The only other question which we deem it our duty to consider, is as to the competency of the witness Jacob Shafer, Jr., one of the payees of the note, and who had also subsequently endorsed it. It is unnecessary to discuss his interest in the suit, as, interested or not, he was incompetent. It is now settled by *Baily* v. *Knapp*, 7 Harris 192, *Katz* v. *Snyder*, 2 Casey 511, and *Foreman* v. *Ahl*, 5 P. F. Smith 325, that the rule furnished by *Post* v. *Avery*, 5 W. & S. 509, is applicable to payees, who have transferred negotiable paper by endorsement. This renders immaterial all the questions which arose upon the testimony of the witness, who ought not to have been heard. Besides which, not one of the assignments of error is in accordance with the rules of court, and might, with propriety, be dismissed on that ground alone.

Judgment reversed, and *venire facias de novo* awarded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]

SUPREME COURT OF CALIFORNIA.[2]

COURT OF APPEALS OF MARYLAND.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

AGENT.

When Agent may sue in his Own Name—Responsibility of Telegraph Companies for Failure to transmit Despatches.—Where an agent is interested, as for commissions, or by reason of special property in the subject-matter, and the contract in reference thereto is made in his name, it is perfectly competent for him to sue and maintain an action in his own name as if he were the principal: *United States Telegraph Co.* v. *Gildersleve*, 29 Md.

This is so in the case of a factor, or a broker, or a warehouseman, or carrier, an auctioneer, a policy broker, whose name is on the policy, or the captain of a ship for freight: *Id.*

So where a contract is in terms made with an agent personally, he may sue thereon; and if an agent in his own name carry on a business for his principal, and appear to be the proprietor, and sell goods in the

[1] From the Judges. The cases, which were decided at the January Term 1869, will be reported in 42 or 43 Ala. Rep.

[2] From J. E. Hale, State Reporter; to appear in 36 Cal. Rep.

[3] From J. S. Stockett, State Reporter; to appear in 29 Md. Rep.

[4] From P. Frazer Smith, State Reporter; to appear in 59 Pa. Rep.

trade as such apparent owner, he can sustain an action in his own name for the price: *Id.*

Where a broker sent by telegraph, in his own name, an order for the purchase of gold, on behalf of his principal, and the telegraph company failed to transmit the order. *Held*:—

1. That the broker may sue the telegraph company in his own name, on the contract to transmit the order, and recover the full amount of damages resulting from a breach of the contract. But that he of course sues and recovers as trustee for his principal:

2. That the company had a clear right to protect itself against extraordinary risk and liability, by such rules and regulations as might be required for the purpose:

3. That as the message was not required to be repeated, and there was no special agreement for the insurance of its transmission, the company, though bound to use due diligence, was not bound to use extraordinary care and precaution:

4. That, having refused to pay the extra charge for repetition or insurance, the broker had no right to rely upon the declaration of the company's agent, that the message had gone through, in order to fix liability on the company: *Id.*

In a suit by a broker against a telegraph company to recover the damages resulting from the failure to transmit a despatch containing the following order "*sell fifty* (50) *gold*," it was proved that the despatch would be understood among brokers to mean fifty thousand dollars of gold, but it was not shown that the company's agents so understood it. *Held*, that the nature of this despatch should have been communicated to the company's agent at the time it was offered to be sent, in order that the company might have observed the precautions necessary to guard itself against the risk; and it was error to instruct the jury that the plaintiff was entitled to recover to the full extent of his loss by the decline in gold: *Id.*

Bills and Notes.

Notice of Dishonor sent through Post-Office.—The free delivery of letters being established and regulated by law, it seems proper the rule in this state should be that where, as in cities, &c., there is a letter-carrier, who carries letters daily from the post-office and delivers them daily at the house and places of business of those who are accustomed to receive letters by him, if a notice of dishonor is left at the post-office in time to go by such carrier on the same day to the party, it will be deemed sufficient: *Shoemaker* v. *Mechanics' Bank*, 59 Pa.

