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## Charlotte Observer.

VOL. XXVII.

SUPREME COURT DECISIONS.

Three points were raised on the argu-

1st. Whether the transfer of the policy can be held to be fraudulent as to

which supplemental proceedings can

be conducted, unless an action will lie

directly against the holders of the prop-erty transferred, the law would be

guilty of the inconsistency of allowing

a right, and affording no remedy for its enforcement. The life policy, notwith-standing its intangible form, or its pro-

ceeds in the hands of the defendants

may be reached, and made subject to

the debts of the intestate by anyone who occupies such a relation to him as

3rd. An administrator cannot main-

the ground that it was given by his in-

his intestate did and is equally

Judgment reversed. Demurrer sus-

Warlick vs. White et als-Catawba.

his wife for the whole of his lands and

a bill of sale for all his personal prop-

died there. Soon after his death his

wife gave birth to a mulatto child. The

plaintiff is the only sister and nearest collateral relation of the deceased, and

claims to be entitled to one undivided

half of the land as heir to Joseph Car-

The court says: That if a wife be an

adulteress, living apart from her hus-

band, no court will interfere to have a

make provision for a wife out of her

husband's estate, when he, if living and

out of all participation in his estate.

If a husband should, by deed, grant

all his estate to his wife, the deed would

vision for her, which is all the courts

of equity hold the wife entitled to, and

erty. He returned to the army and

confers a right of action.

dants to the policy.

RUFFIN, J.:

ment of his intestate.

The court says:

and void in law.

CHARLOTTE, N. C., SATURDAY APRIL 29, 1882.

NO. 4,087.

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in giving her the whole estate he would surrender all his interests. 2 Story Eq. Juris. sec. 1,374. Judgment will be entered here for the plaintiff according to the prayer of

her complaint.

Still vs. Barham-Wake. SMITH C. J.

Motion for certiorari. The court below has no legal authorty to allow a defendant twenty days in which to prepare and file an affidavit of inability, by reason of poverty, to give the required bond, in support of an order made and entered on the last day of the term. This ruling dispensed with immediate efforts to procure the affidavit even if it were practicable, during the last day of the term when

the case was concluded, and it is a proper case in which to award the writ. It is so ordered. Roberts and wife vs. Lisenbee and wife

-Buncombe.

This was a civil action heard before Gilliam Judge, brought for slanderous words spoken by the wife of the de-fendant against the wife of the plaintiff. During the pending of the suit the wife of defendant died, the court below ordered that the action abate. Plaintiff appealed.

Held. That the wrong of the wife was not imputed to the husband, he ification of the general la was only joined with her ex necessitate the use of passing water.] because she could not be sued alone. cause of her liability, therefore when SMITH, C. J .: her liability ceased his ceased also. In Kowing vs. Manly, 49 N. Y. R. 192, it is held, that when husband and wife are jointly sued for the wrong of the wife and she dies during the pendency of the action it would not survive

No error. Judgment affirmed. Gregory Ex'r vs. Ellis et als-Northamp.

against the husband.

This was a petition filed by the plain-tiff to sell the real estate of his testator of probate ordered the sale of all the the testator died seized and possessed order before granted as restrained the that have been assigned to the widow defendant from selling, for the assumed

of said testator for her dower, to be en- insolvent debt be continued and as to

ther adjudged that the plaintiff have a license to sell all the real estate devised to said defendant, also the reversionary interest in the lands covered by the Reported for the Observer by Walton M. Busbee, of the Raleigh Bar. R. O. Burton, Jr., adm'r., vs. Farinholt et als-Halifax. dower, except so much thereof, as shall be allotted and set apart to said defend-ant as and for her homestead," &c. The court says: If the homestead had The plaintiff's intestate effected an insurance of \$5,000 on his life for the benefit of himself, his executors, ad-

joyed subject to said dower. It is fur-

been laid off in the lifetime of the husbeen laid on in the lifetime of the lus-band, at his death, the dower of the wife would have been assigned so as to include the dwelling house in which the husband usually resided and build-ings used therewith. Thus dower would benefit of himself, his executors, administrators and assigns. He made a voluntary assignment of the policy to his three daugnters, he being then insolvent and without sufficient property to pay his debts. The plaintiff insists that he has a right to subject so much of the insurance fund as may be needed to the payment of the debts.

