Daily Charlotte Observer.

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SUPREME COURT DECISIONS.

Digest of Opinions, October Term, 1885.

From Advance Sheets of Attorney General T. F. Davidson's 93d N. C. Reports.

Turner vs. Powell.

1. Ignorance of legal requirements in executing and filing the undertaking upon appeal will entitle an appellant to a writ of certiorari in lieu of an appeal.

2. The ignorance or carelessness of the appellant's counsel in preparing the appeal bond will not entitle the appellant to a writ of certiorari in lieu of an appeal, where the appeal is lost because the bond is imperfect.

Ijames vs. Gaither.

1. Where a mortgage or deed of trust is registered upon a proper probate, it is notice to all the world of existence of the mortgage, of its contents, and of the nature and extent of the charge created by it.

2. When a party is put upon inquiry, he is presumed to have notice of every fact and circumstance which a proper examination would enable him to find out.

3. Where a mortgage was executed by a debtor to indemnify his surety, but who had not paid the debt; Held, to be notice to a purchaser after its registration, of the right in equity of the creditor to subject the land to the payment of his debt.

4. When a debtor executes a mortgage to his surety to indemnify him, the creditor has an equitable claim to the security, and upon the insolvency of both principal and surety he may subject the mortgage land to the payment of his debt, and this is so not only when the mortgage stipulates that the mortgagor shall pay the debt, but also when it merely provides that the surety shall be saved harmless.

5. The right of the creditor is not lost although the personal remedy against the surety is barred by the statute; or if the surety has never been damnified and is insolvent.

6. The debt due the creditor supplies the consideration to support the equity.

7. In such case as soon as the deed of indemnity is executed the equitable right of the creditor attaches, and it is not in the power of the surety to put it beyond his reach.

Spicer vs. Gambill.

1. Where an execution is levied on land before the expiration of the judgment lien, but the sale does not take place until after the expiration of such lien, the levy does not extend the lien to the sale, so as to defeat a purchaser or prior encumbrancer whose right attached during the existence of the lien, but before the levy.

2. If an execution issue more than ten years after the docketing of the judgment a sale of both real and personal property under it is valid, but in such case it is only a lien on both real and personal property from the levy, and not from teste of the execution.

Simpson vs. Simpson.

1. Where the maker and both subscribing witnesses to a deed are dead, proof of the handwriting of one of the witnesses thereto is sufficient to authorize its probate and registration.

2. An equity of redemption cannot be sold under execution on a judgment rendered for the mortgage debt.

3. Where a power of sale in a will is conferred on two executors, one of whom dies, the power can be executed by the survivor.

4. Where a debtor executed a mortgage to his sureties to indemnify them, and afterwards the land was sold under execution issued on a judgment rendered against the principal debtor and one of the sureties was not served with process in such action, and he afterwards conveyed his testator's interest in the land, by virtue of a power conferred on him by the will, in which deed the other surety (mortgagee) joined; Held, That the guarantee under such deed had the legal title to at least a moiety of the land, and it is intimated that the sale under the execution was inoperative, and the entire legal estate passed.

Bowles vs. Cochran.

1. The Code, sections 1841 and 1816, being in pari materia, are to be construed together, and make it the duty of the register of deeds before issuing a marriage license to make reasonable inquiry whether there is any legal impediment to the marriage of the parties, or whether either of them is under the age of eighteen years and resides with her father, &c.

2. By such reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists.

3. When a man of good character and reliable applied for license and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of her parents, and the person producing the statement said it was true, though no name was signed to it; Held, that the register had made such inquiry as was required of him, and was not liable for the penalty.

McNair vs. Commissioners of Buncombe county.

The court has no power, with or without amendment, to convert an action brought for the purpose of obtaining an injunction, into one for a mandamus.

McNair vs. Commissioners of Buncombe.

An act of the Legislature providing a stock law for a county enacted that upon the written petition of a majority of the registered voters of certain townships, presented to the commissioners and justices at their regular joint meeting in June, 1885, they might, by resolution, suspend the operation of the act in such townships. The registered voters of some of these townships prepared the petitions and sent them to the joint meeting, but on account of some disorder in the meeting it adjourned without acting on them, and the commissioners proceeded to build a common fence around the entire county. Held, 1st. That the petitioners had a right to be heard, and as this had been denied, another meeting should be called for that purpose, although the petitioners had unnecessarily delayed bringing their action. 2d. That the words of the act do not make it obligatory on the justices and commissioners to exclude the townships on the filing of the petitions, but it is left to their discretion. 3rd. That the restraining order should not put a stop to the work on the fence altogether, but only on such portions as would interfere with the rights of the petitioning townships, if the meeting should conclude to exempt them from the operation of the act.

Bristol vs. Hallyburton.

1. A court of equity will not interfere by injunction to stay an execution regularly issued upon a judgment at law, because the sheriff has levied on property not the subject of sale under execution, or because the property belongs to another than the judgment debtor, except where the property levied on is personal property and the sheriff and plaintiff both are insolvent.

2. A vested remainder may be sold under execution, but a contingent remainder cannot.

3. A sale under an execution issued upon a judgment which is a lien on all the debtor's property vests in the purchaser only the interest of the debtor at the time the judgment lien attaches, and if the debtor has no interest subject to sale under execution, the purchaser gets nothing.

4 So, where a judgment debtor applied for an injunction to restrain the sheriff from selling a contingent interest in land, which was not liable to be sold under execution; It was held, that the injunction should have been refused.

Morgan vs. First National Bank of Charlotte.

1. Where an act of Congress contains no provision in referrence to the exercise of jurisdictien in enforcing a penalty provided by the act, the State courts have jurisdiction of an action to enforce such penalty.

2. Congress has the power to deprive the State courts of jurisdiction of action brought to enforce a right arising under an act of Congress, and this may be done by implication as well as express provision.

Prior to the act of Congress of 1882, only the United States circuit and district courts, and the State, county or municipal courts in the county where a national bank was located, had jurisdiction of an action to recover the penalty for taking usurious interest imposed by section 5,198 of the Revised Statutes of the United States. Since the act of 1882 any State court has jurisdiction to which jurisdiction would have attached had the action been against a State bank.

4. Where, prior to the act of 1882, an action was brought against a national bank for charging usurious interest, in the superior court of the county in which the plaintiff resided, instead of in that in which the defendant was located, the objection to the jurisdiction must be taken before pleading to the merits, of the defect is waived.

5. The objection that the averments in the complaints are so vague and uncertain that no judgment can be rendered on it, comes too late after an answer has been filed denying the allegation.

6. Where a complaint in an action for usury specified the principal sum constituting the original debt, and the dates and amounts of the usurious payments of interests, it is sufficiently definite, as it furnishes the defendant with all the information necessary to make his defence.

7. Where on the trial below, the defendant's counsel alleged that there was a variance, but made no answer when asked by the court if he had been misled thereby; Held, such variance, if any, is thereby rendered immaterial.

8. In an action against a national bank for usury the complaint need not negative that there are no State banks of issue which by law are allowed to charge more than eight per

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Which will be delivered in any part of the city free of charge.

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