creditors, and the court could not properly have gone further. There appears to be no error in the decree of the circuit court of Loudoun, appealed from here, and the same will be affirmed.

(87 Va. 689)

COLEMAN v. SANDS, Registrar.

(Supreme Court of Appeals of Virginia. April 30, 1891.)

ELECTIONS—REGISTRATION—MANDAMUS—OFFICE AND OFFICER—RESIGNATION.

1. Under Code Va. § 83, providing that if any person shall offer to be registered, and shall be rejected by the registrar, he may take an appeal to the court of his county or corporation, or to the judge thereof in vacation, and that on application of such appellant the registrar shall transmit to the court or judge a written statement of the ground relied on by appellant, and the reasons of the registrar for his action, the answer of the registrar that appellant did not offer to qualify as to his right to vote, and that he is not entitled to register, is no defense to an application for *mandamus* to compel him to transmit such statement to the county judge.

2. A registrar of voters cannot legally resign by merely sending his resignation to the clerk of the electoral board, and receiving from him an acknowledgment of its receipt, without an express or implied acceptance thereof by the board.

LACY and RICHARDSON, JJ., dissenting.

Edmund Waddill, Jr., and *Wm. H. Beveridge*, for plaintiff. *Sands, Pollard & Sands* and *Meredith & Cocke*, for defendant.

LEWIS, P. This is a petition for a *mandamus*, filed in the original jurisdiction of the court by George Coleman against William H. Sands, alleged registrar of Shoemaker's election district, in Henrico county. The petition alleges that the petitioner is a legally-qualified voter in the said election district, and that the defendant, Sands, is the registrar for the same district; that on the 2d day of April, 1891, the petitioner presented himself to the defendant, as registrar, and requested to be registered as a voter in said district; that he then stated to the defendant that he was a duly-qualified voter, and entitled to be registered as such in said district, and offered to make a full statement under oath of all the facts required by law to prove that he was entitled to be registered; that the defendant refused to register petitioner, whereupon he, desiring an appeal, applied to the defendant to transmit a written statement to the judge of the county court of Henrico county of the ground relied on by the petitioner, and the reasons of the defendant for his action; that petitioner thereupon appealed to the county judge, and presented his petition, setting forth all the facts, and offered to prove every allegation made by him that was necessary to be proved to show his right to be registered; that the defendant appeared by counsel, and, instead of filing the said written statement, he entered a demurrer to the petition, and declined to file said statement, or to give any reason for his failure to do so. The petition then goes on to further aver that the judge refused to consider the appeal, on the ground that he had not before him the written statement aforesaid, as required by section 83 of the Code, and because he had no power to compel such statement to be furnished. And the prayer of the petition is that a *mandamus* be awarded by this court to compel the defendant to transmit to the judge of the county court the written statement aforesaid, pursuant to the statute in such case made and provided. To this petition the defendant demurred, and also answered. In his answer he sets up two grounds of defense, viz.: (1) That on the 2d of April, 1891, he was not the registrar for the said election district; and (2) that the petitioner did not on the said 2d day of April, or at any time thereafter, offer to qualify as to his right to vote; and, moreover, that he is not entitled to be registered in the said county. The averment of the answer as to the first point is as follows: "Your respondent states that some time in the month of March, 1891, he qualified as registrar of Shoemaker's precinct in Henrico county, under an appointment of the electoral board of said county, and that, after holding the office for a short time, he, on the morning of the 2d of April, 1891, resigned the same, and herewith files the acknowledgment of the receipt of said resignation by the clerk of the electoral board." To this answer the petitioner demurred. He also filed a general replication, and upon the issue thus joined evidence has been taken. Inasmuch, however, as the questions in controversy may be properly determined on the demurrer, we will consider the case upon the demurrer alone, and in doing so we will consider the points relied on in the answer in the inverse order in which they have just been stated.

