COURT OF ERRORS AND APPEALS

COLE & TAYLOR, *Appellants,* *v.* *DAVID L. CLIVER,* *Appellee.*	*In Error.* *On Appeal.*

Opinion.

MAGIE, J. The defendant, Cliver, was sued in a justice's court by Cole & Taylor. On affidavits filed with him the justice made an order, directing a warrant to issue against Cliver. The grounds for the order were therein stated to be, that there was a debt due from Cliver to Cole & Taylor on an implied contract for goods sold and specified in the affidavit, that Cliver fraudulently incurred that obligation, and that he was not, at the date of the order, a freeholder and resident of the county. Upon this the warrant issued and Cliver was arrested. He then filed a plea, alleging that he was, at the commencement of the action, and had continued ever since to be, a freeholder, and resident of the county. The plea concluded with a verification and a prayer of judgment whether the court would take further cognizance of the action. The justice de-

clined to recognize this plea. As he states in his docket, he decided that he had already settled that an order for a warrant should issue on the affidavits filed, and he was there to try the plaintiffs' claim. He then proceeded to try the case on the merits. Judgment having been rendered for the plaintiffs, Cole & Taylor, the defendant, Cliver, appealed.

When the appeal was called for trial, Cliver's counsel moved for the reversal of the judgment of the justice and the dismissal of the action, upon the plea so filed and evidence then offered and received in support thereof. The state of the case agreed on by the attorneys of the parties, shows that when this evidence was offered, the counsel of the appellees objected to it as irregular and offered to proceed to prove the appellees' demand. The court, however, refused to proceed to the merits of the case, but announced that they would receive evidence from the appellees upon the question raised by the plea. No evidence was offered on their part on that question. The court, thereupon, reversed the judgment of the justice and dismissed the suit, with costs.

If Cliver was a freeholder and resident of the county, he was privileged from arrest by warrant out of any court for the trial of small causes within that county except upon proof, to the satisfaction of a justice, &c., of some of the particulars enumerated in the third subdivision of section 13 of the Justice's Court act. Rev., p. 540. That act, in respect to the issue of a warrant as a first process out of that court, differs somewhat from previous acts on the subject. It provides that warrants shall *only* be issued in the cases enumerated in the section above referred to. Those cases include two where the defendant is not a freeholder and resident of the county, and one where the defendant is a freeholder and resident of the county. In the latter case, there must be proof made to the satisfaction of the justice that the defendant has assigned or disposed of, or is about to assign or dispose of, all his land lying in the

county, with intent to defraud his creditors. This provision, though differing in details, is identical in its scope and plan with that considered by Elmer, J., in Barcklow *v.* Hutchinson, 3 Vroom 195, and held to confer such a privilege. It seems unquestionable that, unless there is proof of a disposition or intended disposition of all his real estate in the county with intent to defraud his creditors, a freeholder and resident is entitled to claim immunity from arrest by warrant out of a justice's court.

Such a claim to privilege as against the writ issued in an action might always be interposed by way of defence. In the common law courts such defence was made by a plea to the jurisdiction in the nature of a plea in abatement. 1 Chit. Pl. *442. Although pleadings in a justice's court are generally *ore tenus*, (Johnson *v.* Van Doren, Penn. 372,) and no written plea, except of title and set-off, is necessary, and although, in such cases, this defence may be made under the general issue or upon a motion to dismiss, (Smith *v.* Van Houten, 4 Halst. 381,) yet a written plea is not objectionable. Such a plea was interposed in Barcklow *v.* Hutchinson, and although overruled, it is manifest that it was regarded by Elmer, J., as a proper plea.

The plea filed in this case was an ordinary plea of privilege. In a common law court, a replication would have been necessary to put the cause at issue. In the court for the trial of small causes no such formality of pleading was requisite. That court is empowered to "hear and examine the respective allegations and proofs" of the parties. The appellate court is empowered to "hear and determine all appeals in a summary way." This plea was notice to plaintiffs of a proper defence to their action. The issue thereon may be considered as joined without any other pleading than the formal denial inferred from the plaintiffs appearing and contesting the matter. The Court of Common Pleas could not ignore that issue as the justice had done. They were bound to try it, and they did so.

The result which they reached on the trial of that issue, was that the defendant had proved his plea. We cannot disturb this result if there was any evidence to support it, and we are bound to presume there was such evidence unless the contrary clearly appears. That the defendant was a resident of the county sufficiently appeared from the preliminary affidavit of the plaintiffs, and there was no contest on that point. The contest was in respect to his being a freeholder of the county. On that subject there was evidence of a devise to defendant of an interest in real estate in that county. The devise was before the court, and from it they inferred that defendant was a freeholder of the county. There is nothing before us to show that such inference was not properly drawn. There was evidence from which it might be drawn.

The two facts necessary to sustain this plea of privilege as against this writ were adjudicated in favor of defendant, and there was evidence before the court on which that adjudication could be made.

The judgment of the Common Pleas must, therefore, be affirmed, with costs.

Appellants' Points.

I. That a duly certified copy of the last will of Samuel Asay, the grandfather of the defendant, devising to said defendant an interest in certain lands and real estate in Burlington county, standing alone, unsupported by any other proofs, is absolutely no evidence that the defendant was a freeholder of said county.

