INDEX.

ADMIRALTY.

1. A cargo of wheat shipped on a British steamer at New York, for Lisbon, was insured by an English assurance company through its agents in Philadelphia "free of particular average unless the vessel be sunk, burned, stranded or in collision"; all losses to be paid in sterling at the offices of the corporation in London; "claims to be adjusted according to the usages of Lloyds." The cargo was loaded and the lines were cast off, ready to sail, when it was found that there was a defect in the machinery, which detained them a few hours. During the detention a lighter, being towed out of the dock, ran into the steamer, breaking two plates in the bulwarks and doing other damage. This resulted in a further detention of two days. After sailing, the steamer encountered heavy gales and seas. She took large quantities of water on her decks, some of which came through the cracks caused by the collision, and was so strained that the water got into the wheat. The machinery becoming strained the captain made for Boston, and on arrival there had a survey made, which resulted in the taking out of the cargo, and its sale for the benefit of all concerned. This libel was then filed by the owners of the cargo to recover for their loss. The District Court gave judgment in favor of the owners, and referred it to a commissioner to assess the damages, and gave judgment accordingly. The Court of Appeals having affirmed that judgment, it was brought here by writ of certiorari, for review. *Held*, (1) That under the circumstances the contract of insurance was to be interpreted according to English law; (2) That, if a ship be once in collision during the adventure, after the goods are on board, the insurers are, by the law of England, liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and, but for the collision, would have been within the exception contained in the memorandum, and free from particular average as therein provided; (3) That the question whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and no opinion is expressed on that question; (4) That under the facts stated in the opinion of the court, the cargo was necessarily sold at the port of refuge, and the loss,

under such circumstances, should be adjusted as a salvage loss. *London Assurance* v. *Companhia de Moagens*, 149.

2. No contribution in general average can be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention and the effect of saving the tug. *The J. P. Donaldson*, 599.
3. The enforcement *in rem* of the lien upon a vessel, created by the Public Statutes of Massachusetts, c. 192, §§ 14–19, for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the courts of the United States. *The Glide*, 606.

BOUNDARY.

The report of the commissioners for permanently marking the boundary line established between the States of Indiana and Kentucky by the decree of May 18, 1896, 163 U. S. 520, is approved by this court. *Indiana* v. *Kentucky*, 270.

CASES AFFIRMED OR FOLLOWED.

1. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, affirmed and followed. *Louisiana* v. *New Orleans*, 407.
2. *Cross* v. *Evans*, 167 U. S. 60, as to the certification of questions to this court by the Courts of Appeal, approved and applied. *Warner* v. *New Orleans*, 467.
3. *New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, affirmed and followed. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 479.

See Habeas Corpus; Patent for Invention, 2;
Jurisdiction A, 6; Public Land, 9, 11;
Mineral Land, 2; Removal of Causes.

CHAMPERTY.

1. By the common law, prevailing in the District of Columbia, an agreement by an attorney at law to prosecute, at his own expense, a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is unlawful and void for champerty. *Peck* v. *Heurich*, 624.
2. A deed, conveying lands in the District of Columbia to an attorney at law and another person, in trust that the grantees should sue for, take possession of, and sell the lands, and that the attorney should retain one third of the proceeds, after paying out of it all the costs and expenditures, and that the other two thirds, clear of any costs or charges whatever, should be paid to the grantors, is void for cham-

perty, and will not sustain an action by the grantees to recover part of the lands from third persons. *Ib.*

CONSTITUTIONAL LAW.

1. The ordinance of the city of Boston which provides that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit from the mayor," is not in conflict with the Constitution of the United States and the first section of the Fourteenth Amendment thereof. *Davis* v. *Massachusetts*, 43.
2. This was a suit by citizens of New York against citizens of South Carolina to recover the possession of certain real property in that State, with damages for withholding possession. One of the defendants in his answer stated that he had no personal interest in the property, but as secretary of state of South Carolina, had custody of it, and was in possession only in that capacity. The other defendant stated that he was watching, guarding and taking care of the property under employment by his co-defendant. Both defendants disclaimed any personal interest in the property, and averred that the title and right of possession was in the State. *Held*, That the suit was not one against the State within the meaning of the Eleventh Amendment of the Constitution of the United States declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State." Whether a particular suit is one against the State within the meaning of the Constitution depends upon the same principles that determine whether a particular suit is one against the United States. *Tindal* v. *Wesley*, 204.
3. *United States* v. *Lee*, 106 U. S. 196, and other cases, examined and held to decide that a suit against individuals to recover the possession of real property is not a suit against the State simply because the defendant holding possession happens to be an officer of the State and *asserts* that he is lawfully in possession on its behalf. The Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law; and when such officers or agents assert that they are in rightful possession, they must make that assertion good, upon its appearing, in a suit against them as individuals, that the legal title and right of possession is in the plaintiff. *Ib.*
4. The judgment in this case does not conclude the State unless it becomes a party to the suit. Not having submitted its rights to the determination of the court, it will be open to the State to bring any action that will be appropriate to establish and protect whatever claim it has to the premises in dispute. *Ib.*
5. The President has power to remove a District Attorney of the United

States, when such removal occurs within four years from the date of the attorney's appointment, and, with the advice and consent of the Senate, to appoint a successor to him. *Parsons* v. *United States*, 324.

6. Section 769 of the Revised Statutes which enacts that "district attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates" provides that the term shall not last longer than four years, subject to the right of the President to sooner remove. *Ib.*
7. It was the purpose of Congress, in the repeal of the tenure of office sections of the Revised Statutes, to again concede to the President the power of removal, if taken from him by the original tenure of office act, and, by reason of the repeal, to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. *Ib.*
8. The legislative, executive and judicial history of the question reviewed. *Ib.*
9. The act of February 25, 1885, c. 149, 23 Stat. 321, is within the constitutional power of Congress to enact, and is valid. *Camfield* v. *United States*, 518.
10. The Government of the United States has, with respect to its own lands within the limits of a State, the rights of an ordinary proprietor to maintain its possession, and to prosecute trespassers; and may legislate for their protection, though such legislation may involve the exercise of the police power; and may complain of and take steps to prevent acts of individuals, in fencing in its lands, even though done for the purpose of irrigation and pasturing. *Ib.*
11. Under the Fifth Amendment to the Constitution of the United States, which declares "nor shall private property be taken for public use without just compensation," Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken. *Bauman* v. *Ross*, 548.
12. By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Ib.*
13. Congress, in the exercise of the right of taxation in the District of

Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages. *Ib.*

14. If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. *Ib.*
15. The recording by public authority of a map of a proposed system of highways within certain territory, without restricting the use or improvement of lands before the commencement of proceedings for their condemnation for such highways, or limiting the damages to be awarded in such proceedings, does not of itself entitle the owners of lands to compensation for damages. *Ib.*
16. An act of Congress, providing for the estimate of damages for taking lands for highways in the District of Columbia, and for the assessment of such damages, with interest, upon lands benefited by the highways, is not invalidated by a provision that the proceedings shall be void if Congress, after being six months in session, shall make no appropriation for the payment of the damages. *Ib.*
17. The act of March 2, 1893, c. 197, entitled "An act to provide for a permanent system of highways in that part of the District of Columbia lying outside of cities," is constitutional and valid. *Ib.*

See Municipal Corporation, 1, 2, 3, 7;
National Bank, 1;
Tax and Taxation, 6, 9.

