INDEX.

ACCOUNT.

See EQUITY, 4.

ACTION.

The *cestui que trust* is not a necessary party in an action by a trustee to foreclose a mortgage. *Dodge* v. *Tulleys*, 451.

ADMIRALTY.

A collision occurred between a ship and a steam-tug while the navigation rules established by the act of March 3, 1885, c. 354, 23 Stat. 438, were in force. The tug was required to keep out of the way of the ship and the ship to keep her course. The tug ported her helm to avoid the ship, and that would have been effectual if the ship had not afterwards changed her course by starboarding her helm. If the ship had kept her course, or ported her helm, the collision would have been avoided. The change of course by the ship was not necessary or excusable. The tug did everything to avoid the collision and lessen the damage. The tug had a competent mate, who faithfully performed his duties although he had no license. Although the tug had no such lookout as was required by law, that fact did not contribute to the collision. The tug did not slacken her speed before the collision. There was no risk of collision until the ship starboarded, and then the peril was so great and the vessels were such a short distance apart that the tug may well be considered as having been *in extremis*, before the time when it became her duty to stop and reverse, so that any error of judgment in not sooner stopping and reversing was not a fault. *The Blue Jacket*, 371.

The tug was not in fault. The ship was wholly in fault. *Ib.*

ADMISSION OF A TERRITORY AS A STATE.

See APPEAL.

ADVERSE POSSESSION.

1. The finding, in a suit to quiet title, that the plaintiff and her grantees had been in continued possession of the premises from a given day is the finding of an ultimate fact, and the sufficiency of the evidence to support it cannot be considered on appeal. *Smith* v. *Gale*, 509.

2. Possession and cultivation of a portion of a tract under claim of ownership of all, is a constructive possession of all, if the remainder is not in adverse possession of another. *Ib.*

3. A possession, to be adverse, must be open, visible, continuous and exclusive, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants. *Sharon* v. *Tucker*, 533.

See EQUITY, 7;
LOCAL LAW, 7.

APPEAL.

The appeal being from the Supreme Court of the Territory of Washington, and that Territory having become a State, the case was remanded to the Circuit Court of the United States for the District of Washington, (Act of February 22, 1889, c. 180, 25 Stat. 676, 682, 683, §§ 22, 23,) for further proceedings according to law. *The Blue Jacket*, 371.

See JURISDICTION, A, 13.

ASSIGNMENT OF ERROR.

Where the errors assigned depend upon the terms and construction of a contract, it should appear in the record. *Red River Cattle Co.* v. *Sully*, 209.

ATTORNEY'S FEE.

An agreement to pay an attorney at law a retainer for professional services which are never performed is not to be implied. *Windett* v. *Union Mutual Life Ins. Co.*, 581.

See MORTGAGE, 2.

BOND.

See MUNICIPAL BOND, 6.

CASES AFFIRMED.

1. *Maxwell Land Grant Case*, 121 U. S. 325, affirmed, quoted from and applied. *United States* v. *Budd*, 154.

2. *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, applied to this case so far as the plaintiff claims to recover for a violation of a contract. *Pope Mfg. Co.* v. *Gormully & Jeffery Mfg. Co.*, 238; *Same* v. *Same*, 254.

3. The judgment below is affirmed upon the authority of *United States* v. *County of Macon*, 99 U. S. 582. *United States ex rel. Jones* v. *Macon County Court*, 568.

See REMOVAL OF CAUSES, 3.

CASES DISTINGUISHED OR EXPLAINED.

The case of *The Manitoba*, 122 U. S. 97, distinguished. *The Blue Jacket*, 371.

The cases of *Davies* v. *Arthur*, 96 U. S. 135, and *Beard* v. *Nichols*, 120 U. S. 260, do not control the present case. *Robertson* v. *Salomon*, 603.

Life Insurance Company v. *Francisco*, 17 Wall. 672, distinguished from this case. *Crotty* v. *Union Mutual Life Ins. Co.*, 621.

Noonan v. *Caledonia Mining Co.*, 121 U. S. 393, cited and distinguished. *Kendall* v. *San Juan Silver Mining Co.*, 658.

See CORPORATION, 2;
PATENT FOR INVENTION, 14 (2).

CASES OVERRULED.

See MUNICIPAL BOND, 3.

CERTIORARI.

See SERVICE OF PROCESS.

CHINESE RESTRICTION ACT.

Section 6 of the Chinese Restriction act of May 6, 1882, 22 Stat. 58, c. 126, as amended by the act of July 5, 1884, 23 Stat. 115, c. 220, does not apply to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reënter it on their return to their business and their homes. *Lau Ow Bew* v. *United States*, 47.

CIRCUIT COURTS OF APPEALS.

See JURISDICTION, A, 13; B.

COMMON CARRIER.

See JURISDICTION, A, 10;
NEGLIGENCE;
RAILROAD.

CONSPIRACY.

See CONSTITUTIONAL LAW, 2;
EVIDENCE, 2.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. The provision in Rule XV. of the House of Representatives of the fifty-first Congress, that "on the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in

determining the presence of a quorum to do business," is a constitutional mode of ascertaining the presence of a quorum empowered to act as the House. *United States* v. *Ballin*, 1.

2. A citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, has the right to be protected by the United States against lawless violence; this right is a right secured to him by the Constitution and laws of the United States; and a conspiracy to injure or oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes. *Logan* v. *United States*, 263.

See JURISDICTION, A, 9.

B. OF A STATE.

See MUNICIPAL BOND, 4, 5.

CONTRACT.

1. J. S. W. having advanced to his brother R. W. W. moneys to aid him in developing mines, the title to which was in dispute, and being about to advance further sums for the same purpose, the latter executed and delivered to him an agreement as follows: "San Bernardino, Cal., May 14th, 1881. — For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that at any time within twelve months from this date, upon demand of J. S. Waterman or his heirs, administrators or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths ($\frac{24}{100}$) of the following mines, known as the Alpha, Omega, Silver Glance and Front, each being 600 feet wide by 1500 feet long, and the same interest in all lands that may be located or *has* been located for the development of the above mines, with such machinery and improvements as *is* to be placed upon same, all subject to the same proportion of expenses, which is to be paid out of the development of the above property, all situated near the Grape Vine, in the county of San Bernardino, State of California." *Held*, (1) That, taken in connection with the evidence, this conveyed to J. S. W. no present interest in the property, but only the right to acquire such an interest within a period of "twelve months from this date." (2) That time was of the essence in such contract for acquisition. *Waterman* v. *Banks*, 394.

2. The principle that time may become of the essence of a contract for the sale of property from the very nature of the property itself is peculiarly applicable to mineral properties which undergo sudden, frequent and great fluctuations in value, and require the parties interested in them to be vigilant and active in asserting their rights. *Ib.*

See PATENT FOR INVENTION, 3.

COPYRIGHT.

1. In an equity suit for the infringement of a copyright, where the defendant appeals from the final decree, if exceptions were taken to the report of a master in favor of the plaintiff, it is the duty of the appellant to bring the exceptions into this court, as part of the record; and, if he took no exceptions, the report stands without exception. *Belford* v. *Scribner*, 490.
2. Where the authoress of a book was a married woman, the copyright of which was taken by her assignee as proprietor, it was held, that, inasmuch as she settled, from time to time, with the proprietor, for her royalties, the court would presume that her legal title as author was duly vested in such proprietor, and that long acquiescence, by all parties, in such claim of proprietorship, was enough to answer the suggestion of the husband's possible marital interest in the wife's earnings. *Ib.*
3. If the husband was entitled to any part of the wife's earnings, that was a matter to be settled between the husband and the proprietor, and could not be interposed as a defence to a trespass on the rights of the proprietor of the copyright. *Ib.*
4. The proof showed that the title to the book was vested in the plaintiff, and that the copyright was secured by him in accordance with law. *Ib.*
5. Under § 4956 of the Revised Statutes, it is sufficient if the two printed copies of the book are deposited with the Librarian of Congress the day before its publication. *Ib.*
6. A certificate of the Librarian of Congress as to the day of the receipt by him of the two copies is competent evidence, though not under seal. *Ib.*
7. The finding by the Circuit Court that a certified copy of copyright had been theretofore filed as proof and lost, is sufficient evidence of that fact to sustain an order granting leave to file a new certified copy in its place, there being nothing in the record to control such finding. *Ib.*
8. As two of the defendants printed the infringing books by contract with the third defendant, who published and sold them, and as, under § 4964 of the Revised Statutes, both the printer and the publisher are equally liable to the owner of the copyright for an infringement, and as the sum decreed was found to be the profit shown to have been made by the defendants from the defendants' infringement, the two defendants who did the printing were held to be sharers in the profits so realized from the sales, and to be properly chargeable with such profits. *Ib.*
9. The matter and language in the infringing books being the same as the plaintiff's in every substantial sense, but so distributed through such books as to make it almost impossible to separate the one from the other, the entire profits realized by the defendants must be given to the plaintiff. *Ib.*

CORPORATION.