The second point, namely, that the defendant did not offer to qualify as to his right to vote, and that he is not entitled to be registered, is clearly not a sufficient answer to the case made by the petition. The question on this branch of the case is not whether the petitioner offered to swear that he was a qualified voter, or whether he is or is not entitled to be registered, but whether the requisitions of the statute in such a case have been complied with. Section 83 of the Code provides that "if any person shall offer to be registered, and shall be rejected by the registrar, he may take an appeal to the court of his county or corporation, or to the judge thereof in vacation;" and by the same section it is made the duty of the registrar, on the application of any person so desiring an appeal, to "transmit to the court having jurisdiction over the said election district, or to the judge thereof, a written statement of the ground relied on by the appellant, and the reasons of the registrar for his action." There is no averment in the answer that an opportunity was given the petitioner to take the oath required by section 75 of the Code of every person before being registered; and, if such opportunity had been given and the petitioner declined to take the oath, that would be no just ground for the refusal of the defendant, if, as the petitioner alleges, he was the duly-qualified registrar for Shoemaker's election district at the time, to transmit the reasons for his action, as required by section 83, above al-

luded to. When such a statement as is required by that section is transmitted, it is for the court or judge, as the case may be, to determine whether or not the appellant is entitled to be registered. But no such question, we repeat, is presented for our consideration. The object of this proceeding is to compel the defendant to transmit a statement to the county judge, giving the reasons for his action in refusing to register the petitioner, to enable the judge to decide whether that action was right or not. Without the required statement, that question cannot be determined, and the proper tribunal to determine it is the county court in termtime, or the judge thereof in vacation.

Then the next, and only other real, question is, was the defendant in office when the application to him was made by the petitioner? or, in other words, had his resignation at that time become complete? In his answer he states that he resigned on the 2d day of April, 1891. But he does not stop there. He goes on to aver how, as he supposes, his resignation was effected; and the averment is that on that day he tendered his resignation, the receipt of which was acknowledged in writing by the clerk of the electoral board. It is not stated, however, that the resignation has ever been acted on by the board, either by formally accepting it, or by appointing a successor. He relies simply on the tender of the resignation and the acknowledgment of its receipt. The question therefore is, did that amount to a deposition of his office as registrar? After a careful consideration of the case we are of opinion that it did not. At the present day, in this country, when, as is commonly said, the man oftener seeks the office than the office the man, especially if it be an office of honor and emolument, to question the proposition that a person in office may resign at pleasure seems, at first blush, perhaps, a little strange, if not absurd. But, be that as it may, in the absence of any controlling statute on the subject, and we are aware of none, such is not the law of this case. The resignation of a public local office is by no means in all cases a matter of right. Such an office is ordinarily held, not at the will of either party, but at the will of both. And a registrar is not only a public officer, but one upon whom, in the administration of the government, most important and essential duties are imposed. He is required, moreover, to take the same oath of office as is prescribed for officers of the state generally. Code, § 76. At common law to refuse to serve in a municipal office connected with local administration, when elected or appointed thereto, was a punishable offense, of which numerous illustrations are to be found in the books. Thus in Rex v. Burder, 4 Term R. 778, the defendant was indicted for that, having been appointed to the office of overseer of the poor, he unlawfully refused to execute the office, and the indictment was sustained. So in Rex v. Lone, 2 Strange, 920, which was an indictment for not taking the office of constable, it was moved, after verdict, in arrest of judgment, that the offense charged was not indictable; but the motion was overruled, and the conviction held good. The same principle was recognized in Rex v. Bower, 1 Barn. & C. 585. That was an application for a *mandamus* to compel the defendant to take upon himself the office of common councilman in the borough of Lancaster, and the defense was that by a by-law persons refusing to fill the office were subject to a certain fine, which the defendant had paid. But the return was held insufficient, as it did not state that the fine was to be in lieu of service. The court said: "It is an offense at common law to refuse to serve an office when duly elected. The by-law in this case does not say that the party paying the fine shall be exempt from serving the office, or that the fine is to be in lieu of service. As that is not declared in the by-law, we cannot say that the payment shall have any such operation." A peremptory *mandamus* was accordingly awarded. Whether, in view of the statute, now carried into section 69 of the Code, which empowers the electoral board, and makes it its duty, to declare vacant and to fill the office of any registrar who fails to qualify within 30 days after his appointment, an indictment would be sustainable in Virginia for a refusal to take the office of registrar, it is not necessary, for the purposes of the present case, to inquire, for here there has been no refusal to qualify, and the question is whether the defendant has legally resigned. In other words, the question is narrowed down by the record to this: Can a registrar resign at pleasure, without any acceptance, express or implied, of the resignation by the proper authority, to wit, the electoral board of his city or county?