A freeholder is one having an estate of inheritance or for life in real property, whether it be a corporeal or incorporeal hereditament.

1 Washb. on Real Prop. 72.

In the case of West et al. *v.* Pine et al., which was a case of ejectment, found in 4 Wash. Cir. Ct. Rep. 693, Justice Washington says:

"I hold the general rule upon this subject to be that a plaintiff in ejectment, who claims as devisee of another, is not bound to do more, in the first instance, in deducing his title, than to show a valid will in his favor, duly made by a person in possession who died seized of the estate devised. He is not required to go further and to trace down the title from the proprietor, so as to show a legal title in the proprietor. The law presumes the person so dying seized to be entitled to a fee simple interest, unless the contrary be shown on the other side.

"A probate copy of a will has been held by the English courts, when the statutory requirements as to its use in evidence have been complied with, simply to be *prima facie* evidence of the validity of the will and the competence of the testator. Baraclough *v.* Greenhough, [Ex. C.] 2 Q. B. 612, 620.

"All title rests on possession, either actual or presumed. No possession is presumed in favor of any person but the sovereign or state."

Graves *v.* Amoskeag Manuf. Co., 44 N. H. 462.
Dame *v.* Dame, 20 N. H. 28.

In 1 N. Y. 528, Court of Errors and Appeals, in an action on the case for injury to real property, the court says: "The plaintiff was bound to show either paper title or actual possession. The barely giving in evidence of a deed to him of the premises fell short of proving title."

Lawrence *v.* Russell, 17 Pick. 388.
Wellborn *v.* Anderson, 37 Miss. 155.
Williams *v.* Peyton, (Common Law,) 4 Wheat. (U. S.) 77.
Abbott's Trial Evidence 634.

It has been uniformly held in Pennsylvania that before

a deed can be admitted in evidence, in the proving of title to lands, its relevancy must be shown by proving some title in the grantor.

Peters *v.* Condron, 2 Serg. & R. 80.
Hoak *v.* Long, 10 Serg. & R. 10.
Kennedy *v.* Skeer, 3 Watts 97.
Zegler *v.* Hantz, 8 Watts 382.
Gonreit *v.* Waterloo, 7 Barr 237.
See, also, 5 Rawle 90.

So a probate copy of a will may be given in evidence to prove chain, when the seizin of testator is proved or admitted.

Morris *v.* Van Doren, 1 Dall. 64.
Fenn *v.* Read, 1 Watts 87.
Burke *v.* Young, 2 Serg. & R. 389.

II. The state of the case agreed upon by counsel being before the Supreme Court, in which it clearly appeared that the will was the only proof offered in the court below, the Supreme Court was not bound to presume that there was evidence in the court below that the defendant was a freeholder.

Legal presumptions must be based upon facts, and not upon presumptions.

Pennington *v.* Yell, 11 Ark. 212.
Richmond *v.* Aiken, 25 Vt. 324.

III. That after the Common Pleas had decided that the defendant had proved his plea, they should have discharged the defendant on common bail, or from arrest, and permitted the plaintiffs to prove their claim.

Corse *v.* Colfax, 2 South. 684.
Branson *v.* Shinn, 4 Halst. 1.
Morris *v.* Geiger, 5 Halst. 331.
Kinney *v.* Muloch, 2 Harr. 334.
Van Kirk *ads.* Staats, 4 Zab. 121.
Perry *v.* Orr, 6 Vr. 302.

No. 12

POWELL & BOWER, Printers, Mount Holly, N. J.

N. J. COURT OF ERRORS AND APPEALS.

COLE & TAYLOR
vs.
CLIVER.
IN ERROR.

Brief of Joseph H. Gaskill for Defendant.

This action was commenced in the Court for the Trial of 10 Small Causes, by warrant issued against Cliver, upon the alleged ground that he was a fraudulent debtor and not a freeholder and resident of the County.

The defendant appeared before the Justice and filed a written plea, verified by affidavit, alleging he was a freeholder and resident of the County.

The Justice refused to recognize the plea and try the issue thereby raised. The defendant appealed and the Court of Common Pleas tried the issue and finding for the defendant, dismissed the action. 20

The Supreme Court (Justices Van Syckle and Magie sitting) affirmed the judgment of the Common Pleas on certiorari.

14 Vroom, 182.

To reverse this decision of the Supreme Court, the plaintiffs present two grounds:

1. The legality of the proceedings under the plea.
2. The evidence upon which the Court acted.

FIRST.

As to the legality of the proceedings.

The third error assigned is as follows: "Because the said "Court decided that the Court below, having come to the "conclusion that the plea of the defendant was proved, they "were bound to dismiss the suit, without permitting the "plaintiffs to go into the merits of the case and prove their "demand or claim."

The action of the Common Pleas was right.

(1.) The defendant had been illegally brought into Court. He was a freeholder and privileged from arrest in this action.

10 Justices Courts, Sec. 13.

Barklow v. Hutchinson, 3 Vroom, 195.

/ Harr 38-40

The Statute provides for three classes of cases, in which a warrant may issue, and in express terms prohibits its use in all other cases.

