HANNUM v. WALLACE.

KNOXVILLE, JULY, 1843.

TRUST IN FAVOR OF ENDORSERS FOR A SPECIFIC AMOUNT. If realty be charged by deed of trust, in favor of endorsers, with a given sum to be raised in bank, and the endorsers go in paper for more than double that amount, of which the principal makes payments equal to the given sum mentioned in the deed, the trust is not extinguished, but continues for the full amount originally secured. (Cited in Johnson v. Rowland, 2 Bax., 216.)

PAYMENT OF DEBT SECURED BY DEED OF TRUST REVESTS LEGAL TITLE OF THE PROPERTY IN GRANTOR. The judge below charged that if the debt secured by a deed of trust was paid by the maker of the deed, the realty conveyed was discharged of the trust, and liable to execution against the maker, and the opinion of the supreme court assumes the correctness of the charge to this extent. (See in accord, Carter v. Taylor, 3 Head., 30; Nichols v. Cabe, 3 Head, 92; Planters' Bank v. Henderson, 4 Humph., 78; Marr v. Gilliam, 1 Coldw., 498.)

[Cited in: 2 Bax., 210; 18 Pickle, 448.]

[143] Ejectment by Wallace against Hannum for three lots in Maryville, Blount county. Plea, not guilty, and an issue thereupon was submitted to a jury at the May term, 1843. A verdict and judgment were rendered for plaintiff, from which the defendant appealed. The facts are stated in the opinion of the court.

Jarnigan, for plaintiff in error.

Hynds, for defendant in error.

Turley, J., delivered the opinion of the court.

This is an action of ejectment brought to recover possession of three lots in the town of Maryville, Blount county, known by Nos. 55, 56, 57. The lessor of the plaintiff claims title as a purchaser at a sale made by the marshal of East Tennessee, by virtue of an execution against James Berry, Jacob F. Fout, and others, issued from the federal court at Knoxville, bearing test the 2d Monday of October, 1834, upon a judgment rendered the 16th of October, 1834; the deed of conveyance from the marshal bearing date the 2d day of February, 1835. The defendant resist a recovery upon the ground that, at the date of the levy and sale by the marshal, there was no legal title to the premises in dispute vested in James Berry and Jacob F. Fout, or either of them, and of consequence that

there was nothing in the premises which the marshal could legally seize, or the lessor of the plaintiff buy. And, to support this position, he read to the court and jury a deed of conveyance from James Berry and Jacob F. Fout, for the lands in controversy, to Daniel D. Fout, bearing date the 19th day of July, 1831, by which they were conveyed in trust to secure Thomas Henderson and Richard Merideth as endorsers for the sum of $3,000, [144] which amount they were desirous of obtaining as a loan from some banking institution in Nashville. The testimony of John Sommerville, the cashier of the branch of the United States Bank at Nashville, shows that on the 4th of May, 1831, a note drawn by James Berry and Jacob F. Fout, for the sum of $5,181, endorsed by Richard Merideth and Daniel D. Fout was discounted at the bank, which was renewed by a note drawn and endorsed by the same parties, on the 27th of July, 1831, for the sum of $5,200, which was renewed on the 28th of September, 1831, for the sum of $5,235, by a note drawn by the same drawers, and endorsed by Daniel D. Fout and Thomas Henderson, which was renewed from time to time, adding interest, until the 4th of July, 1832, at which time it was consolidated with another note under discount for $2,225, and amounted in the aggregate to the sum of $7,592, for which amount a note drawn by said Berry and Fout, and endorsed by said Daniel D. Fout and Thomas Henderson, was then discounted. This note, with the same endorsers, was renewed from time to time till the 1st of June, 1833, at which time it had been reduced by payments made by the drawers to the sum of $5,400, for which it was then renewed for four months, with the same endorsers, and at maturity protested for non-payment. On the 3d of October, 1833, Jacob F. Fout paid on the note the sum of $347.13, which reduced it to $5,050.87, for which suit was brought in the federal court at Knoxville, against drawers and endorsers, and judgment obtained, and an execution issued and sale thereon of the premises to the lessor of the plaintiff, as hereinbefore stated, who purchased at the price of $1,115. That the deed of trust of the 19th day of July, 1831, vested the legal title in Daniel D. Fout, the trustee, subject to the trust therein specified, and left nothing in James