1. Under the statute of Missouri, authorizing execution upon a judgment against a corporation to be ordered against any of its stockholders to the extent of the unpaid balance of their stock, "upon motion in open court, after sufficient notice in writing to the persons sought to be charged," a notice served in another State upon a person alleged to be a stockholder, and who has never resided in Missouri, is insufficient to support an order charging him with personal liability. *Wilson* v. *Seligman*, 41.
2. The trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith; and it was not intended, by anything said in *Clark* v. *Bever*, 139 U. S. 96; *Fogg* v. *Blair*, 139 U. S. 118; or *Handley* v. *Stutz*, 139 U. S. 417, to overrule this principle, or qualify it in any way, but only to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands. *Camden* v. *Stuart*, 104.
3. Applying this rule to the testimony and mass of figures in this case, the court affirms the judgments of the court below against stockholders in these cases, whose subscriptions for their stock in the corporation, defendant in error in No. 643, were shown to be in part unpaid. *Ib.*

See JURISDICTION, C, 4.

COSTS.

See PRACTICE, 10;
REMOVAL OF CAUSES, 2, 4.

COURT AND JURY.

This action was brought by the defendant in error as plaintiff below against the plaintiff in error, defendant below, to recover a balance alleged to be due from him to the plaintiff below as its treasurer. The defendant below denied that any sum was due, and set up an accord and satisfaction. At the trial, after the plaintiff rested, the defendant opened his case at length, setting forth the grounds of his defence. After some evidence had been introduced including the books of account and the evidence of a witness who kept those books, a conversation took place between the court and the defendant respecting the introduction of evidence alleged by the court to be outside of the statements made in the opening. The defendant insisted that the evidence offered was within those statements. A further conversation resulted in the defendant's offering to show that all the moneys ever received by him as treasurer were duly accounted for and paid over. The court held this to be a mixed proposition of law and fact, and

therefore not to be proved by witnesses or other evidence; and, having excluded it, charged the jury that the question at issue was a bookkeeper's puzzle or problem, which must be solved in favor of the plaintiff, although nothing had occurred in the testimony which reflected in the slightest degree upon the integrity or honesty or upright conduct of anybody who was concerned or had at any time been concerned in the transaction. *Held*, (1) That under the rule laid down in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, it was competent for the court, if, assuming all the statements and claims made in the defendant's opening with all explanations and qualifications to be true, he had no case, to direct a verdict for the plaintiff; but (2) that he should have been allowed, especially in view of the statement that there was no imputation upon his integrity or honesty, to offer proof to show that he had accounted for and paid over the money for which he was sued; and that if the proof, when offered, did not tend in law to establish those facts, it could have been excluded. *Butler* v. *National Home for Disabled Soldiers*, 64.

See NEGLIGENCE, 3, 4.

CRIMINAL LAW.

1. The consolidation, under section 1024 of the Revised Statutes, of several indictments against different persons for one conspiracy, if not excepted to at the time, cannot be objected to after verdict. *Logan* v. *United States*, 263.
2. An act of Congress, requiring courts to be held at three places in a judicial district, and prosecutions for offences committed in certain counties to be tried, and writs and recognizances to be returned, at each place, does not affect the power of the grand jury, sitting at either place, to present indictments for offences committed anywhere within the district. *Ib.*
3. A jury in a capital case, who, after considering their verdict for forty hours, have announced in open court that they are unable to agree, may be discharged by the court of its own motion and at its discretion, and the defendant be put on trial by another jury. *Ib.*
4. A juror summoned in a capital case, who states on *voir dire* that he has conscientious scruples in regard to the infliction of the death penalty for crime, may be challenged by the government for cause. *Ib.*
5. The provision of section 858 of the Revised Statutes, that "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application to criminal trials. *Ib.*
6. Under section 1033 of the Revised Statutes, any person indicted of a capital offence has the right to have delivered to him, at least two days before the trial, a list of the witnesses to be produced on the trial for proving the indictment; and if he seasonably claims this

right, it is error to put him on trial, and to allow witnesses to testify against him, without having previously delivered to him such a list; and, *it seems*, that the error is not cured by his acquittal of the capital offence, and conviction of a lesser offence charged in the same indictment. *Ib.*

7. There are no common law offences against the United States. *United States* v. *Eaton*, 677.
8. It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence; and the statutory authority in the present case was not sufficient. *Ib.*

See EVIDENCE, 2;
JURISDICTION, A, 8;
WITNESS.

CUSTOM.

See EVIDENCE, 4.

CUSTOMS DUTIES.

1. Under the provision in the act of May 9, 1890, 26 Stat. 105, c. 200, the duties on worsted cloths were, by the terms of the act, and irrespective of any action by the Secretary of the Treasury, to be such as were placed on woollen cloths by the act of March 3, 1883. 22 Stat. c. 121, pp. 488, 508. *United States* v. *Ballin*, 1.
2. Gloves made of cotton and silk, in which cotton was the material of chief value, were imported in January, 1874, and charged by the collector with a duty of 60 per cent *ad valorem*, that rate of duty being chargeable only on "silk gloves," under the act of June 30, 1864, c. 171, 13 Stat. 210, and on "ready made clothing of silk, or of which silk shall be a component material of chief value," under § 3 of the act of March 3, 1865, c. 80, 13 Stat. 493. The importer protested and appealed and brought suit. His protest stated that the goods were only liable to a duty of 35 per cent less 10 per cent, "being composed of cotton and silk, cotton chief part, the duty of 60 per cent being only legal where silk is the chief part." The goods were made on frames; *Held*, (1) Under § 14 of the act of June 30, 1864, c. 171, 13 Stat. 214, 215, the protest set forth distinctly and specifically the grounds of the objection of the importer to the decision of the collector, and was sufficient; (2) It was immaterial that the protest did not specify that the gloves were made on frames; (3) The goods were dutiable only at 35 per cent less 10 per cent under § 22 of the act of March 2, 1861, 12 Stat. 191, and § 13 of the act of July 14, 1862, 12 Stat. 555, 556, 559, and under § 2 of the act of June 6, 1872, 17 Stat. 231. *Heinze* v. *Arthur's Executors*, 28.
3. Photographic albums, made of paper, leather, metal clasps and plated clasps, imported in April, May and June, 1885, the paper being worth

more than all the rest of the materials put together, were not liable to a duty of 30 per cent *ad valorem*, as "manufactures and articles of leather," under Schedule N of the act of March 3, 1883, c. 121, (22 Stat. 513,) but were liable to a duty of only 15 per cent *ad valorem*, under Schedule M of that act, (22 Stat. 510,) as a manufacture of paper, or of which paper was "a component material, not specially enumerated or provided for" in that act. *Liebenroth* v. *Robertson*, 35.

4. Under § 6 of that act, (p. 491,) title 33 of the Revised Statutes was abrogated after July 1, 1883, and § 2499 in that title was made to read so that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable," instead of reading that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" and that new provision was applicable to this case, although the new § 2499 also provided that "if two or more rates of duty should be applicable to any imported article it shall be classified for duty under the highest of such rates." *Ib.*
5. This last provision was not properly applicable, under § 2499, to an article "manufactured from two or more materials," and it had sufficient scope if applied to articles not manufactured from two or more materials, but still *prima facie* subject to "two or more rates of duty." *Ib.*
6. Laces made by machinery out of linen thread were imported in 1881 and 1882, and charged with duty at 40 per cent *ad valorem*, as "manufactures of flax, or of which flax shall be the component material of chief value, not otherwise provided for," under Schedule C of § 2504 of the Revised Statutes (p. 462). The importers claimed that they were chargeable with a duty of only 35 per cent *ad valorem*, as "thread lace," under the same schedule (p. 463). *Held*, that, as the evidence clearly showed that the goods were invariably bought and sold as "torchons," and not as thread laces, and that thread lace was always hand-made, it was proper to direct a verdict for the defendant, in a suit brought by the importer against the collector to recover an alleged excess of duty. *Meyerheim* v. *Robertson*, 601.
7. Elastic webbings, used as gorings for shoes, some composed of worsted and india-rubber, and the rest of cotton, silk and india-rubber, imported in March and June, 1884, were assessed with duties, the former as "gorings," at 30 cents per pound and 50 per cent *ad valorem*, under Schedule K of § 2502 of Title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 509, and the latter at 35 per cent *ad valorem*, as "webbing, composed of cotton, flax or any other materials, not specially enumerated or provided for in this act," under Schedule N of the same section. *Id.* 514. The importers claimed that they were dutiable at 30 per cent *ad valorem* under said Schedule N, (*Id.* 513,) as "india-rubber fabrics, composed wholly or in part of india-rubber, not specially enumerated or provided for in

this act." *Held*, that the assessment of duties, as made, was correct. *Robertson* v. *Salomon*, 603.