"The warrant shall ONLY be used in the following cases:"

FIRST. Against fraudulent debtors, who are not freeholders and residents of the County.

SECOND. In actions founded upon ~~tests.~~ torts

THIRD. Against resident freeholders who have or are 20 about to transfer their property with intent to defraud creditors.

This action does not come under the second head as it is not founded upon a ~~test.~~ ~~tort~~ torts

It is not under the third head as it is not against a resident freeholder, but against "David L. Cliver of the County of "Burlington, and who is not a freeholder" (pro ut affidavit), nor is there any allegation in the affidavit that he has or is about to transfer his property with intent to defraud his creditors, nor is there any adjudication by the Justice in his order 30 for warrant of any fact that will authorize the warrant under this third head.

The warrant is to be sustained if at all under the first division or head of Section 13, and this requires not only that there shall be shown a fraudulent contract, but also that the defendant IS NOT A FREEHOLDER AND RESIDENT OF THE COUNTY.

It is not every debtor, nor every fraudulent debtor that can be held to bail under this clause of the Section. The re-

quirements are more stringent than under our Practice Act; and it is strikingly shown that the Legislature in authorizing warrants for debt limits to the utmost the authority of Justices of the Peace over the liberty of debtors, and entirely abridges it against debtors who may have fraudulently contracted the debts, if they are resident freeholders.

So that if Cliver was a freeholder and resident of the County he was privileged from arrest by warrant. Justice Elmer in the case cited (3 Vroom) on page 197, says: "If "the defendant is in fact a freeholder and resident in the coun- 10 "ty, it is his privilege to claim immunity from arrest." Cliver was not liable to arrest, and if arrested it was his right to claim his privilege.

(2.) The defendant pleaded his privilege by written plea, verified by affidavit.

While written pleas are not required in Justices' Courts, yet they are neither irregular nor unknown.

Barklow v. Hutchinson, 3 Vroom 195.
Coxe v. Robbins, 4 Halst, 385.

The plea disputed a jurisdictional fact and is in its nature 20 a plea in abatement. This raised a question which it was the duty of the Court first to determine before they could proceed to examine into the disputed account between plaintiffs and defendant, for if the parties were not in Conrt no judgment could be given respecting the subject matter of the dispute, that would bind either.

(3.) If the plea had not been filed and the matters therein set forth had been proven under the general issue, at the close of plaintiffs' case, the Justice would have been obliged to dismiss the case without deciding the merits of the controversy. 30

McGiffin v. Stout, Coxe 108 *92. Penn. 561
Ryerson v. Ryerson, 1 South 416 *363.
Smith v. Van Horten, 4 Halst 381.
Mossler v. Fleming, 12 Vroom 108.
Jeffrey v. Owen, Same 260.

(4.) The service of the warrant in violation of a statutory privilege, necessarily rendered all subsequent proceedings void. 2 Halst 117 *97

The position of plaintiffs in the Common Pleas, that having obtained judgment before the Justice, they were entitled to an affirmance of the judgment, and that if they couldn't have an

execution against the body they had a right to the Appeal Bond to sue on, is one that is untenable and would completely overthrow the right of liberty of debtors sued in the Justices' Courts. It would give unscrupulous creditors, with the assistanoe of ignorant Justices, the power to compel the enforcement of every debt or the imprisonment of every debtor. The principle is laid down by the Justice when he refused to entertain the plea, in these fitting words: "I decided I had 'ALREADY directed that an order for warrant do issue upon
10 "the affidavit filed and was there to try the plaintiffs' claim."

A question of jurisdiction involving the sacred right of liberty, decided by a Justice of the Peace upon an ex-parte affidavit, the plaintiffs contend is not reviewable.

It will be borne in mind that the Justice Court Act contains no section similar to the provisions of the Practice Act (Sec. 64) authorizing the taking of affidavits as to the truth of the affidavit upon which the order for the warrant is based. All that can be done without plea either oral or written, is to inquire before a Judge or Supreme Court Commissioner as to
20 the legal sufficiency of the preliminary affidavit. (Sec. 15.)

10 Vr. 259
13 Vr. 386

The plaintiffs ~~has~~ are issued an execution against the body of the defendant, by virtue of having issued a warrant, and defendant was compelled to appeal.

If the Justice had no jurisdiction over the defendant, the Common Pleas gained ~~some~~ none by the filing of the Appeal Bond.

The Common Pleas retry the case and the proceedings and rights of the parties are the same before that Court as before the Court below. Whatever the Justice ought to have done it is the duty of the Common Pleas to do.

30 Stewart's Digest, page 696, Secs. 617-18 and cases cited.

"If the error ought to have arrested or put an end to the action before the Justice, it ought to do it in the Court above.

Johnson v. Pennington, 3 J. S. Green 188.
3 Harr, 236, 4 Harr, 68, 3 ~~Lab.~~ 203.

Gould v Brown 4 Hal. 208 * 165

SECOND.

As to the evidence upon which the Court acted.

The record from the Common Pleas says: "The Court an-

"nounced that the evidence submitted proved that defendant "was a freeholder, and that they would receive evidence in re- "buttal to show that he was not a freeholder, but would not "at this stage of the case receive evidence as to plaintiffs' "claim or demand."