That an office is vacated by resignation no one will deny. But the question arises, what constitutes a resignation,—*i. e.*, a completed resignation? Bouvier, in his Law Dictionary, after giving the definition of the term "resignation," adds these words: "As offices are held at the will of both parties, if the resignation of an officer be not accepted he remains in office;" and for this he cites the case of Hoke v. Henderson, 4 Dev. 1. In that case the opinion, which is a very able one, was delivered by Chief Justice RUFFIN, who, among other things, said: "An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted, and that has been so much a matter of course with respect to lucrative offices as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are in our statute-book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon office, to discharge the duties of it while he continues in office; and he cannot lay it down until the public, or those to whom the authori-

ty is confided, are satisfied that the office is in a proper state to be left, and the officer is discharged. The obligation is therefore strictly mutual, and neither party can forcibly violate it." Judge Dillon, speaking of the resignation of municipal officers, lays down the same doctrine. He says: "An office must be resigned either expressly or by implication. If the charter prescribes the mode in which the resignation is to be made, that mode should, of course, be complied with. Acceptance by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority the tender or offer to resign is revocable." 1 Dill. Mun. Corp. § 163. We find this subject very fully and luminously discussed by Mr. Justice BRADLEY in delivering the opinion of the court in Edwards v U. S., 103 U. S. 471. That was an application for a *mandamus* against Edwards, as a township supervisor in the state of Michigan, to have a judgment previously recovered by the relator against the township audited and paid. The defendant answered that he had resigned his office in a written communication addressed to the township board, a copy of which he exhibited with his answer. It did not appear, however, that the resignation had been acted on, and it was therefore held not complete. In the course of the opinion it was said: "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law In England a person elected to a municipal office was obliged to accept it and perform its duties, and be subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear; and from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. This acceptance," it was added, "may be manifested either by a formal declaration or by the appointment of a successor " The court then went into an examination of the Michigan statutes, including one which provides that every office shall become vacant by "resignation," and continues as follows: "But it is nowhere declared when a resignation shall become complete. This is left to be determined upon general principles; and, in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement, namely, that a resignation must be accepted before it can be regarded as complete, was not intended to be abrogated. To hold it to be abrogated would enable every office holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law." Many other authorities to the same effect might be cited, but we deem a citation of them unnecessary.

