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SUPREME COURT DECISIONS.

Fall Term, 1882.

Reported by Walton M. Busbee.

State vs. Walker—Transylvania.

ASHE, J.:

This was an indictment for removing a crop off the leased premises and disposing of it without the landlord's consent, he having a lien upon it and without notice to him. After a verdict of guilty was returned, defendant moved in arrest of judgment on the grounds: 1. That inasmuch as A was not the owner of the land, the bill improperly charged that the lien was not on him, but that it should have charged that the same was vested in G, the owner in fee. 2. That the indictment did not sufficiently charge a lease for a year between A and the defendant, for the omission of the word *year* after the word one was a fatal defect. 3. That the bill was defective in not alleging that the defendant failed to give five days notice of his intended removal of the crop. Motion overruled.

The court says: A judgment is never arrested without some substantial defect, appearing upon the face of the indictment. There is nothing in the bill to show that anyone by the name of G was the owner in fee or had any interest in the land. It is stated with sufficient certainty that A was the landlord and that the lien given by the statute was in him.

II. The omission of the word *year* does not vitiate the indictment; it is one of the informalities cured by the act of 1811.

III. Where it is charged that the defendant removed the crop "without first having given the said A or any agent of his, notice of such intended removal," it is sufficient. The averment negatives the five days notice required, as conclusively as if it had followed the very words of the statute. Affirmed.

State vs Rinehart, 75 N C 58; State vs Lune, 4 Ind 113.

State vs Woodfin—Buncombe.

ASHE, J.:

Defendant was indicted, tried and convicted, for carrying a pistol in violation of the act of 1879 Ch 127. Counsel requested his Honor to charge the jury that "if they believed the defendant carried the pistol only for the purpose of hunting with it and that he carried it openly and not concealed on his person for the purpose of hunting merely, he could not be convicted. Instructions were declined and the charge given "that it matters not what defendant carried the pistol for, whether to hunt or for other purposes, yet if he carried it off his own premises, concealed about his person, he is guilty." The facts of the case were not set forth in the statement sent up.

Held. There was no error in the refusal to give the instructions asked. While his Honor laid down the law somewhat too broadly in his charge, yet so far as it applied to the supposed facts of the case it was not erroneous. Affirmed.

McKee vs Wilson—Gaston.

SMITH, C. J.:

The complaint consists of a series of counts separately stated and imputes to the defendant the utterance of slanderous words, both written and spoken, concerning the plaintiff. He was sheriff and tax collector of the county of Gaston from 31st July to September 2, 1872, and is charged with dishonesty and fraud in his settlement with the proper county officer of the taxes collected, withholding a part thereof and corruptly appropriating the same to his own use. The defendant put in his answer to the causes of action containing charges of libelous publication and demurred to the other causes of action imputing verbal slander, on the grounds: 1. That the words do not impute an infamous crime. 2. That it is not averred that the words were spoken of the plaintiff while in the exercise of his office. 3. The offense charged is barred by the staute of limitations and no prosecution will lie therefor. 4. There is no allegation of special damages.

Demurrer overruled, defendant appeals.

The court says: Words spoken of a person in respect to his office, or employment are actionable only by reason thereof, must be spoken while he is holding such office or pursuing such employment, and not afterwards.

To constitute oral slander the words must impute to the plaintiff the commission of an infamous offense. The act of 1871-'2 makes the failure to account for and pay over the public dues a misdemeanor, and such a charge is clearly not actionable.

There being no averment of special damages, the case is not relieved from the general rule applicable to slanders, actionable per se.

Error. Judgment reversed.

Anderson, Starr & Co, vs Hall, Executor—Buncombe.

RUFFIN, J.:

In this case the summons issued on Nov 29, 1875 and was returned, endorsed as follows: "Service accepted this 3rd December, 1875. C A Hall, per M E Carter, atty." Complaint was filed at Spring term, 1876 and also what purported to be an answer. Case stood upon docket at Spring term, 1882 and a rule was obtained upon the plaintiff to show cause why the acceptance of service in defendants name should not be stricken out as unauthorized, and the answer made for her be withdrawn from the files of the court; and also moved to quash the summons and dismiss the action. In support of the rule defendants affidavit was offered in which she sets forth that while she had retained Mr Carter as her attorney in the general management of the estate of her testator. She had never given him authority to accept service of process in her name, or to enter an appearance for her without the actual service of process. Mr Carter had ceased to be her attorney in 1877 by reason of other engagements, &c. The Judge ordered the entry of "service accepted" to be erased, and granted leave to withdraw the answer filed and the appearance entered for her. Plaintiff excepted and appealed.

