

1955

Thomas F. Kirkham v. Orien A. Spencer and Viola Spencer : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

THOMAS F. KIRKHAM, Administrator of the
Estate of William Kirkham, Deceased,
Plaintiff and Respondent,

vs.

ORIEN A. SPENCER and VIOLA SPENCER,
his wife,
Defendants and Appellants.

CASE
NO. 8291

APPELLANTS' BRIEF

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NEW CENTURY PRINTING CO., PROVO, UTAH

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CASE
NO. 8291

BRIEF OF APPELLANTS

STATEMENT OF FACTS

On the 25th day of January, 1952, William Kirkham, now deceased, entered into a written contract of sale of certain real property which is described in the complaint of the plaintiffs to Orien A. Spencer and Viola Spencer, his wife, for the sum of \$5,993.38, payable at the rate of \$65.00 per month or more, with interest at the rate of five per cent.

At pre-trial the parties stipulated that the plaintiff, Thomas F. Kirkham, is the duly appointed, qualified and acting executor and that the contract of sale properly describes the property and that the terms of the contract are

accurate. The only fact reserved for trial was whether the defendants paid to the plaintiff's decedent during the month of August, 1953, the sum of \$4,800.00. It was the defendants' contention that this amount had been paid and it was the plaintiff's position that it had not.

It would appear from the evidence presented by the plaintiff that the decedent was 77 years of age at the time of his death, which was on September 6, 1953, and that he was a widower and had lived alone for a long while. That his brother, the plaintiff, did all his business for him, including his banking, and even assisted to the extent of drawing his contracts, (Tr. P. 4), and that this relationship had continued for at least 10 years prior to his death.

Near the last of August the plaintiff testified that he visited Mr. Hinton, at the request of the decedent, to retain him to collect the delinquent amount then owing under the contract with the defendants. The plaintiff judged the date to be August 30, 1954.

The plaintiff testified that he did all the banking for his brother and that he did not bank any amount of \$4,800.00. He admits that he did not inquire as to whether the decedent had other bank accounts (Tr. P. 16) and he further admits that he did not make a search of the home and property of the decedent for any assets that may have been on hand at the date of death, (Tr. P. 16) and that the only inquiry that he made as to the assets of the estate were from two members of the decedent's family (Tr. P. 16). The plaintiff further admitted upon cross-examination that he did not know what monies were on hand at the decedent's death or in his house, or in his wallet (Tr. P. 17), and that he made no effort to find out. The plaintiff further admitted that he did not deposit all the money

received by the decedent, and that he did not know what happened to some of the money (Tr. P. 18), and that, in fact, the only money that he deposited was that money given to him to deposit by the decedent. The plaintiff stated on P. 36 of the transcript that he cannot remember what any of the children told him about what they found in the way of assets, if anything.

The only other witness called by the plaintiff at the time of trial was Cleo K. Beagley, a daughter of the deceased. She testified that she was present in the house after the death of her father, and that she took part in a search that was made of the house. She stated that as far as her personal search was concerned, she searched the linen closet (Tr. P. 41), and that she was present when the desk was searched, although she does not recall what particular part she played in searching the desk. She admitted that she made no inquiry at any bank (Tr. P. 42) or that she looked in any place other than the house in search of the assets of the estate. She confirmed on Page 40 of the transcript that the only place that the family searched was in the house.

After this evidence the plaintiff rested.

Defendant here moved to dismiss the case on the grounds that the plaintiff did not prove a cause of action, the evidence being insufficient to sustain the complaint, and that the facts proven did not show a right to relief. The defendant's motion was denied.

The defendant then proceeded to introduce Defendant's Exhibit 3, a receipt for \$4,800.00 signed by decedent. The handwriting expert who testified (Tr. P. 47) stated that there was no doubt that the person who signed Defendant's Exhibits 1 and 2 signed the receipt, Exhibit 3, for \$4,800.00.

Exhibits 1 and 2 were two contracts notarized by the plaintiff and which bore the decedent's signature and which signatures the plaintiff admitted were genuine. The receipt was received in evidence.

The defendant then called Orien A. Spencer, one of the defendants. The defendant was not allowed to testify concerning the receipt because of the commonly called dead man's statute (Tr. P. 51). The defendant then rested.

In rebuttal the plaintiff called as his witness his attorney, who testified that prior to September 6, 1953, approximately September 1, 1953, that he wrote the defendant a letter asking him to come and see him but that the defendant did not come and see him prior to September 29, 1953. This constituted the total rebuttal.

