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See BONDS;
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Where a bank fails and the clearing house having notice of such failure returns all of the debit items to the other banks it cannot apply the credit item to payment of claims of other banks against the insolvent bank; under the provisions of the bankrupt act forbidding preferences, it is its duty to pay those funds over to the trustee in bankruptcy. *Rector* v. *City Deposit Bank*, 405; *Rector* v. *Commercial National Bank*, 420.

2. *Proof of claim as prima facie evidence of its allegations.*

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BONDS.

Of contractors on public works; right of recovery on.

The act of August 13, 1894, 28 Stat. 278, was passed, as its title declares, for the protection of persons furnishing materials and labor for the construction of public works, and nothing in the statute, or in the bond therein authorized, limits the right of recovery to those furnishing material or labor to the contractor directly; but all persons supplying the contractor with labor or materials in the prosecution of the work are to be protected. The rule which permits a surety to stand upon his strict legal rights does not prevent a construction of the bond, with a view to determining the fair scope and meaning of the contract. Such statutes are to be liberally interpreted and not to be literally construed so as to defeat the purpose of the legislature. Under the circumstances of this case a materialman, who had complied with the provisions of the statute as to filing notice, was entitled to recover from the surety company on a bond given under the statute although the materials were furnished to a subcontractor and not directly to the contractor. *Hill* v. *American Surety Co.*, 197.

See CONSTITUTIONAL LAW, 15;
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BRIDGES.

Obstruction of watercourse—Rights of railroad company to bridge as against those of public to use of watercourse.

The rights of a railroad company to a bridge over a natural watercourse crossing its right of way, acquired under its general corporate power are not superior and paramount to the right of the public to use that watercourse for the purpose of draining lands in its vicinity in accordance with plans adopted by a drainage commission lawfully constituted under the Farm Drainage Act. Although the opening under a bridge constructed by a railroad company may be sufficient at the time to pass all water flowing through the watercourse, there is an implied duty on the part of the company to maintain an opening adequate and effectual for such an increase in the volume of water as may result from lawful and reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the watercourse. In this case the proper drain-

age of the land in the district being impossible without the removal of a railway bridge over the natural watercourse into which the lands drained and the construction of a bridge with a larger opening for the increased volume of water, *held*, that it is the duty of the railway company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with regulations established by the Drainage Commissioners, under the authority of the State; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

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See INTERSTATE COMMERCE.

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CONSTITUTIONAL LAW.

1. *Contracts—Power of State to alter or destroy municipal corporation, the exercise of which impairs the obligation of contracts.*

The power of the State to alter or destroy its municipal corporations is not, so far as the impairment of the obligation clause of the Federal Constitution is concerned, greater than the power to repeal its legislation; and the alteration or destruction of subordinate governmental divisions is not the proper exercise of legislative power when it impairs the obligations of contracts previously entered into. *Graham* v. *Folsom*, 248.

2. *Contracts—Duty of courts to prevent impairment of obligation.*

Courts cannot permit themselves to be deceived; and while they will not inquire too closely into the motives of the State they will not ignore the effect of its action, and will not permit the obligation of a contract to be impaired by the abolition or change of the boundaries of a municipality. Where a tax has been provided for and there are officers to collect it the court will direct those officers to lay the tax and collect it from the property within the boundaries of the territory that constituted the municipality. *Ib.*

See CORPORATIONS, 4;
GRANTS, 2;
PRACTICE AND PROCEDURE, 2.

3. *Deprivation of property—Exercise by State of right of eminent domain.*

There is nothing in the Fourteenth Amendment which prevents a State in carrying out its declared public policy from requiring individuals to make to each other, on due compensation, such concessions as the public welfare demands; and the statute of Utah providing that eminent domain may be exercised for railways and other means to facilitate the working of mines is not unconstitutional (*Clark* v. *Nash*, 198 U. S. 361, followed). *Strickley* v. *Highland Boy Mining Co.*, 527.

4. *Deprivation of property—Exercise of police power by State.*
Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not taking property without due compensation, and the constitutional prohibition against the taking of private property without compensation "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners,* 561.

See BRIDGES;
PRACTICE AND PROCEDURE, 2;
PUBLIC LANDS, 5.

5. *Due process of law—Committal for contempt in refusing to appear before legislative committee on ground of want of jurisdiction.*
The objection of a person committed for contempt, for refusing to appear before a legislative committee, that the subject which it had been appointed to investigate was not within the jurisdiction of the legislature, under a provision in the state constitution, that neither the legislative, executive nor judicial departments should exercise powers belonging to either of the others, does not present any question under the due process clause of the Fourteenth Amendment. *Carfer* v. *Caldwell,* 293.

6. *Due process of law—Discharge of juror by court in murder case.*
In discharging a juror in a murder trial before he was sworn, for cause sufficient to the court, and after questioning him in absence of accused and counsel but with the consent of his counsel, and substituting another juror equally competent, *held,* that the accused was not denied due process of law within the meaning of the Fourteenth Amendment. *Howard* v. *Kentucky,* 164.

7. *Due process of law—Impeachment of acts of municipal corporations because of illegality under laws of State.*
The acts of a municipal corporation are not wanting in the due process of law ordained by the Fourteenth Amendment, if such acts when done or ratified by the State would not be inconsistent with that Amendment. Many acts done by an agency of a State may be illegal in their character, when tested by the laws of the State, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the States. *Waterworks Company* v. *Owensboro,* 38.

