the return of the Marshall — the written Claim of Tebbe — the bond on which this suit is brot and the evidence of Mr Peyughans the deputy Marshall & one Lubring. In order to have a full understanding of the case it is necessary to give their testimony as also that of defendants' witness in full. Mr Peyughans stated that he was deputy Marshall of St Louis Co. in July 1856 — that he served a writ of Attachment in favour of Weightman ag.st H. A. Layton & William Bell doing business under the name of H. A. Layton & Co — that Tebbe was a grocer on the Corner of 6th & Franklin Avenue and Layton & Co were grocers right on the opposite corner of the same streets — that he found the goods in a back building — back of Tebbe's store — was told of the goods being there by Weightman & Essex, and he and Robert Chapman another deputy Marshall went into the warehouse which was open and afterwards Weightman and Essex & McCaul came in. He sent for Tebbe and read the writ to him. Tebbe claimed the goods as his property. He made his levy — removed them to the State Tobacco Warehouse and afterwards sold them and afterwards sold them under an order of the Law Comr's Court, the particulars of which are stated in the return just read.

On Cross examination, he stated that he did not recollect at what stage of the proceedings the claim was first made — that being called upon without previous reflection and at this distance from the transaction he could not recollect all that was said and done. He was asked if he recollected that Tebbe stretched out his hands over certain goods and said these are not my goods and he said that the matter had escaped him now. He was asked if he recollected that McCaul asked Tebbe if he had a bill of the goods and if he had they would not levy and he said he could not call it to mind. He was further asked if he recollected taking an inventory of the goods to make his levy and

when they came to a barrel of sugar Tebbe remarked "That did not come from across the way - I bought it from Mr —— and paid for it" and he shook his head. He was asked what facts he did recollect and he said he recollected that Tebbe went out after he came, but whether more than once, or how long he stayed he cannot say and he recollects that Tebbe claimed the goods. Being just called up out of the Criminal Court room from the discharge of his duties and no time for reflection he could not state all that occurred. The house where the goods were found was seperated by an alley from the store - the back building was partly used as a carpenter's shop.

Subring testified that Tebbe had used the back building as a warehouse for a year and a half previous - he stated that at the date of the levy Whiskey was selling at from 30 to 35 cts per gallon - that ½ box Tobacco was worth $18 or $20, Buckets $2.50 per doz, tubs 2.50 per nest. On Cross examination he stated that Tobacco varied from $10 to $40.00 per half box - didnt know the quality of the tobacco.

This was all the evidence for the plaintiff.

The defendants offered in their behalf James C. Essex as a witness who stated that he was clerk for McCaul & Essex who also had a writ of Attachment against Layton & Co - that hearing from the drayman that goods had been sent over to Tebbe very early in the morning, they informed the Marshall Mr Peyinghaus - that Peyinghaus, Chapman & McCaul in the latter part of July 1856 went up to the back building - back of Tebbe's store - they got there first. Shortly afterwards he & Wightman went in. The Marshall sent for Tebbe and read his writ. Tebbe said Gentlemen you are too late I have got some papers. He went out and came back again directly & brot two papers which were notices of garnishment left by the Sheriff calling upon him in the cases of Derby & Day and Humphreys, Tutt & Terry to answer his indibledness to Layton & Hill. Mr Peyinghaus remarked "Mr Tebbe this does not effect the goods - it only affects your indebtedness your indibledness to Layton & Hill. Mr McCaul said Mr Tebbe have you a bill of those goods

from Layton & Hill, for if you have we will not levy and he said he had no bill. I saw there the very boxes of tobacco that Layton & Hill had bot of McCaul & Essex two days before there were the tubs and buckets & brooms and other articles that Wightman had sold Layton & Hill. After the conversation about the garnishee, Mr Peyinghaus said he would go on & make the levy. Tebbe stretched out his hands over some of the goods levied on and says Gentlemen I do not claim these goods. The Marshall went on making his list and finally came to a barrel of sugar. Tebbe says this is mine - I bought it from Mr — and paid for it. The Marshall said if this did not come from across the way we will not take it. Tebbe went out and was gone some 10 or 15 minutes and came in & said he claimed the goods.