At this stage the plaintiff again rested and the defendant moved the court again to dismiss the case for the reason that the plaintiff had failed to prove a cause of action, and that he had not carried the burden of proof in that the plaintiff had not presented sufficient evidence for the court to reach a verdict in favor of the plaintiff, and for the further reason that the plaintiff had presented absolutely no evidence to refute the authenticity or genuineness of the receipt.

The defendant's motion was denied and the court took the matter under advisement.

The court on its own motion on the 19th day of October, 1954, ordered that further hearing upon the cause be heard on the 25th day of October, 1954, at 1:30 P. M., in order that the parties present evidence upon the following points, to-wit:

"1. Evidence concerning the possession by the defendants of the sum of \$4,800.00 in cash which could

have been, or which probably was, paid to the deceased on or about the 21st day of August, 1953.

2. Further evidence of the search by plaintiff and/or the heirs of the decedent made either before or after the bringing on of the cause for trial to discover the possession of \$4,800.00 in money in the decedent after the 21st day of August, 1953, including banks in the cities of Lehi, American Fork, Pleasant Grove, Provo and Salt Lake City, and a more detailed search of the premises wherein deceased lived after August 21, 1953, and any other locations known to the heirs and representatives of the decedent wherein the said decedent might have made temporary disposition of \$4,800.00 paid to him prior to plaintiff's return from vacation on August 22, 1953."

On October 25, 1954, the defendant again moved the court to dismiss the case for the reasons stated at time of trial on October 19, 1954, and for the further reason that the court by reopening the case on its own motion and by designating what matters were to be proved and how they were to be proved, was acting beyond its authority and was, in any event, abusing its discretion. This motion was denied.

The attorney for the defendants was unable to notify the defendants of the court's order to reopen in time for the hearing. However, the plaintiff proceeded to introduce evidence along the line requested by the court, recalling to testify Thomas F. Kirkham, Harvard Hinton, plaintiff's attorney, and Cleo Beagley, and calling as a new witness Leslie Goates. The defendant again renewed his motion to dismiss, which was denied.

The case was continued until November 6, 1954, for the purpose of allowing the defendant to present the evi-

dence requested by the court's Order to Reopen; however, on the 5th of November, the parties appeared before the court and the defendant rested without presenting further evidence. The plaintiff moved the court to re-open the case to allow the plaintiff to present further evidence, but the court denied the plaintiff's motion in this instance. The court took the matter under advisement.

On November 8, 1954, the court rendered the judgment complained of. The defendants moved for a new trial, which motion was denied and the defendants appealed.

STATEMENT OF POINTS

POINT 1

DEFENDANTS' MOTION TO DISMISS AT THE END OF THE PLAINTIFF'S CASE IN CHIEF SHOULD HAVE BEEN GRANTED FOR THE REASON THAT THE PLAINTIFF FAILED TO PROVE A CAUSE OF ACTION AND FOR THE REASON THAT THE EVIDENCE PROVED WAS INSUFFICIENT FOR THE COURT TO GRANT THE RELIEF PRAYED FOR.

POINT 2

DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S CASE AND FOR JUDGMENT FOR THE DEFENDANT AFTER BOTH PARTIES HAD RESTED SHOULD HAVE BEEN GRANTED FOR THE REASON THAT THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN A JUDGMENT FOR THE PLAINTIFF AND THE EVIDENCE PRESENTED BY THE DEFENDANTS WAS PRIMA FACIE EVIDENCE OF PAYMENT AND WAS UNREFUTED BY THE PLAINTIFF.

POINT 3

THE COURT ERRED IN RE-OPENING THE CASE ON ITS OWN MOTION AND IN DESIGNATING THE MANNER, KIND AND AMOUNT OF EVIDENCE THAT WOULD BE REQUIRED BY THE COURT.

POINT 4

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BASED UPON THE ERRORS OF LAW COMMITTED BY THE COURT.

ARGUMENT

POINT 1

DEFENDANTS' MOTION TO DISMISS AT THE END OF THE PLAINTIFF'S CASE IN CHIEF SHOULD HAVE BEEN GRANTED FOR THE REASON THAT THE PLAINTIFF FAILED TO PROVE A CAUSE OF ACTION AND FOR THE REASON THAT THE EVIDENCE PROVED WAS INSUFFICIENT FOR THE COURT TO GRANT THE RELIEF PRAYED FOR.