"No evidence being offered on the part of the plaintiffs as "to defendant's being a freeholder, the Court held that the de- "fendant was proven to be a freeholder, &c."

Justice Elmer, in the case in 3d Vroom, page 198, says: "The defendant is privileged to claim immunity from arrest 10 "and is entitled to prove the facts by his own oath, or other- "wise in the Justice's Court, so that his witnesses may be "cross-examined and proof heard on the other side if offered."

The Common Pleas had before them three matters in proof of the plea by the defendant:

The oath of the defendant;

The recital by plaintiff in the execution;

The will of the defendant's grandfather.

It will be noticed by the record from the Common Pleas that plaintiffs took no exception to the evidence offered by the 20 defendant and made no objection to it either as to its competency or sufficiency.

The only objection is this:

"Plaintiffs resisted the motion on the ground it was irregu- "ular and that it was the right of the plaintiffs to prove their "claim and offered then and there to do so," &c.

If the objection is to the sufficiency of the evidence it should have been made below.

Williams v. Sheppard, 1 J. S. Green 76.

The Court after verdict cannot set it aside on an allegation 30 of no evidence when no objection was made when offered.

Dare v. Moore, Coxe 111 *94. —— 13 Vr. 397

(1.) The defendant proved his plea by his own oath. The plea sets out that "at the time of the commencement of the "said action, he, the said defendant was, and from thence hith- "erto hath been and still is, a resident of the said county of "Burlington and a freeholder therein," &c. And in the affidavit annexed the defendant "saith the above plea is true in

"substance and in fact." Here was proof by the defendant's own oath in accordance with the opinion of Justice Elmer above cited, and the defendant was in Court and tendered to plaintiffs' counsel for examination.

(2.) The fact that defendant was a freeholder was admitted in the execution drawn by plaintiffs' counsel, and sent up to the Common Pleas with the other papers. It recites that "David L. Cliver is not a resident and freeholder."

It will be noticed in Sec. 13 above referred to, that these 10 words "resident and freeholder" are reversed and that the negative applies to the first only, the other being an affirmative. By the same construction it would appear that when the Execution came to be drawn, the point as to defendant's being a freeholder was conceded and the writ so worded purposely. The preliminary affidavit, the only matter before the Court on the point of freeholder, on part of plaintiffs, has this language, "that David L. Cliver of the County of Burlington, and "who is not a freeholder, is indebted," &c.

This point while not urged as strongly as the others, is at 20 least deserving consideration in a case that was litigated from the outset in every available manner.

(3.) A certified copy of the last will of Samuel Asay, the grandfather of defendant, a well-known citizen of the county and a man of considerable possessions, was offered in evidence and received by the Court without objection or exception. By this among other things there was a devise of certain lands to defendant and others, the share or interest of which was still in the defendant at the time the suit was commenced.

30 In regard to this evidence the first two errors are assigned.

THE FIRST ERROR ASSIGNED IS—"Because the Supreme "Court decided that the certified copy of the last will of "Samuel Asay the grandfather of said defendant, devising to "him an interest in certain lands and real estate in New Han-"over Township, Burlington County, and offered by the "defendant in the Court below, was evidence that he was a "freeholder in the county."

The Supreme Court did not so decide. The decision says "The contest was in reference to his being a freeholder of the "county. On that subject there was evidence of a devise to

"defendant of an interest in real estate in that county. The "devise was before the Court, and from it they inferred that "defendant was a freeholder of the county. There is nothing "before us to show that such inference was not properly "drawn. There was evidence from which it might be drawn." (See page 185 at bottom.)

If there is evidence before the Court below from which they can reach their conclusion, this Court will not reverse because the evidence would bring them to a different conclusion.

Brown vs. Remsey, 5 Dutch 117.

Wolcott Johnson & Co., vs. Mount, 7 Vroom 268.

The Court determines the competency and not the sufficiency of the evidence.

Hill in New Trials, page 449, Sec. 9. And page 452, Sec. 12.

If this evidence was competent, this Court will not disturb the decision of the Court below that decided its sufficiency.

Ibid.

The presumption of title to lands is so strong from the offer of deeds in evidence as to divest Justices of their jurisdiction.

Mossler vs. Fleming, 12 Vroom 108.

Jeffrey vs. Owen, same 260.

A duly executed will purporting to devise land will certainly give rise to same presumption. As much as a deed presumes the title of the grantor it presumes the title of the testator and with as much force it presumes the title passed thereby remains vested at time of the offer.

The will was legal and competent evidence and the Court announced they were satisfied from it and the other facts that defendant was proven a freeholder and called on plaintiffs for rebutting evidence, which was not offered and the case was dismissed.

THE SECOND ERROR ASSIGNED IS—"Because the said "Court decided that the Court below, having decided that the "plea of the defendant was proved, the Court were bound to "presume there was sufficient evidence, unless the contrary "clearly appears."

The Court will not presume the Court of Common Pleas erred.

Obert vs. Whitehead, 4 Halst 306.

The Court will not make any intendment to overturn a judgment; the facts which constitute the ground of objection must be clearly proved.

Stewart's Digest, page 129, Sec. 245, cases cited.