This was all the evidence offered by defendant.

~~The jury brot in a verdict for plaintiff in the sum of $175.00 the penalty of the bond. The defendant~~

At the instance of the plaintiff the court gave the following instructions.

1. If the jury believe from the evidence that the property in question at the time of the levy, was the property of Tebbe, then the plaintiff is entitled to recover the value thereof within the limit of the bond sued on together with six per cent interest from the time of bringing the suit.

2. The jury are instructed that possession of personal property is prima facie evidence of ownership thereof, and if the jury believe from the evidence that the property in question was at the time of the levy in the possession and control of and claimed by Tebbe as his own then such possession will be construed into ownership of Tebbe unless the contrary is shown.

The defendants asked four instructions three of which were refused & one given.

The instructions refused are as follows.

1. If the jury are satisfied from any evidence offered that Tebbe had not bought in good faith from Layton & Co the property

levied on by the Marshall, then they will find for defendants.

2. That in order to sustain this action which is a contest between the creditors of Layton & Co and Tebbe, the plaintiff must satisfy the jury that he is a purchaser for value and in good faith

3. That altho the law makes possession of personal property prima facie evidence of ownership in a case free from fraud yet in a case where fraud by creditors is charged, the party claiming to hold the property should show that he is a purchaser for value and in good faith

Exceptions were taken to the refusal of the court to give these instructions.

The only instruction given at defendants instance is as follows. "That mere possession of personal property is only presumptive evidence of ownership thereof, but it may be repelled by evidence sufficient to satisfy the jury who in fact is the real owner: and if the jury are satisfied from the evidence offered that Tebbe was not the real & bona fide owner of the property mentioned they will find for the defendants.

The jury returned a verdict for the plaintiff in the sum of $175.00 the amt of the penalty of the bond.

The defendants filed their motion for a new trial stating the usual reasons & in addition that they were surprised by the testimony of Payanhans in his want of recollection of material facts The affidavit of Wm Wightman was filed which stated that he was surprised by the evidence given by Mr Payanhans the Marshall — that relying upon Mr Payanhans to prove that Tebbe did not claim the ownership of the goods until after he had left the building a second time — that when Tebbe was asked whether he had a bill of the goods he said no, he did not use any extra exertions to procure the attendance of Robert E. Chapman knowing that he could prove these and other facts by James C. Essex his other witness — that he was surprised that at that time Mr Payanhans only recollected that Tebbe claimed the goods without remembering at what stage of the proceedings

the claim was made and in fact the testimony of said Peyinghaus as given in, had the appearance of contradicting the evidence of James C. Essex. — that after said Witness had testified he had no time to procure the evidence of Robert E. Chapman the other person present at the levy whose evidence corresponds with Essex's. That had he known Mr Peyinghaus would have forgotten so important facts he would have secured the attendance of Chapman, but fully supposing that the Marshall & Essex would state the same and not supposing that the Marshall would not recollect the facts he did not think it necessary to increase costs by multiplying evidence on the same points. He further states that the Marshall testified in the case of the State use of Tebbe v. McCaul & Essex tried two days after this case and upon reflection he recollected facts that he could not call to mind when testifying in the above cause — that his recollection now corresponds very nearly with Essex & Chapman who are identical in their evidence He states that he has a good ground of defence and he asks the court to grant him a new trial that he may establish his defence before another jury.

The motion for a new trial was overruled & thereupon this case is brought here by appeal.

Thos. S. Johnson Atto
for Appellants
Nightman et al

In Supreme Court.

The State ex rel of Tabbe
Respondent

v.

Wm Wightman et al
appellant

Statement of the case by
appellant.

D W Johnson Atty

Filed 8 April 1858.
Wm S Glanville
Clk.