CONTEMPT OF COURT.

1. It is not within the power of the Supreme Court of the District of Columbia to order the answer of the defendant in a chancery suit pending in that court to be stricken from the files, and a decree to be entered that the bill be taken *pro confesso* against him, simply because he was held to be guilty of contempt in neglecting to pay into court money held by him which was the subject of controversy in the suit, and declined to appear when summoned to do so. *Hovey* v. *Elliott*, 409.
2. A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party

summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. *Ib.*

3. The judicial history of the law concerning contempt of court in England and in this country reviewed and considered. *Ib.*

CONTRACT.

Willoughby, being counsel for Mackall in three cases numbered 2373 and 8118, both against Alfred Richards, and 8038 *Mackall* v. *Mackall*, respectively, the latter agreed with him, after reciting the fact that, "in consideration of the services of said W. Willoughby as such counsel performed and to be performed, he hereby agreeing to conduct . . . No. 2373 to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow and pay to him as compensation for such services, in addition to what has already been received by him, a sum equal to fifty per cent of such money as may be adjudged to the said B. Mackall, Jr., in . . . No. 8118, by way of mesne profits, damages and costs, provided that if such fifty per cent be less than $5000, the said W. Willoughby shall have such sum of $5000, and . . . shall have a lien therefor upon said judgment and such property as may be recovered against the said Alfred Richards." The litigation referred to in the agreement related to lot 7, in square 223 in the city of Washington, on a portion of which the Palace Market was erected. *Held*, that the lien thus given to Willoughby was on all the property that might be recovered in the three cases. *Mackall* v. *Willoughby*, 681.

CORPORATION.

See MUNICIPAL CORPORATION;
TAX AND TAXATION, 3.

CRIMINAL LAW.

See EVIDENCE, 1, 2;
JURISDICTION, D, 1.

DISTRICT OF COLUMBIA.

See CONSTITUTIONAL LAW, 11 to 17.

EQUITY.

In the course of the various proceedings, referred to in the Statement of the Case, for the foreclosure of the mortgages in different States upon different railroads which constituted a part of what was known

as the Wabash system, and for its reorganization, the claim of the appellant which forms the subject of this appeal was considered. His claim was for equipment bonds for equipment furnished the Ohio division. Among the proceedings was a suit in Indiana, involving the question of the lien of such bonds upon the portion of the road in Indiana, in which it was decreed that there was no lien. The various proceedings resulted on the 23d of March, 1889, in a decree of foreclosure in the several Circuit Courts in Ohio, Indiana and Illinois, by which the entire line was to be sold as a unit, and further it was provided that the rendering of that decree in advance of the trial and determination of the appellant's claim should not affect the rights of the appellant, but that they should be preserved and enforced in the manner provided for by the decree. The sale under the decree was made and confirmed. August 17, 1889, it was ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein upon and concerning said claim and lien, and reserved in the former decree herein saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson as special master," etc. The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest, in full. The Circuit Court sustained the master in holding Compton's lien valid, but decided that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Appeal was taken to the Circuit Court of Appeals. That court, after making a full statement, requested the instructions of this court upon the following questions: First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only? Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser? Third. Is the decree of the Circuit Court of the United States for the District of Indiana between the same parties, and unappealed from, *res judicata* upon the foregoing questions in this court? *Held*, (1) That the decree of sale of March 23, 1889, conferred upon Compton, in event that his claim should not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien; (2) That, in event of such sale, and in applying the proceeds thereof, Compton would be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division; (3) That the decree rendered in the Circuit Court of the United States for

Indiana was not *res judicata* upon the foregoing questions. *Compton* v. *Jesup*, 1.

See Trust, 1, 2, 3, 4.

ESTOPPEL.

The city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which it acquired the property and franchise of the Canal Company from Van Norden, and under the averments in the bill, which are set forth in the statement of the case, is estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of its obligation to account for drainage funds, collected on private property, and as a discharge from its own liability to that fund as assessee of the streets and squares: and, accordingly the first question asked by the Court of Appeals must be answered in the affirmative. *Warner* v. *New Orleans*, 467.

See Tax and Taxation, 2.

EVIDENCE.

1. The rulings about challenges are without merit. *Stone* v. *United States*, 178.
2. Tak-Ke and the plaintiff were indicted for murder. On the separate trial of the plaintiff in error, Tak-Ke's wife was a witness against him. On cross-examination the following questions were put to her: Who are you living with now? Is it not a fact that since your husband was arrested and convicted you have been living with this witness Ke-Tinch? Is it not a fact that shortly after this affair took place you and the witness Ke-Tinch agreed to live together if your husband was convicted and you yourself got clear? Each of these was objected to as immaterial and incompetent and the objection was sustained. *Held*, that the questions should have been allowed. *Tla-Koo-Yal-Lee* v. *United States*, 274.
3. The same objections made, sustained below, and that court overruled here, as to drinking of the defendant, and as to what took place at the sailing of the sloop. *Ib.*

See Patent for Invention, 6.

FRAUD.

See Patent for Invention, 2, 3, 4.

HABEAS CORPUS.

Ornelas v. *Ruiz*, 161 U. S. 502, followed, to the point that if, in extradition proceedings the committing magistrate had jurisdiction of the subject-matter and of the accused, and the offence charged is within

the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*. *Bryant* v. *United States*, 104.

INFANT.

