UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 3 Article 10

4-1-1957

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court in the *Harmon* case cited with approval the quotation in *State v. Cutshall*[27] from *Alonzo v. The State*[28] which explains the reason for such a holding. That is, if one of the parties after exercising due care, was mistaken as to a matter of fact which, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. So there is some basis for the inference that the Supreme Court might not find a person in the situation of the husband in the *Harmon* case guilty of bigamy. It certainly seems that this rule is the more logical and reasonable. To prosecute a man for bigamy who has done all that is legally required to get a valid divorce, and is acting in reliance upon an order of the court granting the divorce at the time he remarries, is not reasonable or just. It seems that a person who has acted in good faith should be entitled to rely upon a supposedly valid divorce decree without fear of criminal prosecution.

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Execution—Supplemental Proceedings or Creditor's Bill in North Carolina

Under the dual system of courts of law and equity that existed in North Carolina prior to 1868, the judgment creditor had to resort to his bill in equity[1] to reach property of the judgment debtor that was not liable to execution at law. All the debtor's property was liable for his debts except his legal exemptions.[2] But only legal interests in tangible personalty and realty, equities of redemption, and interests under a passive trust could be reached by execution at law.[3] Legal interests in intangibles and equitable interests other than those pointed out above had to be reached by a creditor's bill in equity. The remedy in equity was not available to a creditor who had not exhausted his legal remedies.[4]

In 1868, a statutory procedure known as supplemental proceedings was adopted whereby the judgment creditor could subject to sale certain of the judgment debtor's property which could not be reached under execution at law.[5] Although ostensibly this statute was intended to completely replace the creditor's bill, the question arose as to whether

[27] 109 N. C. 764, 14 S. E. 107 (1891).
[28] 15 Tex. App. 378 (1910).

[1] Also called creditor's suit, creditor's bill, and judgment creditor's bill (to distinguish it from general creditor's bills with which we are not here concerned). Since the fusion of courts of law and equity, the courts frequently call this proceeding an *action*.
[2] N. C. GEN. STAT. §§ 1-369 et seq. (1953).
[3] N. C. GEN. STAT. § 1-315 lists property that is subject to levy and sale under execution. Here we are concerned only with property not so subject.
[4] Wheeler v. Taylor, 41 N. C. 225 (1849).
[5] CODE OF CIV. PROC. §§ 264 et seq. (1868). Now N. C. GEN. STAT. §§ 1-352—1-368 (1953).

it excluded a creditor's bill entirely or whether either could be used at the creditor's option.

In *McKeithan v. Walker*[6] it was held that supplemental proceedings could not be used but a creditor's bill was necessary to subject the judgment debtor's interest in a resulting trust in land to the satisfaction of his debt. In that case the judgment debtor, prior to the institution of the action in which the judgment was recovered, transferred land to one Brown under a deed of trust to secure certain debts. The judgment was docketed and an execution issued and returned unsatisfied. Then, by supplemental proceedings, the plaintiffs, judgment creditors, obtained an order for the examination of Brown. Finding that he held the land of the judgment debtor under the deed of trust, the plaintiffs asked for a decree to require the trustee to sell the land held in trust and after paying the debts and costs provided for in the deed of trust, to pay the surplus to plaintiffs on their executions. In holding that the interest of the judgment debtor could not be reached by supplemental proceedings but only by an action in the nature of the former creditor's bill in equity, the Court, after concluding that the debtor's interest in the resulting trust was subject to the lien of the docketed judgment under N. C. GEN. STAT. § 1-234, said: "We think the purpose of the Code was to give those remedies [supplemental proceedings] to a plaintiff only in case the defendant had no known property liable to execution, or to what is in the nature of execution, viz: Proceedings to enforce its sale for the satisfaction of the debt, sufficient in value to satisfy the debt. . . . If there be a lien on property, it must be shown either by a sale of the property or by affidavit that the property is insufficient in value to satisfy the debt."[7]

In *Rand v. Rand*,[8] the Court used very strong language to the effect that the bill in equity was abolished and that a judgment creditor's only remedy was by supplemental proceedings.[9] The *McKeithan* case was then considered and the Court concluded that if the decision in that case was the proper construction of the Code in respect to cases where supplemental proceedings would not lie and the party would have to resort