At the end of the plaintiff's case in chief the defendants moved the court to dismiss the plaintiff's case (Tr. P. 43) for the reason that they had not proved a prima facie case. The defendants were then entitled to a non-suit on the basis of insufficiency of evidence.

It was obvious from the facts proven that there had been no showing that the defendant had not paid the \$4,-800.00. In fact, there were from the plaintiff's own testimony many reasonable and probable explanations of where the money was or had gone. It must be remembered that

the plaintiff brought this action and in his pleadings alleged that this payment among others had not been paid. This was specifically denied by the defendant and in fact the defendants pleaded that the defendant made payments to the said William Kirkham regularly and consistently and according to the contract, and that on the 21st day of August, 1953, paid the decedent, William Kirkham, the sum of \$4,800.00, which was believed to be the entire balance of the principal and interest owing on the contract, and the decedent gave the defendants a receipt for \$4,800.00 and agreed that he would calculate the exact amount owing and would deliver the deed to the defendant when he had done so and this amount was paid. The receipt which is admitted herein verifies such pleading.

Surely it is incumbent that plaintiff prove lack of payment, and not just that the money did not appear as one item in a bank account that was handed to the Administrator.

The plaintiff testified (Tr. P. 12) in answer to his attorney's question that it was his duty to collect the assets of the estate and that he had filed an inventory, and in doing so he had not found the \$4,800.00. It is fundamental that one of the chief duties of the Executor is to collect and search out the assets of the estate. However, in this case, the Executor did nothing to find out what was owing the estate, or to search through the belongings of the decedent in an effort to discover whether the money had been found or was among the assets of the decedent, but because it was not in one item in the bank account book of the Lehi State Bank, he assumed that it had not been paid. The entire testimony of the of the plaintiff on cross examination indicated that there was not sufficient proof to justify a

verdict. This is clearly shown by the following testimony:
(Transcript P. 15, L. 17 to P. 18)

MR. HOWARD: Q. "Did he ever bank anything without you being present, or without you doing it or him?

A. The last year or so I did all of his banking for him.

Q. How do you know you did?

A. All that I know about, from this——

Q. You did all the banking in these two bank accounts?

A. Yes, sir.

Q. You don't know whether or not he had a bank account in the Farmers & Merchants Bank in Provo, do you?

MR. HINTON: Your Honor, I object to that. He has testified, and it is in the inventory, that there were no other bank accounts. He is badgering the witness.

THE COURT: He may be cross examined about it anyway. Overruled.

MR. HOWARD: Q. You don't know whether or not he had a bank account in the Farmers & Merchants Bank, do you?

A. I do not know.

Q. And you don't know whether he had one in the Peoples State Bank, of American Fork?

A. I do not know.

Q. Or in the Pleasant Grove Bank?

A. I do not know.

Q. Or in any other bank, but the Lehi Bank, do you?

A. That is the only bank I know about.

Q. Did you make inquiry at any other bank ?

A. I did not.

Q. So he might have had a bank account somewhere else, and you might not know it; isn't that so?

A. Could be so.

Q. That's right. And where did you look for money?

A. Where did who look for money?

Q. Yes, you didn't find any in his home?

A. Ask your first question.

Q. Where did you look for money, when you searched the assets of the estate?

A. I did not search the assets, at the time of his death.

Q. Well, subsequently, did you search the assets of the estate?

A. From all the evidence that was given to me by members of his family, I took the assets.

Q. What inquiry did you, yourself, as administrator of the estate, make in the affairs and property of the decedent? What inquiry did you make as to property? What was in his house?

A. Two members of his family.

Q. Did they do it?

A. They searched his belongings.

Q. But you didn't?

A. I didn't.

Q. In fact, you have made no search at all yourself, have you, into his belongings? Have you?

A. I have taken all of his accounts, and listed them.

Q. From what somebody gave you?

A. From what he gave me.

Q. Did you go through his bureau drawers.

A. I did not.

Q. Did you go through the cupboard in the kitchen?

A. I did not.

Q. Did you go through the things in the basement?

A. I did not.

Q. Or anyplace in the house?

A. I did not.

Q. Or the shelves of the closet?

A. No.

Q. So you don't know what moneys were on hand at his death in his house, do you?

A. I don't know.

Q. You didn't go in his wallet, did you?

A. I did not. The members of his family did all of those things. It was their concern, not mine.

Q. Who were there when they did these things?

A. His children.

Q. Who were they?

A. Well, he has four children.

Q. Which child did these things, to your knowledge?

A. I don't know.

Q. You don't know who did it?

A. I don't know.

Q. You filed an affidavit with the Court that a search had been made, and that these were the things in his estate, did you not?

