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Raleigh Register.

TUESDAY, FEBRUARY 28, 1826.

CASES

Decided in the Supreme Court of this State, at December Term, 1825.

Lewis Leroy v. *Marshall Dickenson*, from Beaufort—in Equity.

Decree for Complainant with cost to be paid by defendant.

A Judgment was confessed by Joel Dickenson to defendant for a large sum, and kept on foot to cover the property of Joel from creditors—The complainant had also obtained a judgment *bona fide*, against Joel D.—Held, that the judgment by confession should be postponed to the judgment of Complainant, and injunction awarded accordingly.

John Bowman, Adm'r. v. *Jas. Greenlee's Admr and others*, from Burke.

All the exceptions to the masters report overruled—report confirmed and decree according thereto for Complainant, for $544 80. Costs to be paid out of the fund,

Streater's heirs v. *Nat. Jones & others*, from Warren.

Exceptions to master's report overruled. Decree for Complainants.

Colquet v. *Bostick*, from Rockingham.

Reference to the master to take an account.

Altman & others v. *Edwards & Sheppard*, from Wayne.

Exception overruled—Decree for Complainants for the sum of $3200. So much of the bill as seeks to charge the real estate and slaves which were Thomas Edwards' with Rents for Complainants, dismissed. Each party to pay his own costs.

Henderson & Burges, v. *Stuart*, from Wake.

Decree that the real estate be sold by the master.

Whether the purchase money remaining unpaid is a lien or not upon lands sold after a conveyance—It is certainly a lien where no conveyance has been made, unless there is evidence that the land was not looked to, or such lien has been abandoned. Held therefore, that where one Casso purchased real estate and a conveyance was to be executed when the purchase money paid, the vendor had a lien upon the estate for the purchase money. And Casso having mortgaged the premises to one Moore, and he having paid the purchase money, held therefore, that he might tack the money paid to the sum advanced upon the mortgage—for the payment was for Casso's benefit, as it discharged the lien and enabled him to call for the legal title.

Under ordinary circumstances the purchaser from a mortgagee must stand in his place, & submit to a redemption upon the same terms; for though he may purchase for a large sum, and though he has the legal title, yet he has not equal equity with the mortgagor, for he buys with notice. For any thing which puts a party upon enquiry is notice.

There are cases however, in which a different rule prevails, as where the purchaser advances the money and takes a conveyance for the benefit of the mortgagor or his heirs, and not for his own benefit. But in this case, the defendant having taken an *absolute conveyance* from the mortgagee, and by his answer *denied* the plaintiff's *right to redeem*, Held, that he must stand as a mere assignee of the mortgagee, and must submit to a redemption on the same terms, and was not entitled to the sum actually advanced by him.

Arrenton v. *Jordan*, from Pasquotank.

Judgment of the Superior Court reversed, and that of the County Court affirmed.

A sheriff may, but he is not *bound to*, insist upon two securities in a bail bond. If a bond be taken with one only, and that one *is insufficient*, the plaintiff may except. The bond, however, with one security is good, either on *scire facias*, or an action of debt.

An assignment of the bail bond is not required when the suit is in the County Court; the 17th section of the Court law (1777) being confined to the Superior Courts.

It is not necessary in a sci. fa. against bail, to state the issuing and return of a ca. sa. against the principal: though the want of such ca. sa. would be a defence for the bail.

Fordham v. *Miller*, from Lenoir.

Bill dismissed at Complainant's costs.

A father, by deed, gave a negro to his daughter, and provided, that if she died without children, the slave should return to the family. The deed was put in the father's possession to be registered; and afterwards the daughter, *by parol*, renounced all claim under the deed, and exonerated her father from all obligation to have it registered, and authorised him to destroy it. She afterwards married and died. Her husband filed this bill to set up this conveyance.

Held, 1st. That after this voluntary renunciation, the daughter would not have been entitled to the aid of a Court of Equity to set up the conveyance.

