of a constructive trust, of which the daughters are the beneficiaries: Id., p. 217, *et seq.*

The children having long ago arrived at majority, the express trust has, for anything that appears in the case, been fully discharged. This fact does not, however, enlarge the estate originally vested in her. That is fixed by the will; and by the discharge of the trust it is relieved of a burden, but not enlarged.

Here, then, is a constructive trust, as to which Judge REDFIELD, in his work on Wills, vol. 3, p. 522, sums up the law in the following clear and explicit language: "However slight or precarious the interest, so long as one holds possession of an estate or property in any fiduciary relation, he cannot deal with it for his own advantage, in any manner or to any extent." Mrs. Hall, therefore, could not convert the personalty into realty for her own advantage; could not convert her life estate in the personalty into a fee simple in real estate, and thus cut off the daughters of John Hall from the provision he had made for them. Equity, regarding that as having been done which ought to have been done, will treat this real estate precisely as though she had taken a conveyance of the legal title to herself for life, with remainder to the daughters.

With respect to the personal estate left by Mrs. Hall at her death, the fact would seem to be that it is the accumulation of the long term during which she has had the use of the real estate. No part of it is traced to the personalty left by the testator; and the income of the real estate must have been greatly in excess of her expenses after the children arrived at maturity. She will therefore be held as the absolute owner of this personalty, and a decree entered accordingly.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF KANSAS.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME COURT OF NEW YORK.[4]

### AGENT.

*Liability of a del credere Agent—Liability of an Agent upon his Endorsement, as between himself and his Principal—Demand and Notice.*—An agent who undertakes to procure a particular person to deal with his principal, and in consideration of an additional commission allowed him, guarantees the payment of all bills of goods purchased of his principal by such customer, is a *del credere* agent, and as such is

[1] From W. C. Webb, Esq., Reporter; to appear in 6 or 7 Kansas Rep.

[2] From J. S. Stockett, Esq., Reporter; to appear in 33 Md. Rep.

[3] From H. K. Clarke, Esq., Reporter; to appear in 20 Mich. Rep.

[4] From Hon. O. L. Barbour, Reporter; to appear in vol. 59 of his reports.

primarily liable to satisfy his principal the price of the goods sold: *Lewis* v. *Brehme*, 33 Md.

A factor acting under a *del credere* commission, collected the proceeds of a bill of goods sold by his principal to a particular customer, and placed the money to his own account with his bankers, and purchased of them a gold draft payable to his own order, which he specially endorsed, without excluding recourse, and transmitted to his principal. The draft included not only the money collected by the agent, but also a balance due from himself to his principal. The draft was afterwards dishonored. Prior to the presentation of the draft for payment, the drawers thereof failed. In an action by the principal against the agent to recover the amount of the draft, *Held*, 1st, That the agent was bound not only for the collection of the money, but for its safe transmission to his principal. 2d. That the endorsement by the agent imported *primâ facie* liability on his part, but he was entitled to show as a matter of defence that it was not the intention that he should be personally charged by his endorsement, and if there were no intention to create personal liability, none would exist as between himself and his principal. 3d. That whether such intention exists or not, will in all cases depend upon the circumstances of the transaction, but the circumstances must be clear and strong to remove the presumption which arises from the endorsement: *Id.*

A *del credere* agent for the purpose of remitting certain moneys which he had received belonging to his principal, as also moneys due by himself, purchased a gold draft payable to his own order, which he specially endorsed and transmitted to his principal. The draft was dishonored and returned to the agent, who retained it and made efforts to procure its payment to himself, and failing in this, procured the drawers of the draft to secure him among their first preferred creditors in a deed of trust. The agent notified his principal of these proceedings. After the dishonor and return of the draft, the agent treated the loss thereon as his own, and promised his principal to send him another draft. In an action by the principal to charge the agent as endorser on the draft, *Held*, That the promise or undertaking by the agent to pay the debt, was not sufficient to bind him as endorser, unless at the time of such promise or undertaking he was fully informed that there had not been due demand, and notice of dishonor. And a prayer which did not submit to the jury to find whether the agent was fully informed, at the time of such promise or undertaking, of all the facts and circumstances of the neglect to make demand and to give notice, was defective: *Id.*

