ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]

SUPREME COURT OF MICHIGAN.[2]

SUPREME COURT OF PENNSYLVANIA.[3]

ABATEMENT.

Equity—Revivor of Suit after Death of Party—Limitation of.—Courts of equity have authority to revive suits on the death of the original parties independent of the enactments governing revivor in the law courts: *Ex parte Kirtland*, 49 or 50 Ala.

The limitation to a revivor in equity is not controlled by R. C. 2542; which relates to courts of law, but is rather governed by the statutes prescribing the time in which suits must be brought: *Id.*

AGENT.

Sale of Principal's Goods in bulk—Evidence.—The Coes having contracted with Nash to sell his hops on commission in New York, settlement to be made in accordance with the bill rendered by their New York correspondent, sued for the amount due, and offered in evidence an account received from their correspondent of a sale of 170 bales of hops, including 12 marked "Nash." *Held*, commercial agents have no right to sell merchandise of their principal as part of a lot with other merchandise, when the principal has never agreed to be bound by any sale not made separately: *Coes* v. *Nash*, S. C. Mich.

In a suit by commercial agents to recover from their principal the advances, charges, and expenses on the sale of his merchandise made elsewhere, the account of the sale, as rendered by the correspondent of the agents, if not proved in the ordinary way, can only be received in evidence on the ground of contract, but it must accord, and not conflict, with the contract. Otherwise it is mere hearsay: *Id.*

AMENDMENT.

Additional Counts changing Cause of Action.—A declaration in trespass q. c. f. d. b. a. complained of breaking his close, cutting and taking oak, ash, beech and chestnut trees; by leave of the court he filed another count, complaining of entering another close and taking cordwood and railroad sills; by leave he filed a third, which without alleging a breach of close, complained of taking with force and arms, &c., oak logs and *hickory* logs. *Held*, that the amendments did not change the original cause of action: *Knapp* v. *Hartung*, 73 Pa.

The cause was called for trial and jury sworn when the amendments were allowed; on application of defendant the cause was continued at the costs of plaintiff, defendant pleaded to the counts; when the cause was again called the court struck off the first additional count and

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[1] From Hon. Thos. G. Jones, Reporter; to appear in 49 or 50 Alabama Rep.

[2] Abstracts by Henry A. Chaney, Esq.; to be reported in full in 27 or 28 Michigan Rep.

[3] From P. F. Smith, Esq., Reporter; to appear in 73 Pennsylvania State Rep.

"hickory logs" from the other, as being for a different cause of action. *Held*, to be error: *Id.*

A plaintiff may add a count substantially different from the declaration, if he adheres to the original cause of action: *Id.*

The rule applies to actions *ex delicto* as well as actions *ex contractû*: *Id.*

ATTACHMENT. See *Insurance.*

BILLS AND NOTES. See *Confederate Money.*

Defence to—Parol Agreement contrary to tenor of Note.—Defendant gave to Hevner a negotiable note in payment of a patent which defendant alleged was a fraud; plaintiff being about to discount the note, defendant told him not to buy it, that Hevner had promised when the sale was made that he would not negotiate it; that if plaintiff bought it he would buy a lawsuit; no notice was given to plaintiff that the sale was fraudulent. Plaintiff having discounted the note, *Held*, in a suit on it, that these facts were no defence, although Hevner had committed a fraud on defendant in the sale: *Heist et al.* v. *Hart*, 73 Pa.

A parol agreement, although made at the time of making negotiable paper, that the payee will not negotiate it and would renew it, &c., is inadmissible to vary the effect of the paper: *Id.*

Acceptance—Form of—By payment of part of Amount.—Peterson sued on an order drawn upon Hubbard & Co., which, when presented in court, bore on its face the words, "Paid on this order $40, R. B. Hubbard & Co." The Circuit Judge declared that this did not constitute an acceptance except as to the $40 paid, and directed judgment to be entered for defendants. He would seem to have regarded the words as in some sort a memorandum of payment made, which was error: *Peterson* v. *Hubbard*, S. C. Mich.