Three points were raised on the argube assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of children to enjoy the homestead during the minority of any one of them must have been taken sub-ject to the paramount right of dower. Watts vs. Leggett 66 N. C. 197.

creditors, upon the ground that it was voluntary and without valuable consideration and that the assignor was at the Where there still remains an amount due creditors for debts contracted prior to the act of 1877, the fee simple estate time insolvent.
2nd. Whether the fund can be folin all the lands of the testator were lialowed into the hands of the assignees and subjected to the payment of debts, since the policy was but a chose in action and not itself the subject of exeble to the payment thereof, subject to the dower and right of homestead as it existed prior to that act,

No error. Affirmed. 3rd. Whether the plaintiff, as administrator, can maintain this action; or whether he is estopped by the assign-Syme administ'r vs. Broughton et als-

This action was brought by plaintiff 1st. That when a party makes a vol-untary assignment, and is indebted at the time to a state of clear insolvency, the act is fraudulent as to his creditors as administrator of Pepper against de-fendant as administrator with the will annexed of W. G. Lougee, to recover the amount due on an inland bill of exchange drawn by the defendant's testator in favor of plaintiff's intestate. Plain-2nd. Where the principal creditor is dead and his personal representative is incapacitated by the estoppel growing out of his intestate's assignment, to intervene in the matter in any way, so that there is no judgment in the case, and by possibility can be none under which supplemental proceedings can submitted to a nonsuit upon an intimation of an opinion of his Honor that the plaintiff could not recover, for the law authorized no action against the defen-dant for any liability of the said Lou-

The only question is, can the action be maintained against the defendant as

administrator cum testamento an-The court says, That sec. 25 ch. 119 Bat. Rev is in pari materia with the 11th and 13th sections of chapter 45. Reference may therefore be had to the latter sections in order to ascertain the intent of the Legislature in enacting sec. 25. Section 13 expressly provides that the collector may commence and main'ain or defend suits and may be

tain a bill for setting aside a deed on When one whose offce is that of a mere collector may be sued, it would be testate to defraud creditors, for he ocunreasonable to suppose that the Legiscupies the exact relations to the deed lature intended to divest of that attrite one who has been regularly vested estopped; the defrauded creditors with the full powers of an administramight have their action against the tor or executor. The proper construcfraudulent alienee as executor de son tion of section 25 is that after the probate is granted in common form and The plaintiff is estopped by his intestate's act to deny the title of the defenthere is an executor who ac's, or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and be has all the powers and is subject to all the liabilities of an administrator or an executor, except that his right to dispose of the estate according to the provisions of the will, is sus-In 1863 Joseph Carpenter, being about to enter the army, made a will wherein he gave to his son one-half of his land pended until the final determination

of the suit. There is error. Reversed.

Rogers vs. Moore-Wake.

and one negro, and to his wife all the balance of his property. In 1864 he come home; his son having in the meantime died he executed a deed to SMITH C J. The action is for goods sold and de-livered, lodging furnished and money Final judgment was entered for want want of an answer. Defendant appealed. The court say, that the cases contem-plated under section 217 C. C. P. were those in which a specific sum was contracted to be paid and not those implied contracts to pay for goods sold or services rendered, what they were reasonably worth was to be determined by others. Referring to the practice in actions of assumpsit Battle J. says, "upon

settlement made for her even out of her own choses, "because she is un. a default in that action which sounds in damages, the judgment is necessarily worthy of the court's notice or inter-ference." It would be inconsistent to interlocutory. The result of the decisions seem to restore the old practice, and to refer the inquiry of damages after an interseeking a divorce, the court would be locutory judgment to the jury acting bound to grant it and thereby dissolve under the supervision of the judge and every bond between them and shut her not to leave it to the mere oath of the

plaintiff as to what he supposes those "He who seeks equity must do so with clean hands." damages to be.

Walton et als vs. Mills-Burke.

be held inoperative, for it could in no just sense be deemed a reasonable pro-SMITH C. J. This action is brought by several proprietors of land on an unnavigable stream which proceeds from an upper tract belonging to the defendant, to restrain him from a contemplated diversion of its waters from their proper channel by means of canals and conduits in process construction and which defendant intends to use in gold washing operations, to the injury of the gold mines and mills on the plaintiff's lands which require the uninterrupted flow of the water. At the hearing the de-fendant was enjoined from diverting the waters of the creek and its tributa-

ries or otherwise interfering with the natural and regular flow thereof, Defendant appealed. Though a proprietor may use the water while it runs on his land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves

his land,—3 Kent, Com. 439. When the injury to the complaining party is uncertain and mainly conjectural and apprehended, it does not follow that the restraining power will be

Where no damage has yet occurred, and where if any shall be hereafter before trial the plaintiff has the right to make application for a restraining order upon actual and ascertained damages, it is error in the court to award an in-

Judgment reversed. Error. [The court calls attention to the fact that this new industry of gold washing may, from necessity, require some modification of the general law governing

He was liable to the action only be- Tillery, et al., vs. Wrenn, et al.- Halifax.