Confederate States. See *Limitations.*

The so-called Confederate Government, and the rebel government in the state of Alabama, were neither of them in the proper legal sense *de facto* governments during the late rebellion: *Chisholm* v. *Coleman*, S. C. Ala.

The government in Alabama during that period did not, and did not claim to, exercise the powers of the loyal, rightful government of said state, under the Constitution of the United States, nor was it, nor did it claim to be, the government of said state that was admitted into the Union, under the laws and Constitution of the United States, in the

year 1819—did not claim or pretend to be that government—that government it destroyed. It claimed to be and was, a new, separate, and distinct government—a government forming, and being a constituent part and member of the said Confederate Government, in open and flagrant hostility to, and war against, the United States; and the said rightful government of said state: *Id.*

A government *de facto,* whose acts bind the rightful government, is a government that gets the possession and control of the rightful government, and maintains itself there by force and arms against the will of the rightful government, *and claims to exercise the powers thereof: Id.*

A judge of the Circuit Court of the state of Alabama, elected before the act of secession, who after that act enters the military service, and takes an office in the armies of the Confederate States, and receives the pay thereof, thereby forfeits and vacates his office of judge under the state of Alabama; and there was no necessity there should be any judicial proceeding to try and determine the fact of forfeiture and vacancy: *Id.*

The present legitimate loyal government of Alabama is not bound nor under any obligations, either moral or legal, to pay the salary of such judge while he was serving the illegal, rebel government in said state: *Id.*

Constitutional Law.

Right of Suffrage.—A right conferred by the constitution is beyond the reach of legislative interference: *McCafferty* v. *Guyer et al.*, 59 Pa.

The legislature cannot confer the right to vote upon any classes but those to whom it is given by the constitution; the description of those entitled excludes all others: *Id.*

The 3d article of the constitution is not merely a general provision defining the indispensable rights of an elector, leaving the legislature to determine who may be excluded. It is a description of who shall not be excluded: *Id.*

The Act of June 11th 1866 (for disfranchising deserters) is unconstitutional: *Id.*

Contract.

Consideration.—In a suit against the owner of houses by a lumber merchant for lumber furnished to the contractor, evidence that at a settlement between the contractor and owner, the contractor admitted the owner's book to be correct, *Held* to be inadmissible: *Landis* v. *Royer*, 59 Pa.

Materials furnished on the credit of a building, are a sufficient consideration for the owner's subsequent promise to pay: *Id.*

A benefit derived from unsolicited services creates a moral obligation, which is a sufficient consideration for an express assumption, but will not raise an implied assumption: *Id.*

Materials for a building were furnished to a contractor on the credit of the building, and charged to him: there was evidence that the owner promised to pay for them. *Held*, that if the promise was a direct and absolute engagement to pay on a consideration moving to himself, and at the time the claim was a lien, it was the debt of the defendant's own building, whose payment could be enforced against it, and although not personally his debt, his promise was in relief of his property—not the

debt of another and not within the Act of April 26th 1855 (Frauds): *Id.*

DAMAGES. See *Agent.*

Fraudulent Sale.—A., being part owner of a vessel and authorized to appoint her master, agreed with B., who applied for the appointment, to appoint him, in consideration that he would take an eighth interest in the vessel at her *cost* price. A. fraudulently represented the cost price of the vessel to have been $34,000, and received from B. the one-eighth part of that sum. B. subsequently learned that the cost price of the vessel was very much less than that which A. represented it to have been. *Held:*—

1st. That B. was entitled to recover from A. for the over-payment, even if the actual value of the share purchased equalled or exceeded what it would have been, had the representation been true:

2d. And that the measure of damages was either the difference between one-eighth of the actual and one-eighth of the represented cost of the vessel, or one-eighth of the difference between the actual and represented cost of the entire vessel: *Pendergast* v. *Reed*, 29 Md.

DEBTOR AND CREDITOR.

Discharge of Insolvent.—An express promise by a debtor, after his discharge under the insolvent laws, to pay a prior debt, waives the discharge: *Knight* v. *House*, 29 Md.