Berry and Jacob F. Fout subject to the execution in favor of the United States Bank, if the deed were a valid, subsisting, and unsatisfied deed at the date of the levy, and the purchaser could acquire no legal title under a sale made by virtue of a levy of an execution under such circumstances, are propositions too plain to be controverted; in fact, they have not been controverted by the counsel for the plaintiff in ejectment.

[145] But the validity of the deed of trust has been attacked upon several grounds, but one of which it is necessary to examine and decide upon, as all the others were determined by the circuit judge in favor of the position assumed by the defendant in ejectment. The plaintiff, among other things, contended that, under the deed of trust, Henderson could not claim an indemnity beyond the sum of $3,000, though his liability as endorser might amount to more; and, if his liability to the amount of $3,000 had been discharged by the drawers, that the property conveyed in the deed was discharged from the trust, and liable to execution; and so the court charged. In this there is manifest error. The substance of this charge is this: If an endorser take surety by trust upon property to the amount of $3,000, and endorsed for $6,000, and the drawer pay $3,000, the property is discharged from the trust, becomes liable to other creditors, and the endorser has lost his surety. The reverse of this proposition is the law. The property is charged to the extent of the $3,000, and is liable to that extent, no matter what amount of liability over and above that may have been discharged from other sources. This proposition is so plain that we do not well see how the error was committed, but it is fatal to the verdict and judgment rendered in this case; for the proof showed that more than $3,000 of liability on the part of the endorser, Thomas Henderson, which had been created after the date of the deed of trust, had been discharged by Berry and Fout; and the jury were bound by the charge of the judge to find that the deed of trust had been satisfied before the levy and the sale under the execution, and that a legal title was acquired under the purchase by the lessor of the plaintiff. There is proof in the record tending to

show that Jacob F. Fout, the trustee, and Thomas Henderson, the *cestui que trust*, consented to the sale. What effect this may have in making the same good and valid we will not now determine, as the case must be reversed upon the proposition discussed. Judgment reversed, and case remanded for a new trial.

JONES v. WILEY *et al.*

KNOXVILLE, JULY, 1843.

SUCCESSOR IN OFFICE CAN NOT SUE ON A BOND WHICH IS NOT STATUTORY. A successor in office can sue only upon an official or statutory bond, and not on a bond obligatory because voluntary, which must be sued on by the obligee or his personal representative. (But see Governor v. Allen, 8 Humph., 183, where the bond in this case is treated as payable to N. C. and his successors, and not to N. C., governor, and his successor. See, also, Cannon v. Snowdon, 4 Humph., 360, the converse of this case, and Finch v. Gore, 2 Swan, 331, citing this case. Code, section 761 *et seq.*)

[146] This action of covenant was instituted in the circuit court of Roane county, in the name of Jones, governor, and successor of N. Cannon, for the use of the State, against Wiley, clerk of the county court, and his sureties on their official bond. This bond was executed on the 25th day of April, 1836, payable to N. Cannon and his successors in office, for the collection and payment of the tax on suits, and other State tax which by law he ought to collect or should come to his hands, and the breach assigned was the non-payment of said taxes.

The defendant pleaded that the bond was taken by a court which had no authority to take or receive the same, and of which he was not clerk.

The plaintiff demurred to this plea, and there was a joinder in demurrer. It was argued before Scott, judge, and he overruled the demurrer and gave judgment for the defendant, and the attorney general appealed on behalf of the State.

Attorney General, for the State.

Lyon and Jarnigan, for defendant.

Reese, J., delivered the opinion of the court.