33 Ga.Supp. 11
Supreme Court of Georgia.

SEABORN C. BRYAN, plaintiff in error,
v.
HUGH WALTON, administrator,
etc., defendant in error.

March Term, 1864.

*1 [1.] W. recovered a judgment against B. and the latter excepted to the judgment, and his counsel being misled by a printed Court calendar in a newspaper, honestly thought that this Court met in Macon on the third, instead of the fourth Monday in June, 1859. Acting upon this mistake, the writ of error was made returnable to the January term, 1860, instead of the June term, 1859, as the law requires, wherefore the writ of error was dismissed without a hearing upon the merits of the exceptions. Upon a bill for new trial alleging this mistake and its consequences:

Held, That the facts furnished no ground for new trial.

[2.] A Court of equity will not relieve a party from a judgment which he might have prevented but for his own negligence.

[3.] Newly discovered evidence that is uncertain in its character, or simply goes to impeach the testimony given on the former trial, or is merely cumulative, or is not so material as that it would likely change the result of the case, or was available to the party before the trial, furnishes no good ground for a Court of equity to interpose by granting a new trial.

Bill for new trial in Houston Superior Court, and tried before Judge O. A. LOCHRANE, at August Term, 1863.

To the April term, 1851, of Houston Superior Court, Hugh Walton, as administrator of Joseph Nunez, a free person of color, commenced an action of trover against Seaborn C. Bryan to recover damages for the alleged conversion of certain negro slaves, to-wit: Patience, a woman about twenty-eight years old, and her children, Sam, a boy about fourteen years old, Josiah, a boy about twelve years old, Louanah, *alias* Jane, *alias* Vienna, a girl about ten years old, James, a boy about seven years old, and Mahaley, *alias* Melissa, a girl about six years old, of the aggregate value of $9,000 00, and worth for hire the aggregate sum of $3,000 00.

To this action the defendant pleaded the general issue and statute of limitation.

The case was tried at April term, 1859, and a verdict rendered in favor of the plaintiff for $6,200 00, the value of the negroes, and $3,820 00 for the hire of the same.

Counsel for the defendant then made a motion for a new trial on the grounds:

1. Because the Court erred in overruling defendant's objection to testimony in relation to the wills of James Nunez and Fanny Galphin, said testimony showing that the property in dispute was disposed of by said wills, and that Joseph Nunez acquired it in that way and not by descent, and yet the wills were not produced or their absence properly accounted for.

2. Because the Court overruled defendant's objection to the testimony of several witnesses as to the present value of the negroes sued for, when they had not seen the negroes in eleven years, and some of them never.

3. Because the Court erred in excluding certain testimony, designated by brackets in the brief of evidence, and in admitting other evidence, likewise designated in the brief.

*2 4. Because the Court erred in admitting in evidence a copy will, found in the brief of evidence, as the declarations of Moses Nunez, the same being objected to, first, because, independent of the paper itself, there was no proof that Moses Nunez was of the same family of Joseph Nunez; second, because the paper, not being duly proved and recorded as a will, a certified copy from the files of the Ordinary's office is no proof of the existence of the original, or that the copy is a correct copy, and if it was, the original must be shown to be lost or destroyed, or out of plaintiff's reach; third, because a copy could not be read as an ancient paper, without proof of the execution of the original and its loss or destruction.

5. Because the Court refused to charge the jury, “That if Joseph Nunez was a free person of color, yet if he owned the property sued for, he had a right to convey

it to a free white man, and if he did so, the plaintiff cannot recover."

6. Because the Court charged the jury that, "Although the title to his property in Joseph Nunez became extinct at his death, without descendants capable of taking it, and it was forforfeited to the State, yet the plaintiff was entitled to recover it as administrator of Joseph Nunez.

7. Because after the jury had retired and were considering the case, certain written communications passed between them and the presiding Judge, without the presence, knowledge or consent of defendant or his counsel. Said communications being as follows:

Judge Love: Will your Honor please to inform us what is the charge given to us in reference to the trading previous or subsequent to the Act of 1818 by free persons of color? Also, if a change of property between legal heirs of the same estate applies to the above Act?

"Respectfully, JOSEPH N. CARR, Foreman."

