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New Jersey Court of Errors and Appeals.

EPHRAIM TOMLINSON, }
 . . . vs. } *In Error.*
MONTGOMERY STILES. }

P L E A D I N G S .

*Burlington County Circuit Court, of the Eleventh day
of January, in the year of our Lord one thousand
eight hundred and fifty-eight.*

BURLINGTON COUNTY, ss. Ephraim Tomlinson,
the plaintiff in this action, by Ewan Merritt,
his attorney, demands of Montgomery Stiles,
the defendant therein, the possession of the
equal undivided one-fourth part of a lot of land 5
with the appurtenances, situate in the township
of Chester, in the county of Burlington, be the
contents more or less, and thus bounded and
described :—Beginning at the corner of the lot,
late the residence of Amos Stiles, deceased, on 10
the north side of Main street, in Moorestown,
and extends thence westwardly along the said
Main street, seventy-five feet, and runs thence
a northwardly course parallel with the line of
the lot, late the residence of Amos Stiles, de- 15
ceased, four hundred and sixty-three feet, to a
corner to said lot, in the line of Second street,
so called ; thence along the line of Second
street, eastwardly seventy-five feet, to a corner
in said street, and corner to a lot late the resi- 20
dence of Amos Stiles, deceased, and thence

along the line of said lot to the place of beginning, being the old Tan Yard property, so called.

- 5 And the plaintiff says, that his right to the possession of the same, accrued on the ninth day of January, eighteen hundred fifty-eight, and that the defendant wrongfully deprives him of the possession thereof to his damage
10 one hundred dollars.

EWAN MERRITT,
Attorney of Plaintiff.

BURLINGTON COUNTY CIRCUIT.

MONTGOMERY STILES,	}	<i>In Ejectment—Plea.</i>
<i>adsm.</i>		
EPHRAIM TOMLINSON,		

- 15 And the said Montgomery Stiles, by John C. Ten Eyck, his attorney, appears and defends this action, and says, that he is not guilty of the injury whereof the said Ephraim Tomlinson hath complained in his declaration, nor
20 of any part thereof, and of this he puts himself upon the country.

And the said Ephraim Tomlinson doth the like.

- 25 J. C. TEN EYCK,
Attorney for Defendant.

BILL OF EXCEPTIONS.

Burlington County Circuit Court.

EPHRAIM TOMLINSON, }
 vs. } *In Ejectment.*
 MONTGOMERY STILES. }

Be it remembered, that at a Circuit Court, holden in Mount Holly, in and for the county of Burlington, before the Honorable Stacy G. Potts, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, at the April term of the said Circuit Court, in the year of our Lord one thousand eight hundred and fifty-eight, according to the statute in such case made and provided, this cause came regularly on to be tried upon the issue joined between the said parties, (pro ut the pleadings,) at which day came as well the said plaintiff, as the said defendant, by their respective attorneys, and the jurors whereof mention, &c., being called, likewise come and were duly sworn and affirmed (those affirmed first severally alleging themselves to be conscientiously scrupulous of taking an oath,) and thereupon, to maintain the issue, on the part of the said plaintiff. The said plaintiff gave in evidence, a certified copy of the record of the Will of Amos Stiles, late of said county, (now deceased) and the codicil thereto, as proved and of record in the Office of the Surrogate of said County, in Book H. of Wills, page 630, &c.

Also, the affidavit and writ of attachment issued thereon, and the return thereof; and also the judgment and proceedings therein and thereon, in the Circuit Court in and for said county, in the suit of Norcross, Heritage and

Company, against Amos Stiles, Jr. Also the deed of the Auditors' in said attachment for the premises in question, to the said plaintiff, bearing date the ninth day of January, eighteen hundred and fifty-eight, and the record thereof, in the Clerk's office of said county, in Book C 6 of Deeds, page 495, &c. Also, the deed of Amos Stiles, Jr., assigning all the right and title of the said Amos Stiles, Jr., in the residue of the estate of Amos Stiles, deceased, to the said defendant, as recorded in said clerk's office, in Book X 5 of Deeds, page 630, of which said residue the premises in question are a part, (pro ut all said writings and records so given in evidence.) And further, in behalf of the said plaintiff, it was then and there admitted by the counsel of the defendant in open court, that at the time of the execution of the aforesaid will and codicil of the said Amos Stiles, and also at the time of his decease, he, the said Amos Stiles, was the owner in fee simple of the premises in question; and that he left four children as his only heirs at law, of whom the said Amos Stiles, Jr., the defendant in attachment, was one; and that at the time of the commencement of this suit, and service of the summons in ejectment, the said defendant was in possession of the premises in question which form a part of the real estate mentioned and referred to in the tenth item or clause of the aforesaid will; and thereupon the said plaintiff, under said evidence and admission, rested his cause. And the said defendant by his counsel, did then and there insist before the said court, that the said evidence and admissions were insufficient to prove and maintain the said issue, on the part of the said plaintiff; and moved the