Every intendment will be in favor of the order of the Court.

State vs. South Amboy, 3 Vroom 275.

2 Zab. 396, 564.

In the Common Pleas the decision of the Court was not objected to on the ground the evidence would not warrant the
10 inference drawn from it; the insistment of plaintiffs being as before ~~maintained~~, that they had a right to their judgment and the appeal bond to sue on, and no fact appears before the Court now that the inference of the Court below could not be drawn from the will.

mentioned

In Barklow vs. Hutchinson the judgment of the Common Pleas did not state that any evidence had been heard and the judgment was held good. 3 Vroom 195.

"If defendant attend trial evidence will be presumed."

Jessup vs. Sharp, Penn. 324.

20 Fleming vs. Newman, Penn. 852.

In determining this case the special attention of the Court is called to the decision of Justice Elmer in Barklow vs. Hutchinson above cited; although the plea in that case was over-ruled the Court will notice on page 197 the case was rested alone upon the sufficiency of the plea, the debt being admitted and no record appearing of any evidence being offered before the Common Pleas.

In over-ruling the plea on page 198, Justice Elmer does it upon the ground the plea was defective in not containing an
30 averment that defendant was a resident, etc.

The judgment of the Supreme Court should be affirmed.

Wm. S. Sharp, Printer and Stereotyper, 21 W. State St., Trenton.

NEW JERSEY SUPREME COURT.

COLE & TAYLOR,

vs.

DAVID L. CLIVER.

In Debt on Warrant. Certiorari to Burlington Common Pleas.

Complaint.

[Filed December 16, 1879.]

State of New Jersey, Burlington county, *ss.*—Thomas B. Taylor, of full age, being duly sworn according to law, on his oath says—That he, the said Thomas B. Taylor, and Jonas W. Cole are partners, trading under the firm name of Cole & Taylor, in the city of Trenton, State of New Jersey aforesaid; that David L. Cliver, of the county of Burlington, and who is not a freeholder, is indebted to the said Cole & Taylor in the sum of ninety two dollars and 10 thirty-nine cents besides interest, for goods and merchandise sold and delivered by said Cole & Taylor to said Cliver, the bill of particulars whereof is hereunto annexed.

And deponent further says that the said debt was contracted by the said Cliver under the following circumstances, to wit: on the second day of October, A. D. eighteen hundred and seventy-eight, the said Cliver, at that time doing business in Wrightstown, having a retail store, and being

desirous of purchasing goods and of obtaining credit from the said Cole & Taylor, represented and said to them in order to obtain such credit and as an inducement therefor, that he, the said Cliver, was, with his four brothers, joint owner of a farm near Wrightstown, containing one hundred and eleven acres of cleared land and eighty acres of wood-land, making a total of one hundred and ninety-one acres of land, valued and assessed at seventy dollars per acre for the farm-land and twenty dollars per acre for the wood-land;
10 that the whole farm was entirely unencumbered; and further, that his, the said Cliver's, whole indebtedness would not then amount to more than five hundred dollars; that he then had in stock over three thousand dollars' worth of goods, besides his interest in real estate and personal property outside of the store.

And deponent further says that, believing said representations to be true and confiding in the integrity and honesty of the said Cliver, they, the said Cole & Taylor, were persuaded and induced to give credit to the said Cliver whereby
20 he became indebted to them in the sum and for the goods and merchandise above named; said goods and merchandise having been sold and delivered to said Cliver on account of his said representations.

And deponent further says that on or about the first day of August last past he applied to the said Cliver at Wrightstown for the payment of the said sum above named; that said Cliver then informed and told deponent that he would not pay said bill, and that he had deeded to his brother his interest in the said farm and wood-land for the sum of nine
30 hundred dollars, which said sum he had owed to his brother for more than a year; that said land had been for a long time encumbered for the sum of three thousand dollars, and that it only contained one hundred acres; and said Cliver stated unto this deponent that prior to the second day of October, A. D. eighteen hundred and seventy-eight, he was indebted to his mother-in-law for the sum of thirteen hundred dollars, and that subsequently to the contracting of the above-named debt of ninety-two dollars and thirty-nine cents, he had turned over all the stock in said store to
40 his said mother-in-law in payment of her claim.

And deponent further says that in his interview with said Cliver on the first day of August last, he, the said Cliver, said he was on the second day of October, A. D. eighteen hundred and seventy-eight, and prior thereto, jointly indebted with his brother in the sum of five hundred dollars, besides his debts above named.

And deponent further says that at said interview said Cliver protested and denied that he had ever made or written any or similar representations as to his property or his indebtedness as above set forth.