Though the Michigan statute requires an acceptance to be in writing, it does not prescribe in what form of words it shall be expressed. Anything written by the drawee, indicating an intent to accept, is sufficient. To say "accepted" or "honored" or "seen," even if no signature is appended, is sufficient. So is the mere writing of the drawee's name across the face of the bill, which is a very common mode of accepting: *Id.*

An endorsement of a partial payment on an order would naturally be made by the holder, because it would be his acknowledgment that the payment had been made, and if the endorsement was made by the party paying, it would be virtually the act of the holder as permitting it: *Id.*

In a suit on an accepted draft, the defendant may, if he sees fit, waive all formal proof that the paper was filed with the justice before whom the case originated; that the written acceptance was made by the drawees whose signature purports to be attached; and that the parties in court as defendants compose the firm which is claimed to have accepted the draft, and whose signature purports to be attached to the acceptance: *Id.*

BROKER. See *Contract.*

COMMERCIAL AGENT. See *Agent.*

CONFEDERATE MONEY.

Payment of Bill of Exchange in.—F. drew his bill of exchange in Richmond, Va., during the late war, on W. & Co., in Mobile, Ala., and procured L. to endorse it, in order to enable him (F.) to raise money. This bill was discounted for F, by the Farmers' Bank at Richmond. When it fell due it was not paid by F.; L. was then required to pay it as F.'s endorser. He did so through the agency of the Bank of Mobile by procuring that bank to forward the necessary funds to Richmond for that purpose. L. had no funds in the Bank of Mobile save Confederate treasury notes, and the funds forwarded to Richmond were in this currency, and the bill was thus paid. Afterwards F. gave his promissory note to L., to reimburse him the sum thus paid on said bill of exchange. L. did not know what kind of funds were paid by the Richmond Bank for said bill to F. *Held*, that the note given by F. to L. was not illegal, because its consideration was Confederate money: *Lyon* v. *Robertson*, 49 or 50 Ala.

CONSTITUTIONAL LAW. See *Pilotage.*

CONTRACT. See *Confederate Money; Trust.*

Public Policy—Violation of United States Law—Broker.—A commercial broker cannot recover commissions unless he has taken out a license under the 71st sect. of the Act of Congress of June 30th 1864: *Holt* v. *Green*, 73 Pa.

An action cannot be maintained in Pennsylvania founded on a violation of an United States law: *Id.*

Although a contract may not be declared by the statute void; and a penalty may be imposed for its violation: an action cannot be maintained on a contract in violation of a statute. There is no difference whether the contract is *malum prohibitum* or *malum in se.* The test is whether the plaintiff requires the illegal transaction to establish his case. Public policy will not allow courts to aid one grounding his action on an illegal or criminal act: *Id.*

Evidence of intent in—Estoppel by Acts or Promises.—Faxton held two mortgages on the farm of his half-brother Faxon, who died intestate. Faxon's eldest son, Josiah, thought of "going West," but his uncle, Faxton, persuaded him to stay and take care of the family, promising that the mortgages should never be enforced. In 1860 Faxton actually endorsed each mortgage with the word "cancelled," signing his initials. In 1871 he erased the endorsements and prosecuted the securities. *Held*, that the cancellation of the mortgage amounted to nothing beyond showing the intention of the mortgagee: *Faxton* v. *Faxon et al.* S. C. Mich.

If there is an actual agreement between persons, the fact that it contemplates no positive action during life is of no consequence. Although a will itself is revocable, an agreement for a sufficient consideration to provide by a will for any given object, does not differ from any other contract: *Id.*

No rule is more necessary to enforce good faith than that which compels a person to relinquish claims which he has induced others to sup-

pose he would not rely on; not because he obtains any advantage thereby, but because he has induced others to act so as to be seriously prejudiced if he is allowed to fail in the performance of that he has encouraged them to expect: *Id.*

CORPORATION.

Corporate Power over Members—Consent of Society to being incorporated—Merger of unincorporated Society in Corporation.—Mason levied upon certain furniture as the property of a corporation known as Adrian Chapter, No. 10. Defendants insisted that it belonged to an unincorporated body known as Adrian Chapter, No. 10, of Royal Arch Masons, in common with another Masonic organization. Proof being conclusive that the property belonged to the society and not to the corporation, unless both were identical, the Circuit Court held that there was no merger of the unincorporated society in the corporation: *Mason* v. *Fruele et al.*, S. C. Mich.