8. *Due process of law—Application of Fourteenth Amendment to acts of States and their instrumentalities.*
The Fourteenth Amendment was not intended to bring within Federal control everything done by the States or by its instrumentalities that is simply illegal under the state laws, but only such acts by the States

or their instrumentalities as are violative of rights secured by the Constitution of the United States. *Ib.*

See CONSTITUTIONAL LAW, 12;
JURY.

9. *Equal protection of laws—Effect of action of appellate court on decision of trial court not subject to exception.*

The Criminal Code of Kentucky, § 281, provides that decisions of the trial court upon challenges shall not be subject to exception, and as the highest court of the State in deciding that even though the action of the trial court in regard to the juror had been error it could not reverse under § 281, followed the construction of that section established by prior cases, it did not make a discriminating application of the section against the accused and he was not therefore deprived of the equal protection of the laws. *Howard* v. *Kentucky*, 164.

See BRIDGES;
TAXATION, 3.

10. *Full faith and credit to judgment rendered against and paid by garnishee.*

Harris v. *Balk*, 198 U. S. 215, followed to the effect that full faith and credit must be given to a judgment rendered against, and paid by, defendant as plaintiff's garnishee in a State, other than that in which plaintiff resides, and in which defendant does business and is liable to process and suit. *Louisville & Nashville Railroad* v. *Deer*, 176.

Jury Trial—See JURY.

11. *States; application of Fifth and Sixth Amendments to proceedings in state courts.*

The provisions of the Fifth and Sixth Amendments to the Federal Constitution do not apply to proceedings in the state courts. *Howard* v. *Kentucky*, 164.

12. *States; provision as to due process of law in relation to.*

While the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights, the Amendment was not intended to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the power of adjudication of its courts in administering the process provided by the law of the State. *Ib.*

13. *States—Effect of erroneous decision of highest court as violation of constitutional obligation.*

A State cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, if acting within its jurisdiction. *Ib.*

14. *States; power to regulate and burden right to inherit.*

The California inheritance tax law of 1893, as amended in 1899, which imposed a tax on inheritances of and bequests to brothers and sisters, and not on those of daughters-in-law or sons-in-law, was assailed as repugnant to the Fourteenth Amendment, and having been sustained by the highest court of the States a writ of error from this court was

prosecuted. After the record was filed a new inheritance tax law was enacted in 1905, which amended and reënacted prior laws on the subject and also repealed the acts of 1893 and 1899 without any clause saving the right of the State in respect to charges already accrued thereunder. Plaintiff in error contended that as this court had jurisdiction on the constitutional question, it should reverse the judgment, on the ground that since the repeal of the acts of 1893 and 1899 the State has no power to enforce any taxes levied thereunder. *Held*, that the Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion and would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority; and the statutes of California, therefore, are not unconstitutional because near relatives by affinity are preferred to collateral relatives. *Campbell* v. *California*, 87.

15. *Suit against State within meaning of Eleventh Amendment.*
A suit to compel county officers to levy and collect a tax on property within the county to pay bonds of a municipality is not, under the circumstances of this case, a suit against the State, either because those officers are also state officers, or because the bonds were issued under legislative authority. *Graham* v. *Folsom*, 248.

16. *Suit against State within meaning of Eleventh Amendment.*
A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment. *Gunter* v. *Atlantic Coast Line*, 273.

17. *Suit against State; waiver of immunity to suit in Federal court.*
While a State may not, without its consent, be sued in a Circuit Court of the United States, such immunity may be waived; and if it voluntarily becomes a party to a cause and submits its rights for judicial determination it will be bound thereby. *Ib.*

18. *Suit against State—Appearance constituting waiver of immunity.*
An appearance "for and on behalf of the State" by the Attorney General, pursuant to statutory provisions, in an action brought against county officers, but affecting state revenues, in this case amounted to a waiver by the State of its immunity from suit; and such immunity could not be invoked in an ancillary suit subsequently brought against the successors of the original defendants to enforce the decree. *Ib.*

19. *Suit against State—Binding effect on State of decree of Federal court in cause in which State has appeared.*
A decree of the Circuit Court of the United States, having jurisdiction of the cause and in which the State appeared, that a charter exemption existed in favor of a railroad company by virtue of a contract within the meaning of the impairment of obligation clause of the Federal

Constitution is binding upon the State as to the existence and effect of the contract during the period of exemption, and the rule that a decree enjoining the collection of a tax is not *res judicata* as to the right to collect for a subsequent year does not apply. *Ib.*

20. *Suit against State—Enforcement by Federal court of decree in cause over which it had jurisdiction.*

Neither the Eleventh Amendment nor § 720, Rev. Stat., control a court of the United States in administering relief where it is acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction; nor is a Circuit Court debarred from enforcing its decree by ancillary suit in equity restraining improper prosecutions of actions in the state courts because there is an adequate remedy at law by interposing defenses in those actions. *Ib.*

CONSTRUCTION.

OF PUBLIC GRANTS. *See* Grants.
OF STATUTES. *See* Bonds;
Interstate Commerce, 1, 2;
Jurisdiction, A 14;
Local Law (Ariz.) (N. C.);
Practice and Procedure, 2.

CONTEMPT OF COURT.

See CONSTITUTIONAL LAW, 5;
WITNESS.

CONTRACTS.