Mr. Foreman, and Gentlemen: The charge was, that free persons of color, subsequent to December, 1818, could not trade for and acquire property. The only way they could acquire it, after that time, was by descent. This rule applies, in my opinion, to all persons of this class, and with all persons, whether heirs of the same estate or not. After the property of a deceased free person of color is distributed among his descendants, it must remain with them respectively and descend to their lineal descendants. It cannot go to collaterals, either by inheritance or by traffic. You will preserve this note, as I desire, when you return your verdict, to show it to the counsel in the case, and give them any benefit they may think themselves entitled to under it. Respectfully,

"P. E. LOVE, Judge."

8. Because the verdict is decidedly and strongly against the weight of the evidence, against law, and without evidence to support it.

The following is a statement of the material evidence appearing in the brief which accompanied the motion for a new trial, to-wit:

***3** *For the plaintiff*, it was shown that he was regularly appointed administrator of Joseph Nunez, deceased, by the Court of Ordinary of Burke county, Georgia, on the 14th January, 1850; that Joseph Nunez died a resident of Burke county, in the winter of 1846; that the negroes sued for were in his possession before and at the time of his death; that after the death of Joseph Nunez, Alexander H. Urquhart removed the negroes from the county of Burke, claiming them as his own; that Joseph Nunez was always regarded as a free person of color, and Alexander H. Urquhart was his guardian at the time he died, and for four or five years previous to that time; that Patience and her children, sued for in this, belonged to Joseph Nunez, and were born his; that Nannie, the mother of Patience, was willed by James Nunez, the father of Joseph Nunez, to Fanny Galphin during her life, and then to the said Joseph Nunez, and that Fanny Galphin died in 1812, and then Nannie went into the possession and ownership of Joseph Nunez, and Patience was born after that time; Fanny Galphin was a free person of color, and the paternal aunt of Joseph Nunez; that Joseph Nunez left no children by any lawful wife, and the children of Patience were his children, and that he always claimed Patience as a slave; that plaintiff demanded the negroes sued for from defendant, on 3d April, 1851, and he refused to give them up, and denied that he ever bought them from Urquhart; that the negroes were worth above $6,900 00, and were worth, for hire, $450 00 per annum.

For the defendant, it was shown that on the 20th of December, 1846, Joseph Nunez, by deed, to which he made his mark, conveyed the negroes in dispute to Alexander H. Urquhart, his heirs and assigns forever, with a stipulation that the negroes should abide and remain in the full possession and control and custody of the said Joseph Nunez, for and during his natural life; that this deed was executed in Burke county; that on the 18th February, 1847, in the county of Houston, Urquhart, by bill of sale, conveyed the negroes to Seaborn C. Bryan for $1,200 00; that Joseph Nunez had never enrolled himself as a free person of color in Burke county. For the defendant, several witnesses testified that the mother of Joseph Nunez was a white woman, and others that she was an Indian. A number of witnesses testified that they knew James Nunez, the father of Joseph, and that he was never regarded as having negro blood in him; that he was of dark complexion, with straight dark or black hair, which he wore in plaits, tied at the end with ribbons; that he was, in the opinion of some, of white and Indian blood mixed, with a predominance of the latter; and, in the

opinion of others, was a Portuguese, or Spaniard, or Indian, or a mixture of these races; that his nose was not flat, or his lips thick, or hair kinky; that he had the air and deportment of a gentleman; that he did not associate with negroes, but with whites; that he was a graceful dancer, and attended the balls, dances and social gatherings of the vicinity from which negroes were excluded, and from which he would have been excluded if he had been thought a negro.