No corporation can have any concern in or control over the business or personal interests of its members, not invested in its own funds or held under its articles: *Id.*

The legislature could not compel any person or society to be incorporated without its assent. It requires the assent of every member to bring him in, and not his dissent to keep him out. And when it is claimed that an association has become incorporated, and has given up its old conditions, some action must appear whereby such a result has been fully authorized. Even an absolute identity in the membership of a society and of a corporation would not merge the society in the corporation. There is nothing in the statutes which contemplates that a society can be transferred bodily into an existing corporation, without, at least, something in the nature of a contract whereby its property can be passed by operation of law and without agreement, into the corporate funds: *Id.*

Only unanimous consent can bind any member of an unincorporated company by any action not within the terms of the association, and no acquiescence by a society or its officers could bind any one who would not have been bound if the same persons had entered into an agreement for the same purpose. An act cannot be ratified by those who could not authorize it: *Id.*

The burden of proving the merger of an unincorporated society in a corporation is on those who seek to establish it. Nothing could tend to prove an acquiescence in a corporate merger which did not show a complete separation of the unincorporated society's action: *Id.*

CRIMINAL LAW.

Explanations by Accused.—When a person suspected of, or charged with a criminal offence, gives a false explanation of any suspicious fact or circumstances tending to connect him with the offence, it is regarded as a criminative circumstance proper to be submitted to the jury: *Walker* v. *State*, 49 or 50 Ala.

The refusal of the court in a criminal case to charge at the request of the defendant, that the evidence must satisfy the jury beyond a reasonable doubt of the existence of every fact necessary to constitute the offence, is erroneous: *Id.*

DAMAGES.

Measure of for Failure to deliver Goods.—No general rule can do exact justice in all cases of failure to deliver property on demand to the party entitled; but a recovery, which at the time of demand and refusal would have enabled the party to purchase other property of the like kind and of equal value at the same place, is, in the absence of special circumstances, as nearly just as the law can provide for: *Chadwick* v. *Butlers*, S. C. Mich.

If a plaintiff is entitled to recover at all on a contract for the sale of goods, he is entitled to the value of the goods at the time when delivery should have been made. A vendor cannot be supposed to undertake that the goods he sells shall not depreciate in value before they are called for: *Id.*

In a suit on a contract for the sale of goods, it was error to allow the plaintiffs to give evidence on the theory that they were entitled to recover the highest market value between the time of the purchase and the time of bringing suit: *Id.*

It was held error to charge a jury upon the assumption that an agreement to deliver at a time agreed upon, on notice given, is the same as an agreement to deliver at such indefinite time as should be reasonable under the circumstances: *Id.*

DEBTOR AND CREDITOR. See *Execution; Insurance.*

Fraudulent Sale as to Creditors—Retention of possession by Vendor—Evidence of Fraud.—The retention by a merchant of possession of stock of goods which he has sold to his creditor, and his continuing to sell them as before, is, as a badge of fraud, susceptible of being overcome by other proof that he was acting as the agent of the vendee and received compensation as such: *Moog* v. *Benedict & Co.*, 49 or 50 Ala.

When a sale is assaulted for fraud, and the date of the transaction is a material question, evidence that some months after its date the vendor and another person applied to a lawyer to write a transfer of the goods from the said vendor to the other person unknown to the lawyer, but claiming to be the vendee and introduced to him as such, is competent and relevant, without regard to its sufficiency as tending to prove a fraudulent antedating: *Id.*

Gift by Debtor—Where fraudulent as against Creditors.—When a gift of land by a father to his daughter is assailed for fraud as against creditors of the donor, and the creditors are all judgment-creditors, whose debts, as appears by the record, are subsequent to the gift, then the fraud complained of must be fraud in fact, and the question of fraud must be left to the jury, and cannot be determined by the court: *Hendon* v. *White*, 49 or 50 Ala.

A gift of land by a father to his daughter, as an advance to her out of his estate, when the father is in prosperous circumstances and unembarrassed with debt, and the provision thus made for the child, according to her state and condition in life, and over and above the gift the father was left with ample means to pay all the debts for which he was liable at the date of the gift, is not void against existing creditors of the grantor, though his estate should afterwards become insolvent by reason of the calamities inflicted on the country by the late war: *Id.*

DECEIT. See *Fraudulent Representations.*

DEED.

Acknowledgment of—Attestation by Witnesses.—A writing for the alienation of land after it is subscribed by the maker thereof should also be attested by one or two witnesses, or in lieu of such attestation, the conveyance should be acknowledged, as required by the Code, to give the instrument completeness. (Rev. Code, ss. 1534–1536. See also *O'Neal* v. *Robinson,* 44 Ala. 526.) *Hendon* v. *White,* 49 or 50 Ala.

When a conveyance for the alienation of land is neither attested by the proper number of witnesses nor acknowledged in lieu of attestation at the time it is delivered, then a subsequent acknowledgment for the purpose of completing the instrument has the effect of a ratification which relates back to the date and delivery of the instrument: *Id.*

EASEMENT.