8. "Goring" and "gorings" make their first appearance in the act of March 3, 1883. *Ib.*

9. The Circuit Court erred in not submitting to the jury the question whether the goods were or were not known in this country, in trade and commerce, under the specific name of goring, and in directing a verdict for the plaintiffs. *Ib.*

DAKOTA.

See LOCAL LAW, 1, 4, 5.

DEED.

See LOCAL LAW, 5.

DISTRICT OF COLUMBIA.

See JURISDICTION, A, 2;
LOCAL LAW, 7.

EQUITY.

1. Remedy for error in a decree for the foreclosure and sale of property mortgaged to a trustee for the benefit of holders of bonds issued under the mortgage, or in the sale under the decree, must be sought in the court which rendered the decree and confirmed the sale. *Kent* v. *Lake Superior Ship Canal Co.*, 75.

2. A canal company which had issued several series of bonds, secured by mortgages on its property, defaulted in the payment of interest on all. Bills were filed to foreclose the several trust deeds, and a receiver was appointed. On due notice to all parties receiver's certificates were issued to a large amount for the benefit of the property, which certificates were made a first lien upon it. The property was sold under a decree of foreclosure and sale, and the purchasers paid for the same in receiver's certificates, the amount of the bid being less than the amount of the issue of such certificates. On a bill filed by a holder of bonds issued under one of the mortgages foreclosed, *Held*, (1) That his remedy should have been sought in the court which rendered the decree; (2) That the paramount lien of the receiver's certificates having been recognized by the trustee of the mortgage under which the bonds were issued, his action in that respect was, so far as appeared, within the discretion reposed in him by his deed. *Ib.*

3. Under a writ of possession, on a judgment entered in January, 1886, in a suit brought in a Circuit Court of the United States by C. against M. in March, 1884, L. was evicted from land, and the agent of C. was put in possession. L. was in possession under a sheriff's deed made in August, 1885, under proceedings in another suit against M. L. brought a suit in equity, in the same Circuit Court, in April, 1886,

against F. as testamentary executor of C. and individually, to have the suit of C. declared a nullity, for want of jurisdiction, and because L. was not a party to it, and for an injunction restraining F. and the agent of C. from molesting L. in the possession of the land. On demurrer to the bill: *Held*, (1) The case was not one for a suit in equity; (2) The possession of L. was that of M.; and L. as a purchaser *pendente lite*, was subject to the operation of the writ of possession; (3) The proper decree was to dismiss the bill, without prejudice to an action at law. *Lacassagne* v. *Chapin*, 119.

4. From March, 1875, to May, 1881, D. sent to H. from time to time various sums of money, to be lent by him for complainant at interest, H. being instructed and agreeing to reinvest the interest in the same way. The money was at first invested at 10 per cent, but early in 1881 H. informed D. that the rate was reduced to 8 per cent. H. died in 1886. D. filed a bill in equity against his executors for an account and payment of what might be found due. They answered and the cause was referred to a master. The executors produced at the hearing no books of accounts or papers of H. and no statements by him of his investments. In the account stated by the master interest was included up to April 1, 1881, at 10 per cent, and at 8 per cent thereafter with annual rests, and a decree was entered accordingly. *Held*, (1) That a trust relation between the parties was disclosed, which entitled the complainant to an account; (2) That it was the duty of H. to keep an account and that in its absence it must be presumed that he reinvested interest moneys, as received, at the rates named in the correspondence; (3) That after his death his executors should be charged at the legal rate of 6 per cent; (4) That certain claims set up by the executors for taxes paid were not sustained by the proof. *Dillman* v. *Hastings*, 136.

5. When, in a court of equity, it is proposed to set aside, annul or correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and not a bare preponderance of evidence; and this rule, well established in private litigations, has additional force when the object of the suit is to annul a patent issued by the United States. *United States* v. *Budd*, 154.

6. When the defendant in a suit in equity appears and answers under oath, denying specifically the frauds charged, no presumptions arise against him if he fails to offer himself as a witness as to the alleged frauds, inasmuch as the plaintiff can call him and cross-examine him. *Ib.*

7. A person who has acquired title by adverse possession may maintain a bill in equity against those who, but for such acquisition, would have been the owners, for the purpose of having his title judicially ascertained and declared, and to enjoin the defendants from asserting title to the same premises from former ownership that has been lost. *Sharon* v. *Tucker*, 533.

8. Such a bill is not a bill of peace, nor is it strictly a bill *quia timet.* The ground of the jurisdiction is the obvious difficulty and embarrassment in asserting and protecting a title not evidenced by any record, but resting in the recollection of witnesses, and the warrant for its exercise is found in the ordinary jurisdiction of equity to perfect and complete the means by which the right, estate or interest of holders of real property, that is, their title, may be proved or secured, or to remove obstacles to its enjoyment. *Ib.*

9. A court of equity has jurisdiction over a bill filed by a State to prevent illegal interference with its control of the digging, mining and removing phosphate rock and phosphate deposits in the bed of a navigable river within its territories. *Coosaw Mining Co.* v. *South Carolina*, 550.

See CORPORATION, 2, 3; MORTGAGE, 2; MASTER IN CHANCERY; PATENT FOR INVENTION, 3.

ERROR.

See ASSIGNMENT OF ERROR; PRACTICE, 3, 4.

ESTOPPEL.

See JUDGMENT.

EVIDENCE.

1. In an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is not competent evidence of negligence in its original construction. *Columbia & Puget Sound Railroad Co.* v. *Hawthorne*, 202.

2. Upon an indictment for conspiracy, acts, or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators. *Logan* v. *United States*, 263.

3. B. contracted with C. to construct and put up for him a crushing plant, with a guaranteed capacity of 600 tons daily, and C. agreed to pay therefor $25,000, one-half on presentation of the bills of lading and the remainder when the machinery should be successfully running. The machine was completed and put in operation October 1. The agreed payment of $12,500 was made on delivery, and $7500 in three payments in the course of a month. B. sent a man to superintend the putting up of the machine and to watch its working. Under his directions a book was kept in which were recorded either by himself or under his directions by C.'s foreman, the daily workings of the machine between October 18 and November 7, which account was copied by B.'s man and sent to B. The working from November 7 to the following March was also kept in the same way. In an action by B. against C. to recover the remainder of the contract price; *Held*,

(1) That B.'s man could use these books in his examination in chief to assist him in testifying as to the actual working of the machines from October 18 to November 7; (2) That the defendant not having introduced the books, (which were in his possession,) in his evidence in reply to the plaintiff's evidence in chief, could not, in rebuttal, ask a witness to examine them and state the results as to the working of the machine in the months of November, December, and January, which subjects had not been inquired about by the plaintiff. *Chateaugay Ore and Iron Co.* v. *Blake*, 476.

4. Evidence of a local custom is not admissible unless it is shown to be known to both parties; and this court may infer, from the general course of the inquiries and proceedings at the trial, that a custom inquired of at the trial and so excluded, was regarded by the court and by both parties as a local custom, and not as a general custom, although the record may contain nothing positive on that point. *Ib.*

5. When the defendant in his answer admits the execution of an instrument set up by the plaintiff in his declaration, and claims that it is invalid by reason of matters set forth in the answer, that instrument is admissible in evidence. *Smith* v. *Gale*, 509.

See COPYRIGHT, 6; EQUITY, 5, 6; COURT AND JURY, 1; LOCAL LAW, 5; CRIMINAL LAW, 5; WITNESS.

EXCEPTION.

An exception that the court did not charge either of eighteen enumerated requests for special instructions except as it had charged is an insufficient exception. *Chateaugay Ore and Iron Co.* v. *Blake*, 476.

See LOCAL LAW, 1.

EXECUTIVE REGULATION.

A regulation made August 25, 1886, by the commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under § 20 of the act of August 2, 1886, c. 840, (24 Stat. 209,) in relation to oleomargarine, required wholesale dealers therein to keep a book, and make a monthly return, showing certain prescribed matters. A wholesale dealer in the article who fails to comply with such regulation is not liable to the penalty imposed by § 18 of the act, because he does not omit or fail to do a thing required by law in the carrying on or conducting of his business. *United States* v. *Eaton*, 677.

See CRIMINAL LAW, 8.

FINDINGS.

See PRACTICE, 1, 2.

FORFEITURE.