An infant female was the owner of an unimproved lot in the city of Washington upon which there were valid liens for unpaid purchase money and taxes. In order that those liens might be discharged and the property improved, she borrowed $8000, and executed a deed of trust upon the lot to secure the loan. Part of the money so borrowed was used to pay off prior liens and taxes, and the balance was applied by her, or under her directions, in improving the lot. Upon arriving at majority, she disaffirmed her contract and deed of trust, and refused to pay the money borrowed by her. At the time the deed of trust was executed, no inquiries were made as to her age, nor did she make any representations in regard to it. *Held*, (1) An infant's deed is voidable only, unless it appears upon its face to be to his prejudice, in which case it may be deemed void. And the infant is not estopped by his acts or declarations, or by his silence, during infancy, from asserting, on arriving at full age or within a reasonable time thereafter, the invalidity of such deed; (2) If the money borrowed by the infant had been expended by her otherwise than in the improvement of her lot, the lender would have been without remedy; for it is not a condition of the disaffirmance by an infant of a contract made during infancy that the consideration received be returned, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed and cannot be returned; (3) Upon the disaffirmance by an infant of his contract, the contract is annulled on both sides, and the parties revert to the same situation as if the contract had not been made; (4) In this case, the infant having disaffirmed her deed, she is not entitled, as between herself and the lender, to be protected except in the enjoyment of such rights in the property in question as she had at the time the deed of trust was executed. And the money borrowed by her having gone into the property which she holds in its improved condition, it is to be deemed to be in her hands within the meaning of the rule which entitles the other party to recover such of the consideration as remains in the infant's hands at the time of disaffirmance. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate; but, as the disaffirmance of her deed restores her right in the property, a sale ought not to have the effect of depriving her altogether of the interest she had at the

time the deed of trust was executed; (5) The decree of sale in the present case was proper, but it was error to give to the lender a preference in the distribution of the proceeds for the *entire* debt secured by the deed of trust, without reference to the amount for which the property in its improved condition might sell. The decree should direct the proceeds to be applied, first, in repaying to the lender, with interest, the sums paid in discharge of the prior liens and taxes; second, in paying to the infant an amount equal to the value of the lot at the institution of the suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with the money borrowed. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured to the lender. *McGreal* v. *Taylor*, 688.

INSURANCE.

See ADMIRALTY, 1.

INTERSTATE COMMERCE ACT.

1. The right of a shipper of goods over a railway, who pays to the railroad company reasonable rates for the transportation of the goods to the place of destination, to recover from such company the excess of such payment over the rates charged to shippers of similar goods to the same destination from another place of shipment of the same or greater distance from it, is a right growing out of the interstate commerce act; and, being in the nature of a penalty, can be enforced only by strict proof, showing clearly and directly the violations complained of. *Parsons* v. *Chicago & Northwestern Railway Co.*, 447.
2. The portion of a through rate received by one of several railway companies transporting the goods as interstate commerce, may be less than its local rate. *Ib.*
3. The only right of recovery given by the interstate commerce act to the individual, is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act"; and before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has operated to his injury. *Ib.*
4. Hauling goods on the Pittsburgh, Cincinnati and St. Louis Railroad from Cincinnati to Pittsburgh and delivering them to a consignee in his warehouse from a siding connection, and hauling similar goods for him from and to the same cities on the Baltimore and Ohio Rail-

road, and delivering them to him from the station of that road in Pittsburgh, there being no siding connection, is transportation "under substantially similar circumstances and conditions," within the meaning of section 2 of the interstate commerce act of February 4, 1887, c. 104; and a rebate allowed him by the Baltimore and Ohio road to compensate for cartage to his warehouse is a discrimination against other shippers over that road to whom no rebate is allowed. *Wight* v. *United States*, 512.

5. Whether the same words as used in section 4 of that act have a broader meaning or a wider reach than they do as used in section 2, is not determined. *Ib.*

6. A railroad engaged in interstate commerce does not violate the provisions of §§ 4 and 6 of the interstate commerce act, by furnishing cartage for delivery free of charge to the merchants of one town on its line, and not furnishing similar service to the merchants of another town on its line thirty-three miles distant, nor by failing to publish such free cartage in the schedule published in the first town, when such privilege has been openly and notoriously enjoyed for twenty-five years. *Interstate Commerce Commission* v. *Detroit, Grand Haven &c. Railway Co.*, 633.

INTERSTATE COMMERCE COMMISSION.

1. Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates either maximum or minimum or absolute; and, as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 479.

2. The fourth section of the interstate commerce act has in view only the transportation of passengers and property by rail, and when property transported as interstate commerce reaches its destination by rail at lawful rates, having regard to rates charged upon similar transportation to other points on the line, it does not concern the Interstate Commerce Commission whether the goods after arrival are carried to their place of deposit in vehicles furnished by the railway company free of charge, or in vehicles furnished by the owners of goods; and the same rule applies to the transportation of passengers. *Interstate Commerce Commission* v. *Detroit, Grand Haven &c. Railway Co.*, 633.

3. In matters of this kind much should be left to the judgment of the Commission; and, should it direct, by a general order, that railway companies should thereafter regard cartage, when furnished free, as

one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers. *Ib.*

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. In this suit the matter in dispute was the right of present possession of real estate in the District of Columbia, whose value was agreed to be over $5000, but there was nothing in the record to show that the value of the right of possession reached the jurisdictional amount, and the case was accordingly dismissed. *Willis* v. *Eastern Trust & Banking Co.*, 76.
2. By its decision in *Goode* v. *Gaines*, 145 U. S. 141, the court did not intend to be understood as holding that the rental value after the date of the rendition of the decree had not been satisfactorily determined, and had in mind in that regard only the exclusion from the decree of November 10, 1887, of the amount found due plaintiffs for rent prior to that date, together with interest thereon ; nor that the finding by that decree of the then value of the improvements should be disturbed. *Latta* v. *Granger*, 81.
3. The reversal of that decree amounted to nothing more than a vacating of the accounting so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion; and it might well be held that the Circuit Court had no power, under the mandate, to again go into the questions of rental rate and value of improvements, which had been determined, and that an accounting was only required to bring the amounts, including subsequent taxes, if any, paid by defendant, and interest down to date. *Ib.*
4. Apart from that, the rent prescribed by the lease did not appear from the extrinsic evidence to be unreasonable or excessive; nor does the additional evidence, when carefully analyzed, all the evidence being taken together, compel to any other conclusion. *Ib.*
5. It is clear that, under the circumstances, this is not a case for the application of the principle of the acceptance by an appellate court of the conclusions of a master, concurred in by the trial court, when depending on conflicting testimony; and this court cannot permit its views to be overcome by presumptions in favor of the second report and decree. *Ib.*
6. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, followed to the point that "the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Levy* v. *Superior Court of San Francisco*, 175.
7. This court has jurisdiction to review a judgment of the highest court of

a State, holding a national bank liable, under a statute of the State, as a shareholder in a state savings bank, when the answer sets up that the stock of the savings bank was issued to it without authority of law, and the motion for a new trial and the specifications of error which were the basis of appeal from the trial court to the Supreme Court of the State assert such want of power under the laws of the United States. *California Bank* v. *Kennedy*, 362.

