ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF GEORGIA.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF NEW YORK.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

AGREEMENT.

What will excuse Performance.—In an action to recover damages for the breach of a contract by which the defendant, in December 1864, agreed to tow with his steamboat, the plaintiff's sloop and her cargo from one place on the Hudson river to another, the judge instructed the jury, in substance, that although navigation was prevented by the act of God, yet the defendant was liable if, at the time he contracted, he had reason to apprehend that navigation would be thus prevented before the contract was to be performed; as he should have provided for such a contingency in the agreement. *Held*, that if the freezing of the river excused the failure of the defendant to perform his contract, the charge was erroneous: *Worth* v. *Edmonds*, 52 Barb.

Held, also, that it was unnecessary for the defendant in the agreement to provide against such a contingency, as the law did it for him. And that if the evidence in regard to the condition of the river satisfied the jury that there was a sufficient cause, in such condition, to excuse the defendant from performance, he was entitled to a verdict: *Id.*

The freezing of a river is such an act of God as excuses performance of a contract to tow a vessel thereon; it being an act to which human agency does not contribute, and which it cannot control, and therefore for the consequences of which a party is not responsible: *Id.*

ATTACHMENT.

Abandonment by prior Attaching Creditor.—Both plaintiff and defendant in error had issued attachment against Joseph A. Crew, and each had served I. S. & Sons with summons of garnishment. The garnishment in favor of B. & Co. was just served. B. & Co., after Murphy had obtained judgment on his attachment, dismissed their attachment in vacation. At the next term of the court, they were permitted with the consent of the defendant in attachment to reinstate their case. *Held*, that they lost their priority over Murphy by dismissing the attachment, and that they could not regain it by reinstating their case: *Murphy* v. *Bruce & Co.*, 38 Georgia.

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[1] Prepared by J. H. Thomas, Esq., from advance sheets of 38 Ga. Reports.

[2] From J. S. Stockett, Esq., Reporter; to appear in 28 Md. Reports.

[3] From Hon. O. L. Barbour; to appear in vol. 52 of his Reports.

[4] From P. F. Smith, Esq., Reporter; to appear in 57 Penna. State Rep.

BAILMENT.

Pledge by Agent to secure his own Debt.—An agent for the sale of goods cannot, as against the owner, pledge or mortgage them to a third party to secure an advance on his own account: *First National Bank of Macon* v. *Nelson & Co.*, 38 Georgia.

To constitute a pledge or pawn, under the Code, there must be a deposit of the thing pawned, and this cannot be dispensed with by a written agreement, that the party making the pledge will be the bailee of the pawnee: *Id.*

BANKS.

Assignment by.—Where a bank made an assignment of its assets for the benefit of its creditors, and a large portion of the assets was in money at a market value, and a creditor nearly twelve months after the assignment, filed a creditor's bill, charging that six months after the assignment, and again shortly before the filing of the bill, he had demanded his share of the cash assets from the assignees, and they had refused to pay him unless he would release the bank from the whole of his claim, and the bill prayed an account. *Held*, that the bill was not demurrable. If there was complication or cause for further delay, it ought to be set up by way of defence, it cannot be assumed: *Dobbins* v. *Porter*, 38 Georgia.

COMMON CARRIERS.

Where one transportation company receives from another freight, to be carried from one place to another, under a contract between the latter and the owner, it is entitled to the benefit of all stipulations in such contract affecting its liability: *Manhattan Oil Company* v. *The Camden and Amboy Railroad, &c., Company*, 52 Barb.