The court says: An attorney cannot, under his general authority accept service for his client of the original process by which the action is begun. The principles upon which the authorities rest is that is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client, of the original process by which the jurisdiction of the court over the person of the client is first established, for until that be done the relation of client and attorney cannot begin, nor can it be created by the act of the attorney alone.

No error. Affirmed. 1 Waits Actions, 439; Bagley vs Barkland, 1 Exch, W H and G; Menterson vs LeClaire, 4 Minn. 108; Weeks on Attor, Sec 197, cited.

State vs Gilbert—Buncombe.

RUFFIN, J.:

Defendant was charged with carrying a concealed weapon, contrary to the statute, ch 127, acts 1879. The special verdict returned after finding the defendant was on his premises and that he did not belong to any of the excepted classes of officers; they say, that within two years next before finding the indictment against him the defendant, while in the streets of Asheville, had upon his person a pistol, which was in his overcoat pocket and concealed from view; that he had no criminal intent in carrying the pistol concealed in his pocket, but brought the same as a sample, he being a merchant living near Asheville, and was carrying it from the store where purchased to another some three hundred yards distant, for the purpose of having it packed with other goods bought at that place; and therefore they submitted the question of his guilt or innocence to the court. His Honor was of opinion against defendant, and gave judgment accordingly.

The court says: It was paying too great a regard to the letter of the law, and too little to its spirit to hold the defendant guilty after such a verdict. The offense charged forms no exception to the general rule, that to constitute a crime there must be a criminal intent.

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose so to carry it.

Where the jury expressly finds that there was no criminal intention connected with the act, that must put an end to the prosecution.

Upon the terms of the special verdict the defendant was entitled to be discharged, and it is so ordered.

Error.

State vs Randall et als—Buncombe.

SMITH, C. J.:

There is no mention in the record of the arraignment of the defendants nor of their putting in any pleas to the charge preferred in the indictment. As the defendants asks it, the court directs the issuing of a certiorari, to the end that such corrections may be made as are necessary to make the record truthful.

Gudger vs W N C Railroad Company—Madison.

SMITH, C. J.:

This action is one of tort, and its object the recovery of damages sustained by the plaintiff resulting from the negligence of defendant company.

The record states that at fall term, 1882, Messrs Buford, Logan and Clyde are made parties defendant, and filed their answer, but at whose instance, unless their own, does not appear. The three added defendants, citizens of other States than that of the plaintiff, filed their petition for the removal of the cause to the Circuit Court of the United States under the act of Congress. The progress of the cause is arrested by law at the point when the removal was demanded.

The court says: If the individual non-resident defendants come into court and assume a common responsibility with the other defendant, while no recovery is asked against them, it cannot be said that there has been constituted in the words of the statute, "a controversy which is wholly between citizens of different States, and which can be fully determined as between them." To enable a party to a removal there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those on the other. The application for removal was properly denied.

Barney vs Latham, 103 U S, 205; Blake vs McKine, Ib, 336; Hyde vs Ruble, 104 U S, 407.

Horah and wife vs Knox et als—Mecklenburg.

SMITH, C. J.:

The script was executed in March, 1877, the formal execution of the instrument, proven by the subscribing witness, was not controverted, but its legal efficacy was impeached on the grounds of a want of mental capacity to make it, and the exercise of undue influence by the sole beneficiary under it.

The court in disposing of the numerous exceptions taken by the caveators, says: When there is an exception to the evidence of a witness who was permitted to testify from his own knowledge and observation and express the opinion that the deceased did not possess sufficient capacity to make any effectual disposition of her property, including as well a disposition by will as by gift *inter vivos*, thus affording the jury the results of the witness' observation and his own general estimate of the mental infirmities of deceased without invading the province of the jury in determining the issue itself, the exception will not be sustained.