A promise by an endorser to pay a draft, subsequent to its dishonor, is presumptive evidence that the draft had been presented for payment in due time and dishonored, and that he had received due notice thereof. This presumption however is one of fact for the jury, and not an absolute legal conclusion to be drawn by the court. It is *primâ facie* only, and liable to be rebutted. *Id.*

## AGREEMENT.

*Construction of "Secures."*—By an agreement for the sale and purchase of real estate, the vendor covenanted to sell and convey the same as soon as the purchaser "secures the payment of the" purchase price. *Held*, that the word "*secures*" was used in its popular signification, and

that signification was not equivalent to payment in money, but implied something given and received, by means of which payment might at some future time be procured or compelled. That it implied a term of credit; but how long that credit was to be, or what security should be given, was left unprovided for: *Foot* v. *Webb*, 59 Barb.

*Statement of Consideration.*—By the same agreement, the vendor agreed to sell and convey the premises "*in consideration of the sum of* $700," and the agreement was signed and sealed by both parties. *Held*, that this was a sufficient statement of the consideration to satisfy the Statute of Frauds: *Id.*

*When void for Uncertainty.*—The owner of a lot, by a written agreement, covenanted "to sell and convey all that piece or parcel of land situated on the corner of the public green, now occupied as a store," to the plaintiff, in consideration, &c. "To be conveyed as soon as the party of the second part (the plaintiff) secures the payment of the same." *Held*, that the agreement was void for uncertainty, because it did not fix the term of credit, nor the kind or nature of the security to be given for the purchase-money, and there was nothing to show that any part of such agreement rested in parol: *Id.*

### Amendment.

*Party's Name.*—Correcting a mistake in the name of a party, where that party is fully described in the pleading, does not change substantially the claim or defence, and is no ground for reversal: *Dewy* v. *McLain*, 6 or 7 Kansas.

### Assignment.

*How to be Construed.*—A transfer of stock, absolute and unconditional in its terms, expressing a consideration, and vesting in the assignee a complete and perfect title to the interest of the assignor in such stock, and a written memorandum of the transaction, of the same date, signed by the same parties and by a third person as surety for the assignee, executed and delivered at the same interview, and in response to a demand of the assignor, for a memorandum of the transaction, must be regarded as delivered at one and the same time, for the same purpose, and should be deemed different parts of the same instrument, and construed together: *Parks* v. *Comstock*, 59 Barb.

*Sealing.*—And such memorandum being a part of the assignment, and the two one instrument, a seal to each is unnecessary; one seal will suffice for both. If a separate instrument, and executed even after the assignment, it would operate as a defeasance, in equity, and (since the Code) at law, though not under seal: *Id.*

### Auction.

*Highest Bidder.*—The "highest bidder" is one who makes the highest bid in *good faith*. A trustee is not bound to accept every bid, and the court will always sustain him in refusing bids which would manifestly frustrate the very object and purpose of a sale: *Gray* v. *Viers*, 33 Md.

### Bills and Notes. See *Agent.*

*Evidence of Transfer—Insanity of Payee.*—Evidence that the payee

of a negotiable instrument, payable to order, was insane during all the time from the issuing of the paper until the death of the payee, is admissible to disprove the validity of the transfer: *Hannahs* v. *Sheldon*, 20 Mich.

CONFEDERATE NOTES.

*Validity of a Contract between Parties residing in Tennessee, during the ascendancy of the Confederate Government.*—A note given in the state of Tennessee, during the ascendancy of the Confederate Government, for a loan in Confederate money, payable two years after date, with interest from date, *in current bankable funds*, is valid, and the payee, in an action instituted after the overthrow of the Confederacy, is entitled to recover the face value of the note, with interest, in United States currency: *Taylor* v. *Turley*, 33 Md.