State use of ~~Wright~~ Tebbe
agt.
Wm Weightman et al.

Brief by Thos. C. Johnson Atty for Appellant.

1. The court should have given the instructions asked by defendants. The question of fraud was raised by the pleadings and fraud was clearly made out in evidence, yet the court refused all instructions upon the subject of fraud, thereby in effect declaring that fraud had nothing to do with the case. The answer distinctly charged that Tebbe's possession was fraudulent. It was not sufficient for him to show that he was in possession — he should have shewn that he paid value for the goods and that he bought them in the usual course of business. This being affirmative proof, he was bound to produce it. And this being shown the defendants could be compelled to ~~show~~ prove such facts as make out a case of bad faith.

2. The verdict was against the evidence in the case. The witness for plaintiff being called upon suddenly without reflection was wholly unreliable & was entitled to no consideration by the jury. He stated himself that being called upon suddenly he could not recollect all that occurred — nor could he recollect at what stage of the proceedings Tebbe claimed the goods. And yet this was a most important fact. The witness for the defendants proved distinctly that Tebbe stretched out his hands over the goods & said these are not my goods — that during the making of the inventory, when the Marshall came to a barrel of sugar Tebbe cried that is mine I bought it from Mr — & paid for it thereby clearly admitting by implication as he had previously done explicitly that the goods levied upon were not his. He was told that if he could produce a bill for the goods, the Marshall would not levy. He said he had no bill. At that time he did not pretend that he had purchased the goods & said on the contrary that they were not his. Defendants witness proved that Tebbe went out first & brought in those notices

of garnishment - it being decided by the Marshall that they affected only his indebtedness & did not bind the property - the Marshall went on & made his levy & inventory - Tebbe claimed the barrel of sugar and after that went out & was gone 10 or 15 minutes. He comes back & then for the first time claims the goods. Why this change from his previous declarations that the goods were not his? It is easy to conjecture. He had no doubt stepped across the street to Layton & Co's. and informing them what the Marshall was doing it was agreed that Tebbe should claim the goods. This is the first time that the claim was made. The Marshall could not recollect at what time this claim was made & yet the Court perceives that the time is a most important fact. Upon this & other facts defendants' witness was very distinct. We say that any sensible jury upon the facts proven should have found for the defendants that therefore the verdict is against the evidence.

3. The Court should have granted a new trial upon the ground of surprise as fully disclosed in the affidavit. Practice in Civil Cases Art. 13 Sec 3 Vol. 2 p. 1285. It is shown in the affidavit that defendant Wightman was surprised by the testimony of Mr Peyroghans. He had every reason to believe that Peyroghans would recollect the facts as they occurred & that therefore his evidence & that of Essex would correspond. And certainly two witnesses proving the same facts would be considered sufficient in any case. Two witnesses to the same points would convict in treason or perjury. He had summoned Chapman but finding two witnesses of the same transaction present, he was bound to go to trial & could not either continue or delay the case. Peyroghans proved only that Tebbe claimed the goods and as he could not recollect at what stage of the proceedings, the jury might have inferred that he claimed the goods in the outset. Instead of being a want of recollection, an incautious jury might conclude there was a contradiction between Peyroghans & Essex & they leave the goods in the same hands the Marshall found them in. The affidavit shows that Peyroghans was mistaken - that in the case of State use of Tebbe v. McCaul & Essex in which the same question was involved precisely

Piyaghans testified again — that subsequent reflection had enabled him to state facts that he at first did not recollect — that his testimony corresponds now very nearly with that of Essex — that Chapman also testified that his testimony & that of Essex's are identical and that he can satisfy another jury that he has a good ground of defence. The jury in the case agt. McCaul & Essex with the testimony of Piyaghans, Chapman & Essex had found for deft. There is not a shadow of doubt that another jury passing on this case with the evidence of these witnesses whose memories are now refreshed by reflection will find for the defendants. ~~We contend that~~ Our statute provides that in every case where there has been a surprise of a party, his agent or attorney and that the party has a just cause of defence the court shall grant a new trial. Here is laid sufficient ground to call for the supervising power of the court.