said court that the said plaintiff be called, and
 a judgment of nonsuit be entered against him ;
 and the said court, after the argument of the
 counsel of the said parties, and considering the
 same, being of opinion that said evidence and
 admissions were insufficient to prove and main- 5
 tain the said issue on the part of the said plain-
 tiff, did sustain the said motion, and did order
 and direct that said plaintiff should be called :
 and thereupon he the said plaintiff, being called 10
 under the order of the said court, came not ;
 whereupon it was considered and adjudged, that
 a judgment of non-suit be entered in favor of said
 defendant against the said plaintiff, and it was
 done accordingly ; and thereupon the said plain- 15
 tiff, by his counsel, did except to the said order
 and judgment of the said court, and did insist
 that the same were, and are, illegal and erro-
 neous ; and that the said evidence and admis-
 sions were sufficient in the law to prove and 20
 maintain the said issue on the part of the said
 plaintiff ; and that the said plaintiff ought not
 to have been called and non-suit as aforesaid ;
 and because the said admissions and evidence
 do not appear, &c. The said plaintiff did pray 25
 of the said court to allow and seal this his bill
 of exceptions, according to the statute in such
 case made and provided ; and it is allowed and
 sealed accordingly.

STACY G. POTTS. [SEAL.] 30

Dated April 27th, 1858.

New Jersey Supreme Court,

February Term, 1859.

EPHRAIM TOMLINSON, } *In Ejectment. Error to*
 vs. } *Burlington Circuit.*
 MONTGOMERY STILES, }

STATE OF THE CASE.

This cause was commenced in the Burlington Circuit Court, on the eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, and came on regularly
 5 to be tried before the said Circuit Court at Mount Holly, at the term of April in said year, then and there held by Stacy G. Potts, Esquire, one of the Justices of the Supreme Court of the State of New Jersey, upon the issue joined
 10 between the parties. (*Prout the Pleadings.*)

It is agreed by and between the attorneys of the respective parties, that the premises in question are the equal undivided one-fourth part of
 15 a certain lot of land situate on the north side of Main street, in the village of Moorestown, in the township of Chester in said county of Burlington, whereof Amos Stiles, late of said county, died, seized and forms part of the residue of his estate.

20 The said plaintiff, to maintain the issue above joined, then and there produced and gave in evidence to the jury then and there empanelled and sworn, the record, or a certified copy of the will of Amos Stiles, deceased, dated December 26th, A. D. 1853, and the codicil thereunto
 25 recorded in Book H. of Wills, page 603, in the Surrogate's office of the county of Burlington.

2nd. An affidavit of Samuel Norcross, on behalf of himself and others, trading under the name, style and firm of Norcross, Heritage & Co., made December 1st, A. D. 1855.

3rd. A writ of attachment issued out of the Circuit Court of the county of Burlington, at the suit of Norcross, Heritage & Co., against Amos Stiles, Jr., dated December 1st, A. D. 1855, returnable to December term, A. D. 1855, and the Sheriff's return thereon, and also the inventory and appraisement of the defendant's property attached and returned with said writ. 5 10

4th. The Book of Minutes of the Burlington County Circuit Court, containing the several rules and entries relating to the said attachment and the final judgment, and also the order of sale of land made thereon, as follows, viz: And it is further ordered that the auditors proceed to make sale of the land so attached, and to distribute the assets which may come to their hands, according to law. 15 20

5th. A Deed from Benjamin Buckman, Amos J. Marple and James D. Shreve, auditors, appointed by the said Circuit Court in the above attachment, to Ephraim Tomlinson, dated January 9th, A. D. 1858, recorded in Book C 6 of Deeds, page 495, in the Clerk's Office of the county of Burlington. 25

6th. An assignment by Amos Stiles, Jr., of his residuary interest in the estate of the said Amos Stiles, deceased, to the defendant, dated December 13th, A. D. 1856, recorded in Book X 5 of Deeds, page 630. And it was then and there admitted by the counsel on behalf of the defendant, that the said Amos Stiles, Jr., with Montgomery Stiles, Franklin Stiles and Rebecca 30 35

Thorn, were the residuary legatees under the will of the said Amos Stiles, deceased.

And the Plaintiff then rested.