8. The second question of the Court of Appeals, inquiring whether the decision in *Peake* v. *New Orleans*, 139 U. S. 342, should be held to apply to the facts in this case, and operate to defeat the complainant's action, puts the facts of the one case over against the facts of the other, and asks this court to search the record in each case to see if one operates to bar the other, and practically submits the whole case, instead of certifying a distinct question of law, and therefore does not come within the rule in respect to certifying distinct questions of law. *Warner* v. *New Orleans*, 467.

See Tax and Taxation, 5.

B. Jurisdiction of Courts of Appeal.

Under the judiciary act of 1891 a Circuit Court of Appeals has no power to certify the whole case to this court, but can only certify distinct questions or propositions, unmixed with questions of fact or of mixed law and fact; and the questions certified in this case are clearly violative of this settled rule. *Cross* v. *Evans*, 60.

C. Jurisdiction of Circuit Courts of the United States.

1. A complaint which alleges that the plaintiff was preëmptor of public land in Washington Territory under the laws of the United States, on which he had lived sufficient time to entitle him to a patent, and that the defendant railroad company, a corporation organized under the laws of the Territory entered upon and seized a strip of said land and appropriated it for railroad purposes without plaintiff's consent and without having compensated him therefor, discloses a case of a contest between a settler claiming title under the laws of the United States, and a railroad company claiming title under an act of Congress, and makes a case of which the Circuit Court of the United States for that circuit had jurisdiction. *Spokane Falls & Northern Railway Co.* v. *Ziegler*, 65.
2. No Federal question is presented in this bill, on which the Circuit Court could base the exercise of jurisdiction, and such jurisdiction cannot be found in the character of the controversy as one existing between citizens of different States. *St. Joseph & Grand Island Railroad Co.* v. *Steele*, 659.
3. A railroad company, owning and operating a line running through several States, may receive and exercise powers granted by each, but

does not thereby become a citizen of every State it passes through, within the meaning of the jurisdiction clause of the Constitution of the United States. *Ib.*

D. Jurisdiction of District Courts of the United States.

1. On July 24, 1896, a warrant was issued by a commissioner for the Southern District of the Indian Territory to arrest Johnson upon the charge of rape, alleged to have been committed upon one Pearl McCormick on the same day. Subsequently, and on the 9th of October, at a regular term of the United States court for that district, he was indicted, and on the 17th of October was arraigned, tried and convicted by a jury, and is now under sentence of death. On July 25, the day following the commission of the offence, a warrant, issued by a commissioner for the Eastern District of Texas, charging him with the same crime, was placed in the hands of the marshal for that district, who demanded of the marshal of the Southern District of the Indian Territory the surrender of the petitioner in obedience to said writ, but the same was refused. It does not appear when this demand was made, or whether it was before or after the 1st day of September. It further appeared that, at the time of the commission of the offence, the United States court for the Eastern District of Texas was not in session, and that no term of said court was held until the third Monday of November, after petitioner had been tried, convicted, and sentenced to death. *Held*, that if the petitioner was actually in the custody of the marshal on the 1st of September, his subsequent indictment and trial were valid, though in the first instance he might have been illegally arrested. *In re Johnson, petitioner*, 120.
2. It is the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody and possession. *Ib.*
3. The United States court in the District of Washington has jurisdiction of an action brought by the United States against a defendant, found there, to recover for timber unlawfully cut from lands of the United States in Idaho. *Stone* v. *United States*, 178.

E. Jurisdiction of the Court of Claims.

A judgment in the Court of Claims against the District of Columbia recovered under the act of February 13, 1895, c. 87, was reversed in this court because interest on the original claim had been improperly allowed, and the case was remanded to that court for further proceedings not inconsistent with the opinion of this court. The mandate of this court was filed in that court, and application was made for judgment in accordance with the opinion of this court, waiving inter-

est. Pending the decision upon this application, the said act of February 13, 1895, authorizing the original judgment, was repealed by Congress, and the Court of Claims declined to enter judgment as prayed for. The plaintiff thereupon made application to this court for a mandamus, to require the Court of Claims to enter judgment as requested. *Held*, that the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act; but that this court did not intimate by this decision that that court would not have jurisdiction to entertain and grant a motion on the part of the petitioner to reinstate the original judgment. *In re Hall*, 38.

F. JURISDICTION OF THE COURT OF PRIVATE LAND CLAIMS.

The fact that Congress may have confirmed similar grants cannot operate to justify the Court of Private Land Claims in adjudication of a case not coming within the terms of the law of its creation. *Rio Arriba Land & Cattle Co.* v. *United States*, 298.

JURY.

See VERDICT.

LACHES.

See PATENT FOR INVENTION, 1.

LEASE.

See LOCAL LAW, 1.

LIEN.

See LOCAL LAW, 1.

LIMITATION.

See PATENT FOR INVENTION, 9, 10.

LOCAL LAW.

P. and P., owners of three sugar plantations in Louisiana, leased the sugar-house on one of them with all its machinery, and such defined land in that plantation as might be found necessary for its use, to F. and F. for a term of years. The lessees agreed to buy during the term, and the lessors agreed to sell and deliver to them during that time, the sugar-cane grown on the three plantations. Elaborate provisions

were made respecting the conduct of the business, and the manner of fixing from time to time the price of the cane. The thirteenth article was as follows: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid." The twentieth article was as follows: "The parties of the first part agree to keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The lessees, with the consent of the lessors, transferred their rights and their interests under the lease to a corporation which assumed their obligations thereunder. This corporation became involved and a receiver was appointed in an equity suit brought by the Burdon Company. The lessors intervened in this suit, claiming that their claim for the balance due on the purchase price, and also their claim for cane delivered to the lessees were secured by a lessor's privilege, under Louisiana law, on the property of the lessees at the sugar-house, and the latter also by an equitable lien on any bounty that might thereafter be collected by the receiver. The Circuit Court decided that the intervenors were entitled to the lessor's privilege, and to an equitable lien on the bounty. An appeal having been taken from this decision, the Circuit Court of Appeals certified the facts to this court and propounded the following questions: "*First.* It being shown that the cane sold by appellees, J. U. Payne & Company et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are the appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane? *Second.* Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar-cane sold and delivered under said contract, have the appellees H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit? *Third.* If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the

present suit as to appropriate the bounty money to the payment of the claims of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?" To these several questions the court now make answer as follows: (1) The first question is answered in the negative; (2) The second question is answered in the affirmative; (3) The third question is answered in the affirmative. *Burdon Sugar Refining Company* v. *Payne*, 127.