CONFISCATION.

*Act of* 1862.—Where real estate is seized, confiscated and sold under the provisions of the law of Congress of July 17th 1862, only the life estate is seized and sold, and the state limitation law of February 20th 1864, does not affect the right of the reversioner to recover the possession of the realty, after the termination of such life estate: *Dewy* v. *McLain*, 6 or 7 Kansas.

CONSTITUTIONAL LAW. See *Highway.*

*Limits of State Laws.*—Under a statute of Pennsylvania it was provided that the total amount of the debts and liabilities (other than the capital stock) of certain companies should never exceed the amount of their capital actually paid in; and if any debts or liabilities should be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, should be jointly and severally liable in their individual capacities for the whole amount of such excess, and the same might be recovered by action of debt as in other cases. *Held*, that the liability imposed upon the directors and officers of such corporations is in the nature of a penalty, and can only be enforced within the limits of Pennsylvania: *First N. B. of Plymouth* v. *Price*, 33 Md.

COURTS. See *Evidence.*

*Session—Adjournment.*—A court legally opened for all general purposes continues in session until it adjourns *sine die*, or expires by law, and when an adjournment is made from Saturday till Monday, and from unavoidable cause the court does not convene until Wednesday, the term not having then expired by law, the court is legally constituted, and its acts are valid and binding: *Union Pacific R. Co.* v. *Hand*, 6 or 7 Kansas.

COVENANT.

*Breach of Contract—Separate Covenants.*—Covenants in a contract by which one party agrees to pay taxes on land belonging to the other; and also that he will make up to the other any deficiency, on the sale of the land below a specified sum; are separate covenants; and the breach of the covenant to pay taxes can have no effect on the conditions relating to the other: *Eldridge* v. *Bliss*, 20 Mich.

## Criminal Law.

*Criminal Pleading—Statement of Offence.*—The averment in an information for obtaining money under false pretences,—that certain representations as to the quantity and value of land which the accused was about to sell to the party to whom the representations were made, were false, "by means of which said false pretences" the money was obtained,—there being no averment of facts showing any connection between the representations and the alleged result, is essentially defective: *Enders* v. *People*, 20 Mich.

The statute (Comp. Laws, sect. 6059) which provides that after verdict, an indictment for certain offences shall be held sufficient "if it describe the offence in the words of the statute," is not to be construed to excuse the neglect to aver any fact essential to the description of an offence; and such defect appearing, the judgment should be arrested on motion, or will be reversed on error: *Id.*

## Debtor and Creditor.

*Assignment for Benefit of Creditors.*—An assignment of property for the benefit of creditors, is not necessarily and *per se* void: *Johnson, Garnishee of Johnson* v. *Ingersoll*, 6 or 7 Kansas.

Property held by an assignee under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the debts of the assignor: *Id.*

*Fraudulent Assignment.*—If a party has assigned any portion of his property for the purpose of defrauding his creditors, such action will sustain an order of attachment issued against him on such grounds: *Johnson* v. *Laughlin*, 6 or 7 Kansas.

## Deed. See *Assignment.*

*Unsevered Crops.*—Ripe crops, although no longer drawing nourishment from the ground, will, if still unsevered, pass by a conveyance of the land: *Tripp* v. *Hasceig*, 20 Mich.

*Reforming Deeds in Equity—Mistake.*—To establish, according to principles administered by courts of equity, a mistake, in order to obtain the reformation of a deed, there must be not only an error on both sides, but the mistake must be admitted or directly proved: *Id.*

## Divorce. See *Husband and Wife.*

## Evidence.

*Nul tiel Record—Change in the form of Process—Renewals of Process—What constitutes the record of a Case.*—An action was instituted on the 3d of December 1859, on a sheriff's bond, and a writ of summons issued, which was returned "cannot be found;" the writ was renewed from term to term, until it was served upon four of the defendants who appeared, the other defendant having died. The parties continued the same in all the writs, and those issued subsequently to the first, differed from it only in stating the cause of action and the amount claimed, so as to conform to the requirements of sect. 84, art.