2. That the husband succeeding to her rights, could claim nothing more than she could have claimed.

Quere. Independently of this objection, if the Court would be justified in setting up this conveyance for the benefit of the *husband*, thus giving it a different operation from that which the parties intended?

Goodman v. *Armistead*, from Chowan.

Judgment of the Court below affirmed.

The omission of the year of our Lord in the *teste* of a subpœna, the year of independence being mentioned, is immaterial. The latter date is sufficiently certain, without the former.

Peter McKellar, v. *A. F. Bowell*, from Cumberland.

Judgment affirmed.

The record of a recovery against a *Guardian* is not competent evidence against his *securities*, in an action brought by the plaintiff in that recovery against the securities to subject them upon the guardian bond for the default of their principal.

The Governor v. *Henrahan & others*, from Beaufort.

Judgment affirmed.

An action upon a sheriff's bond: plea—the statute barring actions on such bonds after six years—replication, a promise within three years. Held, the replication is a departure from the declaration—for the promise, though it may make the party liable to an action founded upon it, does not restore the right of action *on the bond*; for *to that* the lapse of time, is, by the statute, a positive bar.

Den on dem. of Tatem and Baxter, v. *Paine and Sawyer*, from Pasquotank.

Judgment affirmed.

"*What* are the termini or boundaries of a Grant or Deed is matter of law—*Where* these boundaries or termini are is matter of fact. It is the province of the Court to declare the first, that of the Jury to ascertain the second." Where natural objects are called for and course and distance given, the former are the termini, and the latter are mere pointers or guides to the former. Hence, when the natural object called for is unique, or has properties peculiar to itself, course and distance can have no effect—But, where there are several natural objects answering the description, course and distance may be adverted to, to ascertain which is the object designed—In which case they do not control a natural boundary, but merely serve to explain the latent ambiguity.

Governor, use of Allen, v. *Barclay*, from Northampton.

Judgment affirmed.

Wilson v. *Myers*, from Beaufort.

Judgment affirmed.

A petition was filed for an injury to lands by a mill-pond, against several defendants—a trial was had and verdict taken for the plaintiff and judgment against all the defendants. One of the defendants was then dead, and a writ of error was brought for this error in fact. On the return of the writ a motion was made in the Court below to amend, by entering a *nolle prosequi* as to the defendant who was dead, as of the term at which the trial was had. The motion was allowed on payment of costs, and the writ of error dismissed. On appeal to this Court—held, that the Court below were right in allowing the amendment, for it would have been at the trial *a matter of course*. The injury for which the action is brought is still a *tort*, though the act of Assembly has given a different remedy from that existing at common law.

Hackstall & wife v. *Powel*, from Bertie.

Decree in the Court below reversed, and cause remanded for further proceedings.

The act giving power to Courts of Equity to order sales of real estate for the purpose of partition, directs the proceeds to which infants are entitled to be secured to such infant or his *real* representatives. Hence, such share of the proceeds is to be considered as real estate, and (if the infants die before arriving at age) the heir at law will succeed to it, and not the personal representative.—But if the infants arrive at full age and then die, whether the heir at law will be entitled, *quere?*

Ellison's Ex'rs v. *Jas. Ellison*, from Orange.

The Testator executed a paper writing in form of a Trust Deed, and on the same day made a Will referring to the former paper. The purpose of which was clearly a disposition of his estate after death. D Y was one of the Trustees and Ex'rs, and also one of the only two subscribing witnesses. The Trustees were directed to retain out of the funds which they should receive, a compensation for their trouble. The testator had both real and personal estate, all which his Trustees and Ex'rs were directed to sell.—After the death of Ellison, D Y released, &c. all his claim, &c.

The presiding Judge in the court below held, the two papers to make one will, and to be well executed to pass real estate. On appeal to this court, held by two Judges, that the two papers are both testamentary, and make one disposition. One Judge contra. But held by all that the will is not well executed. That D Y the witness, had such an interest in the lands devised as was contemplated by the act of 1784, and that when such interest exists at the time of subscribing, no subsequent release will avail.