The second exception is untenable. The right is expressly given by statute to attorneys "to argue to the jury the whole case as well by law as by fact (Rev. code sec. 57, ch. 31) and more especially under the enlarged privilege conferred by acts 1874-'5 ch. 114, as interpreted in State vs. Miller, 75 N. C. 73. Ex's 3, 4, 5 relate to comments of propounder's counsel upon other matters to wit: the unreliableness of expert testimony &c. "A party cannot be allowed to speculate upon his chances for a verdict and then complain because counsel were not arrested in their comments upon the case." Morgan vs. Smith 77 87; Harrison vs. Chappie, 84-258; Knight vs. Houghtalling, 85-17.

VI. Formal execution and a knowledge of the contents of the writing being shown, the caveators impeaching its validity must affirmatively show the want of capacity or the exercise of a fraudulent influence which is defined in Wright 74 Jones, 412. No error. Affirmed.

Dawkins vs. Patterson et. al.—Richmond.

SMITH, C. J.:

On October 30, 1874, plaintiff executed a note to defendant, secured by mortgage on a certain tract of land, deed condition of it to be void if note was paid at maturity according to its tenor. Default in the payment was made, and after due advertisement according to the terms of the mortgage the land was sold to one Blue for the amount of the secured debt. Blue acted as agent of the defendants, and subsequently for the same consideration re conveyed to them. The sale was assented to by the plaintiff under an agreement between defendants and himself that he should have twelve months thereafter in which to pay the debt and redeem the bond, and on his failure to do so the sale should stand and estate of defendant's become and be absolute. The land was not redeemed and under a summary proceeding before a justice the plaintiff was evicted. In the court judgment was rendered dismissing the action at cost of plaintiff, who appealed.

The facts of this case does not bring it within the scope of the rule, that a trustee or morgagee acting under the power vested in him by the deed cannot become a purchaser at his own sale neither directly nor through an intervening agency. There is no suggestion that the sale was not open and fair, or that any injury resulted to the plaintiff from the manner in which it was conducted. The only consent required was that the defendants might bid and buy, if necessary, to save their debt. This was procured by an agreement for a right of redemption to be exercised within a year thereafter. The judgment below is affirmed.

Brothers vs. Brothers, 7 Jr., Eq.; Patton vs. Thompson, 2, Jr., Eq., 285; Frenebarger vs. Lewis, 79, N. C., 426; McLeod vs. Bullard, 84, N. C., 515, affirmed on the rehearing, 87 N. C., 210; Taylor vs. Hiddle, 83 244; Blount vs. Carroway, 67, N. C., 396.

Fred. H. Stith, vs. McKee—Davidson.

RUFFIN, J.:

This is an action for the recovery of land begun in 1881. Both parties claim under Nancy Trotter—the plaintiffs under a conveyance from her heirs made since her death and the defendant under mesne conveyances from Phillip Hendrick to whom she conveyed it in 1826. The deed to Hardwick after acknowledging receipt of the sum of $200 as its consideration, contains the following limitation: "The aforesaid land with all its waters, woods, &c., to have and to hold, and I, the said Nancy Trotter, do for myself and my heirs warrant and forever defend the right and title of the above bounded land against all and every other person or claim on the said Philip Hendrick, his heirs and assigns forever, etc." Plaintiffs insist that the effect of the deed was to pass only a life estate to Hendricks, and as he is now dead, they are entitled to possession of the land. Defendant insists that it passed a fee simple, but that if it did not it was so intended and so understood by the parties, and if there is any failure in it, it is owing to a mistake in the draughtsman. The jury found that it was Trotter's intention to convey and Hendrick's intention to purchase an estate in fee by the deed. Upon the verdict judgment was rendered for defendant; plaintiff appealed.

The finding of the jury makes it unnecessary to consider the question as to the operation of the deed. Under it defendants are entitled to the judgment of the court.

When testimony is offered for the purpose of contradicting a deed by showing that the real consideration paid was less than the one vested upon its face, then, in the absence of any suggestion of fraud or imposition the testimony would be clearly incompetent.—Jones vs Saner, 1 D & B, 452; Powell vs Manufacturing Co, 3 Mason, 347; Shelly vs Wright, Willis' Rep, 9; Lewis vs Cox, 4 Iredell Eq, 198, cited. No error. Judgment affirmed.