75 of the Code of Public General Laws. Upon an issue joined upon a rejoinder of *nul tiel record*, it was *held:*

1st. That the several writs of summons, together with the docket-entries, were proper to be offered to the court to prove the record of the cause, but were not admissible as evidence to the jury.

2d. That the mere change in the form of process, so as to make it conform to the requirements of the Code, did not have the effect either of putting an end to the suit, which had been instituted prior to the adoption of the Code, or of making it a new and different action.

3d. That after the adoption of the Code, it became necessary that all renewals of process in cases then pending, should conform to its requirements: *State for use of Nesbitt* v. *Logan*, 33 Md.

The summons, returns, pleadings, and all other proceedings in a cause constitute the record, and are admissible, upon a plea of *nul tiel record*, to prove what has been done in the cause: *Id.*

During the progress of a cause, the court has control of its proceedings therein, and where mistakes or omissions occur in the docket-entries, it has the right to correct and amend them: *Id.*

EQUITY. See *Husband and Wife; Specific Performance.*

FRAUDS, STATUTE OF. See *Agreement.*

*Parol Agreement.*—By a deed of bargain and sale, the title in fee to certain lands was conveyed to the vendees who paid the purchase-money. The deed was in form and character what the parties thereto intended it to be. At the time of the conveyance the vendees agreed in parol to sell the land and credit any profits which might be made from such a sale, upon a certain indebtedness to them. A portion of the land was sold and profits were realized, but the vendees refused to credit the same according to their agreement. *Held*, that the agreement could not be enforced: *Kidd* v. *Carson*, 33 Md.

*Guaranty—Variance between the Allegata and Probata.*—The plaintiff declared for a sum of money due for wood furnished a third party "on the credit and guaranty of the defendant," and by his proof rested his right to recover upon a parol contract: *Held*, that to entitle the plaintiff to recover, it was necessary to show that credit was given solely and exclusively to the defendant. If any credit were given to the third party, the undertaking on the part of the defendant was collateral, and being in parol was void under the Statute of Frauds: *Norris* v. *Graham*, 33 Md.

If in an action brought to recover money alleged to be due for wood furnished a third party "on the credit and guaranty of the defendant," the evidence shows that the defendant contracted with and purchased the wood from the plaintiff, and was to pay for it, there is a variance between the *allegata* and *probata*, and the plaintiff cannot recover: *Id.*

*Parol promise to pay the Debt of another.*—A parol promise to pay the debt of another, in consideration of forbearance to sue the original debtor, without any new or superadded consideration moving from the creditor to the promissor, is not enforceable, being within the Statute of Frauds: *Thomas* v. *Delphy*, 33 Md.

## Highway.

*Legislative Power—Retrospective Statutes.*—When the legislature, by a valid exercise of its authority, has conferred a power to act, and prescribed the mode of action, a substantial compliance with the mode will be essential to a valid exercise of the power. But if the power be defectively or irregularly exercised, and for that reason invalid, the legislature may, by subsequent action, cure any such defect or irregularity, the requirement of which was originally within its discretion, and if its power over the subject was plenary, its power of confirmation will be absolute: *People ex rel. Bristol* v. *Board of Supervisors*, 20 Mich.

