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SUPREME COURT DECISIONS.

Reported for the Observer by Walton M. Busbee, of the Raleigh Bar.

State vs. Townsend—Caldwell.

RUFFIN, J.:

The defendant is charged with a libel on one P. C. Henkel, the prosecutor. The indictment contains but one count, in which there are two specifications of libelous matter.

After making proof of publication the solicitor proposed to read the card to the jury, but when he came to the part embraced in the second specification the defendant objected to the reading on the ground that there was a variance between the matter contained in the card, and as set forth in the indictment, the variance consisting in the omission, from the latter of the word "all" which in the card preceeded the words "*this muss.*" The objection was overruled and defendant excepted.

The court says that sterner rules are applied to written or printed defamation, than to verbal slander, because of the deliberation with which it is perpetrated and the more permanent and extended consequences attending it. *Libel* belongs to that class of cases in which it is held to be absolutely necessary to set out in the indictment the alleged libelous matter *according to its tenor.* The reason given is, that the court may be able from an exact knowledge of the contents of the publication, as seen in the record, to form its judgment thereon, and that the accused may, if he please, demur, and thus have the opinion of the court, as a question of law, upon the sufficiency of the matter to constitute libel, and thereupon avoid subjecting it as a mixed question to the jury.

While the misuse or omission of a letter, which works no such change in a word as to make of it a different one, will not be treated as a fatal variance, still *tenor* imports *identity,* and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be so regarded.

Judgment reversed and a *venire de novo* awarded.

Bailey vs. Rutjes, et als—Burke.

RUFFIN, J.:

This is an action to enforce a mechanic's lien upon the property of the "Glen Alpine Springs Company," composed of the defendants Walton & Pearson, for lumber furnished and used in repairing and erecting buildings on its premises.

The defendants insisted that the lumber was not furnished to their company but to their co-defendant, Rutjes, who had leased the premises for five years and who was in possession at the time the lumber was ordered and delivered.

Special instructions were asked for the defendant which the court declined to give, and instructed the jury that "to make the defendants liable there should be a contract, either expresed or implied, between the plaintiff and themselves. That if the plaintiff reasonably believed when he was furnishing the lumber that it was upon the credit of the defendants, and was induced so to believe by their acts, they were liable; and that in this connection they might consider all the conduct of defendants as testified to. That if they believe that plaintiff furnished the lumber solely on the credit of Rutjes, or that he agreed to look only to him for pay, then the defendants would not be liable.

Defendants Walton and Pearson excepted; after verdict and judgment they appealed.

The court says that the action is one for goods sold and delivered, and as such, in order to maintain it, the plaintiff must show a contract, expressed or implied. However reasonably a plaintiff may expect a defendant to pay him for his goods, of itself, it would not be sufficient to establish the existence of a contract, on their part to do so; it must be shown that the defendant in some way assents to be charged, either in terms or by conduct, from which the law will infer the assent. When parties have leased premises, and the lessee has undertaken to have improvements made, they are absolutely without the power to give or withhold their sanction to the delivery and use of the lumber used in the improvements, and ought not to be required to pay for it, unless they knew, or had reason to believe, that the plaintiff was looking to them for pay, and allowed him to deliver it to them under that expectation, and without objection on their part. The error consists in the failure of His Honor to call the attention of the jury to this view of the case.

If not originally liable, a defendant cannot be made so because of his having resumed possession of the premises upon the surrender of his tenant; he may derive some advantages from the materials furnished, but that cannot be avoided, as it is impossible for them to reject or restore to the plaintiff that benefit without a surrender of their own property—and this the law does not require them to make.

Judgment reversed.

Venire de novo.

Sigmon vs. Hawn—Burke.

RUFFIN, J.

