

## LASTER ET AL. vs. TOLIVER &amp; WIFE.

A suit may be well brought in the individual right of the payee on a note given to the plaintiff "administrator" &c.

Where a suit is brought by a feme sole, and she marries during its pendency, her husband may be made a co-plaintiff on motion: and the defendant cannot, on the trial prove that they were never married, but must interpose a plea in abatement.

*Appeal from the Circuit Court of Franklin County.*

This suit was originally commenced before a justice of the peace, from whose decision an appeal was taken to the circuit court: where judgment was rendered in favor of the plaintiff. The case was brought into this court by appeal, and decided by the Hon. T. JOHNSON, C. J. and the Hon. D. WALKER, J.

BATSON and TRAPNALL & TRAPNALL, for the appellants, contended that the defendant below was entitled to show by legal testimony any disqualification of the plaintiffs to sue, and that he was not liable to them jointly; and the testimony disproving the marriage should have been suffered to go to the jury. *3 Brevard* 11.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was commenced before a justice of the peace upon

the following instrument: "One day after date I promise to pay Ann Puckett, administratrix of Thomas Puckett, deceased, one hundred dollars," &c. The defendant is summoned to answer the complaint of Ann Puckett. The action was commenced in the name of the plaintiff in her individual right: See the case of *Hemphill vs. Hamilton, ad.*: decided at the present term of this court, where the question was fully discussed and decided. Upon her marriage therefore pending the action, her husband was properly made a co-plaintiff upon his motion. (*Dig.* 98, *sec.* 3.) Having been made co-plaintiff and an issue formed, it was too late in the progress of the trial before the jury to object to the parties plaintiff. Such objection was properly matter in abatement and should have been interposed at the time and under the like rules prescribed for presenting matters in abatement. (*Watson vs. Lynn*, 5 *Peters R.* 251.) The defendant interposed no plea in abatement, but on the trial offered to disprove the marriage of the plaintiffs. The circuit court correctly refused to permit such evidence to go to the jury.

The proceedings appear in all respects regular. Let the judgment of the Franklin circuit court be affirmed.

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