Courts do not favor forfeitures; but will nevertheless enforce them when the party by whose default they are incurred cannot show good ground in the conduct of the other party on which to base a reasonable excuse for the default. *Hartford Life Insurance Co.* v. *Unsell*, 439.

FRAUD.

See EQUITY, 5, 6.

FRAUDULENT CONVEYANCE TO DEFEAT CREDITORS.

1. The statutes forbidding the transfer by a debtor of his property with intent to hinder, delay or defraud creditors do not invalidate a conveyance by a debtor to a *bona fide* creditor, with intent to prefer him. *Crawford* v. *Neal*, 585.
2. The burden of setting aside a conveyance by a debtor as made with intent to hinder, delay or defraud creditors is on the attacking creditor; but where the fraudulent intent on the grantor's part is made out, and the circumstances are suspicious, then the purchaser must show that he paid full value; and if this is shown it must then be made to appear that the purchaser had full knowledge of the fraud. *Ib.*
3. The continued possession by an insolvent debtor of his real estate after the transfer of it to a creditor by way of preference may be explained by the surrounding circumstances. *Ib.*
4. Of two conveyances made by an insolvent debtor at the same time to two individuals, one may be held to be valid as a preference of a *bona fide* creditor, and the other invalid as made with an intent to hinder, delay or defraud creditors, unless the two transactions are so intermingled as to make them necessarily but one transaction, in which case both will be void. *Ib.*

GOOD-WILL.

While the good-will of a business may be the subject of barter and sale, it must be something substantial and capable of pecuniary estimation, and not shadowy. *Camden* v. *Stuart*, 104.

GRAND JURY.

See CRIMINAL LAW, 2.

HUSBAND AND WIFE.

See COPYRIGHT, 2, 3.

INDIAN RESERVATION.

See MINERAL LAND, 2, 3.

INSURANCE.

1. In an action to recover on a policy of life insurance, error in admitting evidence as to the mental and physical condition of the assured in his last days, when an overdue premium was paid and received is held to be cured by the charge of the court that the only question was whether there had been a waiver by the insurer, and that it was immaterial whether the assured was or was not ill at that time. *Hartford Life Insurance Co.* v. *Unsell*, 439.

2. As an action could not have been maintained against the insurer without offer to pay overdue premiums, evidence of such offer was properly admitted. *Ib.*

3. A life insurance company whose policy provides for the payment of premiums at stated times, and further that the holder "agrees and accepts the same upon the express condition that if either the monthly dues," etc., "are not paid to said company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force" may nevertheless by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due without inquiry as to his health, and such a course of dealing may amount to a waiver of the conditions of forfeiture. *Ib.*

4. A promise by the insurer in a policy of life insurance to pay the amount of the policy on the death of the assured to "M. C., his creditor, if living;" if not then to the executors, etc., of the assured, is a promise to pay to that creditor, if he continues to be a creditor, and if not, then to the executors, etc.; and in an action on the policy by the creditor, if sufficient time elapsed between the making of the policy and the death of the assured to warrant an assumption that the debt may have been paid, it is incumbent on the plaintiff to prove the continuance of the relation and the amount of the debt. *Crotty* v. *Union Mutual Life Ins. Co.*, 621.

5. The fact that an insurance company does not object to answers made to questions on a blank sent out by it for securing proof of the death of the assured, does not prevent it from challenging the truth of any statement in such answers. *Ib.*

INTEREST.

See EQUITY, 4;
LOCAL LAW, 3;
MORTGAGE, 2.

INTERVENTION.

See LOCAL LAW, 4.

INTOXICATING LIQUORS.

See JURISDICTION, A, 9.

JUDGMENT.

1. A judgment for the plaintiffs was rendered in August, 1873, in a United States Court in South Carolina, in an action at law in ejectment, in which a minor was defendant, and appeared and answered by a guardian *ad litem*, and which minor became of age in December, 1885, and brought a writ of error from this court, under § 1008 of the Revised Statutes, within two years after the entry of the judgment, exclusive of the time of the disability of the minor. The case involved the title to land in South Carolina under a will made in 1819, the testator dying in 1820. In June, 1850, a suit in equity was brought in a state court of South Carolina, which set up that the title to the land, under the will, was either in the grandmother of the minor or in her sons, one of whom was the father of the minor, the grandmother and the father of the minor being parties defendant to the suit, and the bill having been taken *pro confesso* against all the defendants, and dismissed by a decree made in March, 1851, which remained unreversed, an appeal taken therefrom having been abandoned. The only title set up by the plaintiff in error was alleged to be derived through his father and his grandmother. In September, 1854, an action of trespass to try title to the land was brought in a state court of South Carolina, and which resulted in a judgment for the plaintiff therein, but to which the plaintiffs in the ejectment suit were not parties or privies. *Held*, that as the decree in the equity suit was prior to the judgment in the trespass suit, and as the plaintiffs in the ejectment suit were not parties to the trespass suit, the judgment in the last named suit was of no force or effect in favor of the plaintiff in error, as against the decree in the equity suit. *Bedon* v. *Davie*, 142.
2. When a second suit is upon the same cause of action, and between the same parties as a former suit, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. *Nesbit* v. *Riverside Independent District*, 610.
3. A judgment against a municipal corporation in an action on coupons cut from its negotiable bonds, where the only defence set up was the invalidity of the issue of the bonds by reason of their being in excess of the amount allowed by law, is no estoppel to another action between the same parties, on the bonds themselves and other coupons cut from them, where the defence set up is such invalidity, coupled with knowl-

edge of the same by the plaintiff when he acquired the bonds and coupons. *Ib.*

JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. It is competent for this court by certiorari to direct any case to be certified by the Circuit Courts of Appeals, whether its advice is requested or not, except those which may be brought here by appeal or writ of error. *Lau Ow Bew* v. *United States*, 47.

2. This court has no appellate jurisdiction over judgments of the Supreme Court of the District of Columbia in criminal cases. *In re Heath*, 92.

3. The decision of the Supreme Court of a State in a case in which application for removal to the Circuit Court of the United States had been made in the trial court and denied, that, as no appeal was prosecuted from the final judgment, the order denying the application to remove was not open to review, and its judgment thereupon dismissing the appeal from the orders refusing to set aside the judgment of the court below, rest upon grounds of state procedure, and present no Federal question. *Tripp* v. *Santa Rosa Street Railroad Co.*, 126.

4. This writ of error is dismissed because the record presents no Federal question properly raised, and because the judgment of the state court rests upon an independent ground, broad enough to maintain it, and involving no Federal question. *Haley* v. *Breeze*, 130.

5. The judgment of the Supreme Court of a State in a case which is remanded by that court to the trial court and retried there, is not a final judgment which can be reviewed by this court. *Rice* v. *Sanger*, 197.

6. S. collected money from the Treasury of the United States as the attorney at law of G., a former collector at the port of New York. Not paying it over, the executors of G. brought suit against him in a state court in New York, to recover this money. He set up in defence that the case had been reopened by the government, and that he feared he would be compelled to repay it; and that no valid agency could exist by force of the statutes of the United States to collect and pay over these moneys. Both defences were overruled and judgment entered for plaintiff. A writ of error was sued out to this court. *Held*, that no Federal question was involved in the decision of the state court. *Sherman* v. *Grinnell*, 198.

7. No Federal question is involved when the Supreme Court of a State decides that a municipal corporation within the State had not power, under the constitution and laws of the State, to make the contract sued on. *Missouri ex rel. Quincy &c. Railroad* v. *Harris*, 210.

8. A writ of error does not lie in behalf of the United States in a criminal case. *United States* v. *Sanges*, 310.

9. A complaint, in Vermont, before a justice of the peace, for selling intoxicating liquor without authority, was in the form prescribed by

the state statute, which also provided, that, under such form of complaint every distinct act of selling might be proved, and that the court should impose a fine for each offence. After a conviction and sentence before the justice of the peace, the defendant appealed to the county court, where the case was tried before a jury. The defendant did not take the point, in either court, that there was any defect or want of fulness in the complaint. The jury found the defendant guilty of 307 offences as of a second conviction for a like offence. He was fined $6140, being $20 for each offence, and the costs of prosecution, $497.96, and ordered to be committed until the sentence should be complied with, and it was adjudged, that if the fine and costs, and 76 cents, as costs of commitment, aggregating $6638.72, should not be paid before a day named, he should be confined at hard labor, in the house of correction, for 19,914 days, being, under a statute of the State, three days for each dollar of the $6638. The facts of the case were contained in a written admission, and the defendant excepted because the court refused to hold that the facts did not constitute an offence. The case was heard by the Supreme Court of the State, (58 Vermont, 140,) which held that there was no error. On a writ of error from this court; *Held*, (1) The term of imprisonment was authorized by the statute of Vermont; (2) It was not assigned in this court, as error, in the assignment of errors, or in the brief, that the defendant was subjected to cruel and unusual punishment, in violation of the Constitution of the United States; (3) So far as that is a question arising under the constitution of Vermont, it is not within the province of this court; (4) As a Federal question, the 8th Amendment to the Constitution of the United States does not apply to the States; (5) No point on the commerce clause of the Constitution of the United States was taken in the county court, in regard to the present case, or considered by the Supreme Court of Vermont or called to its attention; (6) The only question considered by the Supreme Court, in regard to the present case, was whether the defendant sold the liquor in Vermont or in New York, and it held that the completed sale was in Vermont; and that did not involve any Federal question; (7) As the defendant did not take the point in the trial court that there was any defect or want of fulness in the complaint, he waived it; and it did not involve any Federal question; (8) The Supreme Court of Vermont decided the case on a ground broad enough to maintain its judgment without considering any Federal question; (9) The writ of error must be dismissed for want of jurisdiction in this court, because the record does not present a Federal question. *O'Neil* v. *Vermont*, 323.