[6] 66 N. C. 95 (1872).
[7] *Id.* at 98.
[8] 78 N. C. 12 (1878).
[9] "If we clearly ascertain what is a 'supplementary proceeding' as established by our Code, its scope and end, we shall have done much to settle the present and similar questions of jurisdiction. We think it clear that proceedings supplementary to execution under the Code of Procedure are a substitute for the former creditor's bill. . . . The only purpose of the creditor's bill was to enforce satisfaction of a judgment out of the property of the judgment debtor when an execution could not reach it, and the only purpose of supplementary proceedings is to obtain the same ends by the same means. The bill in equity has been abolished and nothing is substituted in its place but the proceedings supplemental to the execution and in aid of it. The office of the former is now performed by the latter, and it would be inadequate, and the parties would be in many cases without remedy, unless it could be applied in the same cases and to the same extent by taking hold on all the property and rights of the debtor out of the reach of an execution at law, and applying them in discharge of the debt." *Id.* at 14.

to a creditor's bill, then a creditor's bill would be necessary to reach the judgment debtor's equitable interest in real estate,[10] whereas supplemental proceedings were proper to reach a like interest in personal property. The Court intimated disapproval of the distinction drawn in its interpretation of the decision in *McKeithan v. Walker* but did not disapprove it expressly. The holding of the *Rand* case in which the judgment creditor sought to subject to the payment of the judgment a distributive share of a *personal* estate in the hands of administrators to which the judgment debtor was entitled, was that the creditor's bill could not be maintained, but the plaintiff's *only* remedy was by supplemental proceedings.[11]

The *Rand* interpretation of the *McKeithan* decision was spelled out and followed in *McCaskill v. Lancashire*[12] where the identical issue was before the court. *McKeithan v. Walker* was followed in other cases where the court required the judgment creditor who was seeking the aid of supplemental proceedings, to show by affidavit or otherwise the nonexistence of any equitable estates in land within the lien of the judgment.[13]

It is important to note that all the cases discussed above were decided between 1868 and 1883 under the Code of Civil Procedure adopted in 1868. In the Code of 1883 there appeared some changes[14] in the chapter on Proceedings Supplementary to the Execution which were apparently designed to abrogate the holdings of these cases. As far as pertinent to

[10] Because the docketed judgment constituted a lien on equitable interests in real property by the construction of N. C. GEN. STAT. § 1-234.

[11] The plaintiff had started a new action in the same court in which she would have had to start supplemental proceedings; the deviation from supplementary proceedings was more in form than substance. The Court refused to dismiss the action but allowed the plaintiff to amend as to form. This allowed the plaintiff to keep the benefit of the restraining order on the administrators, one of whom was the insolvent judgment debtor.

[12] 83 N. C. 393, 399 (1880). "The result of the cases, including the late case of Rand v. Rand, 78 N. C. 12, is that judgment creditors *must* resort to supplementary proceedings, as provided for in the Code, in all cases except the single one of a judgment operating as a lien on equitable estates in land which cannot be sold on execution, and may commence such proceedings even in that case upon affidavit of the insufficiency of the property affected by the lien to pay the judgment; but otherwise, the proceedings to enforce the lien of a judgment on equitable interests in land not liable to execution under the act of 1812 must be by action in court, and the proceeds applied, if sufficient, before the judgment debtor can be subjected to supplementary proceedings. The line of distinction is distinctly drawn, and now well known and generally conformed to in the profession. And, as less circuity is made by the action in court than would be by a receiver on supplementary proceedings, who would have to bring an independent action and then report back to the clerk in the cause for final orders, we are inclined to stand by the decision in McKeithan v. Walker in the limited application it has to equitable interests in land." [Emphasis added.]

[13] Hinsdale v. Sinclair, 83 N. C. 339 (1880).

[14] These changes were added by the code commissioners in their revision, by virtue of the authority in N. C. SESS. LAWS 1881, c. 145 and 315 and N. C. SESS. LAWS 1883, c. 191. The pertinent changes were in § 488 par. 2 and § 493.

this discussion these changes in the Code now appear in N. C. GEN. STAT. §§ 1-353 and 1-362. Future references will be to these sections.