Mutlock v. *Park's Adm'rs*, from Rockingham.

Judgment affirmed.

The administrators of Parks recovered judgment against several—Execution put in the hands of plaintiff then Sheriff, levied on property and advertised for sale, then by agreement proceedings were suspended and the levy returned upon the *fi fa.* The deffts. in the execution then paid the plaintiff in execution, (the present defendant) the whole debt. This action was brought against the defendants as administrators, to recover the commissions. Held 1st, that under the act of 1784, the Sheriff is entitled to the commissions though no sales are made, the service required by the act being substantially performed; but held 2d, that the action cannot be against the defendants in their representative character. And held further, that the power of amendment given to this Court does not extend to amending the proceedings, so as to make them against the defendants in their own right, for the power extends only to such amendments as might have been made by the Court below after final judgment. But no *substantial* amendment, (it seems) should be allowed in this Court, for every such amendment should be accompanied with leave to defendant to vary his pleadings, and where are the new issues to be tried? This Court is strictly a Court of Error, and such amendments presenting a new case and requiring new pleadings, should not be allowed here.

Truett v. *Chaplain*, from Tyrrell.—Judgment reversed, and new trial awarded.

Brady v. *Wilson*, from Moore.

Judgment affirmed.

To charge a man with burning an outhouse not parcel of the dwelling house, is not actionable.

Morgan v. *Purnell*, from Halifax.

Judgment affirmed,

Pride v. *Pulliam*, from Wake.

Judgment affirmed.

Stamps v. *Graves*, from Caswell.

Judgment reversed, and new trial awarded.

A variance between the writ and declaration, the first being in debt the latter in assumpsit, is fatal even after verdict. A note not assignable within the statute cannot be declared on, the consideration must be set out and the note can be only evidence to the jury. Where the contingency on which the payment is promised is of such a kind as shows no benefit or injury to the parties, the note is of itself no evidence of a consideration, but proof must be given of it *aliter* the note.

Spiers v. *Robard's Adm'r*, from Hertford.

Judgment affirmed.

Same point as in Brocket v. Foscue.

Jarvis & others v. *Wiatt & others*, from Perquimons.

Devise to A. for life and after his death to the heirs of his body lawfully begotten, to be equally divided among them and their heirs forever. The words heirs of the body are words of description and not of limitation.

Banner v. *MacMuvray & others*, from Stokes.

New trial granted.

Case made up after the term by the Judge below, and sent to the Clerk of the Court below: this fact appeared upon the Clerk's certificate, and there were affidavits shewing that the Counsel for the appellant had not consent to the case. The Court will not notice the case, but will award a new trial, to have a case properly made up.

Devereux v. *Cape Fear Bank*, from Wake.

This was an injunction bill, and the answer having come in, and being very long, there was not time to hear the bill and answer in the Court below. By consent the case was transmitted to this Court. Held, that the Court has jurisdiction of the cause.

Sims & Allen v. *Graves & Key*, from Caswell.

Referred to the Clerk to take an account, and ordered that Defendant Key deliver up to the Clerk of this Court his bill of sale from the Complainant Sims, to be cancelled.

Stedman v. *Riddick*, from Gates.

Judgment affirmed.

A right to a slave adversely held by another, cannot be assigned so as to pass the legal title to the assignee. It is a mere chose in action, and is, at law, incapable of assignment.

Dozier v. *Simmons' Ex'rs.* from Currituck.

Judgment of Court below affirmed.

Bostick v. *Rutherford*, from Rutherford.

Judgment reversed, and new trial granted.

A discharge by a magistrate upon a warrant for felony, is *prima facie* evidence, of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution. In such action the defendant may give in evidence that after the prosecution instituted by him, the character of Plaintiff was bad, upon subjects unconnected with the felony for which he was prosecuted. It is competent in mitigation of damages.

McClure's Ex'rs v. *Miller*, from Rutherford.

Judgment affirmed.