10. When, in an action brought against a railroad company in Michigan by the administrator of a person killed by one of its trains, to recover damages for the killing, the record in this court fails to show that any exception was taken at the trial, based upon the lack of evidence to show that he left some one dependent upon him for support, or some

one who had a reasonable expectation of receiving some benefit from him during his lifetime, as required by the laws of that State, (Howell's Ann. Stat. §§ 3391, 3392,) the objection is not before this court for consideration. *Grand Trunk Railway Co.* v. *Ives*, 408.

11. A decision by the highest court of a State that a former judgment of the same court in the same case, between the same parties, upon a demurrer, was *res judicata* in that action as to the rights of the parties, presents no Federal question for the consideration of this court, and is broad enough to maintain the judgment; and this court is therefore without jurisdiction. *Northern Pacific Railroad Co.* v. *Ellis*, 458.

12. A suit was brought in the Supreme Court of New York against a railroad corporation created by an act of Congress, to recover damages for personal injuries sustained by the plaintiff, who was a laborer on the road, from the negligence of the defendant. The suit was removed by the defendant into a Circuit Court of the United States, on the ground that it arose under the act of Congress. It was tried before a jury, and resulted in a verdict and judgment for the plaintiff for $4000. The defendant took a writ of error from the Circuit Court of Appeals, which affirmed the judgment. On a writ of error taken by the defendant from this court to the Circuit Court of Appeals, a motion was made, by the plaintiff, to dismiss or affirm: *Held*, (1) Under § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, the writ would lie, because the jurisdiction of the Circuit Court was not dependent entirely on the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other a citizen of a different State, but was dependent on the fact that the corporation being created by an act of Congress, the suit arose under a law of the United States, without reference to the citizenship of the plaintiff; (2) The decision of the Circuit Court of Appeals was not final, nor in effect made final by the act of 1891, as in *Lau Ow Bew* v. *United States*, 144 U. S. 47; (3) As it did not appear by the record, that, on the trial in the Circuit Court, the defendant made any objection to the jurisdiction of that court, and the petition for removal recognized the jurisdiction, it could not be said, as a ground for the motion to dismiss, that the defendant might have taken a writ of error from this court to the Circuit Court, under § 5 of the said act of 1891, and had, by failing to do so, waived its right to a review by this court; (4) There was color for the motion to dismiss, and the judgment must be affirmed on the ground that the writ was taken for delay only; (5) The main defence was contributory negligence on the part of the plaintiff, and the court charged the jury that they had the right to take into consideration the fact that the foreman of the defendant told the plaintiff it was safe for him to cross, at the time, the bridge where the accident took place, through the plaintiff's being struck by a locomotive engine

while he was crossing the bridge on foot. The question was fairly put to the jury, as to the alleged contributory negligence. The case was one for the jury. *Northern Pacific Railroad Co.* v. *Amato*, 465.

13 The Judiciary Act of March 3, 1891, 26 Stat. c. 517, pp. 826, 827, having provided that no appeals shall be taken from Circuit Courts to this court except as provided in that act and having repealed all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error contained in that act, and the joint resolution of March 3, 1891, 26 Stat. 1115, having provided that nothing contained in that act shall be held to impair the jurisdiction of this court in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to this court before July 1, 1891, it is *Held*, that an appeal to this court from a judgment entered in a Circuit Court November 18, 1890, appealable before July 1, 1891, could not be taken after July 1, 1891. *National Exchange Bank* v. *Peters*, 570.

14. A defendant indicted in a state court for forging discharges for money payable by a municipal corporation with intent to defraud it, pleaded in abatement to an array of the grand jury, and to the array of the traverse jury, that all the jurors were inhabitants of the municipality, but did not at that stage of the case claim in any form a right or immunity under the Constitution of the United States. After conviction, the defendant, by motion in arrest of judgment, and by exception to the jurisdiction of the court, objected that the proceedings were in violation of the Fourteenth Amendment to the Constitution of the United States for the same reason, and also because the selectmen of the municipality who prepared the jury list, and took the principal part in drawing the jurors, were at the same time actively promoting this prosecution. The highest court of the State held the objections taken before verdict to be unfounded, and those after verdict to be taken too late. *Held*, that this court had no jurisdiction to review the judgment on writ of error. *Brown* v. *Massachusetts*, 573.

15. A judgment of a state court upon the question whether bonds of the State were sold by the governor of the State within the authority vested in him by the statute of the State under which they were issued, involves no Federal question. *Sage* v. *Louisiana*, 647.

16. The judgment of a state court in a suit to compel the funding of state bonds, that a former adverse judgment upon bonds of the same series could be pleaded as an estoppel, presents no Federal question. *Adams* v. *Louisiana*, 651.

17. Under Rev. Stat. § 914, and according to the Code of Civil Procedure of the State of Nebraska, if the petition, in an action at law in the Circuit Court of the United States held within that State, alleges the requisite citizenship of the parties, and the answer denies each and every allegation in the petition, such citizenship is put in issue, and, if

no proof or finding thereof appears of record, the judgment must be reversed for want of jurisdiction. *Roberts* v. *Lewis*, 653.

See ADVERSE POSSESSION, 1;
JURISDICTION, C, 1;
LOCAL LAW, 1.

B. JURISDICTION OF CIRCUIT COURTS OF APPEALS.

1. By section 6 of the act of March 3, 1891, establishing Circuit Courts of Appeals, 26 Stat. 828, c. 517, the appellate jurisdiction not vested in this court was vested in the court created by that act, and the entire jurisdiction was distributed. *Lau Ow Bew* v. *United States*, 47.
2. The words "unless otherwise provided by law" in the clause in that section which provides that the Circuit Courts shall exercise appellate jurisdiction "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law" were inserted in order to guard against implied repeals, and are not to be construed as referring to prior laws only. *Ib.*

See JURISDICTION, A, 1, 12.

C. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. In an action brought in the Circuit Court of the United States in Alabama the complaint described the plaintiff as a bank organized in accordance with the laws of the United States and as doing business in Tennessee, and the defendant as residing in the State of Alabama. The summons described the plaintiff as "a citizen of the State of Tennessee," and the defendant "as a citizen of the State of Alabama." The question of jurisdiction was raised for the first time in this court. *Held*, that although greater care should have been exercised by plaintiffs in the averments, the diverse citizenship of the parties appeared affirmatively and with sufficient distinctness on the record. *Jordan* v. *Third National Bank*, 97.
2. Under the provisions of the act of July 4, 1884, 23 Stat. 73, c. 179, the United States Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas, and the District of Kansas have concurrent jurisdiction, without reference to the amount in controversy, and without distinction as to citizenship of the parties, over all controversies arising between the Southern Kansas Railway Company and the inhabitants of the Indian nations and tribes through whose territory that railway is constructed. *Southern Kansas Railway Co.* v. *Briscoe*, 133.
3. The jurisdiction of a Federal court by reason of diverse citizenship is not defeated by the mere fact that a transfer of the plaintiff's interest was made in order, in part, to enable the purchaser to bring suit in a court of the United States, provided the transfer was absolute, and

the assignor parted with all his interest for good consideration. *Crawford* v. *Neal*, 585.