Thus, where freight was delivered to a company, at Cincinnati, under a contract between the latter company and the owner, to receive the same and carry it to New York, which contract contained a provision that the company receiving such freight should not be liable for damage or loss by fire, or other casualty, while the property was in *depots or places of transhipment;* and the property, after being carried by said company to Philadelphia, was delivered to the defendant, to be carried by it to New York, and there delivered; and the same having been carried by the defendant to New York and stored in its freight-house there, was destroyed by fire without any negligence, and before any notice of its arrival had been given to the owner: *Held*, that, as the company receiving the property at Cincinnati would not, under these circumstances, be liable for the value of such property, neither was the defendant liable: *Id.*

CONFEDERATE NOTES. See *Trustee.*

As Consideration for Contract.—Where a contract was made between two citizens of the late Confederate States during the war, on the 12th July 1862, payable three years after date, the consideration of which was Confederate treasury notes, the only circulating currency at that time, and which was recognised as *lawful* by the assumed authority which had the actual possession and control over the territory and people at the time the contract was made, *Held*, that although the issuing of such notes by the assumed Confederate authority, for the purpose of

carrying on a war against the government of the United States, may have been illegal, as against that government and the citizens thereof who, during the war, were under the *actual* protection of that government, outside of the lines of the assumed Confederate authority; yet such a contract made between citizens residing *within* the lines of the assumed Confederate authority, in their ordinary business transactions between themselves, and having *no connection with the prosecution of the war against the United States*, is not an illegal consideration, as *between the contracting parties themselves*, they having made the contract under the assumed authority which was then over them, and the assumed authority (whether rightfully or wrongfully is not now the question) *recognised* the currency as legal and valid *at the time the contract was made;* therefore *as between the contracting parties themselves*, the plaintiff below is entitled to recover: *Miller* v. *Gould*, 38 Georgia.

Conveyancer.

Liability of.—The rule of liability of conveyancers for errors of judgment is the same as lawyers and physicians: *Watson* v. *Muirhead*, 57 Penna.

A conveyancer employed (before the decision in *Sellers* v. *Burk*, 11 Wright 344) in the purchase of a ground-rent, relying on the opinion of legal counsel, that it was clear of encumbrances, so represented it to his principal, there being at the time a judgment by default against the vendor, the damages on which had not been liquidated, and under which it was afterwards sold by the sheriff. *Held*, that the conveyancer was not liable to the purchaser for negligence: *Id.*

To pass the title at that time with such an encumbrance, was not evidence of want of ordinary knowledge and skill and due caution, even if the conveyancer had passed it on his own judgment: *Id*

Corporation.

Action for Dividends, Evidence.—In an action by a stockholder against a corporation, to recover a dividend declared by resolution of the directors in general terms, of so much money per share, evidence that the earnings of the corporation were received in property other than money, is incompetent, as it alters the legal effect of the resolution; which is no more admissible than it would be to alter its terms: *Scott* v. *The Central Railroad and Banking Company of Georgia*, 52 Barb.

Where a corporation makes dividends, payable in dollars, without any limitation, and without directing the payment to be made in any currency whatever, the case of *Ehle* v. *The Chittenango Bank*, 24 N. Y. 548, prevents an inquiry into the means out of which it determined to make the dividends. The corporation is concluded by the resolutions directing the dividends. Per Ingraham, J.: *Id.*

Criminal Law.

Motion in Arrest of Judgment.—The bill of indictment contained but one count, which was for murder. The jury returned a verdict of guilty of "involuntary manslaughter," which was received by the court and the jury discharged. A motion was made in arrest of judgment on the ground that there are two grades of involuntary manslaughter—one

punished as a felony, the other by lesser punishment. *Held*, that the motion should have been sustained by the court: *Thomas* v. *The State*, 38 Georgia.

Burglary.—Where upon the trial of the defendant charged with the offence of burglary it was proved that the parties in possession of the warehouse alleged to have been broken and entered by the defendant, were in possession of the same under a written contract for rent, or lease, for a definite period of time: *Held*, that this parol proof of the possession of the warehouse under written contract for lease or rent at the time the alleged burglary was committed as charged in the indictment, was sufficient to sustain that allegation without the production of the written lease: *Houston* v. *The State*, 38 Georgia.