A. Yes, sir.

Q. And yet you had not made a search had you?

A. Yes, sir.

Q. Did you make a search?

A. Sure, to get all these records together.

Q. But you didn't make a search of the assets of the estate?

A. From the members of his family.

Q. Did you deposit everything Mr. Kirkham received in the bank?

A. Not everything, no, sir.

Q. What did he do with some of the moneys that he received?

A. I don't know.

Q. He had moneys that he received that he didn't deposit, didn't he?

A. I don't know.

Q. Well, you know he didn't deposit everything he received, don't you?

A. I don't know that.

Q. Let me ask you this then, Mr. Kirkham: Did you deposit all the moneys that were received from Mr. Albert Peterson, on a contract of Mr. Peterson?

A. I don't know what money that he brought to me represented. What money he brought to me, to deposit for him, I deposited. Other than that, I made no deposits for him, only money that he brought to me, to take over to the bank for him, is what I deposited for him."

You will note specifically that he admits that no search was made (Tr. P. 16). He states, "I did not search the assets, at the time of death", and that (Tr. P. 17) he only took what assets were given to him by members of the decedent's family.

How could the court conclude from this testimony, and this is the principal testimony of the plaintiff's case, that the defendants had not paid the \$4,800.00, especially where by their pleadings they state that they did thereby put the matter in issue. The only further evidence the court could take into consideration was the testimony of Mrs. Beagley, who could testify only to what she found and as to what she did, and she testified in substance and effect that she did not find the \$4,800.00, although she admits that in the house at the same time searching was her sister, her two brothers and her husband. She admits (Tr. P. 41) that she searched the linen closet alone, which obviously means that the others were doing something else. She also ad-

mits that the search she made, and what she supposes the others made, was limited to the house (Tr. P. 42), and that she nor anyone else made any further search other than in the house, her reply being "That wasn't my job, that was the administrator's job." (Tr. P. 42)

Mr. Hinton's testimony was without any probative merit, the substance of it being that he wrote a letter to the defendant, Mr. Spencer, on September 1, 1953, and that by September 29th the defendant had not been in to see him (Tr. P. 57, L. 19 to 22).

It is so fundamental that the plaintiff has the burden of proof that the defendant will not on this point submit authorities. The defendants are aware that the burden in this case requires the plaintiff to prove somewhat of a negative proposition, that of non-payment; however, even in this case a mere statement that it was not paid is not sufficient. Something more must be shown. There should be,, at least, a showing by some evidence that it was not paid; this is done in the usual case by the obligee testifying that he did not receive the money. In the instant case the obligee is dead, so it is incumbent upon the plaintiff to show that he did not receive the money. Is it sufficient for the plaintiff to show this by testifying that he has looked in a bank book of the decedent and someone has told him that they searched the decedent's desk and didn't find it? Is it again sufficient when one of the searchers as corroboration says she didn't find it but admits her search was limited to the decedent's house, and then to only parts of it? It was so obvious that the money was, and probably is, someplace else that the court should have granted a non-suit. Even the trial court, by its own order, admitted that the money had probably been paid and that if the plaintiff

looked he would probably find it. The court said in its order to the defendant to produce more evidence:

“1 Evidence concerning the possession by the defendants of the sum of \$4,800.00 cash which could have been, **or which probably was**, paid to deceased on or about the 21st day of August, 1953.”

(Emphasis added)

Surely the plaintiff should have at least probable reasons to believe the debt to be unpaid before causing the defendants to defend a law suit, and where it is apparent from the plaintiff's own testimony that the debt could have been paid, then there is a failure of proof. A good way to analyze the problem is to say: “Assume the defendants had rested without presenting any evidence, could the court at this stage and having received this quantum of evidence, have granted judgment to the plaintiff?” The answer to this question is “no”.

The appellant's contention that they should have been granted a non-suit in the case below upon the facts stated could not be stated more clearly than in the language used by this Court in the case of *Winegar v. Slim Olson, Inc.*, 252 P.2d 205. That was a case brought by the plaintiff to recover for the loss of a Diesel engine allegedly caused by the negligent installation of an oil filter bag by the defendant's employee, and was tried without a jury. The fact to be proved in that case was that the filter bag, because of its negligent installation, clogged the oil line, thereby causing the damage complained of.