Voluntary Payment.—Where a person with full knowledge of the facts, *voluntarily* pays a demand unjustly made upon him, though attempted or threatened to be enforced by proceedings, it will not be considered as paid by compulsion, and the party thus paying is not entitled to recover back the money paid, though he may have protested against the unfounded claim at the time of payment made: *Lester* v. *The Mayor*, 29 Md.

Where money has been paid under a mistake of the facts, or under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld from the party paying the money, an action may be maintained for the money wrongfully exacted: *Id.*

But such action is not maintainable in the naked case of a party making payment of a demand rather than resort to litigation, and under the supposition that the claim which subsequently turned out to be unauthorized by law, was enforceable against him, or his property: *Id.*

Security for future Advances.—A judgment as well as a mortgage, may be taken to secure future advances and liabilities, when such is a constituent part of the original agreement under which it was entered; and any future advances not exceeding the amount of the judgment made thereunder, will be covered thereby: *Neidig, Administratrix of Neidig*, v. *Whiteford*, 29 Md.

A debtor has the right, if he so elect, to make the application of payments in the first instance, and if he omit so to do, the creditor may make the appropriation; but if neither make any appropriation, the law appropriates the payment to the earliest, and generally the most onerous debt: *Id.*

On the 24th of July 1856, W. confessed a judgment in favor of A., as collateral security for such balance as was due on account to the latter at the date of the judgment. There was a running account between the parties, commencing before the date of the judgment, kept alone by the creditor, and which continued until May 1857. Subsequently to the date of the judgment, large and numerous credits were entered in the account, greatly exceeding in amount the balance due on the account at the time the judgment was rendered. *Held*, that the judgment was discharged by the subsequent payments on account: *Id.*

EJECTMENT.

Writ of Possession—Execution of.—Primâ facie all who come into possession of the land, pending the action to recover possession, must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant: *Wetherbee* v. *Dunn*, 36 Cal.

If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained: *Id.*

EQUITY.

Relief from Contract on Ground of Mistake.—Where parties have presupposed facts or rights to exist as the basis of their contracts, which did not, such contracts made in mutual mistake will be relieved against: *Watts* v. *Cummins*, 59 Pa.

The principle in such cases is, that the party has been misled to his hurt, in trusting to the truth of the other in a material matter, where he has had no opportunity of satisfying himself of its reality, or has been prevented from taking the steps necessary to verify the assertion: *Id.*

When a party asks a chancellor to restrain the inequitable use of a legal title, he must show such facts as entitle him to rescind on the ground of either mistake or fraud: *Id.*

The defendant who had given a note for a share in a tract of oil land defended, on the ground of misrepresentation. The judge below, after referring to the evidence, and the excitement in relation to such land, charged: "If Watts, the defendant, was seized with this oil fever, like multitudes of others, and was induced to subscribe by representations that Campbell, the agent of the owners of the land, believed to be true, a persuasion that was shared by the best informed men who visited and examined the territory, he cannot allege that he was deceived and defrauded by such representations. But if you can find evidence that Campbell made these representations knowing them to be false, and that he made them by the direction and authority of the owners, and for the purpose of obtaining Watts's note, and that Watts signed the paper and gave the note in consequence of these false representations, you will be warranted in rendering a verdict for the defendant." *Held*, not to be error: *Id.*

Miles v. Stevens, 3 Barr 21, explained: *Id.*

Practice.—If a defendant in a chancery suit is sought to be made a party, in his own right as heir at law, and as executor or administrator,

the bill should state the fact, and pray process against him in both characters, otherwise he will be held to be a party only in the character in which process is prayed against him: *Carter* v. *Ingraham*, S. C. Ala.

In such a case, if process is prayed against the defendant in one character only, the register has no authority to issue process against him in both; the process should follow the prayer in the bill of complaint: *Id.*

Specific Performance—Demand for Deed, how far Material.—In an action for the specific performance of a trust by the execution of a deed, a demand therefor before suit is only material as affecting costs. Without such demand the action may be maintained, but the plaintiff will not be entitled to costs: *Jones* v. *City of Petaluma*, 36 Cal.