On the other hand, the defendant relies upon several cases, the first of which is Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. Rep. 530. But that case, as the court said in its opinion, is clearly distinguishable from the Edwards Case and other cases of that class. That was an action against the city of Watertown, and the principal question was whether process in the action had been duly served The charter of the city required service in such cases to be had on the mayor, and also provided that "the resignation of the mayor shall be in writing, directed to the common council or city clerk, and filed with the clerk, and shall take effect at the time of filing the same." The mayor resigned, before the commencement of the action, by complying with this provision, and it was held that his resignation became complete upon being filed, and, consequently, that there had been no valid service of process. It would be an idle waste of time to say more to show that that case is no authority for the position taken by the defendant in the present case. The next case is U. S. v. Wright, 1 McLean, 509, which was a *nisi prius* decision of Mr. Justice MCLEAN, and in which the resignation of a United States revenue officer was a subject of consideration. In the opinion it was said: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office." This is certainly a very broad statement of the doctrine, and, if correct as a universal proposition, would be decisive of the present case. But of that case we need only say (1) that it was virtually overruled by the supreme court in the Edwards Case; and (2) that the doctrine there announced has no application to officers who are chosen to carry on local government. Such was the comment upon the case by the supreme court of New Jersey in State v. Ferguson, 31 N. J. Law, 107, which remark was quoted with approval in the Edwards Case. And the same comment may be made with equal propriety upon Bunting v. Willis, 27 Grat. 144, which was decided before the Edwards Case, and in which MONCURE, P., referring to the resignation by the plaintiff in error of the office of United States deputy collector of customs, observed in language very similar to that of Mr. Justice MCLEAN in the Wright Case that "he had a right to resign his federal office, and that such right does not depend upon the consent or acceptance of the government." It is observable, moreover, that, notwithstanding this broad language, the decision of the case, if we correctly understand it, proceeded on the ground that not until acceptance did the resignation become complete. That was the case of the election of a person, holding a federal office at the time, to the office of sheriff for the term commencing on the 1st of July then next ensuing. He tendered his resignation of the former office on the 19th of June, to take effect on the 30th. On the 1st day of

July he performed an official act as deputy-collector, by completing the clearance of a vessel, and on the next day he was relieved, and the office turned over to another, which was the first manifestation of an acceptance of the resignation; and this court held that not until then did he cease to hold the office. Although the resignation was tendered to take effect on the 30th of June, said the court, "it was not accepted until after that time." It was consequently held that by continuing in the federal office after the 1st of July the office of sheriff was vacated. It is obvious, to say the least, that the case is not an authority against the views we have expressed. In Pace v. People, 50 Ill. 432, also relied upon, which was the case of the resignation of a school superintendent, there was in fact an acceptance of the resignation, and therefore, as the court held, the same became complete upon its being tendered. In People v. Porter, 6 Cal. 26, it was decided by a divided court, and chiefly on the authority of the case in 1 McLean, that the resignation of an office is effectual without acceptance; and following those cases is State v. Fitts, 49 Ala. 402. To the same effect, also, is State v. Hauss, 43 Ind. 105. We have examined these cases, and are unable to yield our assent to them. They do not, in our opinion, state correctly the true principle of the common law, and are, moreover, in conflict with the great weight of authority, as we think we have already shown. Our conclusion, therefore, is that there has not been such a completed resignation on the part of the defendant as to amount to a deposition of his office as registrar, and that a *mandamus* must be awarded, as prayed for in the petition.

LACY, J., (*dissenting.*) This is upon an application by George Coleman, the petitioner, for the peremptory writ of *mandamus* to compel W. H. Sands, the respondent, to transmit to the county court of Henrico a written statement of the grounds relied on by the said petitioner to register as a voter, alleging that the respondent is a registrar of voters in the registration district in question, and that said certificate is required by law. The respondent answers that he is not now, and was not at the time application was made to him for said certificate, a registrar of voters in said district; that he had held such office, but had resigned the same unreservedly before the application was made to him for the certificate in question, and that petitioner was informed of the fact that he had resigned the said office, and was no longer authorized by law to discharge the functions of said office; that he was appointed by the electoral board of the county, as prescribed by law, and had delivered his resignation in writing to the said appointing power, through its clerk. It is set forth therein also that whereas, by law, it is provided that each registrar shall annually on the second Tuesday in May, at his voting place, proceed to register the names of all qualified voters within his election district, not previously registered, who shall apply to be registered, commencing at sunrise and ending at sunset, (section 78, Code Va.;) and although he had notified all persons manifesting an interest in the subject that on that day all would be added to the list who were entitled to be,—that yet, as the law authorized a registrar to register applicants entitled to vote at any time previous to regular elections, numerous persons applied to him at his house at night in such manner, and with such insistence, that he had been unwilling to hold the said office, and had unconditionally resigned it. To this answer the petitioner demurred, and upon consideration of the issue thus raised I am of opinion that the answer is sufficient in law, and is indeed a complete answer to the petition, and that the same should be dismissed, and the writ of *mandamus* denied, because the respondent is not a registrar, but is out of office, and cannot lawfully perform any duty appertaining to it. In Virginia an unconditional resignation of an office is a termination of an office *proprio vigore*. I find all the books agreed upon this proposition, and I have not found anything to the contrary. Mr. Minor, in his Institutes, (volume 2, p. 26,) says: "The grounds on which offices may be determined. The circumstances which may lead to offices being determined may be enumerated as follows: (1) Resignation, expiration of term, and removal from office by competent authority." And again he says on the following page, (29:) "Mode of effecting the removal from office of one on the grounds above named. Resignation, expiration of term, and removal by competent authority, of course, terminate the office *proprio vigore*. But in the other cases of delinquency the office is not determined, *ipso facto*, by the occurrence of the cause. There must be a judgment of a motion," etc. This must be so, under our constitution and laws, which everywhere recognize and provide for vacancies in office created by resignation or otherwise; and Mr. Minor is clearly right in this view, because, if an incumbent has resigned beyond recall, he cannot again rehabilitate himself with the office; and when the resignation is accepted, which it may be either expressly or by implication, the resignation is effective, if peremptory, from its date.