The plaintiff proved that such an installation could have caused such damage; however, upon cross-examination the defendant established that some other causes could have

clogged the oil line. Similar to the principal case in which the plaintiff says he hasn't seen the \$4,800.00 but where the defendant establishes upon cross-examination that he hasn't looked for it and that it might very well have been found if he had looked. The court in that case said:

"It is not reasonable to require a judge, on motion to dismiss under Rule 41(b), to determine merely whether there is a **prima facie** case, such as in a jury trial should go to the jury, when there is no jury—to determine merely whether there is a **prima facie** case sufficient for the consideration of a trier of facts **when he is himself the trier of the facts**. To apply the jury trial practice in a non-jury proceedings would be to erect a requirement compelling a defendant to put on his case and the Court to spend the time and incur the public expense of hearing it if the plaintiff had, according to jury trial concepts, made a case for the jury, even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who had had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the Court to hear it, merely because the plaintiff's case is a **prima facie** one in the jury trial sense of the term."

Winegar v. Slim Olson, Inc., 252 P.2d 205

But even assuming that this case had been tried before a jury, the plaintiff did not establish, even then, a case that would have prevented a non-suit under the rule announced in the above case, wherein the court said:

"If at the conclusion of the plaintiff's evidence the Court decides that the plaintiff has not established a **prima facie** case or cause of action against the defend-

ant, a judgment of non-suit may be properly entered. In order to establish a *prima facie* case the plaintiff must present some competent evidence on every element needed to make out the cause of action. The test is whether or not there is some substantial evidence in support of every essential fact which the plaintiff is required to prove in order to entitle him to recover. *Robinson v. Salt Lake City*, 37 Utah 520, 109 P. 817. If the evidence and the inferences are of such character as would authorize reasonable men to arrive at different conclusions as to whether all the essential facts were or were not proved, then the question is one for the jury and a non-suit should be denied."

Even by the test used in cases in which there is a jury, it is difficult to see how reasonable men could differ on the question that the facts proven did not prove a cause of action. It is obvious that there were essential facts not proven, such as whether the plaintiff knew upon some reasonable basis that the \$4,800.00 had not been paid. There cannot be found anywhere in the record any substantial proof of non-payment.

The court was the trier of the fact in this particular case, and its view of the evidence can probably not be questioned as to what weight was placed upon it, but in regard to whether the defendant testified in a convincing and persuasive manner, the court should note his inability to identify the signature of his brother, the decedent, upon repeated examination, and when asked to compare the purported signature with the admittedly genuine signature, his testimony is seen to be hostile, purposely unresponsive, and evasive. (See Tr. Pages 23, 24, 25, 26 and 27, where he says, when questioned about his brother's signature, that he could not recognize anything that he didn't notarize, and

then compare it with his testimony on Page 77 of Transcript in regard to a letter he received from the Bank of Pleasant Grove about a bank account.)

Referring to the letter:

Q. "And what bank is it?

A. Bank of Pleasant Grove.

Q. And who is this signed by?

A. J. A. West, Vice-President and Cashier.

Q. Do you know who Mr. West is?

A. I do.

Q. And do you know that he is the Vice-President and Cashier of that particular bank?

A. Yes Sir.

MR. HINTON: Your Honor, we offer Plaintiff's Exhibit U in as evidence.

MR. HOWARD: May I voir dire the witness, Your Honor?

THE COURT: You may.

MR. HOWARD: Q. Do you recognize that as Mr. Junius West's signature?

A. I do, yes."

Page 81 of Transcript:

Q. "Is there any reason why you would be more able to recognize Mr. Junius West's signature than you would Mr. William Kirkham's signature?"

A. I do not know.

Q. You mean you do not know of a reason?

A. I do not know of a reason.

Q. You were unable to identify Mr. Kirkham's signature, weren't you? (referring to Page 23, etc.)

A. Sometimes I do not know.

Q. Which times are they, Mr. Kirkham?

A. I do not know."

There is no question that the defendants have denied all the material allegations of the plaintiff's complaint and by stipulation the only issue being whether the \$4,800.00 had been paid and the plaintiff having failed to prove, even slightly, that it had not, should have been non-suited. A good discussion of the burden of proof in general is found in Nichols Applied Evidence, Vol. 1, Page 896.