Purchase subject to.—Where a continuous and apparent servitude is imposed by an owner on one part of his land for the benefit of another, a purchaser at private or judicial sale takes subject to the servitude: *Cannon* v. *Boyd,* 73 Pa.

An owner of land subject to a mortgage laid it out in lots, and built on two adjoining lots; on one was an alley which was used by the other; the land was sold in the distinct lots under the mortgage, the use of the alley being apparent. *Held,* that the first lot was sold subject to the use of the alley, although no reference to it was made in the sheriff's deed: *Id.*

Whether the agent who purchased the dominant lot at the sheriff's sale expected when he purchased to get the alley—was not evidence to affect the principal's title: *Id.*

EQUITY.

As administered by a Judge and Jury in Pennsylvania—Trust ex maleficio.—In a suit at law to administer equity, the judge sits as chancellor, assisted by the jury, who are to determine the credibility of witnesses and conflicting testimony; but the conscience of the chancellor must be satisfied of the sufficiency of the evidence: *Faust* v. *Haas,* 73 Pa.

If the evidence be too vague, uncertain or doubtful to establish the equity set up, the judge must withdraw it from the jury: *Id.*

Faust's property was about to be sold by the sheriff: an attorney by arrangement with Faust and a judgment-creditor agreed to buy it for Faust; under this it was struck down to the attorney; it was afterwards agreed that Haas, another judgment-creditor whom the proceeds would reach, should pay the purchase-money to the sheriff, take the deed and give Faust a time named to repay him. Under this arrangement the deed was made to Haas under the direction of the purchaser; Haas claimed to hold the property. *Held,* that he was trustee *ex maleficio* for Faust: *Id.*

Where artifice or trick are resorted to to procure property at sheriff's sale at an under value, the purchaser takes as trustee for the person misled: *Id.*

ESTOPPEL. See *Contract*.

EVIDENCE. See *Agent; Fraudulent Representations.*

Presumptions of Identity.—Name does not prove.—Though the possession of a note or written contract is some evidence that the person holding it is the party mentioned therein as payee, the possession of the record of a judgment rendered by a justice of the peace does not give room for a similar presumption, because one man can bring suit on it as well as another, if he avers his identity with the plaintiff therein: *Bennett* v. *Libheart*, S. C. Mich.

It cannot be assumed as a legal presumption that where the family name and initials are the same the persons are identical: *Id.*

Name.—Identity of name is evidence of identity of persons, stronger or weaker, according to circumstances: *Moug* v. *Benedict*, 49 or 50 Ala.

EXECUTION.

Exemption from—Partnership Property.—J. & S. formed a partnership to carry on a mercantile business; as partners they became indebted by note to H.; on this note they were sued and judgment was rendered in favor of H. against J. & S.; on this judgment process of garnishment was issued in favor of H. against B. On B.'s answer J. & S. claimed the balance of funds in B.'s hands not appropriated by him, as property belonging to them severally, which was exempt from the payment of said debt in judgment. *Held*, that the exemption was properly allowed, and that the fact that the property was assets of the partnership did not destroy the right of exemption in the individual partners: *Howard* v. *Jones & Starke*, 49 or 50 Ala.

The right of exemption is an incident of ownership as long as the owner, who is an inhabitant of this state, chooses to exert it and the property is within the control of the court and it is personal property: *Id.*

FRAUD. See *Debtor and Creditor; Equity.*

FRAUDULENT REPRESENTATIONS.

Rescission of Contract for—Pleading—Liability for untrue Representations.—Knapp, on the alleged false and fraudulent representations of Beebe and Knight, sold them a span of horses for a seventy-five dollar check and a note for $300, made by one Calvert, afterward found to be irresponsible. Knapp tendered the note and $75 in "legal-tender greenbacks," and demanded back the horses. Being refused, he declared on two counts, one alleging the fraud, and the other being in trover for the horses, and he recovered judgment: *Beebe et al.* v. *Knapp*, S. C. Mich.