District of Columbia. *See* CHAMPERTY.
England. *See* ADMIRALTY, 1.

MASTER AND SERVANT.

See RAILROAD.

MINERAL LAND.

1. The clear import of the language of Rev. Stat. § 2320 is to give to a tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length in that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a surface patent before the discovery of the vein. *Enterprise Mining Co.* v. *Rico-Aspen Mining Co.*, 108.
2. *Enterprise Mining Co.* v. *Rico-Aspen Mining Co.*, 167 U. S. 108, affirmed and applied, and the court further decides that the failure of the tunnel owner to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed does not destroy his right to the veins he discovers in the tunnel. *Campbell* v. *Ellet*, 116.

MUNICIPAL CORPORATION.

1. In 1887, the municipal authorities of Defiance authorized the erection of bridges over the Wabash Railroad, and about eighteen feet above its track, by the railroad company, to take the place of two existing bridges. In 1893, the common council of Defiance changed the grade of the streets crossing on said bridges to the level of the railroad, and changed the approaches to it by causing them to descend to the level of the railroad. *Held*, that the common council acted within its powers in changing the grade of the streets in question, and that the railroad company had no legal right to complain of its action. *Wabash Railroad Co.* v. *Defiance*, 88.
2. The legislative power of a city may control and improve its streets, and a power to that effect, when duly exercised by ordinances, will over-

ride any license previously given, by which the control of a certain street has been surrendered. *Ib.*

3. In this case, it was purely within the discretion of the common council to determine whether the public exigencies required that the grade of the street be so changed as to cross the railroad at a level. *Ib.*
4. A State, being the creator of municipal organizations, is the proper party to impeach the validity of their creation, and, if it acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked: this rule is recognized in Texas. *Shapleigh* v. *San Angelo*, 646.
5. An absolute repeal of a municipal charter is effectual so far as it abolishes the old corporate organization; but when the same, or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities: this view of the law has been accepted and followed by the Supreme Court of Texas. *Ib.*
6. The disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and, upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligations of the old devolved upon the new corporation. *Ib.*
7. The Texas act of April 13, 1891, c. 77, as construed by the Supreme Court of the State, must be regarded, as respects prior cases, as an act impairing the obligation of existing contracts. *Ib.*
8. Under the facts disclosed by this record, the new corporation is subject to the obligations of the preceding corporation, as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization. *Ib.*

NATIONAL BANK.

1. Section 41 of the National Banking Act imposing certain taxes upon the average amount of the notes in circulation of a banking association, now found in the Revised Statutes, is not a revenue bill within the meaning of the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." *Twin City Bank* v. *Nebeker*, 196.
2. Whether in determining such a question the courts may refer to the journals of the two Houses of Congress for the purpose of ascertaining whether the act originated in the one House or the other is not decided. *Ib.*
3. The national banks in Philadelphia organized, for their convenience, a Clearing House Association, with rules for its business set forth in detail in the statement in the opinion below. Among these rules, one

provided for the deposit of securities in fixed amounts by each bank as collateral for their daily settlements; and another for the hours in the day in which settlements were to be made, and the mode of making the exchanges. The Keystone Bank made its deposit in conformity with the rule; but, having become indebted to the clearing house by reason of the receipt of clearing house certificates to a large amount, the securities deposited by it were surrendered, and were re-deposited by it as security for the payment of the certificates. In the clearing of March 19, 1891, the Keystone Bank presented charges against other banks to the amount of $155,136.41, and the other banks presented charges against it for $240,549, making the Keystone Bank a debtor in the clearing for $75,359.08. In accordance with the rule, the Keystone Bank between the hours of eleven and twelve paid the $75,000 in cash or its equivalent, and gave its due bill to the manager of the clearing house for the fractional sum of $359.08, which was deposited by the manager and checked against by him as cash. In the runners' exchange of that day, the Keystone Bank owed a balance of $23,021.34, which balance it settled by giving its due bill to the manager for deposit in accordance with the system above stated. In operating the clearing on the morning of March 20, the Keystone Bank, through its runner, delivered to the respective clerks of the various banks packages containing claims held by the Keystone Bank amounting to $70,005.46, and the settling clerk of the Keystone Bank received from the runners of the other banks packages containing $117,035.21, leaving the Keystone Bank debtor in the clearing for $47,029.75. The packages containing the demands which the Keystone Bank held against other banks, and which had been delivered to the agent of each of those banks, were by them taken away at the termination of the clearing. The packages containing the charges presented against the Keystone Bank, which in the aggregate amounted to $117,035.21, instead of being taken away by its settling clerk, were, under the arrangement which we have stated, turned over by him to the manager of the clearing house, to be retained until at the hour named the Keystone Bank paid the balance due by it. Before the hour for making the payment, however, the Keystone Bank, by order of the Comptroller of the Currency, was closed, and subsequently was placed in the hands of a receiver. On the failure of the Keystone to make the payment of $47,029.75, the committee of the association instructed the manager to call on the banks, by whom claims had been presented against the Keystone, "to redeem the packages against the Keystone Bank." The manager thereupon gave the proper notification, and the various banks notified sent their checks and redeemed the packages in question. Among the obligations for $117,035.21, however, were due bills amounting to $41,197.36. These due bills came from the fractional amounts arising by the settlement made on the morning of the 19th,

to wit, $359.08 ; for the due bill given at the runners' settlement on the morning of the 19th, $23,031.44 ; and for due bills given to various banks during the course of business on the 19th, amounting to $17,806.84. Thereupon, and as part of the same transaction, the manager paid from the $70,005.36, which by his settlement sheet appeared to the credit of the Keystone as owing from other banks to the Keystone Bank for the checks surrendered by that bank, the amount of the due bills referred to, viz., $41,197.36. This left to the credit of the Keystone the sum of $28,808.10, and this amount was by the manager, acting under direction of the committee of the association, credited on the loan certificate account of the Keystone Bank with the association. In a suit by the receiver of the bank to determine the rights of the parties, *Held*, (1) That the claim of the receiver that the Keystone Bank was entitled to be paid $70,005.36 of credit, irrespective of the outstanding due bills which it had been expressly agreed between the parties were to be paid by way of set-off in the clearing, was without foundation. (2) That the Clearing House Association, having been in possession of the $28,808.10 as the fiduciary agent of the Keystone Bank without a lien or right upon it, its appropriation of the same after the insolvency of the Keystone Bank to the debt owing for loan certificates was obviously a preference within the inhibition of the statute against preferences in the cases of insolvent banks, Rev. Stat. § 5242. *Yardley* v. *Philler*, 344.