POINT 2

DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S CASE AND FOR JUDGMENT FOR THE DEFENDANT AFTER BOTH PARTIES HAD RESTED SHOULD HAVE BEEN GRANTED FOR THE REASON THAT THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN A JUDGMENT FOR THE PLAINTIFF AND THE EVIDENCE PRESENTED BY THE DEFENDANT WAS PRIMA FACIE EVIDENCE OF PAYMENT AND WAS UNREFUTED BY THE PLAINTIFF.

When both parties had rested the defendant again made a motion to dismiss the plaintiff's case for insufficiency of the evidence. At this time it would appear to the appellants that there could be no question but that the court should deny the plaintiffs judgment and should dismiss their complaint because of a failure of proof. The court by its order says as much, otherwise there would be no point in requiring the plaintiff to submit further evidence and specifying the kind of evidence necessary, unless there was an insufficiency of evidence that would prohibit the court from granting judgment.

When the defendant introduced the receipt, it had itself proved a prima facie case. It is the law that one

prima facie case is sufficient to offset or equalize the case presented by the plaintiff in his case in chief. The general rule in this respect is as follows:

“The presumption that a debt evidenced by a negotiable instrument is unpaid arising from the production of the instrument by the payee is rebutted by receipts in full for all claims due to the payee which were admitted by the payee’s failure to deny their genuineness or validity.”

Nichols Applied Evidence, Vol. 4, Sec. 6, P. 3939

There was not one scintilla of evidence offered by the plaintiff in the case below to rebut the receipt offered, nor was it contradicted or explained. Under such circumstances the law is that such a receipt is conclusive evidence of payment.

“A receipt is merely prima facie evidence, and is not conclusive, **unless not contradicted or explained.**”

Nichols Applied Evidence, Vol 4, Sec. 6, P. 3939
(Emphasis added)

“A receipt in full of all demands, unexplained and uncontradicted, will defeat an action on a negotiable instrument given before the date of the receipt.”

Nichols Applied Evidence, Vol. 4, Sec. 8, P. 3940
McKenzie v. Ray, 168 Cal. 618, 143 Pac. 1018

“A receipt for money is prima facie evidence of the truth of the statements therein contained.”

U. S. F. & G. Co. v. Martin, 77 Ore. 369, 149 Pac. 1923

“A receipt is not an instrument that the law requires for protection of, or as notice to third parties,

but is only prima facie evidence of payment of an obligation."

Amer. Bridge Co. v. Murphy, 13 Kan. 35

Kuykendall v. Lambert, 68 Okla. 258, 173 Pac. 657

"A receipt acknowledging the payment of money is prima facie evidence of payment, in favor of the party producing it, when the genuineness of the receipt is proved by a preponderance of the evidence, but such evidence may be rebutted by competent testimony."

Stout v. Myatt, 13 Kans. 232

If we search the record we will find nowhere within a denial or a contradiction of any sort in regard to the receipt. It was introduced and is self-explanatory. In a similar case from California in which the receipt was given and no reasonable explanation was offered, (although the explanation offered was at least more substantial than the absolutely unrefuted receipt in this case) the court in reviewing the evidence said:

"To meet this evidence (evidence of indebtedness) respondent produced a receipt dated June 16, 1930, which is in the following language: 'Received of J. R. Brightman ten dollars paid in full up to date. \$10.00. Mrs. M. E. Brown.' Appellant admitted signing this receipt, but testified that it was given to her to cover rental of a room occupied by Brightman. It was for the trial court to determine whether or not appellant's testimony in this regard was true. The language of the receipt is sufficiently broad to indicate that it amounted to a written acknowledgment that payment in full of all demands had been made. **It is now the rule that a receipt is evidence of a high order which is en-**

titled to prevail, unless overcome by clear and satisfactory evidence."

Brown v. Gow, 18 P.2d 377, 128 Cal. App. 671
(Emphasis and parenthesis added)

In the above case the court had to interpolate even to determine that the receipt was applicable to the debt sued upon; however, in the present case, there is no question about it. In fact, its authenticity is even more apparent when we read the receipt.

Defendants' Exhibit 3

"August 21, 1953

Received of Orien Spencer

Forty-Eight Hundred Dollars

Final payment on Home, Principal to be adjusted and
deeds to be received.