The following is a bill of particulars taken from the book of original entries of the said Cole & Taylor of the goods and merchandise sold and delivered to the said Cliver, as above referred to:

DAVID L. CLIVER,
Bought of COLE & TAYLOR,

1879.						
May 3,	1 bbl. N. O. molasses,	49 / 1	48	37	17 76	
	1 " " "	51 / 2½	48½	40	19 40	
	1 " Champion oil,		52	11½	5 98	
	1 " C sugar,		310	6½	20 15	
	1 box 50 lbs. ¼ drd. peaches, 10c.			3¾	1 98	
						65 27
July 11,	1 bbl. 13 Med. Rhu. hams, 15c.	216 / 20	196	11	21 71	
	1 " Ex. sugar,	308 / 18	285	7¾	22 09	
	½ case telegraph matches, 5 gross,			1 95	9 75	
						53 55
	Total amount,					$118 82
	CR.					
May 10,	by 2 Champion oil bbls. @ 80c.,		1 60			
	" 1 Home Light bbl.,		1 25			
			2 85			
	Less freight on same,		25			
				2 60		
June 26,	by cash check,			25 00		
July 11,	" 2 coffee bags, 10c.,			20		
						27 80
	DR.					91 02
21,	To protest on check,					1 37
	Total balance due,					$92 39

THOS. B. TAYLOR.

Sworn and subscribed before me the 11th day of September, 1879.

THOMAS BENNETT, *Justice.*

Order for Warrant.

I, Thomas Bennett, a justice of the peace in and for the county of Burlington and State of New Jersey, upon reading the affidavit of Thomas B. Taylor made and taken before me this day, do adjudge and decide that by the said affidavit, it is proved before me that there is due from the
10 said David L. Cliver to the said Cole & Taylor, a debt or demand founded on contract implied, amounting to the sum ninety-two dollars and thirty-nine cents, for the price and value of goods and merchandise sold and delivered by the said Cole & Taylor to the said David L. Cliver, and that the nature and particulars thereof are in said affidavit specified, and by the affidavit aforesaid it is established to my satisfaction that the said David L. Cliver fraudulently incurred the obligation aforesaid, and that he is not a freeholder and resident of this county at this time; I do there-
20 fore order that a warrant issue against the said David L. Cliver at the suit of the said Cole & Taylor in the sum of ninety-two dollars and thirty-nine cents.

Dated September 11th, A. D. 1879.

THOMAS BENNETT, *Justice.*

Warrant.

Burlington county, *ss.*—The State of New Jersey to any constable of said county: Take the body of

[L. S.] David L. Cliver so that you have him forthwith before the subscriber, one of the justices of the
30 peace of the county of Burlington, at my office, in Bordentown, in the township of Bordentown, in the county aforesaid, to answer unto Jonas W. Cole and Thomas B. Taylor,

partners trading as Cole & Taylor, in a plea of debt; demand, one hundred dollars.

Given under my hand and seal this eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

THOMAS BENNETT, *Justice.*

I have arrested the defendant and taken bond with Samuel A. Cliver as surety for his appearance on the 11th day of September, at two o'clock in the afternoon, agreeable to the statute of New Jersey in such case made and 10 provided.

JOHN D. MITCHELL, *Constable.*

Plea.

[Filed September 26, 1879.]

And the said defendant in his own proper person comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that before and at the time of the commencement of the said action, he, the said defendant, was, and from thence hitherto hath been and still is, a resident of the said county of Bur- 20 lington and a freeholder therein, and this the said defendant is ready to verify, wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

DAVID L. CLIVER.

State of New Jersey, Burlington county, *ss.*—David L. Cliver, the defendant in this cause, being duly sworn according to law, on his oath saith the above plea is true in substance and fact.

DAVID L. CLIVER. 30

Sworn and subscribed this 26th day of September, A. D. 1879, before me.

JOSEPH H. COPPUCK, *Notary Public.*

Execution.

Burlington county, *ss.*—The State of New Jersey to any constable of Burlington, greeting:

To John D. Mitchell, one of the constables of said county— Whereas, on the eleventh day of September instant, upon reading and filing the affidavit of Thomas B. Taylor, taken before me, a justice of the peace of said county, on said day, setting forth and proving to my satisfaction that David L. Cliver is not a resident and freeholder of the county of
10 Burlington and was indebted unto Jonas W. Cole and Thomas B. Taylor, partners, trading under the firm name of Cole & Taylor, of the city of Trenton, in the sum of ninety-two dollars and thirty-nine cents, besides interest, for goods and merchandise sold and delivered by said Cole & Taylor to said Cliver, and that said debt was fraudulently contracted, whereupon I made and filed with the above-named affidavit, on which the same was founded, an order, that a warrant issue against the said David L. Cliver for the sum of ninety-two dollars and thirty-nine cents;
20 and whereas, a warrant in the nature of a *capias ad respondendum* was by me issued, and the said David L. Cliver has by virtue thereof this day appeared before me, the said justice of the peace, and the said Cole & Taylor having also this day appeared before me and proven their said claim, and I having given judgment in favor of the said Cole & Taylor and against the said David L. Cliver for the sum of ninety-three dollars and seventy cents debt and seven dollars and twenty-two cents costs, you are commanded that of the goods and chattels of the said David
30 L. Cliver, which may be found in your county, you cause to be levied ninety-three dollars and seventy cents debt and seven dollars and twenty-two cents costs and also the costs hereof, which the said Jonas W. Cole and Thomas B. Taylor, partners, trading as Cole & Taylor, by my judgment aforesaid, recovered against him this day, and the moneys so as aforesaid by you to be levied, you are commanded to pay forthwith after receiving the same unto the said Cole & Taylor, or in

their absence unto me, the said justice, and the overplus, if any there be, unto the said David L. Cliver; and for want of sufficient goods and chattels whereon to make and levy the same, take the body of the said David L. Cliver and convey him to the jail of the county aforesaid and make return thereof within thirty days.

