

of a demand, and a refusal to redeem? If so, then an insolvent bank, by which, I mean a bank which is unable to redeem its bills, is upon a better footing than one whose credit is good; that is to say, the former is protected by the statute, the latter is not. Whatever of virtue there may be in that idea, we shall not now determine, as such determination is not made necessary by this case. We determine that a bank note is not barred by the lapse of the statutory term, commencing at its date, and that generally the statute of limitations has no application to bank notes. Let the judgment on all the points be reversed.

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ABSTRACTS OF RECENT AMERICAN DECISIONS.

*Supreme Court of Indiana; May Term, 1853.*

*Administrator—Probate Court.*—An administrator is not authorized by the R. S. 1843, to take possession of the real estate of the intestate if the heirs are present.

An order of the Probate Court for the leasing of real estate of an intestate upon the petition of the administrator, is erroneous, if the heirs of the intestate being infants, did not appear to the action, and no guardian *ad litem* was appointed to answer for them. *Comparet vs. Randall.* PERKINS, J.

*Sheriff's Return—Levy—Judgment of Revivor—Sale of Real Estate without notice to heirs.*—The return upon a *fi. fa.*, that it was levied "upon the property of" the execution defendant, without designating the kind, quality or value, and accompanied by no other paper or memorandum to remove the uncertainty, is void for uncertainty.

A levy is *prima facie* a satisfaction of the execution; but it may be shown to have proved to be not an actual one.

Judgment against A and B in the Circuit Court. The judgments having become dormant, a *scire facias* was issued on each of them and served on B, and there was a judgment of revivor. That in the first case was as follows: "On motion it was ordered that the judgment heretofore rendered in this case be revived against B,—the former judgment having been rendered against B and A,—and the defendant in mercy, &c. The

judgment of revivor in the second case was as follows: The parties appeared, and, on motion, the same orders." Held, that the judgments of revivor, though informal, were not void.

When, by statute, the real estate of an intestate is subject to sale for his debts upon a judgment against his administrator, and without notice to his heirs, a sale of the real estate upon an execution, issued on the judgment, will not be void from the fact that notice of the suit was not given to the heirs.

A sale of real estate upon execution without appraisement, is proper, if at the date of the contract upon which the judgment was rendered, the law did not require that lands to be sold on execution should first be appraised.

When it does not appear that the rents and profits of land were not first offered, upon a sale on execution, it will be presumed that they were first offered.

Great inadequacy of price will not vitiate a sale of land upon execution, where the inadequacy has been occasioned by the improper conduct of the execution defendant.

A voluntary conveyance of lands made by father to son to prevent their being subjected to the payment of his debts—whether he is indebted as principal or security—may be set aside by his creditors and subjected to the payment of their debts.

But the creditors will not be allowed to set aside the conveyance until they have exhausted the other property of the grantor.

An adverse possession, to confer title, must, under the R. S. 1843, have been exclusive and continuous for twenty years, under such circumstances as show the party to have been occupying upon a claim of ownership in himself of the premises.

The possession of an execution defendant is not adverse to the purchaser under the execution. *Law vs. Smith.* PERKINS, J.

*Intestate.*—A person inherited lands in this State from his maternal grandfather, and died while the R. S. of 1831 were in force, leaving a father surviving him, but neither children nor their descendants, nor brothers or sisters, but brothers and sisters of his mother. Held, that the father inherited the land. *Case vs. Wildridge.* DAVISON, J.

*Pleading—Bad Plea.*—A plea which professes to answer a whole count, but answers only a part, is bad on general demurrer.

To the declaration upon a promissory note, the defendant pleaded as to

part, &c., that the plaintiff agreed to assign him a judgment against one B, of the amount which this plea professed to answer, and that as to so much, &c., that agreement was the consideration of the note; that the judgment was assigned but "without recourse" upon the assignor; and so the consideration as to so much, &c., had failed. Held, that the plea was bad—it not appearing that the defendant had placed or offered to place the parties in the position they occupied prior to the assignment. *Puett, et al., vs. The State Bank.* STUART, J.

*Lien of Judgment.*—A purchased of B a tract of land in Noble county, received a deed, and simultaneously therewith executed to B a mortgage to secure an unpaid balance of the purchase money. When A received the deed there was a judgment against him in the Noble Circuit Court in favor of one C. A afterwards sold the land to one D, who assumed the payment of the mortgage as a part of the consideration, and paid the rest of the purchase money. Held, that the lien of the judgment attached subject to the lien of B's mortgage. Held, also, that D, by paying the mortgage to B, became substituted as against C, in the place of A, and entitled to all his rights and equities. *Peet vs. Beers.* STUART, J.

