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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JANUARY TERM, 1877.

THOMAS S. KENAN,

REPORTER.

ANNOTATED BY

WALTER CLARK.

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(251)

STATE v. ISAAC KENNEDY and MAG KENNEDY.

Fornication and Adultery—Marriage between Negro and White in Another State—Domicile in this State.

A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading its laws and with intent to return, is not valid in this State.

(*Williams v. Oates*, 27 N. C., 535, cited and approved).

INDICTMENT for fornication and adultery, tried at August Special Term, 1876, of MECKLENBURG, before *Schenck, J.*

By consent the following special verdict was rendered: Isaac Kennedy is a negro man and Mag Kennedy a white woman. In 1868 they were citizens of this State. Subsequently they went to South Carolina to evade the law of this State prohibiting intermarriage of negroes and white persons, and were married according to the law of that State and immediately returned to this State. They did not intend to change their domicile from North Carolina, and have lived together as man and wife. The laws of South Carolina do not prohibit marriages between such persons.

Upon this state of facts his Honor held that the defendants were guilty as charged in the bill of indictment, and the verdict was so entered. Judgment. Appeal by defendants.

Attorney-General, for the State.
Messrs. Shipp & Bailey, for the defendants.

RODMAN, J. The defendants in this case were domiciled in North Carolina before and at the time of their marriage in South Carolina, to which State they went for the purpose of evading the law of North Carolina, which prohib-
(252) ited their marriage, and they immediately after the marriage returned to North Carolina, where they have since continued to reside.

To quote from the opinion of Lord Cranworth in *Brook v. Brook*, 9 H. L., 193: "There can be no doubt of the power of every country to make laws regulating the marriage of its

own subjects; to declare who may marry; how they shall marry, and the consequences of their marrying."

It is not necessary to say that a marriage contracted in another State between residents of this State, without the rites and ceremonies required in this State, will be void, even though the parties left this State for the purpose of evading those rites. *Dalrymple v. Dalrymple*, 2 Hagg. Consist., 416.

As to the formalities of the marriage the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the State with the intent to evade its law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of the marriage. Story Confl. Laws, sec. 65. *Williams v. Oates*, 25 N. C., 535. In *Brook v. Brook*, above cited, *Lord Campbell* says: "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion, or to morality, or to any of its fundamental institutions." In that case an Englishman casually met in Denmark the sister of his deceased wife and married her there. As such marriages were prohibited between English subjects it was held void.

A law like this of ours would be very idle if it could be avoided by merely stepping over an imagi- (253) nary line.

There are cases to the contrary of this conclusion decided by courts for which we have great respect. They are cited and the whole question is learnedly and earnestly discussed by 1 Bishop Mar. and Div., secs. 371, 389; *Medway v. Needham*, 16 Mass., 157; *Stevenson v. Gray*, 17 B. Mon. (Ky.), 193.

It seems to us, however, that when it is conceded, as it is, that a State may by legislation extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries by whose law no

such incapacities exist, as Massachusetts did after the decision in *Medway v. Needham,* the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent to be collected from the statute. About the intent in this case we have no doubt.

PER CURIAM. Judgment affirmed.

Cited: Puitt v. Comrs., 94 N. C., 718; *Woodard v. Blue,* 103 N. C., 114; *McMillan v. School Committee,* 107 N. C., 614; *S. v. Cutshall,* 110 N. C., 552.

(254)

STATE v. THOMAS LONG.

Indictment—Overseer of Road—Incumbent of Office.

One who professes to be the incumbent of an office and performs the duties of the same is estopped from denying the legality of his appointment: *Therefore,* where, in an indictment for failure to keep a public road in repair, it was proven by *parol* evidence that the defendant professed to be overseer of the road and had in all respects acted as such: *Held* to be unnecessary to show his appointment by the Court record.

(*State v. Cansler,* 75 N. C., 442, cited and approved).

INDICTMENT against the defendant as overseer of a public road, tried at Fall Term, 1876, of ALEXANDER, before *Buxton, J.*

The bill charging that the defendant had neglected to keep the road over which he was overseer in good repair (Bat. Rev., ch. 32, sec. 41), was found at Spring Term, 1876, and it was in evidence that defendant for three or four years previous to January, 1876, had acted as overseer of this road, occasionally summoning hands to work on it, and that since that date some one else had acted as overseer.

The defendant denied that he was overseer, and insisted that the State should produce the order of appointment of the township trustees. (Bat. Rev., ch. 104, secs. 7, 8).

By consent the question of law was reserved and a verdict of guilty rendered.

His Honor being of opinion that there was no evidence of a *de jure* appointment of defendant as overseer, and that the fact that he had acted *de facto* as such was not sufficient to render him liable in a criminal prosecution for mere nonfeasance, decided the point of law in favor of defendant, directed the verdict to be set aside and a verdict of not guilty to be entered. From which ruling the Solicitor for the State appealed.

Attorney-General, for the State.
Mr. R. F. Armfield, for the defendant. (255)

FAIRCLOTH, J. The defendant was indicted as an overseer of a public road for failing to keep it in repair, and was convicted. The ground of appeal is that his appointment was proved by parol and not by the Court record. The proof was that he had professed to be overseer for three or four years, had summoned the road hands and worked the road repeatedly; in other words, had acted as overseer in all respects except that he failed to keep it in good order at all times.

It would be better to produce the record in such cases, but we think the defendant has concluded himself by his own acts. He took the benefit of his office by not working as a hand, and its other emoluments, if any there be.

We have held that a justice of the peace who assumed the duties of the office and received the fees belonging thereto, although he had not taken the oath of office, was indictable for misbehavior in office. *State v. Cansler,* 75 N. C., 442. And on the same principle we hold that the defendant is liable in the present case.

PER CURIAM. Judgment reversed.

Cited: S. v. Long, 81 N. C., 564.