The use of the word "fraudulently" in a declaration implies a *scienter*, and is an argumentative allegation, which, if not objected to, is cured by the verdict: *Id.*

Where two persons are interested together in a transaction, the acts and statements of either in regard to any part of it, even if made in the other's absence, may be put in evidence; so also, to show *quo animo*, may the statements of either to third parties as to the responsibility of

the makers of notes which they have endeavored to trade off in such transactions. See *People* v. *Saunders*, 25 Mich. 119, as to evidence of combinations to commit fraud: *Id.*

If one recklessly makes a false representation, of the truth or falsehood of which he knows nothing, and makes it for the fraudulent purpose of inducing another, in reliance upon it, to make a contract, or do an act to his prejudice, and the other party does so rely and act upon it, the first party is as liable for the fraud as if he had known the representation to be false. This principle applies equally in courts of law and of equity. Yet, if he honestly believes his representations to be true, and it turns out that they are false, and the other party suffers by them, he would not be liable in an action for deceit: *Id.*

GARNISHMENT. See *Insurance.*

GIFT.

By Endorsement—Delivery—Acceptance.—Langdon and his wife gave Dillon a fifteen-hundred dollar mortgage on which Mrs. Langdon, by Dillon's direction, endorsed $1000 in payment, his intention seeming to be to extinguish so much of the debt, in recognition of kindness received from the Langdons. One Ferguson, who bought the premises from the Langdons, tendered interest on the remaining sum, but Dillon's administrator filed his bill to foreclose for the whole amount, and the court dismissed the bill: *Green, Administrator of Dillon*, v. *Langdon et al.*, S. C. Mich.

In the absence of any rule of law to prevent the donor's intention from taking effect, the endorsement constituted a gift, or rather an extinguishment or forgiving of the mortgage-debt. The gift, being in the nature of a testamentary act for which the donor recognised a consideration in the kindness of the donees, it must be sustained: *Id.*

Though delivery and acceptance are essential to the validity of a gift *inter vivos*, where tangible personal property, admitting of actual delivery, is concerned, and probably where the notes or bond of a third person are the subject of the gift; yet where the gift is a part of the sum due, and is made to the debtors themselves, it does not admit of technical delivery, and the intention of the donor ought not, on that ground, to be defeated: *Id.*

The intention of making a gift, being fully executed, and actually accepted by one of the donees, acceptance by the other may be presumed. The donor might have retracted it if either a receipt or a release had been given, since there was no consideration, and the absence of any might have been shown even in presence of the seal. (Comp. Laws, § 5947.): *Id.*

HIGHWAY.

Collision—Negligence—Travelling on wrong side of Road.—Miss Clegg, aged twenty, driving rapidly over a hill, met Daniels coming with a loaded wagon on the left side of the road. Daniels turned out, but not in time to avoid a collision that damaged Clegg's horse and buggy, for which Clegg recovered judgment: *Daniels* v. *Clegg*, S. C. Mich.

While it is lawful for one to travel on the left of the middle of the road when it is not occupied by a person coming in the opposite direction, still, as the law requires him to turn out seasonably when he meets a

team, it would also require him to use more than ordinary care to keep out of the way and avoid a collision with passing teams while on the left of the centre of the road, and unless one does use a very high degree of care to get out of the way and to the right of the centre of the road, and a collision occurs to the left of the centre and without the material negligence of the other party, the one driving on the left would be liable: *Id.*

The duty of one on a public highway to turn to the right beyond the centre of the road, would be the same, whether imposed by statute, custom or common law: *Id.*

In using a public highway, one has a right to expect ordinary prudence from others, and to rely on it in determining his own means of using the road, and even if negligent, he is not liable for the injury done to the other's property, if the other might, by using ordinary care, have avoided the collision, and that, too, though still on the left of the road at the time: *Id.*

It lies with the party injured by a collision on the highway to prove negligence or misconduct on the other's part, and to show ordinary care and diligence on his own: *Id.*

If the defendant's negligence is such that injury could not have been avoided by ordinary care on the plaintiff's part, plaintiff's negligence is immaterial, and is not contributive within the meaning of the rule prohibiting recovery in cases of contributive negligence: *Id.*

Age and sex should be considered in deciding the question of negligence; if the care is such as would ordinarily be taken by a person of the age and sex of the party concerned, there is no negligence: *Id.*

Driving over a person on the highway is not like the case of a railroad engineer with respect to persons approaching the track, and of whose character or capacity circumstances prevent him from judging. All persons must notice the approach of trains at crossings, though engineers must act with reference to the incapacity of persons on the track and seeming to be incompetent, and must govern the train accordingly. So with street-railway companies with regard to children getting on or off their cars: *Id.*

The "travelled part of the road"—Comp. Laws, § 2002—is that part which is wrought for travelling, and not simply the wheel-track, since that may be altogether upon one side: *Id.*

HUSBAND AND WIFE.