4. Four children of S. H. P., deceased, recovered judgment in the Circuit Court of the United States for the Western District of Tennessee against a life insurance company, a corporation of New York, on a policy insuring the life of the deceased, to which judgment a writ of error was sued out, but citation issued against only one of the plaintiffs. On this the company gave a supersedeas bond, securing the sureties by pledging or mortgaging some of its property. Proceedings were then taken in the courts of New York, under direction of the attorney general of that State, which resulted in the dissolution of that corporation, and the appointment of a receiver of its property, who, by directions of the court, appeared in this court and prosecuted the writ of error in order to release the property pledged. After sundry proceedings the judgment of the Circuit Court was eventually reversed, and the case was remanded to the Circuit Court. A new trial was had there, but without summoning in the receiver, who did not appear, and judgment was again obtained against the company. This judgment was filed in the proceedings in New York as a claim against the assets of the company in the hands of the receiver, and the claim was disallowed by the highest court of that State. *Held*, that the appearance of the receiver in this court for the purpose of securing a reversal of the judgment below and the release of the mortgaged property gave to the Circuit Court in Tennessee no jurisdiction over the case, after the dissolution of the corporation, which could bind the property of the company in the hands of the receiver, or prevent the receiver from showing that the judgment was invalid because rendered against a corporation which had at the time no existence, and possessed no property against which the judgment could be enforced. *Pendleton* v. *Russell*, 640.

D. Jurisdiction of District Courts of the United States.

See Jurisdiction, C, 2;
Practice, 10.

JURY.

See Criminal Law, 3, 4.

LEGISLATIVE GRANTS.

See Statute, A, 1, 2.

LIMITATION, STATUTES OF.

See Local Law, 7.

LIS PENDENS.

See Local Law, 6.

LOCAL LAW.

1. Upon the trial of this case in the District Court in Dakota, a verdict was returned, November 24, 1888, in favor of plaintiff for $12,545.43, and judgment was rendered accordingly November 26, 1888. On November 28, 1888, the court made an order by consent extending the time for serving notice of intention to move for a new trial, for motion for new trial, and for settlement of a bill of exceptions until January 28, 1889, which time was subsequently extended by order of court for reason given, to February 28, and thence again "for cause" to March 28, 1889, upon which day the following order was entered: "The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for new trial, and within which to move for new trial, is hereby extended to April 13th, 1889." The time was again extended to May 31, 1889, and on the 23d day of that month the following order was entered: "The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial, and within which to move for a new trial in said action." This was the last order of extension. On December 14, 1889, there was filed in the office of the clerk of the District Court a notice of motion for new trial, which was as follows: "Take notice that the motion for a new trial herein will be brought on for argument before the court at chambers, at Jamestown, Dakota, on September 12, 1889, at 10 o'clock A.M., or as soon thereafter as counsel can be heard." On the margin of this notice appeared this indorsement: "Hearing continued until the 21st September, 1889. Roderick Rose, Judge." The notices and motion seem to have been served September 3, 1889. The bill of exceptions was signed August 30, 1889, and filed September 3, 1889. The certificate thereto concluded thus: "Filed as a part of the records in this action this August 30th, 1889, (and within the time provided by law, as enlarged and extended by orders of the judge of this court)." On February 17, 1890, the judge further certified: "The above and foregoing certificate is hereby modified and corrected so as to conform to the facts and record in the case by striking out all that part of it in the two last lines thereof preceding my signature and after the words and figures 'August 30th, 1889.'" On November 2, 1889, the State of North Dakota was admitted into the Union. *Held*, (1) That this bill of exceptions was not settled and filed within the time allowed by law or under any order of the court; (2) That the alleged motion for a new trial not having been filed until December 14, 1889, was not made, and no notice of intention to make it was given, within the

time allowed by law or by any order of the court; (3) That a renewal of notice and motion after the State was admitted, if it could have been made, would necessarily have been in the state court, whose jurisdiction would have attached to determine it. *Glaspell* v. *Northern Pacific Railroad Co.*, 211.

2. In Illinois the filing by the plaintiff under the statute of that State (2 Starr & Curtis' Stats. 1801) of an affidavit "showing the nature of his demand and the amount due him from the defendant" does not prevent the recovery of a larger sum if a larger sum is claimed by the pleadings and shown to be due by the evidence. *Keator Lumber Co.* v. *Thompson*, 434.
3. Interest at the rate of 8¾ per cent in Nebraska is not usurious. *Dodge* v. *Tulleys*, 451.
4. The right to intervene in a cause, conferred by secs. 89, 90 of the Dakota Code of Civil Procedure upon a person interested in the subject of a litigation, relates to an immediate and direct interest by which the intervenor may either gain or lose by the direct legal operation and effect of the judgment, and can only be exercised by leave of the court, in the exercise of its discretion; and if the request to intervene is made for the first time in a case which had been pending for two years, and just as it is about to be tried, it is a reasonable exercise of that discretion to refuse the request. *Smith* v. *Gale*, 509.
5. Since the enactment of the act of January 6, 1873, (Laws of Dakota Territory, 1872–73, pp. 63, 64,) a deed of land within Dakota executed and acknowledged without the State before a notary public having an official seal, and certified by him under his hand and official seal, is sufficient to admit the deed to record and in evidence, without further proof; and the fact that the recording officer in making the record of the deed fails to place upon the record a note of the official seal, does not affect the admissibility of the original. *Ib.*
6. In Dakota a person purchasing real estate in litigation from the party in possession, in good faith and without knowledge or notice of the pendency of the litigation, may acquire a good title as against the other party if no *lis pendens* has been filed. *Ib.*
7. Adverse possession of real estate in the District of Columbia, for the period designated by the Statute of Limitations in force there, confers upon the occupant a complete title upon which he can stand as fully as if he had always held the undisputed title of record. *Sharon* v. *Tucker*, 533.

Illinois.	*See* PRACTICE, 6.
Michigan.	*See* JURISDICTION, A, 10; RAILROAD, 3.
Missouri.	*See* CORPORATION, 1.
South Carolina.	*See* JUDGMENT, 1; STATUTE, A, 1.

MARRIED WOMAN.

See COPYRIGHT, 2, 3.

MASTER IN CHANCERY.

1. There is always a presumption of the correctness of a master's report; and in view of the fact that no exception was taken to it by the plaintiff in error in No. 159, as required by Rule 21, the court does not feel bound to examine into the minor details of the report in this case, and holds that that presumption overrides any effort that has been made to show an error in this particular. *Camden* v. *Stuart*, 104.
2. The findings and conclusions of a master upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, the decree should stand. *Crawford* v. *Neal*, 585.

MINERAL LAND.

1. The top or apex of a vein must be within the boundaries of the claim, in order to enable the locator to perfect his location and obtain title; but this apex is not necessarily a point, but often a line of great length, and if a portion of it is found within the limits of a claim, that is sufficient discovery to entitle the locator to obtain title. *Larkin* v. *Upton*, 19.
2. Intrusion upon and location of a mining claim within the territory set apart by the treaty proclaimed November 4, 1868, for the exclusive use and occupancy of the confederated bands of Ute Indians, was forbidden thereby, and was inoperative to confer any rights upon the plaintiffs. Location of the same premises by others after extinguishment of the Indian title, and prior to relocation of the former prohibited claim, gave the right of possession. *Kendall* v. *San Juan Silver Mining Co.*, 658.
3. The failure of the plaintiffs to record their location after extinguishment of such Indian title within the period prescribed by the laws of Colorado, and until long after the premises had been properly located by others, forbids their claim of priority based upon a wrongful entry during the existence of the Indian Reservation. *Ib.*

MISTAKE.

See EQUITY, 5.

MORTGAGE.

1. In this suit the property of a corporation in a bridge constructed by it over the San Antonio River is held to have been lawfully transferred by the foreclosure of a mortgage upon it. *McLane* v. *King*, 260.
2. A loan was made February 1, and the mortgage and notes were dated on

and bore interest from that day; but as there were sundry incumbrances part of the money was retained; one sum was applied to a payment March 4; another sum March 11; a large proportion of the whole debt was not remitted to the borrower until June 8; and on the 8th of October a final sum of $3000 was sent to the borrower's agent to pay a judgment of $2466, which was paid, the agents retaining the balance. On a suit to enforce the lien of the mortgage a decree was entered for the plaintiff with an allowance of $1000 as an attorney's fee. *Held*, (1) That no rebate of interest should be allowed on the payments made March 4, March 11 and October 8; (2) That a rebate should be allowed on the remittance of June 8; (3) That the attorney's fee should be reduced to $500. *Dodge* v. *Tulleys*, 451.

3. If a mortgagor, who has agreed by the terms of the mortgage that he will pay all taxes, and that the mortgagee, in case of sale for breach of condition, shall be allowed all moneys advanced for taxes, or other liens or assessments, with interest, neglects to pay taxes duly assessed, and the land is duly sold for the non-payment of such taxes, and the validity of the deed made to the purchaser is doubtful, the mortgagee, upon a bill for foreclosure, is entitled to be allowed a sum paid by him to buy up the tax titles, exceeding the amount of unpaid taxes and interest by a very small part only of the penalties accrued. *Windett* v. *Union Mutual Life Insurance Co.*, 581.