\$4800.00

/s/ William Kirkham"

In fact, the trial judge's own consideration of the receipt is of significance. On (Tr. P: 64) he says:

"I can tell you now, that I am inclined to think that the Court is going to be bound to give full credit to the receipt. I think the Court is going to be bound to do that. That is subject to further consideration, but so that—there are people here, that are interested, and would like to know what the Court's trend of thought is. There is a definite argument upon the face of Exhibit 3, and it was emphasized by counsel and the Court has observed it: If this were a faked receipt, it is hard for the Court to see any reason why there would be the added statement in it: "Principal to be adjusted and deeds to be received."

The court goes on justifying its conclusion about the receipt, as can be seen in the Transcript, P. 64.

In the case of *Gallagher v. Theilbar Realities*, which case is in point upon the question of payment and receipt, the court said:

“A receipt is not a contract and may therefore be explained or contradicted by parol evidence, 20 Cal. Jur. 956, but it is prima facie evidence of payment, and therefore the production of a receipt imposes upon the plaintiff the burden of ‘going forward to impeach the receipt.’ ” 48 C. J. 639.

“* * * * There was no attempt made to impeach the receipt or to explain that it was intended to be other than it appeared on its face. * * * * ”

“Under applicable law heretofore stated, the defendant made a prima facie showing of payment which was not overcome in any manner; and consequently the implied finding that the note was not given and received as absolute payment is not sustained by any evidence. Judgment is reversed and the cause remanded to the district court of Cascade County, with direction to enter judgment of dismissal in favor of the defendant.”

Gallagher v. Theilbar Realities, 18 P2d 1101, 93 Mont. 421

The law announced above would put the plaintiff or respondent in the identical position of the plaintiff in the above case, which would put upon the respondent the burden of “going forward to impeach the receipt,” which the facts show the respondent did not do.

POINT 3

THE COURT ERRED IN RE-OPENING THE CASE ON ITS OWN MOTION AND IN DESIGNATING THE

MANNER, KIND AND AMOUNT OF EVIDENCE THAT
WOULD BE REQUIRED BY THE COURT.

The appellants concede that broad latitude and discretion is allowed the trial court in matters of reopening a case. However, nowhere have the appellants been able to find authority that would support the action of the court in this case, where the initiating movant was the court itself.

A motion to reopen is always made by one of the parties, and ordinarily it is upon the basis of newly discovered evidence. As a general rule the court will grant the motion if it can be shown that the evidence to be produced is of a material nature. This is usually established by affidavit or by an offer of proof.

It is also a general rule, and one that is seldom abused, that the attorney is the best judge of what evidence he desires to introduce, and in what manner he wants to try his case. It may well be that he is not as skilled as the court, however, he must account to his client for his actions, and it must be assumed that the trial procedures used are to the best interests of his client. If this fundamental principle is not so, then it would be just as well if the parties were not represented by counsel and that the court by its own methods interrogate the parties, determine what evidence it desires to receive, and to resolve the differences between the parties. It would appear to the appellants that this is no more and no less than what the court did in the instant case.

Not only were the defendants unable to govern the course of conduct of their side of the trial, but they were also required to defend their position twice on two different occasions with respect to matters that they could properly have defended themselves on in the first trial. There

is no showing, and it cannot even be implied, that the facts that the plaintiff was ordered to produce could not have been produced at the regularly scheduled time of trial.

The great harm in such procedure is that it informs the parties of the court's pre-decision of the matter upon the condition that the facts ordered produced are produced. It allows (as is obvious from the transcript in the principal case) the witnesses to change their testimony in such respects as to conform with the order of the court. For example, take the testimony of Mrs. Beagley. Upon the first trial her testimony was quite specific that her search was limited to the house and that she did certain things alone and did not know what the other parties did at all times. When recalled, she was allowed to testify, over the defendants' objection, to those facts that she had previously testified to; however, this time the search was of the most copious magnitude; it even included the garage and the grounds. Compare her testimony shown from P. 88 of the Transcript to P. 93 with her testimony on P. 42. There can be no question but what her testimony was altered to satisfy the order of the court.

The court's only basis for such an order is that it felt such an order was necessary to reach a just decision between the parties; however, it should be apparent that the injustice of such an order, and the abuse of discretion in granting such an order, far outweighs any additional evidence which the court might receive in order to come to a conclusion resolving the matter.

The appellants cannot find any authority either for or against the proposition of the court making such an order on its own motion. This is probably because such practice

is so obviously an ^{abuse}~~abuse~~ of discretion that no court has ventured to do it before, and so no appellate court has had to rule on it. According to American Jurisprudence, Vol. 53, P. 109, cases may be reopened upon the motion of one of the sides, and then only to introduce material evidence which is either newly discovered, was not presented because of inadvertence or excusable neglect, and where it is apparent that the party so moving has acted in good faith.

