In the Supreme Court.
January Term 1878.

Aug. Shepherd & others
against
Gideon Perry & others

Brief of A.W. Tourgee.

The question presented by this appeal is —
— Has a Justice of the Peace any jurisdiction in Forcible entry and detainer and if so what are its limits? —

The contention of the Plaintiffs is, that the jurisdiction and procedure in Forcible Entry and Detainer, is substantially, what it was before the constitution of 1868.

The claim of the defendants is, that a Justice of the Peace has no jurisdiction of a forcible entry and detainer, in any case where the defendant chooses to set up under oath, that he has title to the premises which he is charged to have entered and detained forcibly, except to bind the parties over to the Superior Court.

Argument.

The Constitution of 1868, did not in any respect, affect or modify the jurisdiction of a Justice of the Peace in Forcible Entry and Detainer.

It is admitted, that the Court has, several times, decided that "The distribution of judicial powers, by Article IV, of the Constitution is a virtual repeal, of all laws giving jurisdiction to a Justice of the Peace in cases of forcible entry and detainer, except for the purpose of binding trespassers over to answer a criminal charge."
State v. Yarborough — 70 - 250
Perry v. Tupper — 70 — 538 -

Also, that the Court have given as a reason for so deciding "That a Justice of the Peace has no jurisdiction where the title to land comes in question" — A.T.& O.R.R.Co. v. Sharpe 70 - 509.

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We submit that these decisions were erroneous in this respect for the following reasons:-

1 — The Constitution of 1868, continued in force, all laws not repugnant ~~inconsist~~ to itself — Art. IV. Sec. 24 —

Under this provision it has been held that summary judgment may be taken on an undertaking in Claim and Delivery, because, Chap. 98 of the Rev. Code, provided for summary judgment against the bond in Replevin — although the action of Replevin was abolished. Boylston Ins Co. v Davis — 74-78

Same principle in — Clerk's Office v Huffsteller — 67-449 —

II — The Jurisdiction conferred upon the Courts of Justices of the Peace and the Superior Court, was not repugnant to the jurisdiction formerly exercised by Justices in Forcible Entry and Detainer.

(1) — Civil and criminal actions are defined by Sec. 1. of Art. IV. of the Constitution. ~~The Justices of the~~

(2) Section 33 of Article IV, gave to Justices of the Peace "exclusive jurisdiction", of certain "civil actions" and likewise of certain "criminal actions."

(3) Section 15. Art. IV. gave to the Superior Courts "Exclusive jurisdiction" of all civil actions" not given to some other court, — and of all "criminal actions" in which punishment may exceed &c.

In regard to all judicial matters not embraced by the terms "Civil Action" and "Criminal Action" the constitution is silent as to the jurisdiction of the courts.

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(4) - The terms "Civil action" and "Criminal action" do not include all judicial proceedings. There are certain proceedings essential to the peace of society and requiring judicial action which are not "actions for the enforcement or protection of private rights or the redress of private wrongs"; — nor yet, "Actions prosecuted by the people of the State against a party charged with a public offence, for the punishment of the same;" which is the constitutional definition of "civil" and "criminal" actions.

What is a "civil action" has been defined by the Court in Tate v. Powe - 64 - 644
Woolley v. Gilliam 64 - 649.

A noticeable exception is Mandamus which the Court say is neither a civil action nor a Special Proceeding, but merely a judicial proceeding governed, until the Act of 1871-2 entirely by laws existing previous to the Constitution of 1868 - and not repugnant to it.

Howerton v. Tate - 66 - 231 -

So too, a proceeding upon a peace warrant is not a civil or criminal action under the Constitution, but is made a criminal action, solely by by the Code of Procedure § 5 -

State v. Locust, - 63 - 574.

Yet it will not be questioned that the Justice of the Peace had jurisdiction of this matter, under former laws, before the adoption of Ch. 178, laws of 1868-9 which was ratified April 12th 1869.

So too, the Examination in Bastardy, which does not fall under either of the classes of jurisdiction specifically given to J. P. in the Const. but of

which they have constantly exercised jurisdiction, by virtue of Ch. 12 of the Revised Code.
So too, of an Inquest to ascertain the cause of death, which is a proceeding not very different in its nature from the inquiry of Forcible Entry and detainer, is judicial in its character but is not an "action" either civil or criminal and so was not embraced in the "exclusive" jurisdiction conferred either on the "Superior Court" or "Justices of the Peace"; and has continued to be regulated by the former statute.

Of a like character are many judicial acts necessary to a determination of private rights which are given by statute to some special tribunal without the question being raised as to the justices' jurisdiction such as, -(a) The assignment of Homestead on petition, (b) The valuation of lands taken for public use, (c) - The laying off of a private cartway (d) The establishment of a line fence (e) The Statute regulating drainage and many others of similar ~~import~~ character. (f) as also an inquisition of lunacy.

The Proceeding in Forcible entry and Detainer is precisely of this character. It is neither a "civil" nor a "criminal" action. It is not an "action" at all. It is simply an inquest designed only to ascertain the status quo ante bellum and restore that while the parties are remitted to the courts where they are allowed to fight it out under the rules of decent and Christian belligerency which prevail therein. It determines no right - It is like a provisional remedy - except that there need be no action commenced - It is merely an ascertainment of possession and is designed to discourage the application of the doctrine of the right of conquest to private property. It is to prevent violence and robbery of lands and bloodshed and barbarism by taking away the motive to commit violence -

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The Act of 1874-5 gives no license to enter a plea of title but uses the word plea, inadvisedly as it is used in the Act Suspending the Code and as the word *Venire* is used in the Act of 1868/9 - ch. 257.

Oates v. Gray 66-442

Graham v. Charlotte [illegible] N.C.

64-631.

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Brief in
Perry v Shepherd