A surprise is defined to be that situation in which a party is unexpectedly placed without any fault of his own. which is injurious to his interests. Graham & Waterman on New trials. Vol 3. p 875. These authors remark that they can discover no substantial reason why a party should not be relieved against the forgetfulness of a witness even when called by himself Vol 3 p 960. Much more then when called by the opposite party. Had the appellants been plaintiffs below ~~they~~ might have relieved ~~themselves~~ himself from the consequences of a surprise by taking a nonsuit. But the appellants was defendants & was bound to have the jury pass upon ~~the~~ his case. There is no way to be relieved from the surprise but by granting a new trial

He was placed in this situation without any fault of ~~the~~ his own and ~~the~~ his interests are injured. The court must be satisfied that the appellants has a good ground of defence. The court sees and the defendant swears that he was surprised. There is a complete case made out under the statute & we respectfully contend that the court was bound to grant a new trial.

Thos. Johnson Atty for
Appellant Wightman

In the Supreme Court

The State use of Tebbe
Respondent

vs.

Wm. Wightman et al
Appellant.

Brief by
Thos. L. Johnson Atty
for Appellants.
Submitted by Appellant.

Filed 8 April 1888.
Wm. S. Glanville Clk

The State to the use of Tebbe
"
William Wightman et al } Supreme Court March Term 1858.

On appeal from the Court of Common Pleas.
Statement of Case by Respondent

This is a suit brought by Plaintiff to the use of John R. Tebbe on a bond executed by the defendants under the Laws of the state governing the duties of Sheriff & Marshals of St Louis County passed by the Gen. assembly in the year 1855. See Laws of 1855 p. 464. Under the law the plaintiff made his claim for certain goods which had been attached by the Marshall by virtue of a writ issued from the Land Commissioner's Court in favor of Wightman one of the defendants and against Layton & Hill. Under the bond given the goods were sold and the Plaintiff now sues for the value of the same upon the bond under said statute.

The defendants in their answer admit the execution of the bond, the taking of the property and its value - but deny that it was taken tortuously or wrongfully, or that it was the property of the Plaintiff Tebbe but was subject to said writ of attachment as the property of Layton & Hill.

Brief: The evidence offered by Plaintiff consists:

Firstly: in the Record of the Land Commissioner's Court, showing the attachment issued, the execution of the same, the levy & taking of the goods in question, the claim made by Tebbe under the statutes, and the bond given.

Second: Mr. Reyinghous, deputy Marshall testifies that he executed the writ & took the goods; that Tebbe claimed them at the time - that they were taken out of the store room of Tebbe notwithstanding Tebbe's remonstrances.

Other witnesses testify as to the value of the goods taken and the locality whence they were taken, showing that the goods were in the common store room of Tebbe, who is proved to be a Merchant.

The defendants prove by Mr. Essex an employee in the store of one of the defendants, that he accompanied the Marshall into the store room and was present at the time of the levy. That Febbe at first claimed the goods only as being subject to a garnishment and not as his own, and not until after the lapse of ten or fifteen minutes claimed them as his.

This is in substance the whole of the evidence.

On a verdict for the Plaintiff, and a motion for new trial overruled the defendants appeal.

They base their cause in this Court on the grounds:

1. That the Court below erred refusing to give three instructions asked for by defendants.

2. That the Court below erred in refusing to set aside the verdict rendered because the same was against the evidence & the weight of evidence and the verdict should have been for the defendants.

There is no fault found with the instructions given nor any other exception on record.