Plea of Autrefois Acquit.—Where five defendants were indicted for the offence of an assault, with intent to murder, and after being arrested, demanded their trial under the provisions of the 4554th section of the Code, and the state not being ready, were discharged and acquitted by the judgment of the court, and were afterwards indicted for the same act of shooting, under the charge and accusation of an "aggravated nature," and to the second indictment the defendants, on being arraigned, filed the plea of *autrefois acquit*, to which plea the counsel for the state demurred, and the court below sustained the demurrer, and decided that the defendant's plea was not a good bar: *Held*, that the court erred in sustaining the demurrer to the defendant's plea: *Holt* v. *The State*, 38 Georgia.

Debtor and Creditor.

Right of Subsequent Creditors to impeach a Conveyance.—If, at the time a conveyance is made, there is no person competent to question its validity, the title will vest in the grantee absolutely, as against all the world. Subsequent creditors of the grantor cannot reach it in such a case, as the foundation upon which their rights are held to attach to property once owned by their debtor does not exist. It is only when a conveyance is void, or voidable, as to creditors, when made, that subsequent creditors of the grantor can attach it on that ground alone. It is not, in such a case, a *bonâ fide* conveyance to the grantee, either as to prior or subsequent creditors: *Baker* v. *Gilman*, 52 Barb.

Who is a Subsequent Creditor.—The defendant being sued in actions for slander, retained the plaintiff, an attorney, to defend those actions. Three days afterwards, the defendant conveyed his property to a third person, for the purpose of defeating the claims of the plaintiffs in the slander suits, should any be established. Soon afterwards the plaintiff was informed of such conveyance by the grantor, and of its object. Only a small portion of the plaintiff's demand had then been earned. He went on defending the actions without objection for more than a year, when they were determined in the defendant's favor. *Held*, that the credit was not given by the plaintiff upon the faith of the defendant's ownership of the property conveyed, and that his demand being embraced in a judgment recovered nearly two years after the conveyance, he was clearly a subsequent creditor of the defendant: *Id.*

Who may impeach.—A creditor who has trusted his debtor after being fully informed by the latter that he has put his property out of

his hands, by a conveyance valid as between him and his grantee, though voidable as to existing creditors, should not be allowed to come into court and claim that such conveyance was fraudulent and void as to him, on account of such indebtedness: *Id.*

As to such creditor, a conveyance of that kind would not be fraudulent in any sense, and cannot be avoided on that ground: *Id.*

EXECUTION. See *Partnership—Sheriff.*

Fraud—Payment in Confederate Money.—Plaintiff in the court below sold to defendants four bales of cotton while Confederate money was the currency and had a market value, and was to receive that currency in payment. Defendants delayed payment until the Confederate armies had surrendered, when one of them, with knowledge of the surrender, visited the plaintiff at his residence in the country, and paid the debt in Confederate currency, at a time when plaintiff swears he had no knowledge of the surrender. *Held*, in such case, that it is a question proper for the jury to determine whether defendant practised a fraud upon plaintiff by taking advantage of his ignorance, and misleading him to receive the notes in payment when defendants knew they were in fact of no value by reason of the failure of the Confederacy: *Blalock et al.* v. *Phillips*, 38 Georgia.

HIGHWAY. See *Municipal Corporation.*

HUSBAND AND WIFE.

Wife's Separate Estate—Bill of Sale void as to Creditors.—The receipt and appropriation by a husband of money, constituting the separate estate of his wife, with her knowledge and acquiescence, does not establish the relation of debtor and creditor between them, and entitle the wife to compensation out of the husband's assets, unless at the time of such receipt he expressly agreed to repay the money so received and appropriated: *Kuhn* v. *Stansfield*, 28 Md.

A husband voluntarily executed a bill of sale, to secure to his wife a sum of money, constituting her separate estate, which he had received with her knowledge and acquiescence, and invested in his business, but which, at the time of such receipt, he did not agree to repay. *Held:* That such conveyance was void as to prior creditors, it not appearing that the debtor had other property sufficient to satisfy them: *Id.*

INSURANCE.