1. *Contract relating to commerce within prohibitions of Sherman Act.*

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it; and where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the prohibitions of the Sherman Act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points. *Cincinnati Packet Co.* v. *Bay*, 179.

2. *Interference with interstate commerce affecting validity of contract.*

Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman Act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law. *Ib.*

3. *Effect on validity of contract for sale of vessels engaged in interstate commerce of agreement against competition.*

A contract for sale of vessels, even if they are engaged in interstate commerce, is not necessarily void because the vendors agree, as is ordinary in case of sale of a business and its good will, to withdraw from business for a specified period. *Ib.*

4. *Options to purchase and options to rescind differentiated.*
An option to purchase if the buyer likes the property is essentially different from one to return the property and cancel the contract; in the former case title does not pass until the option is determined, in the latter it passes at once, subject to the right to rescind; and, as held in this case, if the option to rescind is not exercised, and the property returned according to its terms, the sale is complete, and the promise to pay the balance of the purchase price becomes absolute. *Guss* v. *Nelson*, 298.

See BONDS;
CONSTITUTIONAL LAW, 1, 2, 19;
CORPORATIONS, 3, 4;
GRANTS, 2;
INTERSTATE COMMERCE, 1;
JURISDICTION, A 10, 13; B 2;
LOCAL LAW (N. C.) (PORTO RICO);
PUBLIC LANDS, 12.

CONVEYANCES.

See REAL PROPERTY.

CORPORATIONS.

1. *Failure to elect trustees affecting corporate existence.*
The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved, by the mere failure to elect trustees. *Speer* v. *Colbert*, 130.

2. *Corporate powers of educational institution.*
It is within the powers of an institution intended for the instruction of youth in the liberal arts and sciences to take and use a fund for the cultivation of historical research. *Ib.*

3. *Stock; allegations to establish fraud in contract of sale of—Action by minority stockholder to set aside contract—Admissibility of evidence.*
This was a minority stockholder's suit to set aside a contract made for the sale of a large block of stock of the corporation under an arrangement made by the respective owners thereof with the party making the sale who was also president of the corporation. The contract was ratified by a majority of the stockholders and by the directors but against complainant's protests. It contained provisions for payments to the president for services. Complainant charged fraud, alleged a conspiracy between the president and the purchaser and asked for a receiver and an accounting. Other suits were brought in other courts in which similar charges were made. *Held*, that: on the record of this case the charges of fraud were not sustained and the complaint was not established. Where the allegations in the suit in which fraud is alleged are held to be untrue, records of other suits in which like charges were made and sustained on *ex parte* statements cannot be regarded as evidence of the fraud. *Hallenborg* v. *Cobre Copper Co.*, 239.

4. *Control by legislature—Effect of ordinance extending franchise.*
Even though an ordinance extending a franchise may be construed as a contract, it is still subject to the control of the legislature if the con-

stitution of the State then in force provides that no irrevocable or uncontrollable grant of privileges shall be made and that all privileges granted by the legislature, or under its authority, shall be subject to its control; nor is the legislature deprived of this control because the contract was not made by it but by a municipal corporation, as the latter is for such purpose merely an agency of the State. *San Antonio Traction Co.* v. *Altgelt*, 304.

5. *Effect of prior consolidation of corporations on subjection of franchise to provisions of new constitution.*

Where, after a new constitution has been adopted, a railway, chartered prior to such adoption, is consolidated with other roads or accepts new privileges, all contracts, privileges and franchises conferred are subject to the provisions of the new constitution. *Ib.*

6. *Effect of prior consolidation of corporations on subjection of franchise to provisions of new constitution.*

Where a corporation chartered prior to the existing constitution of a State is wound up and all of its property, contracts and obligations transferred by ordinance to a new corporation, the ordinance must be construed in connection with the constitution and the provisions for further control therein contained. *Ib.*

See JURISDICTION, A 14; LOCAL LAW (MINN.) (N. C.); TAXATION, 4.
NATIONAL BANKS, 1; REMOVAL OF CAUSES, 1;

COURTS.

Interference of Federal court by habeas corpus with trial in state court of persons in military service of United States accused of crime.

An officer and an enlisted soldier in the military service of the United States were indicted for murder and manslaughter and held for trial in a state court for having killed a citizen of the State who was not in the service of the United States, the alleged crime having been committed within the State, on property not belonging to, or under the jurisdiction of, the United States. On a writ of *habeas corpus* from a Circuit Court of the United States it was contended that petitioners were seeking to arrest the deceased for felony under the laws of the United States and that he met his death while attempting to escape, and as therefore the homicide was committed by petitioners in the discharge of their duties, the state court was without jurisdiction. On the hearing there was a conflict of evidence as to whether deceased had surrendered or not, and it was conceded that if he were not a fleeing felon the ground for Federal interposition failed. *Held*, that the Circuit Court properly declined to wrest petitioners from the custody of the state officers in advance of trial in the state courts. *Ex parte Crouch*, 112 U. S. 178, applied. *Drury* v. *Lewis*, 1.

See CONSTITUTIONAL LAW, 2, 11, 12, 13, 15–20; INTERSTATE COMMERCE, 1; JURISDICTION; NUISANCE, 1; PRACTICE AND PROCEDURE; TAXATION, 1, 4; TITLE, 1.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 6, 9;
COURTS;
LOCAL LAW (KY.).

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See APPEAL AND ERROR.

DISCOVERY.

See EQUITY, 2.

DISCRIMINATION.