Estoppel.

Former Judgment.—The judgment of a court of competent jurisdiction upon a material matter, put directly in issue by the pleadings, is *res adjudicata* as to that issue, and the parties are estopped by the judgment from litigating it again: *Jackson* v. *Lodge*, 36 Cal.

If the defence made by sureties to a promissory note is, that a deed to a tract of land has been given to the plaintiff by the principal to the note, in satisfaction thereof, and the case is tried on this issue, and judgment rendered for the defendants, this is *res adjudicata* as to that issue; and the same matter cannot be again litigated between the parties in an action to recover possession of the land: *Id.*

Evidence.

Experts.—In an action against the executors of her father on a note given to a daughter, the plea being *non est factum*, the will of the father dated before the note, stating as a reason for excluding her from any part of his estate, that she had received her share in a farm sold to her husband much below its value, was irrelevant, and inadmissible: *Rouch* v. *Zehring*, 59 Pa.

If the fact were material, it could not be proved by the declaration of the obligor: *Id.*

The plaintiff afterwards gave evidence to rebut the declaration in the will. *Held*, that this did not cure the error in admitting the will: *Id.*

The opinion of an expert must be predicated on facts proved or admitted, or such as appear in evidence hypothetically stated. One not an expert must give facts and circumstances within his own knowledge as the ground of his opinion: *Id.*

Declarations of the obligor, shortly after the execution of the note, that he had not signed it were admissible, not as evidence that he had not signed, but to show want of memory and understanding about what he had done: *Id.*

Receipts.—There is a distinction as to oral testimony, between solemn contracts *inter partes* in writing executed and delivered, and receipts, the acknowledgment of one party only: *Batdorf* v. *Albert*, 59 Pa.

Receipts, when mere acknowledgments of delivery or payment, are but *primâ facie* evidence of the facts, and not conclusive: the facts may be contradicted by oral testimony: *Id.*

Executor and Administrator.

Promise to Pay Legacy.—There is no consideration for the promise of an executor to pay a legacy beyond the assets in his hands. The consideration and promise must be co-extensive: *Okeson's Appeal*, 59 Pa.

An executor cannot be made liable *de bonis propriis* on an oral promise, on the mere consideration of assets: such promise would be within the Act of April 26th 1855 (Frauds): *Id.*

Liability of.—An administrator who fails to make and return an inventory of the estate he represents, as required by law, is subject to removal for such failure: *Oglesby* v. *Howard*, S. C. Ala.

An administrator who fails to collect the debts of the estate he represents when they become due, or collects the same in illegal and worthless funds, is guilty of a *devastavit*, and he is subject to removal for the same, unless a sufficient excuse is shown for such failure: *Id.*

Federal and State Courts.

Transfer of Cause from a State Court to a Federal Court.—This Court has no jurisdiction to grant a writ of mandate to compel the judge of a District Court to proceed with the trial of an action commenced therein, in which an order has been made by said District Court directing the cause to be transferred to the Circuit Court of the United States for trial, for the alleged reason that the parties thereto are citizens of different states: *Francisco* v. *Manhattan Ins. Co.*, 36 Cal.

In such case the subject-matter of said order of the District Court is within its jurisdiction, and is not void, even if erroneous. It cannot be reviewed by this court on application for *mandamus*. Moreover, the party aggrieved thereby has a plain, speedy, and adequate remedy by the due course of law: *Id.*

Forwarders.