*4 *For the plaintiff, in rebuttal*, several witnesses testified that James Nunez was a mulatto, and so regarded, though he sometimes associated with the whites; that Joseph Nunez was of mixed blood, composed of white, Indian and negro, the latter predominating; and in the judgment of some, he was one half negro and the balance made up of white and Indian blood; that he did not pretend to be anything but a free negro-lived as man and wife with one of his own negro women-ate, associated and slept with negroes-did not vote, serve on juries, muster, or exercise any other right that white men exercised, and did not eat at the same tables or sleep in the same beds with white folks, and always deemed himself a mulatto; that he applied to the Inferior Court to appoint a guardian for him, and called himself a free person of color, and that the Court did so, calling him a free person of color; that this appointment was made in 1841, and at another time in 1843. The plaintiff also introduced in evidence the exemplified copy of a paper purporting to be the will of Moses Nunez, the father of James Nunez and grandfather of Joseph Nunez. This will bears date at Savannah, 14th October, 1785, and was witnessed by David Montegret and Joseph Abrahams, and was propounded and caveated, and the question of the validity of the will was submitted to and passed upon by Henry Osborn, Chief Justice, and Joseph Clay, Samuel Elbert and Richard Wylly, Associate Justices, in and at a Superior Court begun and held at Savannah in and for the county of Chatham on Tuesday, the 2d of October, 1787. Three of the Justices delivered opinions, and two of them declared against the will, on the ground that it was attested by only two witnesses, and was, therefore, invalid as to the realty devised, but upon appeal to a jury, the will was set up. In this will it is stated that James Nunez, the father of Joseph Nunez, is the son of a woman called, in the will, "*Mulatto Rose.*" Here the evidence closed.

Judge PETER E. LOVE, who presided at the trial of the case, overruled the motion for a new trial, and defendant excepted.

Counsel for defendant then prepared and tendered a bill of exceptions in due form, assigning error upon the rulings of the Judge, as stated in the motion for new trial, and alleging that the Court erred in refusing said new trial. This bill of exceptions was certified by the Judge on the 4*th day of June*, 1859, and counsel for plaintiff acknowledged service of the same of the 9*th of June*, 1859, and it was filed in the office of the clerk of Houston Superior Court on the 11*th of June*, 1859.

The Supreme Court, to which this bill of exceptions should have been returned, began its session, according to law, on the fourth Monday in June, 1859, but the counsel of the defendant and the clerk of the Houston Superior Court being misled by a Court calendar published in a newspaper, honestly thought that the Supreme Court met in Macon on the *third* instead of the *fourth* Monday in June, and acting upon this mistake, the bill of exceptions was returned to the January term, 1860, of the Supreme Court at Macon. If they had known that the Court sat in Macon on the fourth Monday in June, the bill of exceptions could and would have been returned to that term, for there was ample time so to have returned; but honestly believing, from the newspaper calendar, that the Court would meet on the third Monday, and there not being time between the filing of the bill and the said third Monday to return it to that time, it was returned to a subsequent term of the Supreme Court.

*5 At the January term, 1860, of the Supreme Court at Macon, the case was continued for providential cause, and at the June term, 1860, the writ of error was dismissed, because it was improperly returned, and the defendant was not heard upon the merits of his exceptions to the rulings and judgment of the Court in said case.

On the fourth day of March, 1862, the defendant brought a bill in equity, in Houston Superior Court, against the defendant, who lived in the county of Burke, in which bill he set forth all the proceedings in said case, assigning error upon the rulings, decisions and charges of the presiding Judge, as hereinbefore stated, and also alleging the mistake and misapprehension under which he and his counsel and

the clerk all labored as to the time of the meeting of the Supreme Court in Macon, as before stated, by which he lost a hearing upon the merits of his exceptions, and also alleging that since the trial of his case, and since the motion for a new trial was made, and since his writ of error was dismissed, he has discovered new evidence which ought to change the result of the case, in the event of a new trial, and praying that the judgment against him be set aside and a new trial of said case be awarded to him.

Attached to the bill by way of exhibits are the original suit in trover with the verdict and judgment thereon, the motion for new trial with an approved brief of the evidence, the bill of exceptions with a certificate that the same was dismissed without a hearing upon the merits, and the following affidavits as to the alleged mistake, and as to the newly discovered evidence, to-wit:

Affidavit of John M. Giles, taken in Houston county, and dated 6th July, 1861, in which he "deposeth and says, that he was one of the counsel for Seaborn C. Bryan in the case of Hugh Walton, administrator of Joseph Nunez, against Seaborn C. Bryan-trover and conversion in the Superior Court of said county; that he, with the assistance, counsel and advice of the other counsel engaged in the case, prepared the bill of exceptions in said case in behalf of said Seaborn C. Bryan, in order to carry the same to the Supreme Court of the State, at Macon, January term, 1860; that, from a calendar which he consulted, he verily believed at that time that the June term, 1859, of said Supreme Court began on the third Monday instead of the fourth Monday in June of that year; that Messrs. Warren & Humphries, two of his associates in the case, seemed to be of the same impression, and they and deponent acted upon that belief in preparing the case for the Supreme Court. When the bill of exceptions had been signed, this deponent obtained the acknowledgement of service on the original bill of exceptions and filed the bill of exceptions in the clerk's office of the Superior Court, under the impression that the case would, according to law, be regularly returnable to the January term, 1860, of the Supreme Court; that by delaying to serve the bill of exceptions, or to file it in the clerk's office of the Superior Court, after it had been served, two days longer it would have been certainly returnable to said January term, 1860; that such delay would have left several days of the time allowed by law for serving and filing the bill of exceptions; that it was at that time understood by deponent and his associate counsel, and he believes it was so understood by Samuel D. Killen, Esq., one of the counsel for Walton, that the case would be returnable to the said January term, 1860, and deponent and his associates remained of that opinion until after the adjournment of the June term, 1859, of the Supreme Court."

***6** Also, a second affidavit of the said John M. Giles, taken in Houston county, and dated 28th October, 1862, in which he says, on oath, "that the calendar referred to in his foregoing affidavit was a printed calendar, and stated the June term, 1859, of the Supreme Court for the Macon district was the third Monday in June, and that deponent was misled by the said printed calendar."

Also, an affidavit of James F. Dailey, taken in Macon county on the 5th July, 1861, in which he deposes "that he knew Joseph Nunez, of Burke county, while in life, and that he, Dailey, was at that time a citizen of Burke county, and to the best of his recollection and belief, he was tried in the county of Burke upon his *status* of citizenship, and it was then and there determined by the Court that he was a free white citizen. The testimony, so far as he recollects, was that he was a Portuguese, and not a free negro. There are some circumstances that occurred on that day that make it more plain to my mind, perhaps, than it would otherwise have been, but he has no record that he can refer to, and must rely upon his recollection altogether, as the records of the county of Burke have been destroyed by fire, as he learns and believes."

Also, an affidavit of E. J. Carter, taken in Burke county, on the 28th of June, 1861, in which he swears that, "from the best of his recollection there was a judicial investigation in said county of Burke in reference to the *status* of citizenship of Joseph Nunez, and it is his impression he was pronounced not a free person of color, but a Portuguese, and that the records of said county being destroyed by fire, he is unable to refresh his memory by reference thereto."

Also, an affidavit of Ransome Lewis, taken in Burke county, on the 27th of June, 1861, in which he swears, "that to the best of his knowledge and recollection, Joseph Nunez, late of Burke county, was tried in the Superior Court of said county upon his *status*, and it

was then and there determined that he was a free white citizen and not a free negro. The records of the county having been burned, he has to rely upon memory, and he further says that he was there and heard part of the testimony given in upon said trial."

In addition to these affidavits, there was attached to the bill affidavits of complainant and all his counsel that, although reasonable diligence had been used by them to ascertain and prove the *status* of Joseph Nunez, yet they did not know until after the last trial of the trover case in Houston Superior Court, that there had been an adjudication in Burke Superior Court, that said Nunez was a free white citizen, and did not know, until after said trial, that the facts stated in the affidavits of Dailey, Carter and Lewis could be proved.

To the bill Walton set up a demurrer, on the ground that there was no equity in the bill which entitled complainant to the discovery and relief prayed for.

***7** The case was heard and decided upon the bill and exhibits thereto, and the demurrer, and after argument had, the presiding Judge sustained the demurrer and dismissed the bill, and that judgment is the error complained of here.

Attorneys and Law Firms

ELI WARREN, JOHN M. GILES, SAMUEL HALL and SAMUEL T. BAILEY, for plaintiff in error.

SAMUEL D. KILLEN and JAMES A. PRINGLE, *contra.*

Opinion

By the Court-LUMPKIN, C. J., delivering the opinion.