Given under my hand and seal this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

THOMAS BENNETT, 10
Justice of the Peace.

Appeal Bond.

[Filed October 15, 1879.]

Know all men by these presents, that we, David L. Cliver and Samuel A. Cliver, of the county of Burlington, State of New Jersey, are held and bound unto Jonas W. Cole and Thomas B. Taylor, partners, trading under the firm name of Cole & Taylor, of the city of Trenton, state aforesaid, in the sum of two hundred and ten dollars to be paid to the said Cole & Taylor, their and each of their 20 executors, administrators and assigns; to which payment we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

The condition is, that whereas the above-bounden David L. Cliver hath appealed from the judgment of Thomas Bennett, Esq., one of the justices of the peace of the county of Burlington, rendered against him in an action of 30 debt, wherein the said David L. Cliver was defendant, and the said Cole & Taylor, plaintiffs: Now, therefore, if the said David L. Cliver shall appear in the next Court of Common Pleas to be holden in and for the county afore-

said, and prosecute his appeal, shall stand to and abide the judgment of the said court, and pay such further costs as shall be taxed, if the judgment is affirmed, then this obligation to be void, otherwise to remain in force.

DAVID L. CLIVER. [L. S.]
SAMUEL A. CLIVER. [L. S.]

Sealed and delivered in the presence of
GEO. H. HARKER.

Transcript of Justice.

10 1879. State of New Jersey, Burlington county, *ss.*—Court for the trial of small causes. Before Thomas Bennett, Justice.

Jonas B. Cole and Thomas B. Taylor, partners, trading as Cole & Taylor, *v.* David L. Cliver. In debt. Demand, $100.00; cost, $1.75; milage, 72 cents.

Sept. 11th.—Plaintiff filed an affidavit of fraud in an action of debt in the above case, and I made an order after reading said affidavit that a warrant to arrest the defendant do issue.

20 Sept. 11th.—I issued a warrant to arrest the said defendant and delivered it to a constable.

Sept. 13th.—Constable returned the warrant, having taken bond for his appearance before me, at my office, in Bordentown, on Wednesday, the 17th inst., at one o'clock P. M.

Sept. 17th.—Parties appeared; defendant filed a new bond with security; plaintiff filed his state of demand; defendant adjourned the case until Friday, the 26th inst., at the same time and place.

30 Sept. 26th.—Parties appeared; defendant offered to prove by a will that he, the defendant, was a freeholder and resident in the county; I decided that I had already that an order for warrant do issue upon the affidavit filed, and was there to try the plaintiff's claim.

Thomas B. Taylor, being duly sworn, proved his book of account; the book was offered in evidence and admitted; after examination of the accounts I rendered judgment in favor of the plaintiff for the sum of ninety-three dollars and seventy cents debt, with seven dollars and twenty-two cents cost of suit; defendant filed a bond with securities for his appearance on the third day of October, one thousand eight hundred and seventy-nine.

Sept. 26th.—I issued execution in the above action against the goods and chattels of the defendant, and for 10 want of goods and chattels whereon to levy, to take the body of said defendant.

I hereby certify that the above is a true copy of my docket in the above case.

Given under my hand and seal the twelfth day of December, A. D. one thousand eight hundred and seventy-nine.

THOMAS BENNETT, *Justice.* [L. S.]

Defendant filed an appeal bond duly executed and signed. I accepted his bond and granted his appeal. 20

THOMAS BENNETT, *Justice.*

Proceedings before Burlington Common Pleas.

This appeal coming on to be heard in the presence of the parties, the said David L. Cliver, the defendant before the justice, by his counsel did move to reverse the judgment of the said justice and to dismiss the plaintiffs' suit, upon the plea and affidavit thereto of said defendant and the evidence offered in support of said plea; whereupon, the court having heard and considered the same, and the allegations of the parties and their counsel, it is ordered 30 that the judgment of the said justice be reversed and that the plaintiffs' suit be discontinued, and that they take nothing by their said action, with costs. Therefore, it is con-

sidered that the said David L. Cliver do recover, against the said Cole & Taylor, the sum of five dollars and eighty-two cents, for his costs by the court now here adjudged.

On motion of

GASKILL & SOOY,
Att'ys of Appellant.

State of New Jersey, Burlington county, *ss.*—I, John B. Deacon, clerk of the Court of Common Pleas of said county and state, do hereby certify that the foregoing is a
10 true copy of the judgment therein named, as appears of record in this office.

Witness my hand and seal of said office, this fifth day of June, A. D. one thousand eight hundred and eighty.

[L. S.] JOHN B. DEACON, *Clerk.*

Writ of Certiorari and Return.