Liability for Want of Ordinary Care and Diligence.—H. delivered to the Central Ohio Railroad Company, at Newark, Ohio, two hundred and fifty barrels of coal oil to be transported to Bell Air in the same state, by the said company; thence by way of the Baltimore and Ohio Railroad to Baltimore, and thence by steamer to New York, there to be delivered to S., or his assigns. The oil was delivered to the Baltimore and Ohio Railroad Company at Bell Air, and reached Baltimore, where upon being taken from the cars of the company, it was placed in an open lot near their warehouse on Locust Point, and thence forwarded to New York, where upon its arrival, it was ascertained there was a deficiency in quantity of sixty-seven barrels. *Held:*—

1. That the responsibility of the proper custody and storage of the oil after it was unladen from the cars in Baltimore, attached to the Baltimore and Ohio Railroad Company, as warehousemen and forwarders, and they were bound to use ordinary care and diligence in its protection:

2. That S. was entitled to recover from the Baltimore and Ohio Railroad Company for such loss of the oil by leakage, while in their custody

after it was unladen from their cars, as was occasioned by their neglect or want of ordinary care as warehousemen and forwarders, as could be established to the satisfaction of the jury, by competent and admissible evidence: *B. and O. R. R. Co.* v. *Schumacher*, 29 Md.

FRAUDS, STATUTE OF. See *Contract—Executor.*

JUDGMENT. See *Debtor and Creditor—Estoppel.*

LIMITATIONS, STATUTE OF.

New Promise made on Sunday—Act of Congress relating to the Confiscation of Property of Persons engaged in the Confederate Service.—On the 23d of March 1861, A., a resident of Maryland, made his promissory note in favor of B., payable ninety days after date. B. passed the note away and entered the Confederate army, and did not return to Maryland till the war was over. Before maturity the note came into the possession of a bank in Baltimore, and at maturity was protested for non-payment, and remained in the possession and ownership of the bank until the war was ended. After the war B. again became the owner of the note for a valuable consideration, and brought suit on it against A., who pleaded the Statute of Limitations, to which B. replied a new promise, which at the trial was shown to have been made on Sunday. *Held:*—

1st. That the Code of Public General Laws, Art. 30, sec. 178, does not prevent the acknowledgment or new promise made on Sunday, from being used in evidence, for the purpose of removing the bar of the Statute of Limitations:

2d. That there was nothing in the Act of Congress of 1862, ch. 195, that could by any latitude of construction be held as intending to prevent a party situated as the plaintiff was, from purchasing notes or acquiring property after the close of the war, or as making such property liable to seizure and confiscation:

3d. Nor was it necessary that the plaintiff should have obtained a pardon or have complied with the provisions of the amnesty proclamation of the 29th of May 1865, before he could sue upon the note so acquired:

4th. That the plaintiff was entitled to recover interest upon the note pending the war: *Thomas* v. *Hunter*, 29 Md.

LIS PENDENS.

Abatement of Action.—In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions: *Larco* v. *Clements*, 36 Cal.

MECHANICS' LIEN. See *Contract.*

Repairs and Alterations.—Repairs and alterations of a building, which do not fairly change its exterior into a new structure, cannot confer a lien: *Miller* v. *Hershey*, 59 Pa.

It is the extent and character of the alterations, and not the change of purpose, which makes the difference between an old or new building: *Id.*

Newness of structure in the main mass of the building—that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have been retained—is that which constitutes a new building, as distinguished from one altered: *Id.*

The building should present that external change indicating newness of structure, which would put purchasers and lien-creditors upon inquiry: *Id.*

NUISANCE.

Public and Private Nuisance.—A public nuisance may also be a private nuisance, and if so, the person thereby injured may have his action: *County of Yolo* v. *City of Sacramento*, 36 Cal.

The diversion of the waters of a navigable stream may be both a public and a private nuisance: *Id.*

In so far as a wingdam in a navigable river obstructs the navigation, it is a public nuisance; but if it obstructs the reclamation of swamp lands, it is a private nuisance: *Id.*

The abatement of a nuisance, and the recovery of damages therefor, are not distinct causes of action, which cannot be united in the same complaint, but merely different kinds of relief to which the plaintiff may be entitled where a nuisance is the cause of action: *Id.*

PARTITION.

Parties.—In partition, all the tenants in common should be made parties. One tenant in common who owns an undivided interest consisting of a certain quantity, cannot have partition by making the original holder of the whole tract sole defendant, when he has sold divers parts thereof to various persons, but retains more than the quantity to which the plaintiff in the partition suit is entitled. All the grantees of the original owner should be joined as parties: *Sutter* v. *San Francisco*, 36 Cal.