This language of Mr. Minor has been adopted by this court more than once, and is by the decisions of this court the settled law upon this subject in this state. In the case in this court known as the "Bland & Giles Co. Judge Case," reported in 33 Grat. 443, it was said: "An office is terminated *proprio vigore* by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined, *ipso facto*, by the occurrence of the cause. There must be a judgment of a motion," etc.; citing 2 Minor, Inst. 322, and authorities there cited, one of which is 7 Tuck. (Amer. Ed.) p. 11, where the same doctrine is found. Judge TUCKER says: "It remains to remark that offices may be terminated by resignation, or the acceptance of an incompatible office, even though it be inferior, (Milward v. Thatcher, 2 Term R. 81; King v. Godwin, 1 Doug. 398,) or be remote," etc. Adding:

"Offices may be forfeited by misconduct or neglect, etc.; but this can only be by the judgment of a court, I apprehend, in Virginia. * * * I am not aware of any decision as to the necessity of a judgment of a motion when an office has been forfeited by removal, or an incompatible office." It will be observed that the learned commentator seems to regard the case, as Mr. Minor, as obviously a matter of course. Again, in the case of Johnson v. Mann, reported in 77 Va. 265, Judge RICHARDSON, speaking of a case of expiration of term, says in delivering the unanimous opinion of this court, all the judges concurring as the court is at present constituted: "Again, in the Bland & Giles Co. Judge Case, 33 Grat. 450, Judge CHRISTIAN, in delivering the opinion of this court, in speaking of the tenure of office of a county judge, says: 'An office is terminated *proprio vigore* by resignation, expiration of term, and removal by competent authority.'" And again, in the same case, in construing a section of the Pennsylvania constitution which is as follows: "They [certain officers, including the one then in question] shall hold their offices for three years if they shall so long behave themselves well, and until their successor shall be duly qualified,"—it is said: "The obvious meaning of this provision is that such officers cannot hold for less than three years, if they so long behave well, and choose not to resign, although, on the happening of certain contingencies, they may hold for a longer period." The language relied on by the petitioner in the law, that this officer shall hold for a stated term, and until his successor is qualified, refers, I think, to a definition of "term" and "tenure." Where there had been no vacancy created in the office except by expiration of term, the end and object is enabling only.