***8** I have carefully reviewed the voluminous documents connected with this case, and find nothing to raise a doubts as to the correctness of the conclusion to which the Court came in its decision, affirming the judgment of the Circuit Judge. No case has been produced, we presume none can be found, in which a judgment of a Supreme Court had been reversed in an Inferior Court upon the ground of accident and mistake. Establish such a precedent, and the circle of litigation is complete the end of it unattainable. Notwithstanding our Constitution has labored to bring about a contrary result, scores of cases which have been brought up to this Court, which have gone off on similar accidents, mistakes or misapprehensions of law, or fact, or both, might be renewed. This is probably a hard case on Mr. Bryan, but what is the ground of surprise upon which he seeks relief?-that his counsel mistook the term of the Supreme Court to which his bill of exceptions was returnable, and that they were led into the error by relying on a newspaper calendar instead of the published statute of the State for information, a source of information, as is well known to the profession, notoriously inaccurate. In *Rogers vs. Kingsbury*, 22 *Georgia Reports*, 60, a motion to dismiss an appeal was granted by the Superior Court and the appellant excepted. A bill of exceptions was made out, but, owing to a mistake of the clerk, the papers were not transmitted in proper time to this Court, and the judgment of confession was affirmed. A bill was filed praying for a new trial and an injunction. The Chancellor refused, and an appeal was again taken to this Court. Judge BENNING delivered the opinion. "A writ of error," he said, "would have furnished a corrective for the errors complained of in the bill, but the benefit or the writ of error was lost to the complainant by his own negligence. We must impute it to his own negligence that he did not get a *mandamus*, and, therefore, we must impute it to his negligence that he missed having his case heard in this Court. Now, a Court of equity will not relieve a party from a judgment which he might have prevented but for his own negligence." And this is only one of a numerous class of cases standing in the same category. In some, the party supposed he had obtained an acknowledgment of service, but it proved to be otherwise. In all, some misapprehension or mistake as to duty.

We commend the zeal of counsel in their clients' cases. But what are we called on to do in this record? To review our own decisions "upon grave questions of law" decided by this Court between these same parties in 1853, eleven years ago, in 16 *Georgia Reports*, 185; and again reaffirmed in 1856, 20 *Georgia Reports*, 480, to-wit: the escheat question, and the construction of the Acts of 1818 and 1819. Never were questions more elaborately argued or more generally considered, as the Reports will show. For one, I must be excused from such a Sisyphean labor. And as to the abstract justice of this case, I can truly say that, after examining the evidence carefully, and for the third time for the last ten years, there never was a fairer case for doubt on the main point involved, to-wit: the *status*

of Joseph Nunez. Was he a free white man, or a free person of color? Let in the evidence of file from Chatham county of the will of old man Nunez, and there is moral, if not legal, certainty upon the point, and notwithstanding the ridicule attempted to be cast upon this document, as that, although it purports to be dated in 1785, and as adjudicated by the "Honorable HENRY OSBORNE, Esquire, Chief Justice, the Honorable JOSEPH CLAY, SAMUEL ELBERT and RICHARD WYLLY, Esquires, Assistant Justices," yet counsel suggests that "it may be a fiction, a forgery of quite modern date." "The files whence it was taken are subject to constant change, alteration, addition, subtraction, unperceived by any custodian," and counsel "concluded, if anything that a grave Judge might do could possibly look ludicrous, the admission of this document, and the reason for it, would strike my eye in that point of view."