4. The statutes of the United States relating to the organization and powers of national banks prohibit such banks from purchasing or subscribing to the stock of another corporation, although they may, as incidental to the power to loan money on personal security, accept stock of another corporation as collateral, and thus become subject to liability as other stockholders. *California Bank* v. *Kennedy*, 362.
5. The want of such authority may be set up by a bank to defeat an attempt to enforce against it the liability of a stockholder. *Ib.*

See Jurisdiction A, 7;
Tax and Taxation, 5 to 9.

PATENT FOR INVENTION.

1. If an application has been made for a patent for an invention, and the applicant has once called for action, he cannot be deprived of any benefits which flow from the ultimate action of the tribunal, although that tribunal may unnecessarily, negligently or even wantonly, if that supposition were admissible, delay its judgment. *United States* v. *American Bell Telephone Co.*, 224.
2. *Maxwell Land Grant case*, 121 U. S. 325, affirmed and followed to the point that a suit between individuals to set aside an instrument for fraud can only be sustained when the testimony in respect to the fraud is clear, unequivocal and convincing, and cannot be done upon

a bare preponderance of evidence which leaves the issue in doubt; and that if this be the settled rule in respect to suits between individuals it is much more so when the Government attempts to set aside its solemn patent: and if this is true when the suit is to set aside a patent for land, which conveys for all time the title, *a fortiori* it must be true when the suit is one to set aside a patent for an invention which only grants a temporary right. *Ib.*

3. The case which the counsel for appellant presents may be summed up in these words: The application for this patent was duly filed. The Patent Office after the filing had full jurisdiction over the procedure; the applicant had no control over its action. We have been unable to offer a syllable of testimony tending to show that the applicant ever in any way corrupted or attempted to corrupt any of the officials of the department. We have been unable to show that any delay or postponement was made at the instance or on the suggestion of the applicant. Every communication that it made during those years carried with it a request for action, yet because the delay has resulted in enlarged profits to the applicant, and the fact that it would so result ought to have been known to it, it must be assumed that in some way it did cause the delay, and having so caused the delay ought to suffer therefor. There is seldom presented a case in which there is such an absolute and total failure of proof of wrong. *Ib.*

4. Before the Government is entitled to a decree cancelling a patent for an invention on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing and satisfactory. *Ib.*

5. Congress has established a department with officials selected by the Government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and entrusted the entire management of affairs of the department to those officials; and when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of the officials, or through his inducement, or at his instance: and proof that they were in fault, that they acted unwisely, unreasonably, and even that they were culpably dilatory, casts no blame on him and abridges none of his rights. *Ib.*

6. The evidence in this case does not in the least degree tend to show any corruption by the applicant of any of the officials of the department, or any undue or improper influence exerted or attempted to be exerted by it upon them, and on the other hand does affirmatively show that it urged promptness on the part of the officials of the department, and that the delay was the result of the action of those officials. *Ib.*

7. If the circumstances do not make it clear that this delay on the part of the officials was wholly justified they do show that it was not wholly unwarranted, and that there were reasons for the action of such officials which at least deserve consideration and cannot be condemned as trivial. *Ib.*

8. It is unnecessary to determine whether there are two separate inventions in the transmitter and the receiver, or whether the patent of 1891 is for an invention which was covered by the patent of 1880; as the judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit. *Ib.*

9. Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual: in the former cases it has all the privileges and rights of a sovereign, the statutes of limitation do not run against it, the laches of its own officials does not debar its right; but when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. *Ib.*

10. In establishing the Patent Office, Congress created a tribunal to pass upon all questions of novelty and utility, and it gave to that office exclusive jurisdiction in the first instance, and specifically provided under what circumstances its decisions might be reviewed, either collaterally or by appeal; and when Congress has thus created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals. *Ib.*

PRACTICE.

A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. *Peck* v. *Heurich*, 624.

See VERDICT.

PRIVILEGE.

See LOCAL LAW, 1.

PUBLIC LAND.

1. A railroad company whose road is laid out so as to cross public lands cannot take a part thereof in possession and occupation of a settler who is entitled to claim a preëmption right thereto, and who has made improvements thereon, without making him proper compensation. *Spokane Falls & Northern Railway Co.* v. *Ziegler*, 65.
2. Such a preëmption settler, who has paid to the United States the price of the preëmpted land, is entitled to recover damages as owner of the fee, although the patent may not be acquired till after the seizure. *Ib.*
3. This case arose under § 2456 of the code of Washington Territory which required compensation to be made to the owner of the land irrespective of any increased value by reason of the proposed improvement. *Ib.*
4. It is no defence against an action to recover for timber cut from public land, that the defendant was indicted criminally for cutting such timber and was acquitted. *Stone* v. *United States*, 178.
5. The provision in the act of March 3, 1875, c. 152, that the railroad companies therein provided for have "the right to take from the public lands adjacent to the line of said road material," etc., means lands in proximity, contiguous to, or near the road. *Ib.*
6. As between the Government and a settler, the title to public land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. *Ib.*
7. The fact that claimants to lands under the homestead and preëmption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful. *Ib.*
8. Under the laws of the Indies lands not actually allotted to settlers remained the property of the king, to be disposed of by him or by those on whom he might confer that power; and as, at the date of the Treaty of Guadalupe Hidalgo, neither the municipalities nor the settlers within them, whose rights are the subject of controversy in these suits, could have demanded the legal title of the former Government, the Court of Private Land Claims was not empowered to pass the title to either, but it is for the political department of the Government to deal with any equitable rights which may be involved. *United States* v. *Sandoval*, 278.
9. *United States* v. *Santa Fé*, 165 U. S. 175, involved the same considera-

tions in its disposition as those presented on this record, and its reasoning and conclusions are to be taken as decisive here. *Ib.*