Factory—Mill—What are meant by.—A policy of insurance on a building had this condition: "The following risks being considered more hazardous than others, *buildings* intended to be occupied by persons carrying on any of the undermentioned trades or business, or in which any large quantities of the undermentioned goods are deposited, will be subjected to an extra premium on that account. No policy, therefore, will be construed to extend to such a risk, unless liberty be given for the purpose, and expressed thereon." One of the specifications of such risks was, "mills and manufactories of any kind." With the consent of the company the tenant kept hay, straw, produce, &c.; this he gave up and kept broom-corn and made brooms by hand. *Held*,

this did not come within the prohibition of "mills and manufactories:" *Franklin Ins. Co.* v. *Brock*, 57 Penna.

A mill within the meaning of the prohibition is not merely a place where something might be ground, nor a manufactory merely where something may be made by hand or machinery, but what common usage recognises as a mill or manufactory respectively: *Id.*

Two adjoining houses of the same owner were insured by one company at the same time, but in two distinct policies. *Held*, that the policies were distinct contracts, and that the assured could recover for damage by fire to one building, although the other building may have been used in a manner prohibited by the policy and the fire originated in it: *Id.*

A premium for insurance above the usual rate, is evidence indicating though not proving that a more than usual risk was assumed; but a jury should not infer that a concealed or misrepresented fact was to be at the risk of the insurers: *Id.*

Describing a building insured as a "storehouse," is descriptive only, and not a warranty or representation that nothing should be done in it but keeping a store or a storehouse: *Id.*

A *storehouse* was insured, and keeping broom-corn was not specified as a hazardous risk; the assured had a right to keep broom-corn there. Keeping it did not prevent his recovery for damage to the building by fire, because the danger was greater by keeping it, or because the fire originated in it: *Id.*

A policy enumerating certain risks as hazardous, does not cover any of them unless liberty be given to keep the articles, &c., mentioned as hazardous: *Id.*

If words in a policy are of doubtful signification, the meaning most favorable to the assured is to be adopted: *Id.*

JURISDICTION.

Appeal—Limited Jurisdiction.—The right of appeal from the decisions of the Commissioners for Opening Streets, being given to the Criminal Court of Baltimore, it is the exclusive province of that court to determine whether such an appeal has been regularly and properly taken, and its judgment thereon is final and conclusive, no right of appeal therefrom having been given by statute: *Rundle* v. *Baltimore*, 28 Md.

If no appellate power had been conferred on the Criminal Court of Baltimore in such cases, its judgments unwarrantably pronounced in assertion of jurisdiction over the subject, might by appeal be reviewed and reversed in this court: *Id.*

The Criminal Court of Baltimore, in reference to proceedings had therein, on appeal from the decision of the Commissioners for Opening Streets, is clothed only with a special and limited jurisdiction, to be exercised in a particular manner, and not according to the course of the common law; and from a judgment rendered in the exercise of such special jurisdiction, in the absence of express right given by statute, no appeal will lie to this court, whether the judgment be pronounced in the exercise of original jurisdiction, or on appeal from some inferior authority: *Id.*

LAND.

Right to Bore for Oil—Corporeal Interest.—An agreement to lease

land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor: *Held*, to pass a corporeal interest: *The Chicago, &c., Oil Co.* v. *U. S. Petroleum Co.*, 57 Penna.

The taking by the lessee of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms: *Id.*

Where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right or a *primâ facie* right, with such circumstances of danger or probable loss as will move the conscience of a chancellor to interfere: *Id.*

LICENSE. See *Land.*

LIS PENDENS.

Pendency of a Suit in a Court of another State.—While it is settled, that for all national purposes embraced by the Federal Constitution, the states and the citizens thereof constitute one government, united under the same sovereign authority, and governed by the same laws, yet in all other respects and for all other purposes, the several states retain their individual sovereignties, and with respect to their municipal regulations, are to each other foreign: *Seevers* v. *Clement*, 28 Md.