***9** I submit that there is one thing, at least, more ludicrous than the ruling of his Honor, and that is the foregoing supposition of learned counsel. Did Hugh Walton or his counsel introduce by stealth this document amongst the files of the Ordinary in Chatham county? I doubt whether there be two men in the State that know that HENRY OSBORNE was Chief Justice of Georgia in 1787, and that JOSEPH CLAY, SAMUEL ELBERT and RICHARD WYLLY were his associates. Sir Walter Scott has acquired no little celebrity as a writer of fiction, but the forger of the *imaginary* will of the imaginary Moses Nunez has thrown the author of the Waverly Novels far into the background. No more genuine document ever came from the pigeon-holes of a clerk's office than this paper, purporting to be the last will and testament of Moses Nunez, "gentleman," as he is therein styled, and the decision of the Court upon it, delivered by the Judges *seriatim*, smacked smartly, too, of Westminster Hall, although it may not quite equal in ability the decree of Sir Thomas Moore, Chancellor of England, as to the disputed ownership of a dog, claimed by his own lady and a market woman, (which, strange to tell, is the only monument of his judicial wisdom that has been preserved to us,) or the decision of Solomon as to the maternity of the child. Assuming, then, this document to be genuine, what inferences are to be made from its contents? What was Moses Nunez? Probably a Portuguese, as his name imports, from a left hand marriage with a mulatto by the name of Rose; that from this connection sprang James Nunez, Alexander Nunez, and Fannie Nunez, who afterwards intermarried with George Galphin; that James, one of the offspring, emigrated to a then distant part of the country, that he acquired some notoriety at dances for the grace and agility with which "he tripped the light fantastic toe;" that James Nunez intermarried with a very pretty white woman, that by reason of this intermixture with the white race, Joseph Nunez was lighter than his father, whose mother, in the words of one of the witnesses, was a woolly-headed mulatto. From this simple, and, I doubt not, truthful genealogy, you have the solution of this much mooted matter as to the origin and blood of this mongrel family. Some of the witnesses testified that it was constituted of white, Indians and negroes-others, that they were white, Indian, negro, Portuguese and Spanish; whereas, the Portuguese and mulatto, viz: white and negro, accounts for the whole difficulty. This early record, then, sheds a flood of light upon these various conjectures as to the blood of this family. Says the counsel for plaintiffs in error, in commenting on the pliancy with which Joseph Nunez yielded himself to the guardianship of McNowell and Urquhart, "We call Joseph Nunez idiotic from the conduct of his whole life. Although all the testimony shows that his father was a man of property, refinement and education, and left a considerable property to Joseph, yet he never learned to write his own name, and took up with negroes as his associates, instead of maintaining in society the position of his father and mother, marrying one of his own slaves for his wife and having a family by her. Could not such a dunce be made to believe it was necessary for him to have a guardian ?" I ask, why was he suffered thus to grow up in ignorance? Who was charged with his early training? I answer, James Nunez, his father-this man of property, refinement and education, but who seems, after all, to have prided himself much more upon the accomplishment of his feet than his head. No; the father had eaten sour grapes, and the children's teeth were on edge. The old Portuguese ancestor took "mulatto Rose" for his concubine, acknowledged her as such in his will, (feeling no degradation by the fact,) in which he styles himself "gentleman," and renders thanks to the mercy and goodness of God "in preserving to him a sound mind and memory by which he is enabled to give freedom to mulatto Rose and their mutual offspring, James, Robert and Alexander Nunez, and their daughter, Fannie Nunez-a full and

perfect freedom from all slavery and servitude, and, also, negroes and other property, as a reward and acknowledgment of the faithful conduct and behavior of the said mulatto Rose toward him and his children."

***10** Is it strange that persons should have mistaken the blood of James and Joseph Nunez? It is done daily in our midst. A mistress and her maid recently received Episcopal confirmation together, kneeling side by side at the same altar, boarding at the same hotel, where the latter was received and treated as a white woman by the inn-keeper and his female guests, when the latter turned out to be a mulatto, and was promptly hurled from her position of social equality. A man, at the beginning of this war, dropped into a village of one of our counties in Middle Georgia, and becoming rather famous for his pugilism, he was chosen an officer in one of the volunteer companies enlisting for the military service. His *status* was never questioned, until, accosted rather familiarly by his *fellow-servant*, who had known him long and intimately, an investigation was had, and Sambo was returned to his owner. Which of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family? But I forbear further remarks, and come to the *gravamen* of the bill for a new trial in the action of trover.