Separate Estate of Wife—Mortgage by Husband and Wife of Wife's Land.—Land conveyed to a husband in his own name, by the guardian of his wife, in satisfaction of a decree rendered against him in her favor on the final settlement of his guardianship, will be decreed in Chancery to be her separate statutory estate on her application: *Fry et al.* v. *Hamner*, 49 or 50 Ala.

A promissory note and mortgage of such land to secure its payment, executed by her and her husband in consideration of advances of money to pay off an outstanding mortgage on the premises and to make a crop, imposed no liability on her or the land in favor of parties who were cognisant of her right: *Id.*

The said mortgagees cannot claim that a trust in the land resulted to them, in consequence of their advance of the money with which the prior

encumbrance was extinguished, and which was made at a time subsequent to the purchase: *Id.*

IDENTITY. See *Evidence.*

INFANT.

Conveyance by—Rescission—Delay.—Bill to remove a cloud from Prout's title to lands which one Cadwell owned originally. In 1850, Cadwell sold them, while a minor, and after seven years' absence in foreign parts, said the deed was not good for that reason, and offered a perfect one, for a money consideration, to Koegel, the then holder, it having changed hands twice meanwhile. But Koegel held on without paying, and Cadwell, having served him with notice in ejectment, let the matter drop till 1865. Being then in the army, and hearing that the premises were vacant, he authorized an agent to take possession, and soon after sold the land to one Haviland, who sold it to Prout. Five months after the sale to Haviland, Koegel's administrator, under a probate license, sold Koegel's interest to Wiley. *Held*, that as the privilege of infancy cannot be used as a weapon of attack or fraud, Cadwell could not in equity repudiate his deed and regain his property without restoring the consideration paid in good faith for it. Prout, therefore, in succeeding to his rights, in asking equity, must do equity, and refund the purchase price with interest from 1850: *Prout* v. *Wiley*, S. C. Mich.

Delay or acquiescence without any act either indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as quietly seeing improvements made, or money expended, or a sale of the property to another, or failure to assert one's claim, &c., will not operate as an affirmance or confirmation of a deed executed during minority, nor prevent a minor from disaffirming it and reclaiming the lands at any time within the period allowed by the Statute of Limitations for bringing an action: *Id.*

INSURANCE.

Representations by the Insured held as Warranties.—Where an insurance policy expressly makes the application for insurance a part of itself and a warranty by the assured of the truth of all statements contained in it as to the value of property insured, &c., and further provides that false representations, material omissions, and over-valuations in the written application or otherwise shall render the policy void, all statements contained in such application must be treated as warranties, and under the general rule, must be strictly true to authorize a recovery upon the policy: *American Ins. Co.* v. *Gilbert*, S. C. Mich.

Parties may contract on such conditions as they see fit, and if an insured person has chosen to make his representations warranties, as regarded the condition and value of his property, he is estopped from denying and the insurer relieved from showing that they are material to the contract, and no court can presume to say that the insurer would have made the contract on any other terms: *Id.*

Where it is expressly provided in an insurance policy that over-valuation of his property by the assured shall make his policy void, it is error for a court to submit the question of over-valuation to the jury as one of fraud or good faith, because the question for the jury is simply

whether or not the property has really been over-estimated, whatever the intent may have been. If the estimate of value has been made by some one else, even if it be the insurance agent himself, and has been adopted by the insured under the honest belief that it is correct, the insured is still responsible for it under the notice contained in the policy: *Id.*

Claim for loss on Policy—Liability to Garnishment.—Hebel insured in the company May 27th 1872. Martz and his co-plaintiffs sued him in assumpsit, Dec. 18th 1872, and obtained judgment, at the same time, the premises having burned, garnishing the company, which, Jan. 29th 1873, disclosed the fact of insurance, but denied that proof of loss by fire had been furnished them. The insurance policy had stipulated that it should be optional with the company to replace the articles lost or damaged, or to take them at their appraised value, or to rebuild or repair within a reasonable time, if they gave notice of such an intention within thirty days after receiving the preliminary proofs. On April 29th 1873, Hebel made the proofs of loss, and gave the required notice, and on July 15th, there was a final hearing in garnishment, pursuant to Comp. Laws, § 6467, when it was shown that the company had not undertaken to restore, rebuild, or repair, and did not mean to do so. The court adjudged the company not liable: *Martz et al.* v. *Detroit F. & M. Insurance Co., Garnishee of Hebel*, S. C. Mich.