Mullen, Executor, vs. Sarah Helderman—Lincoln.

SMITH, C. J.:

This was an issue of *devisavit vel non*, tried at Fall term, 1881. Upon the propounding the script purporting to be the will of Valentine Helderman by Mullen, the executor, Sarah Helderman the associate executrix and the surviving wife of deceased renounced her said office and caused her dissent to the alleged will to be entered of record. Thereupon the heirs at law and next of kin appeared and filed their caveat thereto: the probate was resisted upon the ground of undue influence exerted over the mind and volition of deceased by his wife in procuring the making of the instrument in the sole interest of herself and her own children, to the exclusion of the children by a former marriage, and in the impairment of that freedom essential to the validity of a dispositive testamentary act. Verdict for caveators; appeal.

The force and effects of the acts, evidence of which tended to show the personal relations and intercourse between deceased and his wife and the wife's harsh treatment of the children by the former marriage, belong exclusively to the jury and an exception to the admission of such evidence will not be sustained. Evidence was not inadmissable in answer to the reason given for the exclusion of one class of the testator's children, to show that no foundation for such exclusion existed, and that the natural parental sentiment had been perverted. But if it were irrelevant unless its admission tended to mislead or may have mislead the jury, this would not constitute an error fatal to the verdict.

The proof of the improper liberties and indecent behavior of Ballard at the bedside of the wife and the anguish it seemed to have wrung from an enfeebled and helpless old man, was forcible and direct upon the over-mastered and unresisting temper of the deceased, and the objection to it is wholly untenable.

The introduction of the declaration of the wife after the making of the will and on the day prior to death of deceased may be defended upon the ground of showing a continued exercise of influence after the execution of the instrument and before its consummation by death. No error. Affirmed.

Loves, Executors, vs. Harbin, et als—Haywood.

RUFFIN, J.:

Action for the recovery of land. The only issue submitted was: "Did plaintiff's testator execute the deed alleged in defendant's answer." The original deed had been lost, a certified copy was offered in evidence and the case closed for defendants. Plaintiffs objected. 1st. Because it appeared from the paper itself that it was no deed as there was no consideration expressed in it. 2. probate was not such as to justify the registration of the original deed as there was no subscribing witness to the instrument and it was admitted to probate upon proof merely of the handwriting of the maker. 3. Because the probate, even if sufficient to authorize the original to be registered was not sufficient to authorize the introduction of the copy as evidence, but that it was incumbent on defendants, since the execution of the deed was denied, to prove it as at common law, notwithstanding it had been registered. Objection overruled. After verdict and judgment for defendants plaintiffs appealed.

Held. All deeds are put upon the footing of feoffments, which take effect by livery of seizure and need no consideration as between the parties to support them. (The seal itself imported a consideration.) A deed to which there is no subscribing witness may be admitted to probate and registration by proof of the maker's handwriting only and this without reference to the fact whether he be living or dead.

The statute nowhere makes it the duty of the officer who admits a deed to probate, to make and record a formal adjudication of its probate. Nor is there any provision which requires the Register to spread upon his books the certificate of such adjudication. "It would shake too many titles to allow such an objection to prevail at this day."

A main purpose intended to be accomplished by registration is the perpetuation of the instrument and of the memorial of its probate and order of registration and it will not do to hold that the intention of the statute may be defeated by an order to produce the original.—Hogan vs Strayhorn, 65 N C, 279, Ivey vs Granberry, 66 N C, 233; Morely vs Morely, (this term) C C P, sec 843; Black vs Justice, 86 N C, 504; Carrier vs. Hampton, 11 Iredell, 307; Starke vs Etheridge, 71 N C, 240, cited and approved. No error. Affirmed.

Rogers, Executor, vs. Gooch, Administrator—Halifax.

RUFFIN, J.:

Held. Where the title to a bond sued on is not in the plaintiff, nor is the estate of his intestate the real party in interest, the action must fail. The plaintiff might have avoided useless litigation and yet have accomplished his purpose, and may yet do so by making the defendant a party to the action now pending between the administrator *de bonis non* and himself, so that all the parties being before the court, the interest of Mrs Johnson as a legatee and her liability upon the bond may be properly adjusted and *pro tanto* discharged, the one by the other.