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*Abstracts of Recent Decisions by the Supreme Court of Iowa,  
June Term, A. D. 1853.*

*Attachment—Bond.*—Property taken by a writ of attachment will be released by a delivery bond, but such bond will not deprive the defendant of an issue and trial upon the facts set forth in the affidavit, upon which the attachment issued.—*Curtis, Executor, vs. Cleighorn, Administrator.*

*Chancery—Partition—Fraud.*—*Held, 1st.*—That all persons interested in the proceedings of partition of the half-breed lands of Lee County, having had notice thereof, the Judgment of partition therein is conclusive evidence of title. If frauds were committed in adjusting the titles to the land, it can only be charged in a direct proceeding to set aside the judgment for that cause.

2d.—Where the relation of trustee and "*cestui que trust*" existed between persons intrusted in that proceeding, it became the duty of the Court to determine the relation and adjust the rights of the parties, as all

parties interested had their day in Court, it will be presumed that their rights were considered and adjudicated. *Wright vs. Messenger.*

*Code—Guardian.*—H. was declared a monomaniac, and with his estate placed under the care of guardians; H. was subsequently declared sane, and his property restored; on settlement with the guardians, a balance was declared in their favor, for which judgment was rendered by the County Court, and execution issued against the estate of H. *Held,* That the County Court had no power, under the code, to render the judgment and issue the execution.—*Hummer vs. Patterson.*

*Code—Indictment.*—An indictment charging an offence substantially in the language of the code, is good. Sections 926 and 932 of the code, which prohibit dram shops, and authorize proceedings against them, are not unconstitutional.—*The State of Iowa vs. Our House, No. 2.*

*Criminal Law—Monomaniac—Held,* that a person legally declared a monomaniac, as insane, under the statute, and who, at the time of the proceeding under our criminal code, was, by virtue of due process of law, under the care of guardians as insane, could not be convicted and punished upon a charge of crime involving the subject-matter of his insanity. *Hummer vs. The State of Iowa.*

*Criminal Law—Assault and Battery—Held,* that in a criminal prosecution for assault and battery, with intent to commit a bodily injury, under the statute :

1st.—Indentures of Apprenticeship, although not under seal, admissible as evidence to justify the master of the apprentice in resisting an attempt, by force, to abduct such apprentice, the seal being referred to in the body of the instrument.

2d.—Where it is assigned as error, that in the trial of the cause in the District Court, an attorney at law, and not the judge of the District presided, this Court will not reverse the judgment and set aside the proceedings, unless the record shows affirmatively that such attorney, and not the judge, did act as judge in the case.

3d.—On an indictment for an assault and battery, with intent to commit a great bodily injury, and also for a common assault and battery, the defendant may be convicted of the assault only. *Orton vs. The State of Iowa.*

*Lien—Held,* That in proceedings under the statute authorizing liens against boats and vessels in certain cases, the lien will not attach prior

to the date of the judgment, so as to preclude an attachment lien, unless such lien is given and specified by the judgment. Note.—In this case a re-hearing was applied for, which was granted.—*Galland vs. Miller.*

*Mortgage—Notice—Judgment.*—Bell having a mortgage regularly recorded, upon which a decree of foreclosure was rendered, and sale of the mortgaged premises ordered and made, but prior to the execution and delivery of the deed to Bell by the Sheriff, a judgment for mechanic's lien was rendered against the mortgagor, and sale of the same premises to a third person. *Held, 1st.*—That the decree on the mortgage operated as a judgment lien upon the premises, and being anterior in date, had priority of the judgment for the mechanic's lien.

2d.—The proceedings of foreclosure decree, sale and sheriff's return thereof, were sufficient to charge subsequent purchasers with notice.

3d.—That by the mortgage, the legal title to the estate, after condition forfeited, was vested in Bell, the mortgagee, and could only be defeated by payment and redemption.

4th.—That the purchaser of the estate under the mortgage could not be prejudiced in his rights by the neglect or delay of the sheriff in making the deed.

5th.—That the deed, when made, relates back to the sale, and cuts off intermediate judgments and purchases.