10. In the grant which forms the subject of controversy in this case, the Spanish governor did not intend to grant nearly 500,000 acres to the applicants, in common, and the alcalde did not so understand it, but delivered juridical possession only of the various allotments made to petitioners in severalty. *Rio Arriba Land and Cattle Co.* v. *United States*, 298.
11. *United States* v. *Sandoval*, 167 U. S. 278, followed, that, as to all such unallotted lands within exterior boundaries, where towns or communities were sought to be formed, the title remained in the Government for such disposition as it might seem proper to make. *Ib.*
12. The claimants have not made out their case by a fair preponderance of evidence, or such weight of testimony as is necessary to establish their title to this large tract of land. *Whitney* v. *United States*, 529.
13. F. located a bounty land warrant on the west half of range 14, with which he was acquainted. The land office, knowing his purpose and intending to comply with it, by mistake and oversight entered the location as of the half of range 17 instead of range 14. F., being ignorant of the mistake, entered upon the half of range 14 which he had thus located, took possession of it, paid taxes on it, and sold it. His grantees and their successors paid taxes on it, occupied it, and exercised acts of ownership over it. H., by his agent W., who knew all these facts, applied to enter the tract in range 14 so intended to be located by F., and received a patent therefor. In an action instituted by H. to recover possession of a portion of the land, *Held*, that the plaintiff was not entitled to recover, and that he held the legal title, evidenced by his patent, as trustee for those holding under F. *Hedrick* v. *Atchison, Topeka & Sante Fé Railroad*, 673.
14. The land in controversy, being 240 acres situated in California, was settled upon and improved in good faith by H., in 1858, with the intention of taking, at the proper time, the necessary steps to acquire the title thereto from the United States, by procuring its location in part satisfaction of the grant made by the United States to the State of California of 500,000 acres of land; and then of purchasing the land in question from the State. In June, 1864, H., in proper form, made application to the State, under the act of California approved April 27, 1863, for sale of certain lands, to locate this land as a "lieu school land location," and to purchase it from the State. This application and offer to purchase were approved by the State's locating agent upon the condition that "if said location should be made and approved by the United States, it should be for the use and benefit of said applicant upon his complying with all the conditions and provisions of the said act of April 27, 1863." Subsequently, February 28, 1865, the State's agent, proceeding under the state law, located this land in lieu of a portion of those which had been lost to the State, at the request and

for the use of H., by filing an application for the same in the United States land office at San Francisco. This application to purchase was completed, so that on the 31st day of August, 1865, H. received from the State a certificate of purchase in due form. Menotti, the plaintiff in error, claims under H. At the time the above application was filed in the land office at San Francisco, the lands in controversy were withdrawn from preëmption, private entry and sale, by order of the Land Department, for the benefit of a railroad company which had filed its map of *general* route under the acts of Congress of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, granting lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. By the act of Congress of July 23, 1866, 14 Stat. 218, c. 219, quieting land titles in California, it was provided that "in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State." This act excepted from its operation "lands to which any adverse preemption, homestead or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town or village, or within the county of San Francisco." The railroad company filed its map of definite location in 1870. In 1872 the plaintiff in error, claiming under the purchaser from the State, made application to the proper officers of the United States Land Department for a confirmation of the right of said State to said land so selected by said State for his benefit, under the provisions of the above act of Congress of July 23, 1866, and thereupon, and upon due notice to the railroad company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing had, that on the 15th day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said State this 240 acres of land "as confirmed to said State of California." In 1875, Menotti received a patent from the State. The railroad company received a patent from the United States in 1872, but this was after the above proceedings under the act of 1866 were initiated. *Held*, (1) That the act of July 1, 1862, as amended by the act of July 2, 1864, did not grant to the railroad company any lands which had been sold, reserved or disposed of by the United States, nor impair any existing "lawful claim," at the time the line of railroad was "definitely fixed"; (2) The act of 1866 did not except from its

operation lands within the exterior lines of the general route of the railroad, and which, for the benefit of the railroad company, had been withdrawn by executive order from preëmption, private entry and sale. The withdrawal order of 1865 did not stand in the way of the passage of the act of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, within certain limits on each side of the road, or any of them, at any time prior to the definite location of the line of the railroad; second, both acts reserved to Congress the power to alter, amend or repeal them; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a "float," and title does not attach to any specific sections until they are identified by an accepted map of definite location of the line of the road. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. Consequently, at the date of the definite location of the railroad in 1870, there was a "lawful claim" upon these lands based on the act of 1866, which confirmed to the State, for the benefit of those who had purchased from it in good faith, lands embraced by its provisions. *Menotti* v. *Dillon*, 703.

15. The Board of Commissioners appointed under the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, confirmed to Manuel Dominguez and others, claimants under a Mexican grant, a certain tract of land known as the Rancho San Pedro. Upon appeal to the District Court of the United States for the Southern District of California, the action of the Board was approved, and it was adjudged, February 10, 1857, that the claimants had a valid title to that ranche, the decree giving the boundaries to the land so confirmed. In execution of the decree, the lands were surveyed under the direction of the United States surveyor general of California. The survey upon its face excepted, reserved and excluded from the claim surveyed the Inner Bay of San Pedro. Within the exterior lines of that Bay is Mormon Island, containing at mean low tide 18.88 acres, and at mean high tide, about one acre. The survey having been filed in the Land Department, a patent was issued February 19, 1858, to the claimants under the decree of confirmation, conveying lands that were outside the exterior lines of the Inner Bay of San Pedro, and containing eight square leagues more or less. The patent followed the survey, and did not include that Bay or any lands within its exterior lines. The present action was brought by various parties, asserting title under the decree of confirmation, to recover possession of the above 18.88 acres. The defendant claimed under a patent issued to him by the United States

in 1881. No application was ever made to the District Court of the United States to correct any error in the decree of 1857, nor was any step taken to have a new survey or to obtain a patent conveying all the lands apparently embraced by that decree: *Held*, (1) If the surveyor general misinterpreted the decree of confirmation, and made a survey which excluded from the surveyed claim any of the lands within the lines given by that decree, it was within the power of the District Court to have its decree properly executed, and to that end to order a new survey; (2) While it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, a patent issued avowedly in execution of a decree passed under that act, was conclusive between the United States and the claimants, and until cancelled, such patent alone determines, in an action to recover possession, the location of the lands that were confirmed by the decree; (3) The patent in question having been accepted by the patentees, and being uncancelled, the plaintiffs in this action, claiming under the patentees, cannot recover lands not embraced by it, even if such lands are embraced by the lines established by the decree of confirmation — the conclusive presumption being that the patent, being uncancelled, correctly locates the lands covered by the confirmed grant. *Dominguez de Guyer* v. *Banning*, 723.