The text authorities also indicate that the time the motion is made also has a bearing on the right to reopen. In other words, a motion to reopen during the trial and before the case is submitted to the court or jury is much more favorably received than one made after the case is submitted, and a motion made after court has taken a matter under advisement, has been adjourned and the parties have excused their witnesses and have relied upon the respective rests of each of the litigants has even less standing and the court's discretion in this instance is even more limited. To hold otherwise would be to say that the court, on its own motion, can prolong the trial and retrial of a case indefinitely.

In any event, a case should not be reopened to allow counsel to experiment rather than to develop his case. In the principal case the evidence introduced by counsel for plaintiff and respondent did nothing to refute the prima facie case established by the defendants, and was immaterial, irrelevant and incompetent evidence. All of the evidence received after the trial, but pursuant to an order of the court, was gathered after the parties had rested and over a year from the date of death of the decedent. The very remoteness of such evidence would make it incompetent because of the many factors that could and did inter-

vene. For example, the house in which the decedent was living at the date of his death had been rented for approximately a year, and there is not even a showing of any kind that inquiry had been made of the tenants or that the house had been researched. Note the testimony of Mr. Hinton, attorney for the plaintiff, as set forth on Pages 99 and 100 of the Transcript:

BY MR. HOWARD:

Q., "Did you make any search other than that, Mr. Hinton?

A. You mean——

Q. For the \$4800.

A. I searched all the papers and documents that were turned over to me by the administrator, and the same papers and documents that were testified were found on that search and turned over to Mr. Thomas Kirkham, the administrator. I checked each document carefully.

Q. When was the house rented?

A. As to the date, I couldn't be sure, but it would be approximately—I would say from two weeks to a month after the death.

Q. Did you inquire of the people who rented the house, if they found any money?

A. I did not. I didn't feel it was necessary.

Q. Did Mr. Kirkham live alone?

A. William Kirkham, he did.

MR. HOWARD: I have no further questions.

MR. HINTON: Your Honor, that will conclude our evidence as to that aspect of the case. We reserve our right to offer rebuttal evidence, when the defendant's portion of the case is presented.

MR. HOWARD: We again would like to renew our motion to dismiss, on the ground that they haven't

proved a prima facie case. We think the most obvious spot to look has been overlooked, and we think they haven't carried the burden.

THE COURT: The motion is denied.' '

Even taking the evidence that was offered pursuant to the order of the court, the plaintiff did not prove a prima facie case. The evidence received was merely cumulative in value and did nothing to refute or contradict the receipt. In fact, the evidence produced did not by any means show that, even then, a thorough search had been made, as indicated in the above testimony. Surely at this time the court should have granted the defendant's motion.

After the defendant had again rested, the plaintiff moved the court, this time on his own motion, to reopen the case for a second time to allow him to put in further evidence that he claimed would add substantially to his case, and he made an offer of proof. This time the court quite properly refused to allow the motion of the plaintiff, and it was denied.

POINT 4

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BASED UPON THE ERRORS OF LAW COMMITTED BY THE COURT.

The principal errors of law committed by the court and duly set out above constitute the foundation for this motion. It is the position of the appellants that the court having been advised of its errors should have granted a new trial.

SUMMARY AND CONCLUSION

The facts of this case are novel, and errors committed are such that support injustice. In the first place, the court has instituted trial by new and novel procedure, and has deviated so far from the civil procedure that we know of that the appellants were unable to know to what extent they could rely upon orthodox procedure in the preparation and trial of their case.

In the second place, viewing the evidence presented by the plaintiff, and giving him the benefit of all presumptions and inferences as can be applied to such evidence, he has not proved a prima facie case at any stage of trial.

In the third place, assuming that the evidence presented by the plaintiff was sufficient to prove a prima facie case, it was not sufficient to allow the relief prayed for when contradicted and refuted by the receipt introduced by the defendants. At this time the plaintiff's case was at the very least equalized and the plaintiff did not meet his burden of going forward to overcome the case presented by the defendants.

Under no possible theory of law could the court have rightly decided the case as it did. The defendants respectfully petition this Court to reverse the ruling of the trial court and to order it to enter judgment for the defendants.

Respectfully submitted,

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