This language has been under review here in several cases. In the case of Johnson v. Mann, supra, and in the case of Kilpatrick v. Smith, 77 Va. 358, Judge RICHARDSON says: "The twenty-fifth section of article six of the constitution is in its nature enabling. It empowers judges and all other officers elected and appointed to continue to discharge the duties of their offices after their terms of service have expired, until their successors have been qualified; no longer. * * * The clause in question in our constitution does not extend the term, but simply enables the incumbent to hold over until his successor, whether elected or appointed, is chosen in the way prescribed by law." And I think this language cannot be correctly used to do more than to enable an officer to discharge the duties, when his term has ended by expiration of the time for which he was chosen It is not intended to compel a citizen to hold an office against his will, and after he has chosen to resign. It was intended to enable the incumbent to hold for that time, (to use the language of the unanimous opinion of this court, cited above,) unless he chose sooner to resign. There are other decisions of this court to the same effect on both propositions, but it is not necessary to further cite them.

I do not concur in the argument that the authority granted by sections 67, 69, and 84 of the Code of Virginia is intended to and does compel an officer to hold for the full term, and afterwards, whether he wishes to or not. They mean, as this court has said, that he may do so unless "he choose sooner to resign;" and he may resign during the term, if he chooses to do so, and thus create a vacancy. But the argument is that the supreme court of the United States has held in certain cases, erroneously cited as Badger v. U. S., (Badger v. Bolles,) 93 U. S. 599; Solomaka v. U. S., (Salamanca Tp. v. Wilson, 3 Sup. Ct. Rep. 344,) that an officer cannot resign when he chooses, and thus throw off his responsibilities to the public, etc., and especially that Justice BRADLEY has said so in Edwards v. U. S., 103 U. S. 471. Without pausing to myself explain or construe these cases, I will leave that where it is so well done by that learned justice himself in the later case of Amy v. Watertown, 130 U. S. 315, 319, 9 Sup. Ct. Rep. 530, merely remarking that in the case of Edwards v. U. S., supra, the justice says: "In this country, where offices of emolument and honor are commonly more eagerly sought after than shunned, a contrary doctrine (that is, contrary to the common law) with regard to such offices, and in some states with regard to offices in general, may have obtained, but we must presume that the common-law rule prevails, unless the contrary is shown;" and he goes on to show that in that state (Michigan) the common-law rule has been adopted by statute, and cites a law of that state where, if an officer declines to accept an office, and does not qualify within 10 days, he is fined $10. Of course, when acceptance of an office is made compulsory by the penal laws, and resignation is restricted by law, the question is distinguishable from this. But I have said that I would cite this learned justice in Amy v. Watertown, decided in 1889. In that case, speaking of an officer who had resigned, he said: "There was no mayor in office at the time. The last mayor had resigned, and his resignation had taken effect. Service on him was of no more avail than service on an entire stranger. The case is different from those in which we have held that a resignation of an officer did not take effect until it was accepted or until another was appointed. In these cases either the common law prevailed, or the local law provided for the case, and prevented a vacancy. Such were the cases of Badger v. U. S., 93 U. S. 599, and Edwards v. U. S., 103 U. S. 471, and Salamanca Tp. v. Wilson, 109 U. S. 627, 3 Sup. Ct. Rep. 344. "In the present case," further says the learned justice, "it is true the consolidated charter of the city of Watertown provides that 'all elective officers except aldermen shall, unless otherwise provided, hold their respective offices for one year, and until their successors are elected and qualified.' But that provision has respect to ordinary cases. It cannot apply in case of death, and does not apply in case of resignation." And it goes on to show that this resignation was to take effect by the state law from the time

it was filed. And it appears that this case, like the others, proceeds upon a consideration of the law of the state where the case arose in accordance with the act of congress of June 1, 1872, (Rev. St. U. S. § 914,) since the passage of which act the practice and pleadings and forms and modes of proceeding must conform to the state law and the practice of the state courts.