See INTERSTATE COMMERCE, 2.

DISTRICT OF COLUMBIA.

See CORPORATIONS, 1, 2 (*Speer* v. *Colbert*, 130);
MORTGAGE AND DEED OF TRUST (*Warner* v. *Grayson*, 257);
NEGLIGENCE (*Looney* v. *Metropolitan R. R. Co.*, 480);
WILLS (*Speer* v. *Colbert*, 130).

DIVERSITY OF CITIZENSHIP.

See REMOVAL OF CAUSES.

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See CONSTITUTIONAL LAW, 4, 5, 6, 7, 12;
JURY.

EASEMENTS.

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See CONSTITUTIONAL LAW, 18.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 3.

EQUAL PROTECTION OF LAWS.

See BRIDGES;
CONSTITUTIONAL LAW, 9;
TAXATION, 3.

EQUITY.

1. *Jurisdiction; grounds for,—Adequacy of remedy at law.*
Notwithstanding averments in the bill of fraud, conspiracy and violation of trust, if the action is really one of trespass or trover to recover damages for wrongful cutting and conversion of timber from complainant's

lands, and there is no question of defendant's financial responsibility, and the recovery of a money judgment and not of specific property is sought, complainant's remedy at law is adequate and equity has no jurisdiction; nor can equity take jurisdiction merely because of the difficulty of proving the case on account of various devices alleged to have been used by defendants, or because the principal defendant is an executor of a party, whose estate is solvent, alleged to have been the chief wrongdoer. Complainant, in an action at law of this nature, is entitled to the same inspection of books and papers that he could have in a suit in equity. The holder of permits to cut timber from certain specified government lands, who willfully and fraudulently cuts from other lands, is not a trustee *ex maleficio* as to timber wrongfully cut, but a mere trespasser and liable for damages in action at law, and equity has no jurisdiction either on the ground of trusteeship or accounting. Prevention of multiplicity of suits is not a ground for equity jurisdiction if all persons must be made parties, whether the suit be at law or in equity, and where a class does not exist of which a few can be made defendants as representatives thereof. *United States* v. *Bitter Root Co.*, 451.

2. *Discovery as ground of equity jurisdiction.*

Discovery, although now seldom the object of a suit in equity, and not always sufficient to uphold a suit when the full information is obtainable by proceedings at law, was a well-recognized ground of equity jurisdiction. *Southern Pacific* v. *United States*, 341.

3. *Right of appellate court as to dismissal of bill in equity where objection of adequate remedy at law first raised there.*

Although a suit in equity cannot be maintained where there is an adequate remedy at law, and this objection may be taken for the first time in the appellate court, still, if not raised until then, the court need not, if the subject matter of the suit is of a class over which it has jurisdiction, dismiss the bill; and so held in regard to a suit brought by the Government, under an act of Congress, to recover from a railroad company the value of lands erroneously patented to and sold by it to numerous persons, some of whom were made defendants as representatives of the class, the bill also praying for cancellation of patents, quieting of titles, discovery and accounting. *Southern Pacific* v. *United States*, 341, 354.

See CONSTITUTIONAL LAW, 20;
JURISDICTION, A 12;
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GRANTS.

1. *Strict construction in favor of public.*

Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public; whatever is not unequivocally granted is withheld; and nothing passes by implication. *Water Company* v. *Knoxville*, 22.

2. *Right of municipality, under contract with waterworks company, to establish its own waterworks.*

Although the contract in this case between a waterworks company and a

municipality provided that no contract or privilege would be granted to furnish water to any other person or corporation, the city was not, in the absence of a special stipulation to that effect, precluded from establishing its own independent system of waterworks. *Ib.*

See PUBLIC LANDS.

HABEAS CORPUS.

See COURTS;
JURISDICTION, C 2.

HAWAIIAN FISHERIES.

1. *Fishing rights of owner of an ahapuaa.*

Damon v. *Hawaii*, 194 U. S. 154, followed to effect that under the Hawaiian Act of 1846, "of Public and Private Rights of Piscary," the owner of an ahapuaa is entitled to the adjacent fishing ground within the reef, and that the statute created vested rights therein within the saving clause of the organic act of the Territory repealing all laws of the Republic of Hawaii conferring exclusive fishing rights. *Carter* v. *Hawaii*, 255.

2. *Effect of omission to establish right to a fishery before Land Commission.*

The Land Commission of Hawaii was established to determine title to lands against the Hawaiian Government, and, as that Commission rightly treated fisheries as not within its jurisdiction, the omission to establish the right to a fishery before that Commission does not prejudice the right of the owner thereto. *Ib.*

HEADNOTES.

See REPORTS.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 1;
PRACTICE AND PROCEDURE, 2.

INHERITANCE TAX.

See CONSTITUTIONAL LAW, 14.

INJUNCTION.

See CONSTITUTIONAL LAW, 16, 20; JURISDICTION, A 12;
INTERSTATE COMMERCE, 1; NUISANCE, 2;
TAXATION, 2.

INTERSTATE COMMERCE.

1. *Rates; application of prohibition of Interstate Commerce Act as to charge by carrier of less than published rates—Illegality of contract for sale and transportation of commodity—Immateriality of intent to violate prohibitions of act—Scope of injunction against violations of act—Binding force on courts of ruling of Interstate Commerce Commission.*

(*a*) A carrier, not expressly authorized so to do by charter obtained prior

to the Interstate Commerce Act, cannot contract to sell, and to transport in completion of the contract the commodity sold, when the stipulated price does not pay the cost of purchase, the cost of delivery, and the published freight rates.