1. As to instruction marked "E" refused:

"If the jury are satisfied from the evidence offered that Febbe had not bought in good faith from Layton & Hill the property levied on by the Marshall then they will find for the defendants"

It is difficult to say upon what pretext such an instruction should have been offered, much less given. There is not a word mentioned by any witness in the case of any purchase of goods by Febbe from Layton & Hill. It is true the defendants in their answer assert that the goods in question belonged to Layton & Hill & simply that they were hidden in Febbe's store. But evidence of that fact there is none whatever. The question for the jury was to decide whether the goods at the time of the attachment were the property of Febbe, and so far as the ~~evidence~~ real merits of the case are concerned it was utterly immaterial whether

Tebbe had bought them from Layton & Hill or any other person. The instruction asked, virtually begs the whole question, and whatever of law applicable to the case was in it, was embraced in the instructions which the Court gave and to which there is no objection.

The instruction F:

"That in order to sustain this action, which is a contest between the creditors of Layton & Hill and Tebbe the plaintiff must satisfy the jury that he is a purchaser for value and in good faith"

This is in substance the same as the former, only somewhat worse for the additional grave objection: that it assumes a fact which is not only utterly immaterial, but also irrelevant and tending to embarass the jury.

The instruction G:

"That although the law makes possession of personal property prima facie evidence of ownership in a case free from fraud, yet in a case where fraud by creditors is charged the party claiming to hold the property should show that he is a purchaser for value & in good faith"

All the objections made to the two first instructions are also applicable to the latter. And in addition I ask: What has the words "in a case free from fraud" ~~[illegible]~~ to do with the jury in this case? Is any evidence of fraud shown or preserved? And is the mere charge of "fraud" in an answer, unsupported by any evidence whatever, sufficient to entitle a party to a consideration of that defence by the jury? Counsel have mistaken their impressions or prejudices with facts in urging for such an instruction. A mere implication establishes no fraud. The isolated fact: that the witness Essex identifies parts of the goods levied upon as being the same some days before that sold by Essex & Co to Layton & Hill, does certainly not constitute evidence of fraud or even a circumstance tending to fraud on the part of Tebbe in the absence of any other proof?

Moreover the fourth instruction given by the Court at the instance of defendants Counsel embraces every material proposition necessary for the jury for their guidance.

The instructions complained of were therefore rightfully refused.

The instructions given were legal and ample; nor is there any exception thereto.

The second objection complained of by defendants is: that the verdict of the jury is against evidence, and the weight of evidence &c. &c. and that the Court therefore should have granted a new Trial.

The Court below was its own judge upon this question, and this Court will, under its uniform rule, not disturb the verdict rendered, or interfere with the legal discretion of the Court below in granting or refusing on the ground alleged a new Trial.

Yet it may be said: that the verdict of the jury was in accordance with, & fully sustained, by the evidence, the whole subject before the jury to determine being a question of veracity or memory between Peyinghouse, a public sworn officer & entirely impartial, and Essex a brother and clerk of our defendants, also an attachment creditor of Layton & Hill and therefore equally interested with Weightman.

Although the defendant's Counsel does not in his assignment of errors assign the refusing of a new Trial because of the affidavit filed on the ground of surprise, as a reason for reversing the judgment below, I will briefly take notice of that affidavit also:

In the first place let it be asked: Is the point at all material whether Tebbe claimed the goods at first, or at the end of the interview, or at any time afterwards? It might become material to show this, if there were any proof that