In this case, therefore, if the supreme court of the United States were considering this question, the said court, in view of the foregoing decisions of this court, would, I think, decide this question as I have urged that it should be decided, and I do not find anything in that court to the contrary. We have been referred to numerous other authorities by the learned counsel for the respondent; among the cases in this court, of Bunting v. Willis, 27 Grat. 155, where MONCURE, P., speaking for this court, said, as to an officer who had resigned a federal office in Virginia: "That he had a right to resign his federal office, and that such right does not depend upon the consent or acceptance of the government or its agents, seems to be well settled. That after such a resignation becomes complete it cannot be withdrawn by the officer, even with the consent of the government, seems also to be settled, though he may receive a new appointment, which may perhaps be given to him in the form of a withdrawal by consent of his resignation of his former office." Further citations are not necessary, I think. It is clear to me that Mr. Sands, the registrar, is out of office, and is no longer capable or able to do the act required of him, and that the writ should be denied.

RICHARDSON, J., concurs.

(87 Va. 381)

BRUCE v. JOHN L. ROPER LUMBER CO.

(*Supreme Court of Appeals of Virginia.* Jan. 22, 1891.)

CUTTING TIMBER — INJUNCTION — WRITTEN CONTRACT — PAROL EVIDENCE — RIGHTS OF STRANGER.

1. Where defendant obtained a license from a land company to cut timber from its land, knowing at the time the superior rights of plaintiff lumber company, and such license is revoked, defendant will be enjoined from further cutting and removing lumber.

2. Plaintiff, being a stranger to the contract between defendant and the land company, may by parol evidence show the true meaning and scope thereof.

E. E. Holland and *S. D. Davies*, for appellant. *White & Garnett* and *Geo. McIntosh*, for appellee.

HINTON, J. This is a controversy between the appellant and appellee as to the right of the former to cut timber in that part of the Dismal swamp which, from its proximity to Suffolk, is known as the "Suffolk Side" of the swamp. The appeal is taken from a decree of the circuit court of Nansemond county, which perpetuates the injunction previously awarded, and allows the defendant, Bruce, "to remove from the lands in the bill and proceedings mentioned all the timber which he had cut thereon prior to the 14th day of August, 1886, that being the date on which he received notice from the Dismal Swamp Land Company to cease cutting on said lands. * * *" This decree, we think, after repeated and careful examinations of the record, and the able argument presented for the appellant, should be sustained; because we are satisfied that, no matter what may be the rights, if any, of the said Bruce, under his contract, to cut "down and refuse lumber," those rights were to be taken in subordination to the rights of the John L. Roper Lumber Company, and never were intended to extend to the cutting of the juniper and cypress lumber, except as a subcontrator of that company. Without going into a detailed statement of all the testimony upon these points, we think it sufficient to say all this fully appears, not only from the testimony of Loyall, Herring, and Roper, but from the testimony and acts of Bruce as well; for, after having waited some time, according to his own admission, to find out from Roper's own lips what were the rights of John L. Roper Lumber Company, and whether they had been surrendered so far as the Suffolk side of the swamp, thus impliedly admitting that, whatever those rights were, he knew that they were superior to his own, he nevertheless, without having seen Roper, went on and entered into the contract with Loyall, president of the Dismal Swamp Land Company, and commenced to cut timber, both dead and growing, under it. In answer to the thirty-third question, which is in these words: "Then you knew, both in person and by letter, from the president of the Lumber Company, that he declined to let you cut juniper and cypress timber, and you say that at your second interview Mr. Roper told you that he had a contract for all the juniper on the company's land, and that Mr. Loyall had no right to contract with me, you, or any one else. Is that so?"—he says: "Yes, sir;" thus showing in the clearest manner, as we have said before, that, although he was aware of the superior rights of the lumber company, he went on and acted in defiance of them. The court is also of opinion that, although neither Bruce nor the Dismal Swamp Land Company can be allowed, as between themselves, to introduce testimony to contradict the contract made between them, it is competent for the lumber company, a stranger to said contract, to show what was the true meaning and scope of that contract. "The rule," says Mr. Greenleaf, excluding parol proof in such cases, "is applied only [in suits] between the parties to the instrument. * * * It cannot affect third parties, who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statement of others." 1 Greenl. Ev. § 279, and cases there cited, and in Barreda v. Silsbee, 21 How. 169. And the court is further of opinion that that contract, when viewed in the light of the surrounding circum-