(*b*) The Interstate Commerce Act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all-embracing and applicable to every method by which the forbidden results could be brought about.

(*c*) Where a contract of a carrier for sale and transportation is illegal under the Interstate Commerce Act because the amount charged for transportation is less than the published rates, the contract is not made legal because the carrier is also released by the same shipper from a claim, admitted by the carrier and amounting to more than the difference between the published rate and the amount charged, for breach of a prior contract, where it appears that such prior contract was also illegal for the same reason.

(*d*) Whatever powers a carrier may possess as to its commerce not interstate, it is subject as to its interstate commerce to the Interstate Commerce Act, the application of whose prohibitions depends not upon whether the carrier intends to violate them but upon whether it actually does so.

(*e*) Congress has undoubted power to subject to regulations adopted by it every carrier engaged in interstate commerce, and although the Interstate Commerce Act may not contain an express prohibition against a carrier becoming a dealer in commodities transported by it the court will enforce the general provisions of the act although in so doing it may render it impossible for a carrier to deal in such commodities.

(*f*) While the construction of a statute by a body charged with its enforcement which has long obtained, and, which has been impliedly sanctioned by the reënactment of the statute without alteration, must be treated, when not plainly erroneous, as read into the statute, the binding force of such construction on the court is restricted to the precise conditions passed on; and a ruling by the Interstate Commerce Commission as to the right of a carrier, possessing charter rights granted prior to the passage of the act, to also be a vendor is not applicable to the case of a carrier which does not possess such rights.

(*g*) Where a carrier has violated the provisions of the Interstate Commerce Act in a particular manner in regard to a particular commodity the court may perpetually enjoin it from further violations of that act by the means employed and as to that commodity, but should not enjoin the carrier in general terms not to violate the act in any particular. *New Haven R. R.* v. *Interstate Com. Com.*, 361.

2. *Construction of Interstate Commerce Act—Rebates—Joint through rates—Pooling of freights—Unlawful discrimination by carriers.*

The Southern Pacific and other railroads published a guaranteed through rate on citrus fruits from California to the Atlantic seaboard. The

shippers availing of this rate routed the goods themselves from the terminals of the initial carriers and illegally obtained rebates for the routing from the connecting carriers. To prevent this—and the action was successful—the initial carriers republished the rate reserving the right to route the goods beyond their own terminals. On complaint of shippers the Interstate Commerce Commission ordered the initial carriers to desist from enforcing the new rule, holding it violated § 3 of the Interstate Commerce Act by subjecting the shippers to undue disadvantage. The Circuit Court sustained the Commission but on the ground that the routing by the carrier amounted, although no other agreement was proved in regard thereto, to a pooling of freights and violated § 5 of the act. *Held*, error and that:

(*a*) As the general purpose of the act was to facilitate commerce and prevent discrimination it will not be construed so as to make illegal a salutary rule to prevent the violation of the act in regard to obtaining rebates.

(*b*) The question of joint through rates is, under the act, one of agreement between the companies and under their control, and nothing in the act prevents an initial carrier guaranteeing a through rate to reserve in its published notice thereof the right to route the goods beyond its own terminal.

(*c*) A carrier need not contract to carry goods beyond its own line, or make a through rate; if it does agree so to do, it may do so by such lines as it chooses, and upon such reasonable terms, not violative of the law, as it may agree upon; and this right does not depend upon whether it agrees to be liable for default of the connecting carrier.

(*d*) The fact that the initial carrier, in order to break up the practice of rebating by the connecting carriers, promises them fair treatment and carries out the promise by giving them certain percentages of its guaranteed through rate business, does not amount to a pooling of freights within the meaning of § 5 of the Interstate Commerce Act.

(*e*) A reservation applicable to a single business by the initial carrier, guaranteeing a through rate, of the right to route goods beyond its own terminal does not amount to an unlawful discrimination within the prohibition of the act if the business is of a special nature, like the fruit business, having nothing in common with other freight. *Southern Pacific* v. *Interstate Com. Com.*, 536.

See CONTRACTS.

JOINDER OF PARTIES.

See REMOVAL OF CAUSES, 1.

JUDGMENTS AND DECREES.

See CONSTITUTIONAL LAW, 10, 19, 20; TITLE, 2; LOCAL LAW (N. C.) (PORTO RICO); UNLAWFUL COMBINATIONS.

JUDICIAL NOTICE.

Of government permits to cut timber.

This court cannot take judicial notice of the contents of permits to cut timber which are issued in different forms and subject to the discretion of the Department giving them. *United States* v. *Bitter Root Co.*, 451.

JURISDICTION.

A. Of This Court.

1. *Appeal from territorial court—Determination of amount involved.*

In the proceedings in *quo warranto* in this case the alleged usurpation of the office is the matter in dispute, and the liability to fine on judgment of ouster or the effect of the judgment in a subsequent action to recover the emoluments of the office does not make that matter measurable by some sum or value in money, and an appeal to this court will not lie from the Supreme Court of a Territory under either section of the act of March 3, 1885, c. 355. *Albright* v. *Sandoval*, 9.