An action for seduction of the plaintiff's daughter, is not an action concerning properly within the meaning of the Acts of Assembly for reviving of actions. Such action abates by the death of the Plaintiff and cannot be revived.

Den on demise of Taylor v. *Shufford*, from Iredell.

Judgment affirmed.

Alexander v. *Clark & Springs.*

Judgment reversed, and new trial awarded.

Same point as that in McKellar v. Bowell decided at this term.

Taylor's Ex'rs. v. *Lucas & others*, from Chatham.

Decree below reversed.

Taylor's Ex'rs. v. *Pannell & wife*, from Granville.

Decree for Complainants according to Master's report, with costs.

State v. *Antonio*, from Craven.

Judgment affirmed.

An alien is not entitled to a *jure de medietate.*

State v. *Alexander*, from Wilkes.

Judgment reversed.

State v. *Yates*, from Wilkes.

Judgment reversed as to corporal punishment

Same point as in the State v. Kearney, decided at a former term.

State v. *Justices of Lenoir*, from Lenoir.

The Judgment of the Court below sustaining the demurrer affirmed.

State v. *Sanders*, from Johnston.

Judgment affirmed.

State v. *Twitty*, from Lincoln.

Judgment affirmed.

The Governor's power to pardon under the Constitution extends to the remission of part of a pecuniary fine.

A shocking affair took place in Warrenton on the 15th instant. The facts are said to be as follows: Thomas H. Christmass was standing at his tavern door about the middle of the day, when Dr. Stephen Davis, without any previous notice, fired his gun upon him from an opposite store door; that Christmass on receiving the shot, retired to his sitting-room—but finding himself faint from the loss of blood, and believing he was dying, he made for his wife's apartment, when, on his passage from one room to the other, the Doctor discharged the other barrel of his gun upon him. He was then conducted to his chamber. The first information we received was, that Christmass was killed; but we have since learned that, contrary to all expectation, he is, in the opinion of his Physicians, convalescing. As this affair will most likely become a matter of legal investigation, we shall forbear making any comments upon it; though we cannot help expressing our regret that such a state of things should exist in a small community like that of Warrenton, as to produce so flagrant an outrage on all the rules of civilized society.

Since the abolishment of religious tests in the State of Maryland, by which the Jews in common with their fellow-citizens have been admitted to a participation in the offices of civil government, North-Carolina has been denounced as more intolerant even than that State, disfranchising not only Jews but Catholics. We observe the fact reiterated in a letter addressed by Bishop ENGLAND, to Mr. Tyson, the fearless advocate of equal rights in the Maryland Legislature, in which he returns his thanks, for the decided support he gave to the Jew Bill. It is true, as stated, that our Constitution contains this disqualifying clause, but it is and always has been a dead letter, and will no doubt be expunged whenever an opportunity occurs for so doing. We recollect but one instance, in which even an attempt has been made to enforce the provision of the Constitution in this particular, and in that one, the effort was fruitless. We allude to the case of *Jacob Henry*, whose expulsion was moved for on the ground, "that he disbelieved in the divine authority of the New-Testament," and whose eloquent appeal on the occasion, may be found in most of the compilations of popular speeches, now in vogue. In numerous instances, Catholics have been elected and have served as Legislators without molestation, and have filled various important civil offices. in Maryland, the Legislature had the power of removing the stain from her character, and it was therefore a disgraceful reflection on the liberality of the age, that she suffered it to remain; but in our own State, the objectionable feature can be erased only by a Convention: whenever one is held, it will most assuredly be done.

The Packet Manhattan, from Liverpool, arrived at New-York on the 18th inst. and brought London papers to the 6th ult. The Cotton market was dull, and the price had declined a farthing in the pound. Letters from Gibraltar state, that 50 square rigged vessels had been driven ashore in the gale of the 7th and 8th of December, many of which were totally lost. The Emperor Constantine had not arrived at Petersburg, but was daily expected. All the public functionaries had taken the oath of allegiance to him.

The trial of Judge Chapman of Penn. has resulted in his acquittal of all the charges preferred against him.