5 Whereupon the counsel for the defendant moved the Court to nonsuit the said plaintiff.

And the Court, after hearing the argument of counsel thereon, sustained the said motion and directed a judgment of nonsuit to be entered in
10 favor of the said defendant, and against the said plaintiff.

And thereupon the counsel for the plaintiff prayed a bill of exceptions might be sealed, and it was sealed accordingly.

15 And to set aside the said judgment of nonsuit, the said plaintiff brings here his writ of error.

Opinion of the Supreme Court.

EPHRAIM TOMLINSON, }
 vs. } *In Error.*
 MONTGOMERY STILES. }

The Chief Justice.—On the trial of this cause in the Court below, the plaintiff in error, who was also plaintiff in ejectment, attempted to establish title to the premises in dispute, under a deed made by auditors in attachment. Two 5 objections were made to the validity of the title, viz :

1st. That the land in question had never been attached.

2d. That the defendant in attachment had no 10 such interest in the premises at the time of the service of the writ as could be attached.

On one or both of these grounds, the plaintiff was nonsuited, and he now seeks to reverse that judgment for illegality. 15

By the return of the Sheriff to the writ of attachment, and by the inventory and appraisal thereto annexed, it appears that the Sheriff, by virtue of the writ attached and inventories, two lots of land, a legacy of \$5,000, and 20 certain specified chattels, all of which were duly inventoried and appraised at \$5,703. In addition to the articles thus inventoried, the defendant was also entitled, under the will of his father, to an interest in the proceeds of the sale 25 of the residue of the real and personal estate of

the testator. This interest was not attached by the Sheriff, nor specified in the inventory and return. To sustain the plaintiff's title, it is necessary to maintain that it is unnecessary to
 5 attach or inventory real estate, but that the mere issuing of the writ not only creates a lien upon the defendant's real estate, which continues, though the land be not attached or inventoried under the writ.

10 The act (Nixon's Digest, 33, § 5 & 6,) specifies the mode in which the attachment shall be executed, and requires that the officer executing the writ shall, with the assistance of one discreet and impartial freeholder, make a just
 15 and true inventory and appraisement of all the property, estate of the defendant, so by him attached, and such inventory and appraisement, dated and signed by himself and the said freeholder, shall annex to and return with the said
 20 writ.

By the act of 1748 (Allinson's Laws, 172,) an inventory or appraisement of the personal property only was required. But by the act of
 25 1798, (Paterson's Laws, 296, § 4,) the officer executing the writ is required to make an inventory of all the property and estate of the defendant by him attached. The language clearly includes the real as well as the personal estate attached, and the change in the phrase-
 30 ology is so marked as to render it certain that it was designed to effect a change in the statute itself. The uniform construction of the statute of 1798 has been in accordance with its literal meaning, and it has been held necessary for the
 35 Sheriff to attach inventory, and appraise as well the real as the personal estate of the defendant. Such is believed to have been the

constant practice under the act for a period of over 60 years. The writ by the terms of the act of 1798, bound the property and estate of the defendant attached by virtue of the writ, from the time of executing the same.

By the act of 1820, sec. 3, it was provided that no person against whom a writ of attachment should issue, shall, after issuing the same, alien or encumber his lands, and that the writ should immediately upon the issuing thereof become a lien upon the real estate of the defendant.

This provision in the revision of 1846, was incorporated into the original act, and now forms the eighth section. Nixon's Dig. 33, § 8. Its design was to prevent the alienation of the real estate by the defendant, after the issue of the writ of attachment; and before its execution. It was not designed to alter the mode of executing the writ, much less to render its actual execution unnecessary. The sole design of the provision was, to make the lien operative upon real estate from the issue, and not from the service of the writ. But the lien is created only upon the property actually attached—where there is no attachment there is no lien, either upon real or upon personal property. Where, then, attachment is executed, the lien attaches upon real property, at the time of issuing the writ, upon real estate at the time of its service. The mere issuing of the writ is not an attachment of the property. If no property be inventoried or appraised, no judgment in attachment can be rendered. The proceeding is in rem, and operates only upon the property attached. The auditors can make sale and assurance only of such goods and chattels, lands and

tenements of the defendant as were attached and taken in the mode prescribed by the act, i. e., either such as were attached on the execution of the writ, or such as were seized
 5 and taken by the auditors under the special provisions of the act. (Sec's 29, 30.)

The 5th and 6th sections of the act, so far as they relate to the formal mode of the execution, have been regarded as directory only, a
 10 substantial compliance with the requirements of the statute has been held sufficient. But all the cases and all the dicta concur, that there must be an attachment and a substantial compliance with the requirements of the act. When
 15 there is no actual attachment, inventory or appraisement of the property, there is no lien, and no title can be acquired under the provision of the act. (*Neal vs. Cook*, 5 Hals. 337; *Welsh vs. Blackwell*, 2 Green 344; *Thompson*
 20 *vs. Eastburn*, 1 Harr. 100.)