16. The court further said it was unnecessary to decide whether the defendant was entitled to a judgment on his cross-complaint, or whether the lands under the navigable waters of the Inner Bay of San Pedro, and those here in controversy or any part thereof, passed to the State of California upon its admission into the Union, or after the issuing of the patent of 1858. *Ib.*

See Constitutional Law, 10;
Jurisdiction, D, 3;
Mineral Land.

RAILROAD.

A brakeman on a regular train of a railroad and the conductor of a wild train on the same road are fellow-servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter, and by his disregard of the rules of the company. *Northern Pacific Railroad* v. *Poirier*, 48.

See Equity;
Interstate Commerce Act;
Jurisdiction, C, 1, 3;
Public Land, 1.

REMOVAL OF CAUSES.

Chappell v. *Waterworth*, 155 U. S. 102, affirmed to the point that a case not depending on the citizenship of the parties nor otherwise spe-

cially provided for, cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's own statement; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker* v. *Collins*, 57.

REMOVAL FROM OFFICE.

See CONSTITUTIONAL LAW, 5, 6, 7, 8.

RES JUDICATA.

See TAX AND TAXATION, 2.

SHIPPING COMMISSIONER.

The act of June 19, 1886, c. 421, 24 Stat. 19, did not repeal the provisions of the act of June 26, 1884, c. 121, 23 Stat. 59, as respects expenditures by shipping commissioners other than for clerks. *United States* v. *Reed*, 664.

STATUTE.

A. STATUTES OF THE UNITED STATES.

See CONSTITUTIONAL LAW, 6, 7, 9, 17;
INTERSTATE COMMERCE ACT;
INTERSTATE COMMERCE COMMISSION;
JURISDICTION, B; C, 1; E;
MINERAL LAND, 1;
NATIONAL BANK, 1, 3;
PUBLIC LAND, 5, 14, 15;
SHIPPING COMMISSIONER.

B. STATUTES OF STATES AND TERRITORIES.

Louisiana. *See* TAX AND TAXATION, 1.
Massachusetts. *See* ADMIRALTY, 3.
Pennsylvania. *See* TAX AND TAXATION, 5.
Texas. *See* MUNICIPAL CORPORATION, 7.
Washington Territory. *See* PUBLIC LAND, 3.

SUNDAY.

See VERDICT.

TAX AND TAXATION.

1. By the act of January 30, 1836, the legislature of Louisiana exempted the capital of the Citizens' Bank in New Orleans from taxation. *New Orleans* v. *Citizens' Bank*, 371.

2. The two judgments of the District Court of New Orleans between the bank and the city, which are set forth in the opinion of this court, hold that this exemption continued after the expiration of the original charter and during its extension, and as they were made upon identically the same facts and circumstances as those here presented, they are *res judicata*, conclusive upon the parties, and estop the city from attempting to enforce such taxes. *Ib.*

3. The exemption of the capital of a corporation from taxation does not necessarily exempt its shareholders from taxation on their shares of stock. *Ib.*

4. The claim of the bank to non-liability to taxation on property acquired by it under foreclosure of a mortgage is rejected, without prejudice to the right of the State and the municipal authorities to claim a license tax, if imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defences to the payment of such tax. *Ib.*

5. The decision of the Supreme Court of Pennsylvania that the act of June 8, 1891, in respect of the taxation of national banks does not conflict with the constitution of that State is conclusive on this court. *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 461.

6. There is no lack of uniformity of taxation under that act which renders it obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," as the right of election which, if not availed of by all, may produce an inequality, is offered to all. *Ib.*

7. That act treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such. *Ib.*

8. The making the national bank the agent of the State to collect such taxes is a mere matter of procedure, and there is no discrimination against the national banks in the fact that the state banks are not so compelled, but the auditor general looks to the stockholders directly. *Ib.*

9. The statute, by fixing the time when the bank shall make its report, and directing the auditor general to hear any stockholder who may desire to be heard, provides "due process of law" in these respects. *Ib.*

See Constitutional Law, 13 to 16;
National Bank, 1.

TRUST.

1. The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised, whenever such a state of mutual ill-feeling, growing out of his behavior, exists between him and his cotrustee or the beneficiaries, that his continuance in office would be detrimental to the execution of the

trust, even if for no other reason than that human infirmity would prevent them from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated. *May* v. *May*, 310.

2. A testator devised all his estate to his wife and a son, in trust to pay to the wife one third of the income of the real estate for life, and one third of the personal property absolutely; to divide the income of the other two thirds of the estate, after paying his debts and cancelling existing mortgages, among his children and their issue; and in certain circumstances to sell or mortgage the real estate, if necessary; the two trustees to exercise jointly all the powers conferred, except that the son should manage the real estate, collect the rents thereof, pay the taxes and other expenses thereon, and render monthly accounts to the wife; and gave the other children, "for good and sufficient cause," and with the widow's concurrence, power, "by their unanimous resolution" to remove him from his office of trustee, and to appoint another person in his stead. *Held*, that the other children, with the concurrence of the widow, had power to remove him, for what they determined to be good and sufficient cause, subject to the jurisdiction of a court of equity to restrain abuse of the power; and that his removal from the office of trustee terminated his authority to manage the real estate. *Ib.*

3. The filing of a bill by a trustee under a will to obtain the instructions of a court of equity in the execution of his trust does not suspend a power of removing him given to the beneficiaries by the will; but only subjects their action to the supervision and control of the court. *Ib.*

4. Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of parties not in being, and unnecessary to be decided for the present guidance of the trustee. *Ib.*

5. Under a will by which the testator devises and bequeaths all his estate in a trust to pay to his widow one third of the net annual income of the real estate during her life, and one third of the personal property absolutely, and to divide the income of the estate, with the exception of her thirds, after paying his debts and cancelling existing mortgages, among his children, the widow is entitled to a third of the income of the real estate, deducting taxes, insurance and repairs, but without any deduction for interest on debts or mortgages. *Ib.*

VERDICT.

A general verdict is not a nullity by reason of its being received or recorded on Sunday. *Stone* v. *United States*, 178.

WILL.

See Trust, 5.