2. *Appeal from territorial court—Sufficiency of record.*

Where the record in an appeal from a judgment of the Supreme Court of a Territory does not present any exceptions to rulings on admission of evidence worthy of consideration, and the judgment was rendered in the trial court and affirmed by the Supreme Court on a general finding, the appeal will be dismissed. *Guss* v. *Nelson*, 298.

3. *Appeal from territorial court—Limitation of review.*

On appeal from the Supreme Court of a Territory the jurisdiction of this court, apart from reviewing exceptions to rulings on evidence, is limited to determining whether the findings support the judgment. *Herrick* v. *Boquillas Cattle Co.*, 96.

4. *Dismissal of writ of error where only abstract question remains and relief impossible.*

Where, in a suit to cancel the revocation of an annual permit to do business in a State, the permit has ceased, since the writ of error was filed, to have any effect, and the plaintiff in error could not do business even if successful without obtaining a new permit, an event has occurred which renders it impossible for this court to grant any relief, and, as only an abstract question remains to be decided, the writ of error will be dismissed. *Security Life Ins. Co.* v. *Prewitt*, 446; *Travelers Ins. Co.* v. *Prewitt*, 450.

5. *Effect of certificate of state court as to existence of Federal question.*

While a certificate of a court of last resort of a State may not import into a record a Federal question not otherwise existing, such certificate serves to elucidate whether such Federal question does exist. *Rector* v. *City Deposit Bank*, 405.

6. *Review of action of state court in directing verdict.*

While this court is bound by the facts found by a state court, where that court does not find the facts but instructs a verdict on the ground that

the evidence justifies no other verdict, a question of law, reviewable by this court, is raised as to whether the jury could have found otherwise under any reasonable view of the evidence. *Ib.*

7. *Error to state court—Review of Federal question where local question involved one for state court.*

The California inheritance tax law of 1893, as amended in 1899, which imposed a tax on inheritances of and bequests to brothers and sisters, and not on those of daughters-in-law or sons-in-law, was assailed as repugnant to the Fourteenth Amendment, and having been sustained by the highest court of the State, a writ of error from this court was prosecuted. After the record was filed a new inheritance tax law was enacted in 1905, which amended and reënacted prior laws on the subject and also repealed the acts of 1893 and 1899 without any clause saving the right of the State in respect to charges already accrued thereunder. Plaintiff in error contended that as this court had jurisdiction on the constitutional question, it should reverse the judgment, on the ground that since the repeal of the acts of 1893 and 1899 the State has no power to enforce any taxes levied thereunder. *Held,* that as the Federal question on which the writ of error is prosecuted has not become a moot one, and the affirmance of the judgment on that question alone will not prejudice the right of plaintiffs in error to have the purely local question of whether the State still has the right to enforce the taxes levied prior to the act of 1905, determined by the state court, it is the duty of this court to consider and decide the Federal question only leaving the local question open for investigation in, and adjudication by, the state courts. *Campbell* v. *California,* 87.

8. *Error to state court—Sufficiency of showing of existence of Federal question and time of raising.*

Where it appears from the record of a case in a state court that a Federal question was raised, and, in the absence of an opinion, it appears from a certificate made part of the record that it was not raised too late under the local procedure, and that it was necessarily considered and decided by the highest court of the State, this court has jurisdiction to review the judgment on writ of error. *Cincinnati Packet Co.* v. *Bay,* 179.

9. *Federal question raised by denial by state court of right asserted therein by trustee in bankruptcy.*

Where a trustee in bankruptcy seeks to recover in a state court what is asserted to be an asset under the bankrupt law, the denial of the asserted right is a denial of a right or title specially claimed under a law of the United States, and presents a Federal question, reviewable in this court by writ of error under section 709, Rev. Stat. *Rector* v. *City Deposit Bank,* 405; *Rector* v. *Commercial National Bank,* 420.

10. *Involution of Federal question.*

An attorney was employed to prosecute a claim against the United States; the contract, which was in writing, provided that he should prosecute

it before the courts, officers and departments of the Government and Congress; that he should receive as compensation a sum equal to a specified percentage of the amount allowed, the payment whereof was made a lien upon the recovery. The prosecution was successful and the amount allowed was collected by the claimant himself. The attorney sued in the state court on the contract and recovered a judgment, his claim being resisted on the ground that the contract was void under § 3477, Rev. Stat., prohibiting transfers of claims against the United States, and also that being for lobbying services was void against public policy. He also sought a recovery upon a *quantum meruit*. He moved to dismiss the writ of error on the ground that there was no Federal question. *Held*, in affirming the judgment that a party who insists in the state court that a judgment cannot be rendered against him consistently with a statute of the United States asserts, within the meaning of § 709, Rev. Stat., a right and immunity under such statute, although it might not give him a personal or affirmative right, enforceable in direct suit against his adversary, and a writ of error will lie from this court to review the judgment denying the existence of such right or immunity. The contract, so far as it gave a lien on the amount allowed, was void under § 3477, Rev. Stat., but the provision agreeing to pay the compensation fixed was not in violation of the statute and could stand alone. The state court having held, on evidence taken in that regard, that the suit was not one for lobbying services, this court accepts that view of the case. *Nutt* v. *Knut*, 12.

11. *Certified question; nature of.*

A question certified must be one the answer to which is to aid the court in determining a case before it. *Alabama Southern Ry.* v. *Thompson*, 206.