PARTNERSHIP.

Fraudulent Transfers of Partnership Property.—While the members of a solvent partnership by their own acts may convert the joint property of the partnership into the separate property of individuals, or into the joint property of two or more partners, when done in good faith, such conversions or transfers, when fraudulent and calculated to hinder and delay the partnership creditors, are void as against such creditors and will not be allowed to operate to their prejudice: *Flack* v. *Charon*, 29 Md.

While it is true that the joint creditors, as such, have no immediate or direct lien upon the partnership property, yet they have a derivative or secondary lien that can be worked out and made effectual through the lien of the partners; and which *quasi* or secondary lien of the creditors, constitutes an equity, that courts will recognise and protect, against the meditated fraud of the partners themselves: *Id.*

And hence while the joint creditors have no right to impeach or call into question the *bonâ fide* sales or transfers of the partnership property, it has been uniformly held that it was necessary to the validity of such sales or transfers, as against the creditors, that they should be fair and *bonâ fide;* and where they have been found otherwise, they have been declared inoperative as against creditors: *Id.*

Fraudulent Debt—Liability of Partners for.—The fraudulent intent of a party to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of sale. The debt, under such circumstances, is fraudulently contracted: *Stewart* v. *Levy*, 36 Cal.

In case of a debt fraudulently contracted by a partnership firm by one member alone, the others being ignorant of the fraud, while all the members will be bound in an action brought on the contract or to recover the property so fraudulently obtained, yet the liability to an action for the fraud which is essentially different and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud, or ratified it by adopting the act of the fraudulent partner, or retaining its fruits with knowledge of the fraud: *Id.*

PAYMENT. See *Debtor and Creditor.*

PUBLIC OFFICER.

Liability of.—Although public officers should be made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, yet if the damages would have been sustained notwithstanding the malconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer cannot be held responsible: *Lick* v. *Madden et al.*, 36 Cal.

SALE.

Conditional Sale of Personal Property—Title.—Where on sale of personal property the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser: *Putnam* v. *Lamphier*, 36 Cal.

It is a general rule, applicable alike to conditional and absolute sales, that a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general denomination of currency: *Id.*

STAMP.

Unstampea Note.—A promissory note, made since the 30th day of June, 1864, is not provided for in the Act of Congress of that date, and cannot be stamped in open court, and thus stamped, read as evidence to the jury: *Wigham* v. *Pickett*, S. C. Ala.

But such note is not void, unless it was left unstamped at the time it was made, with the intent to defraud the government of its revenue. Such fraudulent intent will not be presumed, but must be proved, as any other fraud is proved: *Id.*

Such note may be made available, as evidence, by having it stamped by the collector of the revenue of the proper district, under section 158 of said act: *Id.*

SUNDAY. See *Limitations.*

Trustee.

Creditors of Trust Estate.—Persons who have traded with and given credit to the trustee of a married woman's separate estate, cannot, in the first instance, go into chancery to have their debts paid out of the trust estate: *Pollard et al.* v. *Cleveland et al.*, S. C. Ala.

A trustee who is a member of a company, and as such member becomes the seller, and as trustee the buyer, for and on account of the trust estate, makes no exception to, but rather a reason for the necessity and propriety of the general rule: *Id.*

Statute of Frauds as to Resulting Trust.—Where A. agrees with B. that he will purchase from C., at a given price, a sheriff's certificate of sale, which C. holds, of a tract of land, and that B. shall furnish one-half of the money, and that the assignment of the certificate shall be taken in A.'s name, for the joint benefit of A. and B., and B. furnishes A. his proportion of the money, when in truth A. has already bought the certificate unknown to B.: *Held*, that A. is estopped from alleging that he had made the purchase before his agreement with B., and that on this ground said agreement is within the Statute of Frauds, and does not create a resulting trust: *Dikeman* v. *Norrie*, 36 Cal.