6th.—That the deed to Bell, made by the sheriff, by virtue of the sale on the decree of foreclosure, having been recorded before the sale of the premises on the judgment for the mechanic's lien, was notice to the purchaser under it. *Bell vs. Hale.* GREENE, J., *dissenting.*

*Promissory Note—Fraud in Transfer.*—*Held,* That in an action by an endorsee against the maker of a promissory note, to which the general issue was pleaded, the maker may show fraud in the transfer, to prove that such transfer was made to defeat the creditors of the payee, and the payment of the money for which the note was given by the payor in compliance with process of garnishment on an attachment against the payee, is a satisfaction of the indebtedness thereon, if such payment be made before the transfer, and even after, if such transfer was made to defraud creditors. *Loveland vs. Huber.*

*Promissory Note—Set Off.*—*Held,* That in a suit on a note received for services by a surgeon in setting a dislocated arm, the defendant may

off-set damages sustained, by reason of the services being unskillfully performed, and recover a judgment for any balance found due.—*Norton vs. Winscott*.

*Sale—Motion to Set Aside.*—A motion to set aside a sale under execution, nearly eighteen months after the sale, and after the purchase money was paid and deed executed, is too late, and should not be entertained.—*Pitman vs. Marshall*.

*Statute of Limitations.*—*Held*, That where the defendant admitted the execution of the note, and at the same time stated "That he had delivered to plaintiffs some barrel staves and a flat boat, which had been sold for the use of plaintiffs, which he thought would pay the amount of their claim; but if there was any balance due after deducting the value of said barrel staves, and the price of said boat, he would pay said balance that might be found due: but that he did not believe he owed plaintiffs anything, and refused to pay anything." *Held*, That this was not sufficient to take the case out of the statute of limitations.—*Height vs. Wheeler*.

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### *Abstracts of Recent Cases in the Supreme Court of Mississippi.*<sup>1</sup>

*Attachment.*—After issue joined between the parties, the Court could make no order quashing the attachment, which could in any manner interfere with the issue.—*Carr vs. Coopwood*, 256.

An affidavit for an attachment process which says that "the owner or person interested in the Steamboat Buckeye, now lying in the navigable waters of the Mississippi, is indebted to him in the sum of, &c., to the best of his knowledge and belief, for and on account of said Steamboat," is sufficient under our attachment laws, to uphold the attachment.—*Lum vs. Steamboat Buckeye*, 564.

In proceedings begun by attachment against a non-resident, who does not appear and defend the suit, the judgment only operates *in rem*, and binds nothing but the property levied on.—*Ridley vs. Ridley*, 648.

<sup>1</sup> We are indebted to J. F. Cushman, Esq., for these abstracts in advance of the publication of his Second Vol., now ready to issue.

*Attorney at Law.*—It is a well settled rule, that the attorney of a party cannot be compelled to discover papers delivered, or communications made to him, or letters or entries made by him in that capacity, but is bound to withhold them. *Held*, That this principle extends to every communication made by a client to his attorney, when consulted upon the subject of his rights and liabilities.—*Parkhurst vs. McGraw*, 134.

The deposition of witness in this case, ought to be excluded, on the ground that it violates professional confidence reposed by a client in his attorney. *Ib.*

*Bills of Exchange and Promissory Notes.*—A party can only recover commissions for advancing to take up a bill of exchange or other obligation at maturity, where there was an express contract to pay commissions; or the course of dealings between the parties will prove the existence of such a contract. *Gibson vs. Randolphs*, 237.

*Contract.*—An overseer's contract for wages is not an entire contract; and if he be turned off for misconduct, he may recover for the time he conducted himself well. *Houston vs. Sale*, 6 S. & M. 34, cited and confirmed. *Robinson vs. Sanders*, 391.

Where a party is arrested in the performance of his portion of a contract by an injunction issued at the instance of a third person, which stays the operation of the work to be done, and prevents him from completing it, according to contract; *held*, that he can recover upon a *quantum meruit* count for the labor performed. *Whitfield vs. Zellnor*, 663.

*Covenant.*—Where a party covenants to make a deed to a certain quantity of land, "more or less;" these words mean, that when there is only an inconsiderable deficiency as to the quantity of land, that the vendor is not to submit to a deduction from the amount of the purchase money, if the tract of land contains less than the amount, nor is the purchaser to pay more than the sum stipulated, if the land exceeds the number of acres described. *Phipps vs. Tarpley*, 597.

*Criminal Law.*—After the fact is known, that either the influence of hope or fear existed, superinducing a confession of guilt, explicit warning should be given the prisoner of the consequences of a confession; and it should likewise be manifest that the prisoner understood such warning before his subsequent confession could be given in evidence. *Peter (a slave) vs. The State*, 4 S. & M. 31; *Van Buren (a slave) vs. The State*, 512.