The legislature have full power within certain constitutional limitations, over the subject of laying out, altering, or discontinuing highways; and this power they may exercise directly: Art. 4, § 23 of the Constitution, which declares that the legislature shall not vacate or alter any road laid out by commissioners of highways, is equivalent to the express affirmation of the power to vacate or alter a state road. And this power they may delegate to the Board of Supervisors: *Id.*

The right to pass and repass upon a highway, of persons the value of whose property might be affected by its discontinuance, but who are not owners of the land through which the portion proposed to be discontinued passes, can hardly be looked upon as a vested right of property, which it would not be competent for the legislature to take away and, even if they were entitled to compensation, the law makes full provision for ascertaining and adjusting it: *Id.*

## Husband and Wife.

*Right of Wife to carry on Business.*—A married woman, having a separate estate, may purchase a boat and carry on the business of boating, on her sole account: *Whedon* v. *Champlin*, 59 Barb.

There is nothing in the statute which limits the kind of business a married woman may carry on. Nor is there any prohibition against her employing her husband as master, or captain of the boat: *Id.*

*Rights of Husband's Creditors.*—Creditors have no lien on the husband's labor, nor is there any way by which they can force him to labor for them. He may give his labor to a third person for his board, washing, and clothing, and the creditors have no way to prevent it. So he may give his labor to his wife, upon the same terms: *Id.*

After he has acquired property by his labor, his creditors may follow it; and if he has invested it in the name of his wife, or expended it to enhance the value of her separate property, a resulting trust may arise in their favor, to the extent of the moneys thus invested: *Id.*

The question, in all cases of this class, is one of fraud; and, like other kindred questions, must be submitted to the jury, either when the evidence is conflicting, or when the circumstances are of such a character as to create doubt or uncertainty: *Id.*

*Estoppel against Wife.*—An execution against the husband was levied upon a canal-boat, and the wife joined in a receipt to the sheriff. The execution was subsequently paid. Another creditor of the husband afterwards issued an execution, which was levied upon the same boat.

*Held*, that the wife was not estopped from showing title to the boat, as against this second execution: *Id.*

An admission by the wife, to a third person, that the boat belonged to her husband, would not be binding as an estoppel, in favor of others whose conduct had not been influenced by it: *Id.*

*Divorce on account of Impotence—Jurisdiction of Courts of Equity in Applications for Divorce—Deed of Separation.*—Where, by organic defect of the female, existing at the time of marriage, there cannot be *vera copula* between the parties, and the defect is permanent and incurable, the case comes within the legal definition of impotence, and will authorize a divorce *a vinculo*: *J. G.* v. *H. G.*, 33 Md.

Courts of equity in this state, on applications for a divorce, sit not in the exercise of their ordinary equitable jurisdiction, but as divorce courts, and must be governed by the rules and principles established in the Ecclesiastical Courts in England, so far as they are consistent with the provisions of the Code: *Id.*

A voluntary deed of separation between husband and wife, is not a bar to a *bonâ fide* application by the former for a divorce from the latter, on the ground of her impotence at the time of marriage: *Id.*

*Abandonment—Divorce a mensa et thoro.*—Abandonment, to constitute a sufficient cause for a divorce *a vinculo matrimonii*, must be the deliberate act of the party complained against, done with the intent that the marriage relation should no longer exist: *Lynch* v. *Lynch*, 33 Md.

Violent and outrageous conduct on the part of the wife, towards the husband, rendering the proper discharge of the duties of married life impossible, is sufficient ground for a divorce *a mensa et thoro*: *Id.*

*Right of Husband to Wife's Personal Estate upon her Death.*—A testator bequeathed to his daughter certain leasehold property, for her sole and separate use and benefit, without being subject to the control or disposal of her husband, if she should marry, or liable for his debts. The share of the daughter under the residuary clause of the will was also declared to be for her sole and separate use and benefit, independent of the control of any future husband. The daughter became possessed of the property bequeathed to her by her father's will, and subsequently married. She died intestate and without issue, her husband surviving her. *Held*, that the personal property of the wife, limited to her sole and separate use by the will of her father, passed upon her death, intestate and without issue, to her husband in his own right: *Cooney Adm'r* v. *Woodburn*, 33 Md.