In legal contemplation the jurisdiction of the courts of Pennsylvania is foreign to the jurisdiction of those of Maryland: *Id.*

At the common law the rule is well established, that the pendency of a prior suit *in personam* in a foreign court, between the same parties, for the same cause of action is no sufficient cause for stay or bar of a suit instituted in one of our own courts. It is only the definitive judgment on the merits that will be considered conclusive: *Id.*

This rule has been frequently and upon good and sufficient reasons declared to obtain in all its force, both by Federal and state courts, in regard to actions pending in another state of the Union: *Id.*

MORTGAGES.

Delivery—Date.—The date of a mortgage is the day of its delivery, and that day may be shown by parol notwithstanding a different date be on the face of the deed: *Russell* v. *Carr*, 38 Georgia.

Two mortgages executed in the same day are of equal date, and, if both are recorded in time, are entitled to share *pro ratâ* in a fund not sufficient to satisfy them both: *Id.*

The law will not note fractions of a day except to prevent injustice, and in cases specially provided by law: *Id.*

MUNICIPAL CORPORATION.

Negligence—Highway.—A municipal corporation, the owner of a market, the stalls of which it rents, is bound to keep the pavements in front of the stalls in a safe condition, and if a citizen of the corporation is injured through a neglect of this duty by the officers of the corporation, the corporation is liable to the extent of the injury received: *The City of Savannah* v. *Cullens and Wife*, 38 Georgia.

NEGLIGENCE. See *Municipal Corporation.*

Injury to Dam by Matter thrown in the Stream.—A dam was filled

by deposits of coal-dirt from different mines on the stream above the dam, some worked by defendants and their tenants and others by persons entirely unconnected with the defendants. The court charged in substance that if at the time the defendants were throwing coal-dirt into the river, the same thing was being done at other collieries and they knew of it, they were liable for the combined results of all the deposits. *Held*, to be erroneous: *Little Schuylkill Nav. Co.* v. *Richards*, 57 Penna.

The ground of the action is not the deposit of the dirt in the dam by the stream, but the negligent act above: *Id.*

Throwing the dirt into the stream is the tort, the deposit is only the consequence: *Id.*

The liability of the defendants began with their act on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and did not become joint because its consequences united with other consequences: *Id.*

The defendants are not liable for acts of their tenants, not done by their authority or command: *Id.*

Infant—Duty of Parent.—Though an infant of tender years may recover for an injury, partly caused by his own imprudent act, the father cannot: *Glassey* v. *Hestonville R. Co.*, 57 Penna.

It makes no difference whether the injury was to the father's absolute or relative rights: *Id.*

Protection being a paternal duty, entire failure to extend it is negligence: *Id.*

If a father permits a child of tender years to run at large, without a protector, in a city traversed constantly by cars and other vehicles, he fails in the performance of his duty and is guilty of negligence: *Id.*

The fact that a young child having parents, is found alone and unprotected in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors: *Id.*

It is the duty of the parent at all times to shield his child from danger, and this duty is the greater when the risk is imminent; the degree of protection is in proportion to the helplessness and indiscretion of the child: *Id.*

Infant.—To a child of tender years no contributory negligence can be imputed: *N. P. R. Co.* v. *Mahoney*, 57 Penna.

A person not in charge of a child of tender years, took it into her arms with intention to protect it, fell with it on a railroad track and the child was injured by the engine. An action would lie against such person at the suit of the child, but the negligence of such person was not contributory negligence on the part of the child so as to discharge the railroad company, their servants having also been negligent: *Id.*

NUISANCE.

Indictment for.—A person who shall erect or continue (*after notice* to abate) any nuisance which tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, is liable to indictment under the penal code of this State. This legal offence of continuing a nuisance is not complete before notice to abate. And until the notice is given and the legal offence is complete, the city

authorities have power, as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to indictment after notice to abate. But where the offence is complete they have only the power to bind over the offender to the proper court to answer for the offence: *Vason* v. *The City of Augusta*, 38 Georgia.