12. *Original; of controversies between States—Enjoining action of one State at instance of another.*

Missouri filed its bill in this court to enjoin Illinois and the Sanitary District of Chicago from discharging sewage through an artificial channel connecting Lake Michigan with the Desplaines River, a tributary of the Illinois, the latter of which empties into the Mississippi River above St. Louis, claiming that such sewage so polluted the water of the Mississippi as to render it unfit to drink and productive of typhoid fever and other diseases. Illinois denied the jurisdiction of this court, and the allegations of the bill, and alleged that if the conditions complained of at St. Louis existed they resulted from discharge of sewage into the Mississippi by cities of Missouri and from other causes for which Illinois was not responsible. A demurrer was overruled, with leave to answer, 180 U. S. 208; after answer and taking of proof including much expert testimony as to effect of sewage on water and health, *held*, that:

(*a*) This court has jurisdiction and authority to deal with a question of this nature between two States, which, if it arose between two independent sovereignties, might lead to war.

(*b*) In such a case, while this court cannot take the place of a legislature it must determine whether there is any principle of law, and if any what, on which the plaintiff State can recover.

(*c*) Every matter which would be cognizable in equity if between private citizens in the same jurisdiction would not warrant this court in interfering if such matter arose between States; this court should only intervene to enjoin the action of one State at the instance of another when the case is of serious magnitude, clearly and fully proved; and in such a case only such principles should be applied as this court is prepared deliberately to maintain.

(*d*) While a State may have relief in this court against another State to prevent it from discharging sewage through an artificial channel into, and thereby polluting the waters of, a river flowing through both States and on which the complainant State relies for water supply, if the alleged facts as to such pollution are not fully proved, and it also appears that such pollution might result from the discharge of sewage by cities of the complainant State into the same river the bill should be dismissed,—but in this case without prejudice. *Missouri* v. *Illinois*, 496.

13. *Of appeal from Supreme Court of Porto Rico.*

A Porto Rican contracted, in 1894, to pay a certain amount of pesos in money current in the commerce, whatever may be the coinage in circulation, at the rate of one hundred centavos of the money in circulation for each peso. Section 11 of the Foraker Act, passed April 12, 1900, provided for the retiring of Porto Rican coin and the substitution thereof of United States coin and for the payment of debts at the rate of sixty cents per peso—and thereafter the debtor offered to pay the obligation at that rate, but the Supreme Court of Porto Rico held that he was entitled under the contract to one hundred cents for each peso. The creditor also claimed the matter was *res judicata* under a judgment which had been obtained for an instalment of interest. In reversing this judgment *held*, that appellant having claimed, and been denied, the right to pay the indebtedness at the rate fixed by § 11 of the act of April 12, 1900, this court has jurisdiction under § 35 of that act to review the judgment on appeal. *Serralles* v. *Esbri*, 103.

14. *Review of construction by state court of state statute.*

The construction, by the highest court of a State, that a license tax imposed on meat packing houses was exacted from a foreign corporation doing both interstate and domestic business only by virtue of the latter, is not open to review in this court. *Armour Packing Co.* v. *Lacy*, 226.

See EQUITY, 3.

B. OF CIRCUIT COURTS.

1. *Cognizance of suit to prevent municipality from improperly issuing bonds where neither Federal question nor diverse citizenship exists.*

The Circuit Court cannot take cognizance of a suit to prevent a munici-

pality from improperly issuing bonds under the circumstances of this case as it does not involve a controversy under the Constitution and laws of the United States and diverse citizenship does not exist. *Waterworks Company* v. *Owensboro*, 38.

2. *Sufficiency of averments of pleading to raise Federal question.*

Where the bill properly sets forth the facts on which a corporation insists that the agreement under which it erected, and is operating, its plant constituted a contract whereby it acquired exclusive rights for a given period and that the obligation of that contract will be impaired by the threatened action of the municipality in erecting its own waterworks, the case is one arising under the Constitution of the United States and of which the proper Circuit Court can take cognizance without regard to the citizenship of the parties. *Water Company* v. *Knoxville*, 22.

3. *Sufficiency of pleading Federal question to confer jurisdiction in absence of diversity of citizenship.*

In order that the Circuit Court may have jurisdiction where diverse citizenship does not exist it must appear, by a statement in legal and logical form, such as good pleading requires, that there is a controversy really involving the construction or application of the Federal Constitution or that the validity or construction of a treaty or statute made under its authority is drawn in question. *Catholic Missions* v. *Missoula County*, 118.

4. *Of action to recover taxes levied by State.*

The Circuit Court has no jurisdiction of an action, where diverse citizenship does not exist, to recover taxes where the right depends upon statutes of the State and no claim to exemption is based on any provision in the Federal Constitution; or on any Federal statute or treaty with Indians; nor can it be assumed from the complaint in this case on any Federal ground that cattle, belonging to a religious organization and roaming over an Indian reservation, are exempt from taxation by the State because the organization devotes its property to purposes of charity among the Indians; nor can such exemption be claimed on the ground that the property is one of the means and instrumentalities of the Federal Government. *Ib.*

5. *Of action by transferee to recover contents of promissory note or chose in action—Of suit to foreclose mortgage—Pleading.*

In construing § 1 of the act of August 13, 1888, which provides that Circuit and District Courts shall not have cognizance of suits to recover the contents of any promissory note or chose in action in favor of an assignee or subsequent holder unless the suit could have been prosecuted in such court, if no assignment or transfer had been made, this court has *held*, that:

A suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract or other chose in action.

A suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill.

The bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if the assignment had not been made.