The substance of the ground is, that since the trial of the above action of trover, Mr. Bryan has been informed and believes that the records of Burke Superior Court will show that the *status* of Joseph Nunez as a free white citizen was established by the judgment of the Superior Court; that said records have been destroyed by fire, and that he hopes and expects to be able to supply them upon sufficient testimony, so as to procure and produce in evidence record proof of said important fact, and the plaintiff in error attaches to his bill as exhibits the depositions of James F. Dailey, E. J. Carter and Ramsome Lewis in support of this ground. The Court could do no better than adopt the criticism of Colonel Pringle, counsel for the defendant in error, upon this testimony. Dailey swears that he knew Joseph Nunez while in life, and to the best of his recollection and belief, he was tried in Burke county upon the *status* of his citizenship, and it was then and there determined by the Court that he was a free white citizen. The testimony, so far as he recollects, was that he was a Portuguese, and not a free negro. There are some circumstances that occurred *on that day* that make it more plain to my mind, perhaps, than it would otherwise have been, etc. He has to rely upon his recollection, as the records of the county of Burke are destroyed, etc. In this deposition there is nothing certain. The witness testified from the best of his recollection, and as far as he recollects, etc., and says there were some circumstances that occurred on that day that make it more plain, etc. But what these circumstances are that made it more plain, the witness has not deigned to tell. Indeed, the whole tenor of his affidavit shows the witness to have been in doubt, and yet struggling between his doubts and his duly on the one hand, so as to avoid the crime of false swearing, and his ardent desire to accommodate his friend and neighbor, Mr. Bryan, on the other. He seems to strain a point and state that he (himself) was tried on his *status* of citizenship, to the best of his (witness') recollection and belief. Carter swears, to the best of his recollection there was a *judicial investigation in reference* to the *status* of citizenship of Joseph Nunez, and it is his *impression* he was pronounced not a free person of color, but a Portuguese, etc.

***11** Here is more doubt and uncertainty than in the other affidavit. He only remembers, to the best of his recollection, a judicial investigation in reference to his *status*, etc., and then states his *impression* of the result. Lewis goes one step further in his affidavit; he says, to the best of his knowledge and recollection, (not belief,) that Nunez was tried in the Superior Court of Burke county upon his *status*, and it was then and there determined that he was a free white citizen, and not a free negro; the record being burnt, he had to rely upon memory; and he further saith, that he was there and heard a part of the testimony given in upon said trial. I say Lewis' deposition goes one step further, because he states that it was in the *Superior* Court that the trial was had; but, like the others, he speaks of but a single trial or investigation, as if only one trial was had, nor do either of the witnesses specify with proper precision the nature of the issue, nor the time at which it was tried, and the Court is left to conjecture whether it was the direct issue on the *status* of Joseph Nunez, as provided by statute of 1840, (see *Cobb N. D.*, 530,) or some other issue in which the *status* of said Nunez became a question. Nothing but a direct issue on said *status* could operate as an estoppel. The statute above alluded to requires "*two concurring verdicts, as in case of divorce.*" Which of these verdicts do the witnesses allude to? If the first,

the depositions do not go far enough. If the last, the fact would have become so notorious that the complainant would have little or no difficulty in establishing it by the positive testimony of some one who sat upon the trial, or by some other person who was present, either a resident lawyer or the Judge, or some other member of the bar. But there is abundant proof in the record here that no such state of facts ever existed. This statute in *Cobb's New Digest, page* 530, was passed in 1840, and the exhibit to complainant's bill shows that it was proven in the trover trial by the records of Burke Inferior Court that the intestate of defendant in error (Nunez) had applied both in 1841 and 1843 to have a guardian appointed, and *in the judgment* of said Court, which is a Court of record in both applications, Nunez is called " *a free person* of color:" See printed exhibit, page 26. Again, by page 12 of said exhibit, it will be seen that the complainant *had searched the records of Burke* Superior Court, for he has there introduced the interrogatories of the clerk, together with the copy interrogatories of one Joseph Bush, in order to impeach his (the said Bush's) testimony in the trover trial in Houston. In these copy interrogatories, Bush in speaking of James Nunez, the father of Joseph Nunez, says, "he was an American; his father was a Portuguese; *he passed as a white man*," etc. If there had been anything more in his favor, would he not have then discovered it? See complainant's exhibits, pages 12 and 13. In this we have the clue to the muddy and indistinct recollections of Dailey, Carter and Lewis, on which they have grounded their affidavits. It is altogether more than probable that this was the case of which they still had a dim recollection when they testified for complainant's benefit. Another consideration is worthy the attention of the Court. The affidavits were in the hands of complainant since the last of June or 1st of July, 1861. His bill is not filed until the April term, 1862, of Houston Superior Court. The argument on the demurrer was heard in Chambers in November, 1862, at which time counsel amended his bill. In this amended bill they state that complainant had been very diligent to ascertain or elicit testimony concerning the *status* of said Nunez, etc., but he nowhere alleges that he has taken any steps in Burke county to have the pretended burnt or destroyed record set up, etc. Why did he not do so? Is it not evident to the Court that if he had placed much confidence in these affidavits of Dailey, Carter and Lewis, that he would have done so? How is the pretended fact which he wished to set up by these affidavits to avail him unless he does establish the lost record, which he would have the Court believe once existed. To my mind, the conclusion is irresistible that it is all a mere pretext to revivify the defunct case-to once more get it reinstated on the docket of the Court below, and thus delay, for an indefinite period, the final result of the case, and this, too, when he has already had *four trials* at law and two hearings in this Court, besides the one on which his case was dismissed, on account of his negligence and that of his counsel. But this evidence, if it were unexceptionable in every other respect, is only cumulative; because it only seeks to make a defense stronger which they have already made. Indeed, it was on the point to which the testimony relates that the main issue was made below.