New Jersey, *ss.*—The State of New Jersey to the Judges of the Court of Common Pleas
[L. S.] in and for the county of Burlington, greeting:

20 We being willing, for certain reasons to be certified of the judgment, order and proceedings given and made in our said Court of Common Pleas, in a certain action brought by Jonas W. Cole and Thomas B. Taylor, partners, trading under the firm name of Cole & Taylor, plaintiffs, against David L. Cliver, defendant, in a plea of debt, which said action was prosecuted in the said Court of Common Pleas, upon an appeal from the court for the trial of small causes, upon which appeal said David L. Cliver was appellant, and said Cole & Taylor were appellees, we command you
30 that you send under your seal to our justices of our Supreme Court of Judicature, at Trenton, on the fourth Tuesday of February next, the judgment, order and proceedings aforesaid, with all things touching and concerning the same, as fully and entirely as they remain in our court before you, by whatsoever names the parties may be called therein,

together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness Mercer Beasley, esquire, Chief Justice of our Supreme Court, at Trenton aforesaid, this twenty eighth day of January, in the year of our Lord eighteen hundred and eighty.

BENJ. F. LEE, *Clerk.*

W. D. HOLT, *Att'y.*

Allocatur: M. BEASLEY, *C. J.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court: 10

The judgment, order and proceedings aforesaid, whereof mention is within made, we do hereby certify and send, with all things touching and concerning the same, as fully and entirely as they remain in our court before us, under our seals, in the schedule hereto annexed, as within we are commanded.

In witness whereof we have hereunto set our hands and seals, in open court, this fifth day of June, A. D. eighteen hundred and eighty. 20

CLAYTON LIPPINCOTT. [L. S.]
CLAYTON A. BLACK. [L. S.]
WILLIAM PARRY. [L. S]

Agreed State of the Case.

The above cause was tried before the Burlington Common Pleas at the December term, eighteen hundred and seventy nine, in an appeal taken by said defendant from the judgment rendered against him by Thomas Bennett, Esq.

After the appeal had been duly reached and moved in its turn, the attorney of the defendant and appellant read 30 the within plea and affidavit filed before the justice, and renewed the motion made before the justice to dismiss the plaintiffs' suit upon said plea and affidavit, and offered in evidence in support of said motion a duly certified copy of

the last will of Samuel Asay, the grandfather of said David L. Cliver, devising to him an interest in certain lands and real estate in New Hanover township, Burlington county.

The attorney of said plaintiffs resisted the motion, on the ground it was irregular and that it was the right of the plaintiffs to prove their claim, and offered then and there by witness in court and by books of account to prove plaintiffs' demand.

The court announced that the evidence submitted proved 10 that defendant was a freeholder and that they would receive evidence in rebuttal to show that he was not a freeholder, but would not at this stage of the case receive evidence as to plaintiffs' claim or demand.

No evidence being offered on the part of the plaintiffs as to defendant's being a freeholder, the court held that the defendant was proven to be a freeholder, and thereupon reversed the judgment of the justice and dismissed the plaintiffs' suit. (*Pro ut* rule in minutes.)

It is hereby agreed that the foregoing shall be regarded 20 as a true statement of the proceedings before the Court of Common Pleas in above cause and may be used as such in argument before the Supreme Court, the same to be printed with true copies of the writ issued in this cause and the return thereto, and the papers issued and filed by the justice, together with a true copy of the transcript from his docket, and copies of all rules entered in the minutes of the Common Pleas.

March 13th, 1880.

W. D. HOLT,
30 *Attorney of Plaintiffs.*

GASKILL & SOOY,
Attorneys of Defendant.

COURT OF ERRORS AND APPEALS

COLE & TAYLOR,

vs. } *In Error.*

DAVID L. CLIVER.

New Jersey, to wit.—The State of New Jersey to our justices of our Supreme Court, greeting:

Because in the record and proceedings, and also in the giving of the judgment, in a plaint which was [L. S.] in our said Supreme before you, between the State of New Jersey, (Jones W. Cole and Thomas B. Taylor, partners, trading under the firm name of Cole & Taylor, being the prosecutors,) and David L. Cliver, defendant, on a *certiorari* issued out of our said Supreme Court, to the Burlington county Common Pleas 10 directed, as is said, manifest error hath intervened, to the great damages of the said Cole & Taylor, prosecutors, as aforesaid, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that

if judgment be thereupon given, then you send distinctly and openly under your seal the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the judges thereof, on the fourteenth day of June next, and this writ, and that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon, what of right and according to law ought to be done.

10 Witness our Chancellor and president judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and eighty-one.

W. D. HOLT, *Att'y.*

BENJ. F. LEE, *Cl'k.*

Assignment of Error.

And now at this day the plaintiffs in error assign the following causes of error:

First.—Because the Supreme Court decided that the
20 certified copy of the last will of Samuel Asay, the grandfather of said defendant, devising to him an interest in certain lands and real estate in New Hanover township, Burlington county, and offered by the defendant in the court below, was evidence that he was a freeholder in the county.

Second.—Because the said court decided that the court below having decided that the plea of the defendant was proved, the court were bound to presume there was sufficient evidence, unless the contrary clearly appears.

30 *Third.*—Because the said court decided that the court below having come to the conclusion that the plea of the defendant was proved, they were bound to dismiss the

suit, without permitting the plaintiffs to go into the merits of the case, and prove their demand or claim.

Fourth.—Because the said court ordered the judgment of the court below affirmed, when such judgment should have been reversed.

W. D. HOLT,
Attorney for Plaintiffs.