The plaintiff claims to be the owner of the land in controversy. At the time of the execution of her husband's will the plaintiff executed an instrument, which was incorporated in the will, by which she professed to relinquish her right to her own land, as to which she had never been privily consulted, nor has the same been registered. One of the provisions in the will is that, if not satisfied with what is given her therein, she may take dower in all the lands, and, in that event, she is to have a certain portion of the personalty. After the lapse of eighteen months from the probate of the will, the plaintiff dissented from the same and filed her petition for dower. The Probate Judge refused to recognize her right to dower, under the common law, but adjudged her to be entitled to dower under the will, and the same was done. The executors then sold the land in dispute and defendant became the purchaser; in making the sale they professed also to be the agents of the plaintiff. The dower assigned is no greater than it would have been had the husband died wholly intestate. A jury trial being waived, His Honor ruled that the plaintiff was never put to her election whether she would take under the will or not, and the assignment of dower was no act of election by which she was barred from setting up her claim to her own land. Judgment that she recover; defendant appealed.

The court say: That if in the proceeding for dower the land was treated by the parties and recognized by the court as belonging to the estate of the plaintiff's husband, and the title thereof as being in his heirs, they would hold that she is estopped, by the judgment then rendered, from now setting up title to herself therein. In Gay vs. Stancell, 76 N. C., 369, it was held that inasmuch as the right to dower depended upon the title, the judgment was conclusive between the parties and those claiming under them, and no one would be permitted to again draw in question the title of any portion of the land embraced in the proceedings.

The case is remanded, in order that it may be ascertained whether the land sued for was really embraced in the plaintiff's petition for dower, and the title thereto recognized and treated as being in the heirs of her husband.

Judgment accordingly.

Russell vs. Collins—Buncombe.

ASHE, J.:

This action commenced before a Justice and was carried by appeal to the Superior court. At the spring term, 1882, the case was called and the suggestion of bankruptcy made. His honor ruled that the defendant had had a reasonable time in which to obtain his discharge in bankruptcy and ordered him to trial. There was a verdict for plaintiff and defendant appealed.

The only question is, that whether under section 21 of the Bankrupt Act there was unreasonable delay on the part of the defendant in endeavoring to obtain his discharge.

Held, In Calvert vs. Peebles, 80 N. C., 337, the lapse of five years after filing the petition, before obtaining his discharge, was held to be an unreasonable delay, but in that case there was no explanation given for the delay.

Where only eleven months elapsed from the time of the defendants amending his schedule, to the time in which his case is called in the Superior court, and there is nothing in the record to show that it is his fault that no action had been taken in the two intervening terms of the district court and that there were no laches on his part, it is error to rule him to trial. *Ventre de novo.*

Henry vs. Cannon—Macon.

ASHE, J.:

This was a motion to amend an answer. The motion had been refused at a former term and his Honor again would not allow the amendment. Defendant appealed.

Held, The C. C. P. invests the court with ample powers in all questions of amendments and continuances. It is within the discretion of the presiding Judge and not reviewable in this court. (The court hopes it may now be considered a "settled question.")—Johnson vs. Rowland, 80 N. C., 1; Austin vs. Clark, 70 N. C., 459; Hinton vs. Deans, 75 N. C., 18; State vs. Lamon, 3 Hawks, 175; Cannon vs. Beeman, 3 Dev., 363; Bright vs. Sugg, 4 Dev., 492; Phillipps vs. Hegden, Busb. 380; Henderson vs. Graham, 84 N. C., 496, and other cases cited. No error.

Miller, et al., vs. Justice—Buncombe.

ASHE, J.:

The parties in this case entered into a co-partnership in writing to build a saw and grist mill on land belonging equally to themselves.

They quarrelled amongst each other and finally came to blows. Miller bought the interest of his co-partner Welch and thereby became owner of one-half of the stock of the company, Justice had a notice served upon him by his co-partners of their withdrawal from the partnership, and of their intention to institute suit against him for a settlement and winding up of the partnership. At the spring term, 1880, by consent the court decreed a reference, the referees to take and state an account of the partnership dealings, sell the property at the court house door and report the same at the next term of court. A day was appointed, but the account was never taken. His Honor, at the special term, 1881, upon application of plaintiffs on their affidavit and the evidence of witnesses as to the constant deterioration in value of the property, in consequence of its roofless and exposed condition, ordered a sale of the same, and that the funds arising therefrom be held subject to said account. Defendant excepted.