***12** I need not cite authorities to support the position that newly discovered evidence, which is cumulative, furnishes no ground for relief against a judgment at law. All evidence is cumulative which merely multiplies witnesses to any one or more of those facts before investigated, or only adds other circumstances of the same general character: 3 *Graham and W.*, 1048; 20 *Com. Rep.*, *Waller vs. Graves*, 303.

The evidence brought up here by the complainant does this only, and nothing more, for it fails to establish the fact that there was a legal judgment on the issue of Nunez *status*. There is, it is true, an occasional exception to this rule, as when by admitting cumulative testimony, what was before mysterious and doubtful, becomes plain and certain; so that, if received, the most obvious justice-and if rejected, the most palpable injustice-will be done. Courts do not hesitate to adopt the former alternative, or where a case with all the light that can be thrown upon it is still obscure, and subsequent developments entirely remove that obscurity and show that injustice has been done by the verdict, it is but common justice that the aggrieved party should have a new trial: 3 *Graham and Waterman*, 1064. But this case presents no such claims upon the consideration of this Court. Like a bill of review, a bill for a new trial should not be entertained for a discovery of evidence, unless the new evidence be either of a certain and permanent character, as a writing, or relevant to a point which was not put in issue for want of proof to sustain it. This is the general rule. We know of no case in which a new trial has been granted or sanctioned on the

isolated ground of a discovery of witnesses to a fact involved in the issue at law and tried. That this ought never to be done is proved not only by the unjust and mischievous consequences of a different practice, but by an unbroken series of decisions: 3 *Graham and Waterman*, 1540 and 1541. Again, these affidavits go to impeach the testimony in the former trial, because if they lead to anything at all, it is to prove that which, if obtained, would be in direct conflict with the records of Burke Inferior Court, and for this reason the Court will refuse a new trial: 10 *Georgia*, 511, *Berry vs. The State*. Nor is the evidence (that is, what these witnesses would themselves prove,) so material as that it would probably produce a different verdict if the new trial were granted: *Ibid.* As to the other grounds in complainant's bill, if, indeed, his counsel are serious in urging them, though I suppose they were put in as mere "make shifts," they come too late, because they knew of them during the pendency of the trover trial, and nowhere allege that they have recently come to the knowledge of them. If they were available at all, they were so pending the trial at law. For Courts of equity will not interpose for the relief of parties against verdicts and judgments at law if the defendant below neglect to bring his bill for discovery in aid of his defense at law: 1 *Graham and Waterman*, 571, and cases there cited; *William vs. Lee*, 3 *Ark.*, 223.

***13** We will merely add that it is strange that no one can be found to testify more satisfactorily about this issue, alleged to have been tried in Burke Superior Court. My brother JENKINS, though by no means an old man, skill his professional recollection reaches back, I apprehend, to 1840, and perhaps beyond that; he is intimately acquainted with the population of Burke county, and for upwards of twenty years has borne an important part in its judicial proceedings: does he recollect of any such question ever having been tried and decided by the Courts of that county? So of ex-Governor Crawford, and many other attorneys, some of whom are yet alive, and others were living until within a late period. Would the testimony of these three witnesses be sufficient to supply the burnt records? We apprehend not, and that test is decisive of the question.

Upon a calm review of the whole case, then, we feel constrained to affirm the judgment of the Court below.

Let the judgment be affirmed.

Parallel Citations

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