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SUPREME COURT DECISIONS.

Reported for the Observer by Walton M. Busbee, of the Raleigh Bar.

R. O. Burton, Jr., adm'r., vs. Farinholt et als—Halifax.

RUFFIN, J.:

The plaintiff's intestate effected an insurance of $5,000 on his life for the 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 argument.

1st. Whether the transfer of the policy can be held to be fraudulent as to creditors, upon the ground that it was voluntary and without valuable consideration and that the assignor was at the time insolvent.

2nd. Whether the fund can be followed 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 execution.

3rd. Whether the plaintiff, as administrator, can maintain this action; or whether he is estopped by the assignment of his intestate.

The court says:

1st. That when a party makes a voluntary assignment, and is indebted at the time to a state of clear insolvency, the act is fraudulent as to his creditors and void in law.

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 be conducted, unless an action will lie directly against the holders of the property transferred, the law would be guilty of the inconsistency of allowing a right, and affording no remedy for its enforcement. The life policy, notwithstanding its intangible form, or its proceeds 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 confers a right of action.

3rd. An administrator cannot maintain a bill for setting aside a deed on the ground that it was given by his intestate to defraud creditors, for he occupies the exact relations to the deed that his intestate did and is equally estopped; the defrauded creditors might have their action against the fraudulent alienee as executor *de son tort.*

The plaintiff is estopped by his intestate's act to deny the title of the defendants to the policy.

Judgment reversed. Demurrer sustained.

Warlick vs. White et als—Catawba.

RUFFIN, J.:

In 1863 Joseph Carpenter, being about to enter the army, made a will wherein he gave to his son one-half of his land 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 his wife for the whole of his lands and a bill of sale for all his personal property. He returned to the army and 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 Carpenter.

The court says: That if a wife be an adulteress, living apart from her husband, no court will interfere to have a settlement made for her even out of her own choses, "*because she is unworthy of the court's notice or interference.*" It would be inconsistent to make provision for a wife out of her husband's estate, when he, if living and seeking a divorce, the court would be bound to grant it and thereby dissolve every bond between them and shut her out of all participation in his estate. "He who seeks equity must do so with clean hands."

If a husband should, by deed, grant all his estate to his wife, the deed would be held inoperative, for it could in no just sense be deemed a reasonable provision for her, which is all the courts of equity hold the wife entitled to, and 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.

Error.

Still vs. Barham—Wake.

SMITH C. J.

Motion for *certiorari.*

The court below has no legal authority 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.

ASHE, J.:

This was a civil action heard before Gilliam Judge, brought for slanderous words spoken by the wife of the defendant 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 was only joined with her *ex necessitate* because she could not be sued alone. He was liable to the action only because of her liability, therefore when 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 against the husband.

No error. Judgment affirmed.

Gregory Ex'r vs. Ellis et als-Northampton.

ASHE J.

This was a petition filed by the plaintiff to sell the real estate of his testator for the payment of his debts. The judge of probate ordered the sale of all the lands belonging to the estate of the testator, except the land assigned to the widow for her dowef and that devised by the will to the daughter, which were reserved to abide the issues raised by the answer of the defendant. Upon a case agreed it was adjudged by the court "that a homestead be allotted to defendant out of those lands of which the testator died seized and possessed that have been assigned to the widow of said testator for her dower, to be enjoyed subject to said dower. It is further 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 dower, except so much thereof, as shall be allotted and set apart to said defendant as and for her homestead," &c.

The court says: If the homestead had been laid off in the lifetime of the husband, 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 buildings used therewith. Thus dower would be 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 subject to the paramount right of dower. Watts vs. Leggett 66 N. C. 197.

Where there still remains an amount due creditors for debts contracted prior to the act of 1877, the fee simple estate in all the lands of the testator were liable to the payment thereof, subject to the dower and right of homestead as it existed prior to that act.

No error. Affirmed.

Syme administ'r vs. Broughton et als—Wake.

ASHE J.

This action was brought by plaintiff as administrator of Pepper against defendant 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- 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 defendant for any liability of the said Louee.

The only question is, can the action be maintained against the defendant as administrator *cum testamento annexo.*

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 maintain or defend suits and may be sued.

When one whose offce is that of a mere collector may be sued, it would be unreasonable to suppose that the Legislature intended to divest of that attribute one who has been regularly vested with the full powers of an administrator or executor. The proper construction of section 25 is that after the probate is granted in common form and there is an executor who acts, or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he 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 suspended until the final determination of the suit.

There is error. Reversed.

Rogers vs. Moore—Wake.

SMITH C J.

The action is for goods sold and delivered, lodging furnished and money Final judgment was entered for want want of an answer. Defendant appealed.

The court say, that the cases contemplated 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 a default in that action which *sounds in damages,* the judgment is necessarily interlocutory.

The result of the decisions seem to restore the old practice, and to refer the inquiry of damages after an interlocutory judgment to the jury acting under the supervision of the judge and not to leave it to the mere oath of the plaintiff as to what he supposes those damages to be.

Judgment reversed for irregularity.

Walton et als vs. Mills—Burke.

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 defendant was enjoined from diverting the waters of the creek and its tributaries 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 exercised.

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 injunction.

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 the use of passing water.]

Tillery, et al., vs. Wrenn, et al.—Halifax.

SMITH, C. J.:

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 extend the time if the plaintiffs would assume a large insolvent debt due to him, for which the plaintiffs were in no manner responsible. From the pressure of their necessities they assumed the debt and reconveyed said lands to defendant Dunn in trust to secure the same. The notes falling due the trustee advertised and proposed to sell the land. The plaintiffs moved an injunction before the Judge, who issued a restraining order and set a day for the hearing. Upon the hearing it was adjudged that so much of the restraining order before granted as restrained the defendant from selling, for the assumed insolvent debt be continued and as to the original indebtedness, the order be dissolved. Defendants appealed.

The court says: That those 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 opportunity of dictating to the other his own terms and the contract itself is so unreasonable as to indicate that the power was exercised in bringing about its execution, involving duress. Without any proof of actual fraud, conveyances obtained by one whose position gave him 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 present suit is prosecuted. The defendant 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 due.

2. For that no sufficient demand was made before bringing the action.

3. For that the default set out is not 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 of 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 necessary 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 *ex-officio* treasurer of the county board of education—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, notwithstanding the penalty or condition may 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 entered into.

The judgment is reversed. Demurrer overruled.

Wilson et al. vs. Powell et al.—Catawba

SMITH, C. J.:

Mahala Sherrill made her will in June, 1863, and died during that summer. In the second clause a legaey 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 received 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 is in universal use at the time it is made.

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 payable 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 craditor.

Overruled for error.