A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises by a tenant during the lease. If the nuisance existed on the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance. As the landlord, under our statute, is liable for necessary repairs on the premises, if the nuisance grows out of his neglect to make the repairs, the tenant may make them, and set off the reasonable value against the rent due the landlord: *Id.*

Partnership.

Lien of Creditors on separate and joint Property.—Cake took a mortgage on Snyder's interest in land, appearing by the record to be held *in common* with Bergstresser, without notice that it was *partnership* property. He afterwards took another mortgage on the land from Snyder and Bergstresser, for a partnership debt; and at the same time Snyder confessed to Cake a judgment on his individual property, as collateral security for the latter mortgage. The land was sold under both mortgages, but did not pay the debts. *Held*, that the collateral judgment was not extinguished by the sale: *Vandike's Appeal*, 57 Penna.

The personal property of the partnership was sold on an execution on the judgment against Snyder and on executions against Bergstresser. *Held*, that the proceeds should be divided between the executions against Snyder and those against Bergstresser: *Id.*

When partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners and not that of the partnership: *Id.*

Receiver. See *Land.*

Seduction.

Pleading and Evidence in Action for.—In an action on the case by a father for the seduction of his daughter, under twenty-one years of age, *per quod servitium amisit*, the relation of master and servant, at the time of the seduction, must be averred in pleading, and established by proof: *Greenwood* v. *Greenwood*, 28 Md.

A farther may maintain an action for debauching his daughter, under age, *per quod servitium amisit*, although she was not living with him at the time the offence was committed, unless by some act of his own, he has destroyed the relation of master and servant, which the law implies from the legal control he has over her services: *Id.*

Sheriff.

Right to return "Nulla Bona" where Title is doubtful—False Return.—In an action for a false return of "*nulla bona*," unless it appear that the property pointed out belonged to the defendant in the execu-

tion, an offer to indemnify the sheriff will not make him liable: *Commonwealth ex rel. Hood* v. *Vandyke*, 57 Penna.

The Interpleader Act of April 10th 1848 is not imperative on the sheriff; but it affords him a means of relieving himself from responsibility. He may take the risk of returning "*nulla bona*" or levying and selling: *Id.*

When there is a claim of property adverse to the defendants which would raise a reasonable doubt as to title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for indemnity, and if refused, may ask the court to enlarge the time for his return till indemnity be given: *Id.*

Whether the insufficiency of the indemnity, although it may justify no return, is a defence to an action for false return. *Dubitatur*, per SHARSWOOD, J.: *Id.*

A sheriff has a right to require that the sureties in a bond of indemnity to him should reside in his county: *Id.*

Whether the indemnity is reasonable ought not to be too broadly submitted to the jury without instructions, but is within the province of the court, leaving the facts, if disputed, to the jury: *Id.*

STAMP.

Letters—When to be Stamped.—A debtor placed a note due him in the hands of a creditor to receive the amount, and afterwards wrote to another creditor that he should receive his debt from the proceeds of the note after the first creditor should be paid; the second creditor, by direction of the debtor, showed the letter to the first, who promised to pay the money when received. *Held*, that the letter was not an instrument requiring a revenue stamp: *Boyd* v. *Hood*, 57 Penna.

A tax law cannot be extended by construction to things not described as the subject of taxation: *Id.*

A letter in the character of a substantial instrument cannot be used to evade taxation: *Id.*

Accidental Omission to Stamp at the Proper Time.—A note having been executed at a time when the parties did not know it was necessary to place a revenue stamp upon it, and on the fact being ascertained, the maker having voluntarily placed the necessary stamp on the note, and again delivered it to the payee, whereby the government received the revenue to which it was entitled, the maker will not now be allowed to controvert the fact that the note was legally stamped: *Green* v. *Lowry*, 38 Georgia.

SURETY.

Discharge of.—As Congress has the power, under the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, and as the Act of Congress forbids the prosecution of an action against a person adjudged a bankrupt, until the question of his discharge has been determined, and relieves him, when discharged, from all debts, liabilities, &c., which might have been proved against his estate; a surety on an appeal bond in this state is no longer liable, when the principal is discharged in bankruptcy, which discharge of the principal terminates the case pending in the state courts against him, and

prevents any judgment. The surety on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending: *Odell* v. *Wooten*, 38 Georgia.