The auditors are authorized to make sale of the property of the defendant only by virtue of an order of the Court for that purpose; without such order, no sale or assurance made by
 25 them of the defendant's property is valid. The order of the Court authorized the auditors to sell only the lands attached by virtue of the writ. They proceeded to sell not only lands which were attached and taken by virtue of
 30 the writ, but also the lands in question which were not attached. The sale therefore was not only in violation of the statute, but was unauthorized by the order of the Court. It vested
 35 no title whatever in the plaintiff. The judgment of the Circuit Court non-suiting, the plaintiff was right and must be affirmed.

This conclusion renders it unnecessary to

express any opinion upon the question whether the defendant in attachment had such an interest in the real estate included in the residuary clause of his father's will; as could be attached and sold under the provisions of the attachment act. 5

The judgment below must be affirmed.

And the said plaintiff Johnson, by his Attorney, comes now before the Court of Errors and Appeals in the last term in all causes at Trenton in and for said State and says that in the record and proceedings aforesaid and also in giving the judgment in the said Montgomery Elix, by the Justice of the Supreme Court of Judicature of the State of New Jersey, before whom the cause was argued, there is manifest error in this that it appears by the record that the said Supreme Court have by their judgment aforesaid affirmed the judgment of the Circuit Court of the County of Burlington aforesaid, when in truth and in fact, and by the law of the land, the said Supreme Court ought to have reversed and annulled the judgment of the said Circuit Court of the County of Burlington; and the said Johnson prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that he may be restored to all things which he hath lost by reason of the said judgment, &c.

EWING MERRITT

Attorney for the plaintiff

New Jersey Court of Errors and Appeals.

EPHRAIM TOMLINSON, } *Assignment*
 vs. } *of Errors.*
 MONTGOMERY STILES.

And the said Ephraim Tomlinson, by Ewan Merritt, his Attorney, comes now before the Court of Errors and Appeals, in the last resort in all causes, at Trenton, in and for said State, and says, that in the record and proceedings aforesaid, and also in giving the judgment for the said Montgomery Stiles, by the Justices of the Supreme Court of Judicature of the State of New Jersey, before whom the cause was argued, there is manifest error in this, that it appears by the record that the said Supreme Court have by their judgment aforesaid affirmed the judgment of the Circuit Court of the County of Burlington aforesaid, when in truth and in fact, and by the law of the land, the said Supreme Court ought to have reversed and annulled the judgment of the said Circuit Court of the County of Burlington; and the said Ephraim Tomlinson prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

EWAN MERRITT,
Attorney for Plaintiff in Error.

*Return and Inventory to Writ of Attachment
under which Plaintiff claims.*

RETURN.

I have duly executed this writ in the manner directed by law, this third day of December, in the year of our Lord one thousand eight hundred and fifty-five, in the presence of and with the assistance of a creditable person, being a discreet and impartial freeholder, as per inventory and appraisement hereto annexed. 5

SAM'L A. DOBBINS.

December 3d, 1855.

INVENTORY (ANNEXED TO WRIT.)

Burlington Circuit Court.

NORCROSS, HERITAGE & Co. } *Attachment*
vs. } *in Case.*
AMOS STILES, JR.

By virtue of the above-mentioned Writ of Attachment hereunto annexed, I have, with the assistance of Benjamin Buckman, a discreet and impartial freeholder of the County of Burlington, made a just and true inventory and appraisement of all the property and estate of the defendants attached, as follows: All that lot of land called the orchard lot, lying on the east side of the public road adjoining lands of Benjamin Warrington and Samuel Stiles, containing three and one-fourth acres, we do appraise at four hundred dollars. 10 15

- Also, lot No. 2, adjoining land late of Joseph French, deceased, containing two acres appraised at three hundred dollars; both of which above-mentioned lots are situated in the township of Chester, Burlington County, N. J., bequeathed to said defendant by the last will and testament of Amos Stiles, dec'd. Also, a legacy of five thousand dollars bequeathed to said defendant by the last will and testament of
- 5 Amos Stiles, dec'd; appraised at five thousand dollars, the whole of the value of five thousand seven hundred and three dollars. All of which above-named property was attached in the hands of Montgomery Stiles and Clayton
- 10 Lippincott, Executors of the aforesaid Amos Stiles, deceased.

SAM'L A. DOBBINS, *Sheriff*.

BENJ. BUCKMAN.

December 3d, 1855.