An insurance company being garnished, it was held that the right to hold it upon the process in garnishment depended upon the state of the claim as one garnishable or not at the time of service of process: *Id.*

Under Comp. Laws, § 6503, which enacts that no one shall be adjudged a garnishee by reason of any money or other thing due from him to the principal defendant, unless it be at the time of service of the writ of garnishment, due, or to become due, absolutely, and without depending on any contingency, it was held that the liability of an insurance company was contingent, the policy reserving to them the privilege of choosing between making indemnity by replacing the property, or by paying for it. The right to elect between these courses was absolute and exclusive as conferred by the policy, and could not be extinguished by the insured, and reduced to a determinate character: *Id.*

NAME. See *Evidence.*

NATURALIZATION.

Certificate is a Record not impeachable collaterally.—Certificates of naturalization granted by the courts, on which Congress has conferred jurisdiction, stand on the footing of judgments of courts of competent jurisdiction, and when drawn in question collaterally, are conclusive, unless invalidity is apparent on their face: *Scott* v. *Strobach*, 49 or 50 Ala.

A certificate of naturalization, except in a direct proceeding for its revocation in the court granting it, is unimpeachable. No allegations of fraud or perjury in its procurement will be collaterally entertained: *Id.*

NEGLIGENCE. See *Highway.*

PARTNERSHIP. See *Execution.*

Rights of Representatives of a Deceased Partner.—The representatives

of a deceased partner have no right of possession, and nothing but an equitable interest in the partnership property, until the business of the partnership has been settled and its debts paid; and though this equitable interest may make them tenants in common with the surviving partner, subject to the debts of the firm and a final settlement, it does not constitute them tenants in common at law: *Pfeffer* v. *Steiner*, S. C. Mich.

Suit by a Survivor.—The right of action at law for any trespass on the property of a firm, a member of which has died, rests solely in the survivor: *Id.*

PILOTAGE.

State Laws—Constitutional Law.—The Act of March 24th 1851, provides that a vessel licensed to coast not taking a pilot shall pay *half pilotage* and one not licensed full pilotage:—"and all half pilotage, forfeitures and penalties in nature thereof, accruing by virtue of this act * * * shall be recovered in the name and for the use of the society," for relief of pilots, &c. *Held*, that a forfeiture of *full pilotage* was for the use of the society: *Collins* v. *Soc. for Relief of Distressed Pilots, &c.*, 73 Pa.

The appropriation of the penalty is not part of the penal provision and is to be construed reasonably to ascertain the intent of the legislature: *Id.*

The penalty not being a tax, its appropriation to a private corporation is not unconstitutional: *Id.*

Imposing full pilotage on vessels in foreign commerce and half pilotage on coasting vessels, is not in conflict with sect. 10 of art. 1 of United States Constitution: *Id.*

PLEADING. See *Fraudulent Representations.*

POWER. See *Trust.*

REVIVOR. See *Abatement.*

SALE.

Completion of—Identity of Goods—Acts remaining to be done by Vendor.—If goods are unmistakably designated, even without express words, neither delivery, deliverable condition, nor certainty as to quantity and quality, is absolutely essential to the completeness of the sale: *Lingham & Osborne* v. *Eggleston*, S. C. Mich.

The question whether a sale is completed or only executory must be determined from the construction of the agreement, showing the intent of the parties, the situation of the thing sold, and the circumstances: *Id.*

Delivery is almost conclusive evidence that the property shall vest in the purchaser, notwithstanding that weighing, measuring, inspection, &c., is to be done afterwards: *Id.*

Property may pass under a contract even when something remains to be done by the vendor, although it be only at the direction and for the convenience of the vendee: *Id.*

Where the price depends on the quantity or quality of goods, whatever remains to be done by the vendor, or for the mutual convenience of both parties, as weighing, testing or measuring, is a condition precedent to the transference of title: *Id.*

SHERIFF'S SALE. See *Equity*.

STOLEN PROPERTY. See *Trover*.

TROVER.

Ratification of Sale.—In an action of trover against one who received for sale a wagon belonging to the plaintiff, from his pretended guardian, and sold it, receiving the purchase-money for which he gave his promissory note payable to the said guardian, the fact that the plaintiff, with knowledge of the circumstances, received the note from the payee, and demanded the payment of the maker which was refused, is not so conclusive of an intention to ratify the sale as to preclude him from maintaining the suit: *Abbott* v. *May*, 49 or 50 Ala.