MASTER AND SERVANT. See *Negligence.*

MORTGAGE.

*Tort for Fraudulent Conversion of Property.*—Property described in a chattel mortgage, and which is taken out from its operation by a fraudulent contrivance of the mortgagor, is wrongfully converted; for which an action of tort may be maintained, and the defendant held to bail: *Matter of Hicks*, 20 Mich.

*Sale of Chattels—Conditional Delivery.*—Upon a sale of personal

property,—machinery, designed to be fixed to realty,—a part of the purchase price being paid in cash, and the balance secured by chattel mortgage on the same property, which, however, was not to be delivered until the owner of the realty should endorse upon the mortgage his recognition of the rights of the mortgagee, the title passes on the day of the sale; the delivery only is suspended until such recognition is endorsed: *Id.*

NEGLIGENCE. See *Railroad.*

*Evidence—Presumption in favor of Railroad Companies in actions for injuries to Employees—Reputation of unfitness of Employee who caused the injury—Burden of Proof—Special Directions.*—In a suit brought by a railroad employee against the company for damages caused by the alleged unskilfulness or negligence of another employee of the same company, the defendants are entitled to the benefit of the presumption that they exercised due care in the employment of the person charged with unskilfulness, or negligence, and that they had no knowledge of the defects of capacity or character imputed: *Davis* v. *D. and M. Railroad Co.*, 20 Mich.

General reputation of unfitness would be admissible as evidence, and might be sufficient to charge the company with knowledge, notwithstanding they may have been actually ignorant of it. The ignorance will be negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. But the burden of proof to establish the unfitness alleged as the ground of the plaintiff's action, and the defendant's knowledge of it, is upon the plaintiff: *Id.*

A railroad employee having knowledge of the unfitness of another employee of the same company, or one whose position or duties are such that he ought to be acquainted with such unfitness, when it had become notorious; and who does not give information to the company of the unfitness thus actually or constructively known to him, takes upon himself all the risks of injury from such unfitness, while engaged in the ordinary performance of his duties, as much as if he had expressly contracted with reference to possible injuries from that cause: *Id.*

Where the reasons which are relied upon to charge the officers of the company with knowledge, apply with equal force to show the knowledge of the plaintiff, the negligence of the latter in not complaining is as great as that of the company in employing an incompetent person; and where employer and employee have equal knowledge, and the latter continues the service, each party takes the risk, unless the employer undertakes to give special directions. A direction by a railroad officer to his subordinate to perform an ordinary service such as his employment contemplated, there being nothing unusual in the mode directed, is not such a special direction as will charge the company for an injury happening during the performance of such service: *Id.*

RAILROAD. See *Negligence.*

*Special Risks incident to proximity to Railroads—Liability of Companies.*—The care which a railroad company must exercise in the running of trains so as not to injure property situated near their track, is not contingent upon such circumstances as the force and direction of

the wind, the dryness of the weather, or the combustible character of property liable to be affected. The company not being in fault as to the quality or character of their equipments, the special risks incident to proximity to railroad trains must be borne by those who establish themselves in such localities: *Michigan Central Railroad Co.* v. *Anderson*, 20 Mich.

*Negligence—Evidence.*—Where the petition alleges the cause of plaintiff's injury to arise from a defective track, the defect in the track anywhere may be shown, if it contributed to the injury: *Union Pacific R. R. Co.* v. *Hand*, 6 or 7 Kansas.

Railroad companies are required to use the utmost human sagacity and foresight in the construction of roads, to prevent accidents: *Id.*

Where the amount of damages assessed in a verdict shows that the jury was influenced by passion and prejudice, it is the duty of the court to order a new trial of the case: *Id.*

## Sale.

*Sale of Real Estate to fix Contract Liabilities—Notice.*—In making a sale of real estate in order to fix a contract liability, the sale must be made within a reasonable time, and conducted in a reasonable manner. And if the sale be by auction, the analogies of sales under legal process will furnish the rule as to notice; and these prescribe a notice of at least six weeks: *Eldridge* v. *Bliss*, 20 Mich.