N. C. GEN. STAT. § 1-353 deals with the order of examination of the judgment debtor and/or others who might be indebted to him. The change was an addition which reads: ". . . And the judgment creditor is entitled to the order of examination under this and the preceding section, although the judgment debtor has an equitable estate in land subject to the lien of the judgment. . . ." This addition clearly dispensed with a requirement of the affidavit held necessary in *Hinsdale v. Sinclair*,[15] and it has been so held.[16]

N. C. GEN. STAT. § 1-362 concerns the Court's authority to order the application of property of the judgment debtor to his debt. It reads in part: "The Court or judge may order any property, whether subject or not to be sold under execution . . . to be applied towards the satisfaction of the judgment. . . ." The clause "whether subject or not to be sold under execution" was the addition to this section. Although no authority has been found to support this position, it is the opinion of this writer that the purpose of this addition was to nullify the holding in the *McKeithan* case and subsequent cases relying on it as authority.

According to these cases, the only instance in which a creditor's bill was proper was where a judgment operated as a lien on equitable estates in land which could not be sold on execution. It is submitted that the clause "whether subject or not to be sold under execution" was intended to include such property interests, thus eliminating the one instance in which a creditor's bill was necessary and making supplemental proceedings the remedy in all cases. As pointed out above, the change that appears in N. C. GEN. STAT. § 1-353 was held to dispense with the necessity of showing in the affidavit for the order of examination the non-existence of any equitable estates in land subject to the lien of the judgment. The reasons for this requirement in the affidavit were stated in *Hinsdale v. Sinclair* to be ". . . to indicate the necessity of the remedy in point of justice to the creditor, as an assurance to the court against the invocation of its aid to an idle end, and as a protection to the debtor against the discovery of his private affairs from the curiosity or other unworthy motive of the creditor."[17] Why eliminate this requirement if the creditor still has to resort to a creditor's bill to reach such interest? The requirement was eliminated even though the purported reasons for it still existed.

[15] 83 N. C. 339 (1880).

[16] The First Citizens National Bank of Elizabeth City v. Hinton, 213 N. C. 162, 195 S. E. 359 (1938); Boseman v. McGill, 184 N. C. 215, 114 S. E. 10 (1922); The Farmers and Mechanics National Bank of Westminister v. Burns, 109 N. C. 105, 135 S. E. 871 (1891); Hackney Bros. v. Arrington, 99 N. C. 110, 5 S. E. 747 (1888). But see Magruder v. Shelton, 98 N. C. 545, 4 S. E. 141 (1887), where the court followed Hinsdale v. Sinclair on this point. Apparently the change in the Code was not brought to its attention.

[17] 83 N. C. 339 at 343 (1880).

The creditor could invoke supplemental proceedings even where such property interest existed by presenting affidavit proof of its insufficiency to satisfy the judgment.[18] Factors worthy of note are that the changes in the two sections were made at the same time and the general purpose of the Code to give more complete relief in one action.

The circuity of action objection raised in *McCaskill v. Lancashire* might be answered by observing that the court could order the sale of such property and allow other interested persons to interplead in the supplemental proceedings.[19]

Whatever might have been, the courts have not held that supplemental proceedings was the exclusive remedy for a judgment creditor whose judgment could not be satisfied at law. An examination of some of the cases decided since 1883 will reveal that the courts have neither made supplemental proceedings the exclusive remedy nor strictly followed the distinction indicated above as to when the use of each remedy is proper.

In *Trimble v. Hunter*,[20] the Court said that the plaintiff had to proceed by creditor's bill to enforce the lien on a resulting trust in defendant's favor.[21] The Court *held* in *Everett v. Raby*[22] that the right in equity of defendant to call for a conveyance of land for which he paid the purchase money was not subject to sale under execution and *said* that the remedy of the creditors was an action in the nature of a bill in equity to subject the land to the payment of their debts. In *Cooper v. The Adel Security Co.*,[23] the judgment creditor brought an action in the nature of a creditor's bill to have an account stated of the assets and liabilities of a corporation. The only assets were unpaid stock subscriptions which the Court said were a trust fund for the benefit of creditors. The lower court dismissed the action as to defendant stockholders because there had been no personal service on defendant Security Co. The Supreme Court held that the dismissal of the action was error and thereby said in effect that the creditor's bill was the proper remedy. If the law was as stated in *McCaskill v. Lancashire* supplemental proceedings would have been mandatory under these facts. There are, of course, cases in which supplemental proceedings were used to reach a property interest of the judgment debtor that was not subject to sale under execution.[24]

[18] McKeithan v. Walker, 66 N. C. 95 (1872).