Where A. agrees with B. that he will purchase a sheriff's certificate of sale of a mining claim, and take an assignment in his own name for the joint benefit of both, and A. makes the purchase, B. furnishing his proportion of the money, and takes a sheriff's deed in his own name, a resulting trust arises, and A. holds a part of the property in trust for B.: *Id.*

Such resulting trust cannot be defeated by the fraud of A. in making this agreement and taking B.'s money, when in fact he had already, unknown to B., made the purchase: *Id.*

Vendor and Purchaser.

Vendor's Lien.—If the vendor deliver possession of the estate to the vendee before all the purchase-money is paid, equity recognises and will enforce a lien on the land as a security for such unpaid purchase-money; and this is so whether the legal estate be or be not conveyed: *Schwarz* v. *Stein*, 29 Md.

Such lien exists independent of any special agreement, and as an incident to the contract of sale of real estate, and it exists not only against the vendee and his heirs and other privies in estate, but against those claiming as volunteers, judgment-creditors, and all subsequent purchasers for value, having notice that the purchase-money or any part thereof remains unpaid: *Id.*

Where the vendor, claiming the benefit of the lien, retains the conveyance and holds in himself the legal title, subsequent purchasers or mortgagees may be affected with notice of the lien for any balance of unpaid purchase-money: *Id.*

The general rule is that the purchaser of an equity is bound to take notice of all prior equities: *Id.*

Whether the lien has been waived is generally a question of intention, to be determined from the special circumstances of each case; and it is always incumbent upon the party resisting the lien, to show the facts which repel its existence: *Id.*

Where the deed was withheld until much the larger portion of the

purchase-money was paid, and a promissory note for the balance, with the endorsement of a third party thereon as security, was given; and the deed was then delivered to the purchaser, and he was thus clothed with the legal estate to deal with the same as he pleased. *Held*, that the lien was extinguished, and the vendor must rely alone upon the personal security taken for the balance of the purchase-money: *Id.*

Where the legal title has been conveyed to the vendee, and he has given his note with the responsibility of a third person endorsed thereon as security, the lien must be considered as having been waived or surrendered, unless there be an express agreement that it shall be retained: *Id.*

Vendor's Lien—Against whom it may be enforced.—A vendor's lien for the unpaid purchase price of land may be enforced against the vendee and his grantees who have notice of the vendor's equities: *Pell* v. *McElroy*, 36 Cal.

The fact of notorious and exclusive possession of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such vendor out of possession, presumptively imparts notice to such purchaser of the equitable rights in the premises of the party in possession; and this presumption can only be rebutted on the part of such purchaser, or those claiming under him, by explicit proof of diligent and unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in the premises in behalf of the party in possession: *Id.*

The continued adverse possession of lands by the vendor after his formal conveyance of the legal title, is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subjects him to the rule applicable in case of the party in possession being a stranger to the title as of record: *Id.*

WILL.

Charge on Land.—"I give to Samuel the tract, &c., two horses, &c.; I bequeath to Margaret $300, one bed and bedstead, to make her equal with the rest; I leave to Daniel's children $30, to be divided equally between them; all my money or bonds to pay my debts, and then all my personal property to be sold and the money to be equally divided," &c. There was a deficiency of personal estate to pay all the legacies. *Held*, that Margaret's bequest was not charged on Samuel's land: *Okeson's Appeal*, 59 Pa.

No particular language is necessary to create a charge on land; the intention to charge is to be carried out whenever it is discoverable from anything in the instrument: *Id.*

Commonwealth *v.* Shelby, 13 S. & R. 354, English *v.* Harvey, 2 Rawle 309, explained: *Id.*

Whether an Instrument is a Deed or Will.—Ritter conveyed land in trust to be farmed, and from the proceeds to pay him an annuity during life, the remainder of the income to his wife for life: if he survived his wife all the proceeds to him for life; after the death of both, the land to be sold, a specified sum to be paid to three children named, and the residue to be divided amongst all the children of Ritter and