## Seduction.

*Breach of Promise of Marriage—Damages.*—In an action to recover damages for the breach of a promise of marriage, evidence was offered of the promise and of the breach, and also of a subsequent seduction of the plaintiff by the defendant; and there was evidence tending to show that the seduction was accomplished by means of the promise of marriage. *Held*, that the jury were warranted, in estimating the damages, to consider the fact of seduction: *Sauer* v. *Schulenbery*, 33 Md.

## Shipping.

*Mortgage of Vessel—Assignment—Rights of Assignee—Equities of Mortgagors.*—The assignee of a mortgage of a vessel takes it with all the rights and powers which were possessed by the mortgagee; and no equities existing between several mortgagors will deprive the assignee of any of the usual remedies for the enforcement of the security: *Dalrymple* v. *Sheehan*, 20 Mich.

## Specific Performance.

Although it is a matter of discretion whether specific performance will in any case be granted, yet the discretion must be exercised according to certain well-established rules, and does not rest in the mere caprice of the judge: *Foot* v. *Webb*, 59 Barb.

## Tenant in Common.

*Ejectment against Co-tenant.*—The possession of one tenant in common being in law the possession of all the co-tenants, a tenant in common cannot bring *ejectment* against his co-tenant unless there has been an

*ouster.* The *ouster* need not be accompanied by positive force, but may be established by acts and declarations brought home to the knowledge of the co-tenant: *Hammond* v. *Morrison's Lessee*, 33 Md.

TROVER. See *Mortgagee.*

TRUSTS AND TRUSTEES. See *Auction.*

*Purchases by Trustees, at their own Sales.*—A trustee making a sale of the trust property, cannot become a purchaser on his own account, either directly or through the aid of another: *Terwilliger* v. *Brown et al.*, 59 Barb.

Thus, if an executor selling property under the order of the surrogate, for the payment of debts, becomes himself interested in a purchase thereof made by one employed by him to act as auctioneer, and who thus becomes his sub-agent, a residuary devisee may come into a court of equity and set aside the sale, and have the property resold: *Id.*

Upon a sale of lands, by an executor, under an order of the surrogate, for the payment of debts, B. officiating as auctioneer, struck off the premises to himself. Before the confirmation of the sale, the payment of the purchase-money, or the delivery of the deed to B., an arrangement was made between him and the executor, by which the latter became equally interested with the former in the purchase of the property. The sale was confirmed by the surrogate, and a conveyance of the premises executed, by the executor to B., who, on the same day, conveyed an equal undivided half of said premises to the executor. *Held,* that neither B. nor the executor could be protected against the claims of those interested in the estate directed to be sold; the purchase being a palpable violation of the statute, and in direct hostility to the well-established principle that a trustee shall not be allowed, directly or indirectly, to speculate out of the trust property, or to become a purchaser thereof for his own benefit: *Id.*

VENDOR AND PURCHASER. See *Agreement; Sale.*

WATER.

*Right to Erect and Maintain Barriers.*—Where a stream running across the defendant's land, and thence upon the plaintiff's land below, during a flood broke through its bank, making an opening sufficient to carry all the water ordinarily running, and through this new channel the water would have continued to run, if not prevented, *Held,* that the defendant had a right, for his own protection, to erect a barrier or levee across the crevasse or new channel, for the purpose of confining the waters within their original channel; provided he did not build such barrier too high, nor project it into the stream, so as to prevent the water running in its accustomed channel and with its usual force: *Pierce* v. *Kinney*, 59 Barb.

*Held, also,* that the defendant was not bound to keep the original channel of the creek open, upon his own lands, as a condition to his right to maintain such barrier. And that he was not liable to the plaintiff for any damages that might ensue from a failure to do so: *Id.*