Trustees.

Ordinary Care by.—A trustee in possession of the trust property, is only bound to ordinary diligence in its preservation and protection: *Campbell* v. *Miller*, 38 Georgia.

If the trust property consists of promissory notes the trustee may receive payment of the notes when due, in such currency as a prudent man would receive for debts due him under similar circumstances: *Id.*

If the trustee changes the investment with the consent of the *cestui que trust* who is of legal age, he is not liable for any loss growing out of any such new investment: *Id.*

Vendor and Purchaser.

Constructive Delivery—Symbolical Delivery—Vendor's Lien—Stoppage in Transitu as between Vendor and Vendee.—A quantity of pig iron lying in piles at a furnace and on the road was sold, and the parcels constituting the whole were pointed out and shown by the agent of the vendor to the agent of the vendees, and the whole was charged in the books of the vendor to the vendees by their agent, under the direction of the vendor. *Held:* That these acts being done with the intent and for the purpose of making delivery, constituted such a constructive delivery as would pass the title to the vendees: *Thompson* v. *B. & O. R. R. Co.*, 28 Md.

Where ponderous articles incapable in the ordinary course of business of actual manual delivery, are the subject of sale, symbolical or constructive delivery is sufficient, and such constructive delivery may be implied from the acts of the parties: *Id.*

There is a marked distinction between those acts, which as between vendor and vendor, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price; and the law in holding that a vendor who has given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu*, then his lien is restored, and he may hold the goods as security for the price: *Id.*

The lien of the vendor always exists until he voluntarily and utterly resigns the possession of the goods sold, and all right to detain them. So long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount to a conclusive delivery, so as to pass the title or avoid the statute: *Id.*

In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it

is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor: *Id.*

When Title does not pass.—The title to property sold does not pass to the vendee, where anything remains to be done in order to ascertain the precise property sold or the price to be paid: *Camp* v. *Norton et al.*, 52 Barb.

But whether the kind, or the quantity of property has been ascertained, so as to pass the title, are facts to be proved in each case, and cannot, ordinarily, arise upon a complaint properly drawn: *Id.*

Complaint in Action for Refusal to Deliver.—In an action by a vendee against the vendor to recover damages for not delivering the property sold, it is only necessary for him to aver, in his complaint, the making of the contract, performance or readiness to perform, on his part, and neglect or refusal to deliver on the part of the vendor after demand, when demand is required by the contract: *Id.*

Separating, Weighing or Measuring of Property.—There is no presumption of law that property sold has not been separated, weighed or measured, so as to pass the title. If these acts are not done, it devolves on the party insisting on these omissions to show them, and thus discharge himself from a liability which would otherwise devolve upon him: *Id.*

WASTE.

Opinion of Witness—Cutting of Timber.—In an action for waste, a witness must state *facts*, and while he may give his *opinion* accompanied by the facts upon which it is predicated, as to the number of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportion of the timbered land, and the like; it is error in the court to permit him to give in evidence his *opinion* that the estate of the remainderman has been damaged a certain amount by the acts of the defendant. It is the province of the jury to draw from the facts stated, their own conclusion as to the amount of damage, if any, sustained by the plaintiff: *Woodward* v. *Gates et al.*, 38 Georgia.

The stringent rules of the English laws relative to waste were not applicable to our condition, and were not embraced in our adopting statute. It is not always waste for a tenant for life to cut growing timber or clear land. Regard must be had to the condition of the premises; and the proper question for the jury to decide under the instructions of the court will be, did good husbandry require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed: *Id.*

WITNESS.

Mileage.—A witness for the state in a criminal case, who, in obedience to a subpœna served upon him while temporarily in this state, actually comes from his home in a distant state, where he resided when the subpœna was served upon him, and testifies in the case, is entitled