Tebbe purchased the goods in question from Layton & Hill. But there is no such proof. Mr. Tebbe at first remarked: "Gentlemen you come too late," and produced three notices of garnishment. Did Tebbe know that the Marshall and Wightman, Chapman & Essex came for attaching the goods or simply to garnishee him also, or at least to ascertain whether any thing was to be found? How could he know what those parties wanted, when they came in? But, hearing that they were after Layton & Hill & their property, he says: "Gentlemen you are too late," & shows his garnishments, meaning no doubt, that garnishing him was of no avail, since Derby & Day, and Humphreys Fitt & Ferry had already served their garnishments upon him. Is it to be implied that Tebbe, by saying: "you are too late, I have been garnished," meant to say that he did not own the property, and is such an implication, even if allowed, to destroy the legal presumption of law? But Peyinghouse says: Tebbe claimed the goods at the same time - Essex says he did not, till afterwards, and now: because Wightman had conversed with Essex, and knew what the latter would swear to, and on the strength of that fact takes it for granted that Peyinghouse will swear to the same, and therefore does not see fit to summon Chapman who was also present & is a resident of the city: therefore the Defendants have been "surprised". Who brought Peyinghouse on the stand? The defendants? No! the Plaintiff. Who summoned Essex? The defendant. Why was ~~not~~ Chapman not summoned or brought on the stand? Because the defendant Wightman tells us with becoming candor that he thought Essex was enough. And because his calculation turns out wrong, he appeals to the Court to do the whole thing over again. If a trial in a Court of justice were a mere play, or rather a kind of rehearsal for a play, then there might be no objection to this. There is clearly no evidence of due diligence on the part of defendants by which what Wightman calls "surprise" might have been

obviated. The assertion that Peyinghouse came on the stand suddenly, just from the Criminal Court addresses itself to psychological law exclusively. How any person can come slowly or gradually, or suddenly on the witness stand to testify his knowledge of a transaction of which he is cognizant, and what the degree of speed, promptness or supineness in such case might or should be is hard to determine. I presume Peyinghouse came no more suddenly from the Criminal Court room than a shoemaker, if similarly situated, from his shop, or a merchant from his counting house. If Peyinghouse ran in great haste and came upon the stand in a state of suffocation (which does not appear of record) then he should certainly have had time to recover; or if, finally, "suddenly" means that Peyinghouse had not been allowed time to consult with the defendants counsel and inform them of his testimony first, before the Plaintiff put him on the stand, then the defendant should hardly have the benefit of a new Trial for giving them an opportunity for instructing the witness.

Alex Kribben
atty. for Respondent.

The state of Mo
to use of Tiblee

vs

Wm Wightman et al

cu.

Respondents
Brief

Kribben
p. d.

Filed 9 April 1858.
Wm S. Glanville
Ch

No 106 — State to the use of Tebbe v. Wightman

The instructions given by the Court presented the questions of law in the case fairly to the jury. The plaintiff could stand on his possession until the integrity of his position was assailed, and could rely on the familiar principle of law that the possession of personal property raises the presumption of ownership. And the allegation in the defendant's answer that the plaintiff's possession has fraudulently obtained was insufficient, without evidence to shift the burden of proof.

Surprise is a ground for granting a new trial, but it is not regarded with favor by the Courts. It is the duty of parties in the preparation of their cases, not only to know what evidence they need, but what their witnesses will most probably prove, and a new trial will not be granted if the surprise is the result of negligence or could have been avoided by reasonable diligence. 3 Graham & Wat. New Trials 876.

This is not the case of a party's own witnesses betraying him, or the ~~adversary's~~ adverse party's witnesses swearing falsely, for it is not averred that the defendant's own witness deceived him or that the plaintiff's witness stated an untruth, but that he omitted from forgetfulness to state a fact which was proven by ~~another~~ one witness

without contradiction, and which the defendant states he could have proved by another if he had supposed the plaintiffs witness had forgotten it; and that he could have secured the attendance of another witness if he had not relied on the memory of the plaintiffs witness. If he was willing to go to trial in the absence of one of his witnesses relying on the plaintiffs witness to corroborate his own, he ought to have taken some pains to have ascertained beforehand that his recollection was refreshed.

The fact which the witness forgot was proved by another, and the ~~only~~ object ~~attained~~ in getting the new trial would be to introduce cumulative evidence which is never allowed

State is Stumbo 26 Mo — 3 Gra & Wat.
New Trials 1046.

The judgment will be affirmed the other other judges concurring

Jno O Richardson

No 106
Hale to use of Tebbe
in
Wightman

Op. of the Court
Affirmed

Filed 26 May 1858.
Wm S Glenville Ck
Richardson