See ACTION;
EQUITY, 1, 2;
SUBROGATION.

MOTION FOR NEW TRIAL.

See LOCAL LAW, 1.

MOTION TO DISMISS.

See JURISDICTION, A, 12.

MUNICIPAL BOND.

1. Bonds were issued by the city of Brenham, in Texas, in July, 1879, payable to bearer, to the amount of $15,000, under the assumed authority of an act of Texas, passed in 1873, incorporating the city and giving its council authority to borrow, for general purposes, not exceeding $15,000 on the credit of the city; *Held*, that the city had no authority to issue negotiable bonds, and that, therefore, even a *bona fide* holder of them could not recover against the city on them or their coupons. *Brenham* v. *German American Bank*, 173.

2. Power in a municipal corporation to borrow money not being nugatory although unaccompanied by the power to issue negotiable bonds therefor, it is easy for the legislature to confer upon the municipality the power to issue such bonds; and, under the well settled rule that any doubt as to the existence of such power ought to be determined against

its existence, it ought not to be held to exist in the present case. *Ib.*

3. The cases on this subject reviewed; and *Rogers* v. *Burlington*, 3 Wall. 654, and *Mitchell* v. *Burlington*, 4 Wall. 270, held to be overruled. *Ib.*
4. When the constitution of a State forbids "county, political or other municipal corporations" within the State to "become indebted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporation in excess of such limit are invalid without regard to any recitals which they contain. *Nesbit* v. *Riverside Independent District*, 610.
5. A holder of such bonds for value is bound to take notice of the amount of the taxable property within the municipality at the date of their issue, as shown by the tax list, and is charged with knowledge of the over-issue. *Ib.*
6. Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or the other coupons, and gives rise to a separate cause of action. *Ib.*

See JUDGMENT, 3.

NEGLIGENCE.

1. The terms "ordinary care," "reasonable prudence," and similar terms have a relative significance, depending upon the special circumstances and surroundings of the particular case. *Grand Trunk Railway Co.* v. *Ives*, 408.
2. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court. *Ib.*
3. In an action against a railroad company to recover for injuries caused by the negligence of its servants the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury. *Ib.*
4. In such case if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appear that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Ib.*
5. In determining whether the injured party in such case was guilty of contributory negligence, the jury is bound to consider all the facts and circumstances bearing upon the question, and not select one particular fact or circumstance as controlling the case to the exclusion of all others. *Ib.*

See JURISDICTION, A, 12;
RAILROAD, 1, 2.

PARTIES.

See ACTION.

PARTITION.

See REMOVAL OF CAUSES, 1.

PATENT FOR INVENTION.

1. Letters patent No. 272,660, issued February 20, 1883, to Alfred A. Cowles for an "insulated electric conductor," are void for want of patentable novelty in the alleged invention covered by them. *Ansonia Brass and Copper Co.* v. *Electrical Supply Co.*, 11.

2. The cases reviewed which establish (1) that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated; and (2) that on the other hand, if an old device or process be put to a new use which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability. *Ib.*

3. A court of equity will not enforce the specific performance of a contract wherein the defendant, in consideration of receiving a license to use certain patents belonging to the plaintiff during the life of such patents, agrees never to import, manufacture or sell any machines or devices covered by certain other patents, unless permitted in writing so to do, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and further to aid and morally assist the plaintiff in maintaining public respect for and preventing infringements upon the same, and further agrees that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions, the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice. *Pope Manufacturing Co.* v. *Gormully*, 224.

4. Letters patent No. 252,280, Claims 1 and 2, issued January 10, 1882, to Curtis H. Veeder for "a seat for bicycles," when properly construed, are not infringed by the defendant's Champion saddle. *Pope Mfg. Co.* v. *Gormully & Jeffery Mfg. Co.* (No. 2), 238.

5. Letters patent No. 197,289, Claim 2, issued November 20, 1877, to A. L., G. M. and O. E. Peters for an anti-friction journal box, are void for want of novelty. *Ib.*

6. Letters patent No. 245,542, issued August 9, 1881, to Thomas W. Moran for velocipedes, if they involve any invention, are void for want of novelty in the alleged invention protected by them. *Ib.*

7. Claims 1 and 3 in letters patent No. 310,776, issued January 13, 1885,

to William P. Benham for improvements in velocipedes are void for want of novelty in the alleged invention protected by them. *Ib.*

8. The second and third claims in letters patent No. 323,162, issued July 28, 1885, to Emmit G. Latta for a mode of protecting the pedals of a velocipede with india-rubber are void for want of invention; as it is clear that the coating of pedals to prevent slipping being conceded to be old, the particular shape in which they may be made is a mere matter of taste or mechanical skill. *Ib.*

9. The monopoly granted by law to a patentee is for one entire thing, and, in order to enable an assignee to sue for an infringement, the assignment must convey to him the entire and unqualified monopoly which the patentee holds in the territory specified, and any assignment short of that is a mere license. *Pope Mfg. Co.* v. *Gormully & Jeffery Mfg. Co.* (No. 3), 248.

10. A conveyance by a patentee of all his right, title and interest in and to the letters patent on velocipedes granted to him so far as said patent relates to or covers the adjustable hammock seat or saddle, is a mere license. *Ib.*

11. Claim 1 in letters patent No. 314,142, issued to Thomas J. Kirkpatrick March 17, 1885, for a bicycle saddle, when construed with reference to the previous state of the art, is not infringed by the saddle constructed by the defendants. *Ib.*

12. Claims 2 and 3 in letters patent No. 249,278, issued November 8, 1881, to Albert E. Wallace for an axle bearing for vehicle wheels are void for want of novelty. *Pope Mfg. Co.* v. *Gormully & Jeffery Mfg. Co.* (No. 4), 254.

13. Claims 2 and 3 in letters patent No. 280,421, issued July 3, 1883, to Albert E. Wallace for an improvement upon the device covered by his patent of November 8, 1881, are also void for want of novelty. *Ib.*

14. A bill in equity for the infringement of letters patent for an invention was in the usual form, and did not mention or refer to any contract with the defendants for the use of the patent. There was a plea setting up an agreement in writing between the plaintiff and one of the defendants to assign to him an interest in the patent, on certain conditions, which it was alleged he had performed, and certain other matters which it was alleged had given the defendants a right to make, use and sell the patented invention. The plea being overruled the defendants set up the same defence by answer. To this there was a replication, and a stipulation in writing was entered into, admitting that the defendants had made and sold articles containing the patented inventions, and that a certain written agreement between the plaintiff and one of the defendants had been made, to the purport before mentioned, and certain proceedings had been had in pursuance thereof. Thereupon the Circuit Court entered a decree dismissing the bill "for want of jurisdiction;" *Held*, (1) The decree was erroneous, because the jurisdiction was clear on the face of the bill, and the Circuit Court did

not decide the case on the facts contained in the stipulation, nor adjudicate on the legal effect of those facts, while it had jurisdiction to try the case; (2) The cases of *Wilson* v. *Sandford*, 10 How. 101; *Hartell* v. *Tilghman*, 99 U. S. 547, and others, explained; (3) The Circuit Court ought to have proceeded to hear the case on the merits and the proofs put in. *White* v. *Rankin*, 628.

POSTMASTER.

Under the act of March 3, 1883, "to adjust the salaries of postmasters," 22 Stat. 600, c. 142, a postmaster who is assigned by the Postmaster General to the third class, at a designated salary from a designated date, is entitled, if he performs the duties of the office, to compensation at the rate of that salary, from that date, without regard to his appointment by the President and confirmation by the Senate. *United States* v. *Wilson*, 24.

PETITION FOR REHEARING.

See PRACTICE, 9.

PRACTICE.