Held, In Worth vs. Grey Jones, Eq. 6, p 4, the court says the orders and decrees of a court of equity are not necessarily absolute, but may be moulded and shaped during the pendency of the suit to meet the exigencies of each particular case. Every order made in the progress of a cause may be rescinded or modified upon a proper case made out. There is no error. Affirmed.

Eliason vs. Coleman—Iredell.

SMITH, C. J.:

The plaintiff brings this action to recover so much of the salary of the chief engineer of the Western North Carolina Railroad company, as was received by the defendant for services while in possession of the office and in discharge of its duties for the period immediately preceding his retirement therefrom in June, 1872.

The Judge below intimated an opinion that the position of chief engineer was not such an office as to give the plaintiff a tenure and vested right thereto and he could not maintain the action. The plaintiff suffered a nonsuit and appealed.

The court says, that an office, such as to come within the legitimate scope of a *quo warranto* may be defined as a public position to which a portion of the sovereignty, either legislative, executive or judicial, attaches for the the time being, and which is exercised for the benefit of the public. High Ex. Leg. Rem. sec. 620.

The company is essentially a private corporation and the right to conduct and carry on its business is not such a delegation of authority as to make one of its agents a public officer. The true test of a public office is that it is parcel of the administration of government—civil or military—or is itself created directly by the law-making power. It is only such as can avail themselves of the remedy by action under the provisions of the code to recover possession of the office and maintain suit for the recovery of emoluments which the usurping intruder has wrongfully received.

Judgment affirmed. No error.

The Bank of Statesville vs. Simonton et als—Iredell.

SMITH C. J.

The Bank of Statesville incorporated in 1870, commenced operations and a banking business under the management of R. F. Simonton, as cashier, and so continued until his death in 1876 when it and his estate were found to be insolvent. Simonton deposited in the bank as part of its capital stock, ten thousand dollars in bonds issued by the county of McDowell, which he afterwards withdrew and used in the purchase of certain real estate then known as "The Concord Female College," and since as the Simonton Female College, title to which he caused to be made to his wife.

This action is prosecuted by the receiver in favor of the creditors of the bank and against the executrix to recover said lands with the value of the funds used in the purchase.

The defenses set up are, that there never was any legal organization under the charter; that the corporate name was assumed; that the liabilities incurred were personal; that the gift to defendant is valid under act of 1840 and she relies upon the Statute of Limitations.

In Attorney-General vs. Simonton the court says, "that those who held themselves out, are estopped to deny the *existence* of the corporation, as to those who dealt with it, it did exist."

If the existence of the bank is to be assumed for the benefit of those to whom it has become indebted for moneys deposited or otherwise, it is plain the tor's debt must treated like that due by due by any other debtor. The trust funds invested in the college property may followed, and it, in the defendant's be hands be charged with the payment of the value of the fund thus appropriated.

It not being the property of the testator, the title can not be sustained under act of 1840.

The Statute of Limitations has no application to such a case.

No error. Judgment affirmed.

Sumner, Administrator, vs. Candler.—Buncombe.

RUFFIN J.

The plaintiff alleged that his intestate, who was sheriff, placed in the hands of the defendant certain claims against the treasurer of the State, amounting to one thousand dollars which he had collected and failed to pay over.

The sole defense relied on, was that of accord and satisfaction. A receipt was offered in evidence proven to be in the hand writing of the deceased. The defendant himself being introduced was asked by his counsel, when the receipt above referred to was signed by the intestate, upon objection, the court allowed the question. He then testified that the receipt was signed by the intestate at a mill about two miles from the defendant's house.

The court says, this was error, for it is difficult to conceive of testimony that would more certainly involve a transaction with a deceased person than this.

The question as to the competency or incompetency of evidence must be determined by the substance of the witness's answer and not by the form of the inquiry put to him.

Error. *Venire de novo.*