[19] Wilson v. Chichester, 107 N. C. 386, 12 S. E. 139 (1890); Munds v. Cassidy, 98 N. C. 558, 4 S. E. 353 (1887).

[20] 104 N. C. 129, 10 S. E. 291 (1889).

[21] See also Mayo v. Staton, 137 N. C. 670 at 686, 50 S. E. 331 at 337 (1905) where the Court in referring to the lien on a resulting trust in land, created by the docketing of the judgment, said: "The lien can be enforced only by judgment rendered in a civil action." The holding of the case was that this interest was not subject to sale under execution.

[22] 104 N. C. 479, 10 S. E. 526 (1889).

[23] 122 N. C. 463, 30 S. E. 348 (1898).

[24] Boseman v. McGill, 184 N. C. 215, 114 S. E. 10 (1922) (cash and securities

In *Monroe Bros. & Co. v. Lewald*,[25] the Court held it error to dismiss supplemental proceedings when there was a creditor's bill (which the court assumed to be a judgment creditor's bill instead of a general creditor's bill) pending by another person and intimated that both creditor's bills and supplemental proceedings would be proper to reach some types of property interests, by saying that the two proceedings should be consolidated when they conflict, as where the same property is sought to be subjected. In *McIntosh Grocery Co. v. Newman*,[26] the Court said that both remedies were still open to claimants in proper instances.

In the recent case of *Cornelius v. Albertson*,[27] the plaintiff, a judgment creditor of defendant, had an execution issued against the trustee of a trust of which the defendant was the beneficiary. The res of the trust was personal property. The trustee was not a party to the suit. The Court said: "The plaintiff cannot reach by the execution she had issued the property held in trust for defendant, . . . but *must* endeavor to reach it, if she can, by a supplemental proceeding. . . ."[28] [Emphasis added.]

It is apparent from the foregoing cases that the Court has not always required strict compliance with the clear cut rule stated in *McCaskill v. Lancashire*. No case has been found, however, in which it was held error to allow the remedy required by that rule.

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Judgments—Collateral Attack on Judgment Regular on Its Face

In *Carpenter v. Carpenter*,[1] a husband sought to have his marriage annulled on the ground that a decree of divorce obtained by his spouse from her former husband was a nullity. The allegations were that the wife, having falsely sworn that she had lived separate and apart from her former husband for two years, failed to meet the statutory requirements[2] which thereby invalidated her divorce and rendered her marriage to the plaintiff without legal efficacy. The North Carolina Supreme Court reversed the trial court's denial of the wife's motion to strike the allegations. In refusing to permit the plaintiff to attack collaterally the prior decree, the Court said:

held by another person); Johnson Cotton Co., Inc. v. Reaves, 225 N. C. 436, 35 S. E. 2d 408 (1945) (an interest in a judgment recovered against another).

[25] 107 N. C. 655, 12 S. E. 287 (1890).

[26] 184 N. C. 370, 114 S. E. 535 (1922).

[27] 244 N. C. 265, 93 S. E. 2d 147 (1956).

[28] *Id.* at 268, 93 S. E. 2d at 150. At the same page the Court, when referring to the Supplemental Proceedings statute (N. C. GEN. STAT. §§ 1-352 et seq.), said, ". . . the provisions of this article are intended to supply the place of a proceeding in equity, where relief was given after a creditor has determined his debt by a judgment at law and was unable to obtain satisfaction by process of law."

[1] 244 N. C. 286, 93 S. E. 2d 617 (1956). See N. C. GEN. STAT. § 50-4 and § 51-3 as to annulment.

[2] N. C. GEN. STAT. § 50-6 (1950).