1. Where special findings are irreconcilable with a general verdict, the former controls the latter. *Larkin* v. *Upton*, 19.
2. If the findings are fairly susceptible of two constructions, the one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction. *Ib.*
3. The refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, and when the defendant has not rested his case, cannot be assigned for error. *Columbia & Puget Sound Railroad Co.* v. *Hawthorne*, 202.
4. The giving of an erroneous instruction which was not prejudicial to the objecting party is not reversible error. *Grand Trunk Railway Co.* v. *Ives*, 408.
5. An objection that replications were not filed to the defendant's pleas when the trial commenced, nor before judgment, with leave of court, comes too late if made after entry of judgment. *Keator Lumber Co.* v. *Thompson*, 434.
6. When a defendant is compelled to proceed with a trial in Illinois in a case in which the issues are not made up by the filing of replications to the pleas, and makes no objection on that ground, the failure to do so is equivalent to consenting that the trial may proceed. *Ib.*
7. When the charge contains all that need be submitted to the jury on the issues, it is no error to refuse further requests to charge. *Hartford Life Insurance Co.* v. *Unsell*, 439.
8. If, in a case where the evidence warrants a request for a peremptory instruction to find for the defendant, no request for such instruction

was made, it cannot be made a ground of reversal that the issues of fact were submitted to the jury. *Ib.*

9. On a petition for a rehearing the court vacates the judgment ordered in this case (*ante*, 189) and reverses the judgment and remands the cause for further proceedings not inconsistent with this opinion. *Brenham* v. *German American Bank* (No. 2), 549.
10. Money, the proceeds of a note, was deposited to the credit of a suit in equity in a Circuit Court, in a Safe Deposit Company. G. brought another suit in equity in the same court, against the company and P. to obtain a decree declaring him to be entitled to the money. The Circuit Court dismissed the bill on the ground that the question ought to be adjudicated in the first named suit, but did not decree that the dismissal was without prejudice to the right of G. to make his claim in that suit. This court, on appeal by G., modified the decree to that effect, but gave the costs of this court to the appellees. *Gregory* v. *Boston Safe Deposit and Trust Co.*, 667.

See APPEAL; ASSIGNMENT OF ERROR; EXCEPTION; JURISDICTION, A, 12; LOCAL LAW, 1.

PROMISSORY NOTE.

1. A promissory note payable to the order of the maker, being endorsed by him was endorsed and delivered to another for his accommodation. The latter endorsed it and borrowed money upon it, waiving demand and protest. The waiver was stamped upon the back of the note by mistake over both endorsements. *Held*, that the liability of the maker was not affected thereby. *Jordan* v. *Third National Bank of Chattanooga*, 97.
2. The evidence in this case does not tend to show a contract of extension for a valid consideration, and for a definite and certain time, binding upon the parties, and changing the nature of the contract to the prejudice of the maker of the note. *Ib.*

PUBLIC LAND.

1. "Public lands . . . valuable chiefly for timber, but unfit for cultivation," within the meaning of the timber and stone act of June 3, 1878, 20 Stat. 89, c. 151, include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands. *United States* v. *Budd*, 154.
2. B. entered a quarter section of timber land in Washington under the act of June 3, 1878, 20 Stat. 89, c. 151, and after receiving a patent for it transferred it to M. M. purchased quite a number of lots of timber lands in that vicinity, the title to 21 of which was obtained from the government within a year by various parties, but with the same two witnesses in each case, the deeds to M. reciting only a nominal consid-

eration. These purchases were made shortly after, or in some cases immediately before, the payment to the government. B. and M. were both residents of Portland, Oregon. One of the two witnesses to the application was examining the lands in that vicinity and reporting to M. *Held*, (1) That all that the act of June 3, 1878, denounces is a prior agreement by which the patentee acts for another in the purchase; (2) That M. might rightfully go or send into that vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and that a person knowing of that offer might rightfully go to the land office and purchase a timber lot from the government, and transfer it to M. for the stated excess, without violating the act of June 3, 1878. *Ib.*

See MINERAL LAND.

QUIET TITLE.

See ADVERSE POSSESSION.

QUORUM.

See CONSTITUTIONAL LAW, 1.

RAILROAD.

1. The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinances, is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by the train. *Grand Trunk Railway Co.* v. *Ives*, 408.
2. Whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury; although in some cases it has been held to be a question of law for the court. *Ib.*
3. Where the statutes of a State make provisions in regard to flagmen at crossings, this court will follow the construction given to such statutes by its courts; and, so following the decisions of the courts of the State of Michigan, it is held that the duty to provide flagmen or gates, or other adequate warnings or appliances, may exist outside of the statute if the situation of the crossing reasonably requires it. *Ib.*

See JURISDICTION, A, 10;
NEGLIGENCE.

RECEIVER.

See EQUITY, 2;
JURISDICTION, C, 4.

REMOVAL OF CAUSES.

1. A suit in a state court for partition of land cannot be removed into the Circuit Court of the United States under the act of March 3, 1875, c.

137, § 2, by reason of a controversy between the plaintiff and a citizen of another State, intervening and claiming whatever may be set off to the plaintiff. *Torrence* v. *Shedd*, 527.

2. When, on appeal from a decree of the Circuit Court of the United States upon the merits, it appears that the case had been wrongfully removed from a state court on petition of the appellant, the decree should be reversed for want of jurisdiction, and the case remanded to the Circuit Court, with directions to remand it to the state court, and with costs against him in this court and in the Circuit Court. *Ib.*
3. On the authority of *Stevens* v. *Nichols*, 130 U. S. 230, *Jackson* v. *Allen*, 132 U. S. 27, and *La Confiance Compagnie* v. *Hall*, 137 U. S. 61, the decree below in this case is reversed and the cause remanded with directions to remand it to the Circuit Court, it not appearing in the record that the diverse citizenship which was the cause of removal from the state court existed at the commencement of the action. *Kellam* v. *Keith*, 568.
4. In such case the appellees are entitled to their costs in this court and in the Circuit Court. *Ib.*

RULES.

A. Of the House of Representatives.

See Constitutional Law, A, 1.

B. Of the Supreme Court.

Rule 21. *See* Master in Chancery, 1.

Rule 67. *See* Appendix.

SALARY.

See Postmaster.

SERVICE OF PROCESS.

Service of citation by a plaintiff in error upon the defendant in error by depositing in the post-office a copy of the same, postage paid, addressed to the attorney of the defendant in error at his place of abode, is an insufficient service. *Tripp* v. *Santa Rosa Street Railroad Co.*, 126.

STATUTE.

A. Construction of Statutes.

1. The statute of the State of South Carolina, passed March 28, 1876, (acts of 1875–6, p. 198,) is capable of being construed either, when taken by itself, as conferring upon the Coosaw Mining Company the exclusive right of digging, mining and removing phosphate rocks for an unlimited period, so long as it should comply with the terms of the statute, or, when taken in connection with the act of March 1, 1870,

14 Gen. Stats. So. Car. 381, as conferring such a right only for "the full term of 21 years" named in the latter act; and as the interpretation should be adopted which is most favorable to the State, it is *Held*, that such exclusive right expired on the termination of the 21 years named in the act of 1870. *Coosaw Mining Co.* v. *South Carolina*, 550.

2. Only that which is granted in clear and explicit terms passes by a legislative grant of property, franchises or privileges in which the government or the public has an interest. *Ib.*

See RAILROAD, 3.

B. STATUTES OF THE UNITED STATES.

See ADMIRALTY; APPEAL; CHINESE RESTRICTION ACT; CONSTITUTIONAL LAW, A, 2; COPYRIGHT, 5, 8; CRIMINAL LAW, 1, 2, 5, 6; CUSTOMS DUTIES, 1 to 8; EXECUTIVE REGULATION; JUDGMENT; JURISDICTION, A, 12, 13, 17; B, 1, 2; C, 2; POSTMASTER; PUBLIC LAND, 1, 2; REMOVAL OF CAUSES, 1.

STATUTE C, *District of Columbia.*

C. STATUTES OF STATES AND TERRITORIES.

Dakota. *See* LOCAL LAW, 4, 5.
District of Columbia. *See* LOCAL LAW, 7.
Illinois. *See* LOCAL LAW, 2.
Michigan. *See* JURISDICTION, A, 10; RAILROAD, 3.
Missouri. *See* CORPORATION, 1.
South Carolina. *See* STATUTE, A, 1.
Texas. *See* MUNICIPAL BOND, 1.
Vermont. *See* JURISDICTION, A, 9.

SUBROGATION.

M. gave to a bank a mortgage on land owned by him to secure paper which the bank might discount. Among the paper so discounted was a note made by J., which M. had discounted, and which J. paid to the bank. The note had been given for a certificate of deposit which J. afterwards endorsed, and subsequently paid. J. claimed subrogation under the mortgage to the rights of the bank as respected the certificate of deposit: *Held*, that the claim could not be allowed; that the payment of the note to the bank by J. discharged the mortgage, so far as it was a security for the note: and that the certificate of deposit was not secured by the mortgage. *Underwood* v. *Metropolitan National Bank*, 669.

TREASURY REGULATION.

See EXECUTIVE REGULATION.

TRUST.

See ACTION;
CORPORATION, 2.

VERDICT.

See PRACTICE, 1.

VERMONT.

See JURISDICTION, A, 9.

WITNESS.

1. Unless by express statute, the competency of a witness to testify in one State is not affected by his conviction and sentence for felony in another State. *Logan* v. *United States*, 263.
2. A pardon of a convict, although granted after he has served out his sentence, restores his competency to testify to any facts within his knowledge. *Ib.*

See CRIMINAL LAW, 5, 6;
EQUITY, 6.

WRIT OF POSSESSION.

See EQUITY, 3.