Owner of Stolen Property may reclaim.—The owner of negotiable securities which have been stolen may follow them and reclaim them in whose hands soever they may be found, and when shown that the securities had been stolen from the owner, the burden is upon the holder to show that he took them in the usual course of business and for value: *Robinson* v. *Hodgson*, 73 Pa.

In trover for such securities, merely showing that they were in possession of another from whom defendant or his immediate bailor received them is not a defence: *Id.*

A holder's possession is *primâ facie* evidence of ownership, because the presumption is that it was honestly acquired: *Id.*

TRUST. See *Equity*.

Discretion of Trustee—Control of Court of Equity over—Trammelling of his discretion by promise to exercise it in particular way.—A testator devised his whole estate (after some legacies) to his executor, in trust to select and purchase a lot in Philadelphia, thereon to erect a building for the Philadelphia Library Company; and as soon as the building should be completed to convey the lot to the company; he afterwards purchased a lot himself; a few days before his death he directed that the building should be erected on that lot; and at his request the executor verbally promised the testator that he would erect the building there; after the testator's death he selected it. He answered to a bill to declare him disqualified to act as a trustee by reason of having trammelled his discretion by his promise, that he had selected the lot not only in accordance with the testator's wishes but with his own judgment, after a careful deliberation. *Held*, that his discretion was not so controlled as to disqualify him: *Williams's Appeal*, 73 Pa.

Such trust could not be taken from the donee except on the clearest evidence of his incapacity, or that he was acting in fraud of his powers: *Id.*

The verbal direction of the testator and promise of the executor, were not a fraud on the power in the will, and the trustee was bound to perform the promise: *Id.*

A chancellor will so control a trustee that he shall not disappoint the intent of the donor, as gathered from the instrument containing the power: *Id.*

An innocent motive will not save the exercise of the power if it violate the true purpose of the trust: *Id.*

When a testator, to fulfil his own purpose, confers an absolute discretion, it is his right to have the power executed by his own trustee, and a court cannot displace the trustee without clear and adequate cause: *Id.*

Purchase by Trustee—Consideration for Contract to stand Trustee.—A testator devised lands in trust for a charity; and made a residuary devise. The residuary devisees and heirs at law commenced proceedings to have the devise declared void, and agreed as a family arrangement, to avoid dispute amongst themselves, that in case of success it should be treated as intestate property. The court below decided the devise good; an appeal was taken under the same agreement; the husband of one of the heirs having means (the others being poor), agreed to pay the expenses, &c., to be taken out of the land and the balance to be divided between his wife and the other heirs. *Held*, that these facts constituted a sufficient consideration for his agreement: *Dickey's Appeal*, 73 Pa.

This agreement constituted the wife a tenant in common in equity with the other heirs in the title if any, to the lands; and the husband was bound to proceed with the appeal until released by all the parties: *Id.*

Any purchase of the lands made by the husband on behalf of his wife would enure to the benefit of the other heirs: *Id.*

The appeal pending, the husband purchased the lands from the trustees in the devise and sold them at an advance. *Held*, that he was trustee for the heirs and must account for the profits: *Id.*

The husband sold the lands and some of his own adjoining of greater value for an aggregate sum. *Held*, that he was entitled to be credited in his account with the excess of value of his own lands: *Id.*

Power—To sell includes power to mortgage—Security.—Husband and wife conveyed land in trust, amongst other things empowering the trustee to sell such parts as the wife by writing might request, and pay the purchase-money to the wife. The trustee had power on request in writing of the wife to mortgage the land: *Zane* v. *Kennedy* 73 Pa.

At the request of the wife, the trustee sold the property to A., in order that he might mortgage it as collateral security for money to set up her son in business. *Held* to be a valid execution of the power in the trust-deed: *Id.*

An absolute and unrestricted power to sell includes a power to mortgage: *Id.*

The mortgage was given to secure the payment of notes of the son; their times of payment were extended by the holders. There being no evidence of a consideration for such extension, *Held*, that this did not discharge the wife if she were surety: *Id.*

The trust provided first for the payment of debts of the husband; the land having been sold under the mortgage; in ejectment against the purchaser by the wife as cestui que trust to recover her equitable estate, she could not set up these debts; that could be done only by the husband's creditors or the trustee for their use: *Id.*

VENDOR AND PURCHASER. See *Debtor and Creditor; Fraudulent Representations; Sale.*