In 1875, plaintiffs entered into a contract with Wrenn for the purchase of certain lands. One-fourth to be paid cash, three-fourths secured by three several bonds for the same amount, bearing interest from date, maturing successively on the first day of January in the years ensuing. When the notes became due being unable to raise the sum demanded as a condition for further indulgence, Wren offered to ex-tend the time if the plaintiffs would assume a large insolvent debt due to him, for which the plaintiffs were in no for the payment of his debts. The judge | manner responsible. From the pressure of their necessities they assumed lands belonging to the estate of the tes- the debt and reconveyed said lands to tator, except the land assigned to the defendant Dunn in trust to secure the widow for her dower and that devised same. The notes falling due the trusby the will to the daughter, which were | tee advertised and proposed to sell the reserved to abide the issues raised by land. The plaintiffs moved an injuncthe answer of the defendant. Upon a tion before the Judge, who issued a recase agreed it was adjudged by the court "that a homestead be allotted to hearing. Upon the hearing it was addefendant out of those lands of which | judged that so much of the restraining

power and influence over the other, should not stand at all if entirely voluntary, or should stand only as a security for what was actually paid or advanced upon them, where there was a partial consideration.—Patton vs. Everett, 7 Ir. Eq., 152; Futrill vs. Futrill, 5 Ir. Eq., 61; re-affirmed in McLeod vs. Bullard, at this term. The court upon an interlocutory application will not pass upon the merits of the controversy, but leave them to be determined upon the final hearing.

The modified injunction was proper. Affirmed. State ex rel. Board of Commissioners of Wake vs. Magnin, et als.—Wake. SMITH, C. J.: This action is brought against Magnin as county treasurer and his bondsmen. When his term expired he had, or ought to have had, of moneys received by virtue of his office for county school purposes, an unexpended balance of \$2,648.38, as appears upon his own sworn statement, for which the

the original indebtedness, the order be

The court says: That these who make bargains, must ordinarily abide by

them, for the court will not interfere

with the enforcement of contracts, because of their consequences, unless the inequality of the contracting parties is

such as to give one of them the oppor-

tunity of dictating to the other his own

tained by one whose position gave him

dissolved. Defendants appealed.

ant Bunting alone demurred to the complaint: 1. For that the relators are not proper parties and the action can only be maintained by, and on the relation of the successor in office to whom the sum is 2. For that no sufficient demand was made before bringing the action.
3. For that the default set out is not

present suit is prosecuted. The defen-

covered and protected by the condition in the bond. His Honor sustained the demurrer and adjudged that Bunting go without day and recover his costs.

From this ruling the relators appeal. The court says: 1st. That the exception to the form f the action was settled and disposed of in the action between the same parties reported in 78 N. C., 181. 2d. A demand before suit is not ne-

cessary where a public officer collects and retains money which he ought to pay over. State vs. McIntosh, 9 Ired., 307; State vs. Woodside, Ib. 496; Little vs. Richardson, 6 Jones, 305. But in the present case there was a demand. 3d. The county treasurer becomes exflicio treasurer of the county board of

equeation-Bat. Rev., ch. 68, sec. 32. In sections 34 and 35 are the principal special provisions relating to the functions and duties pertaining to the office. The disbursements mentioned in section 35 have reference to the administration of the fund, and contemplate a settlement of the treasurer's account.

The only obligation imposed in express words is to "disburse all public school funds," If this includes the official duty of a final settlement with his successor, the similar language employed in the condition of the bond must have an equal import and be construed to cover the alleged defalcation. The purpose of the act of March 28, 1870, which is but a re-enactment of the act of 1842, is to cure certain defects and irregularities in conferring the office and accepting the instrument, and to maintain its solidity as an official undertaking, as far as it goes, notwith-

standing the penalty or condition may Eight of the Leading Makers vary from those prescribed by law. The safe keeping, disbursement and delivery over of the funds are the duties enjoined, and this was the manifest purpose of the bond and the common understanding of its import when en-

The judgment is reversed. Demurrer overruled.

Wilson et al. vs. Powell et al.—Catawba SMITH, C. J.: Mahala Sherrill made her will in June Judgment reversed for irregularity. the second clause a legacy of one thousand dollars is bequeathed to her neice Elizabeth, together with several other bequests in money, &c. During that year and the year following payments were made on the legacy. His Honor ruled that the legislative scale should apply to the Confederate money re-ceived to the discharge of the legacy, and not to the legacy itself. The appeal

is from this ruling.

Held: That the application of the scale must be made to both the legacy and the successive subsequent payments, each according to its date. The rule in the construction of pecuniary legacies seems to be that the legacy is to be paid in the currency which

A reasonable method of interpretation to give money legaces while Confederate money was the only currency in use and was received in discharge of antebellum debts is to consider them paya-ble in the value of such currency, of which the legislative scale is the measure. Dealings between trustee and cestui que trust stand upon different grounds from those between debtor and

# Overruled for error.

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