A suit may be maintained between the immediate parties to a promissory note as indorser or indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract, and in such case the original contract may be considered to ascertain the amount of damages.

Although an action of fraud might be sustained upon the facts involved in an action where the requisite diversity of citizenship exists if the suit is in substance one to foreclose a mortgage, and it appears by the bill that the fraud is a mere incident, the suit is one within the meaning of § 1 of the act of August 13, 1888, and will not lie in a Federal court unless plaintiff's assignor might have maintained the bill had no transfer been made. *Kolze* v. *Hoadley*, 76.

See CONSTITUTIONAL LAW, 17, 19;
COURTS;
JURISDICTION, C 2.

C. OF FEDERAL COURTS GENERALLY.

1. *Power over state instrumentalities.*

When a Federal court acquires jurisdiction of a controversy by reason of the diverse citizenship, it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court. But, as between citizens of the same State, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right. *Waterworks Company* v. *Owensboro*, 38.

2. *Habeas corpus; limitation of jurisdiction to issue writs of.*

As the jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations, a Circuit Court cannot issue the writ to release a citizen from imprisonment by another citizen of the State merely because the imprisonment is illegal. *Carfer* v. *Caldwell*, 293.

See CONSTITUTIONAL LAW.

D. OF STATE COURTS.

See COURTS.

E. Of Equity.
See Equity.

JURORS.
See Constitutional Law, 6, 9.

JURY.
Right of accused person as to racial composition of jury.
While an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that in organizing the grand jury, and empanelling the petit jury, there shall be no exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries; and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto. *Smith* v. *Mississippi*, 162 U. S. 592, 600, followed. An accused person cannot of right demand a mixed jury some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race. *Martin* v. *Texas*, 316.

LAND GRANTS.
See Public Lands.

LIMITATION OF ACTIONS.
See Local Law (Ariz.).

LOCAL LAW.
Arizona. Limitation of actions—Rev. Stat. Arizona, 1901, § 2938. There was no statute of limitations in Arizona prior to 1901 barring a right of action for the recovery of lands by one claiming title against another holding merely by peaceable and adverse possession, and paragraph 2938, Rev. Stat. Arizona, 1901, requiring such an action to be instituted within ten years after the cause of action accrues has no retroactive effect making it applicable to an action commenced prior to its enactment and under the circumstances of this case. *Herrick* v. *Boquillas Cattle Co.*, 96.
Public lands, Rev. Stat. § 891 (see Public Lands. 2), *Howard* v. *Perrin*, 71.
Public Waters, Rev. Stat. § 3199, sec. 1 (see Waters). *Ib.*

California. Inheritance tax (see Constitutional Law, 14). *Campbell* v. *California*, 87.

District of Columbia. Bequests to sectarian institutions (see Wills, 1). *Speer* v. *Colbert*, 130.

Hawaii. Rights of piscary, act of 1846 (see Hawaiian Fisheries). *Carter* v. *Hawaii*, 255.

Illinois. Reclamation of lands—Farm Drainage Act (see States). *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

Kentucky. Effect of absence of accused from trial. It is the law of Kentucky that occasional absence of the accused from the trial from which no injury results to his substantial rights is not reversible error. *Howard* v. *Kentucky*, 164.
Criminal Code, § 281 (see Constitutional Law, 9). *Ib.*
Constitution, § 241, and Statutes of Kentucky, § 6 (see Removal of Causes, 2). *Cincinnati & Texas Pacific Ry.* v. *Bohon*, 221.

Minnesota. Corporations; liability of stockholders. A Minnesota manufacturing corporation having failed, the creditors, a national bank among them, organized a new corporation under the laws of Minnesota for the purchase of the capital stock, evidences of indebtedness and assets of the corporation and for the manufacture of the same articles that it had manufactured. The bank and other creditors exchanged their claims against the old corporation for stock in the new corporation. After the incorporation, and prior to the failure, of the new corporation the laws of Minnesota imposing double liability on stockholders of certain corporations were amended and a new method of procedure for enforcing them was provided. Stockholders of corporations organized exclusively for manufacturing purposes are not subject to double liability. Proceedings having been taken under the statute to enforce the double liability of the stockholders, a receiver was appointed, an assessment determined, and a judgment for the *pro rata* amount obtained against the national bank, which denied liability, claiming that the corporation was organized for manufacturing purposes only, and therefore the stockholders were exempt from double liability; that the provisions in the statute providing for enforcing double liability were unconstitutional under the impairment of obligation clause of the Federal Constitution; and that the original taking of the stock by it as a national bank was *ultra vires*. *Held*, that under the construction given by the Supreme Court of Minnesota to its articles of association the corporation was organized to engage in a purely speculative business in buying and selling the stock and assets of another corporation with power, but without any obligation, to engage independently in a manufacturing business and did not fall within the class of corporations whose stockholders were exempted from liability. *First National Bank* v. *Converse*, 425.

North Carolina. Subjection of mortgaged property of corporations to execution on judgments for tort. Section 1255 of the Code of North Carolina of 1883 provides that mortgages of corporations shall not exempt the property mortgaged from execution for judgments obtained in the state courts against the corporation for torts and certain other causes. A corporation constructed a plant for supplying a city with water, having received exclusive authority therefor from the city. It executed two mortgages, under the foreclosure of the second of which its plant was sold, subject to the first mortgage, to a new corporation, which then executed a further mortgage. Subsequently judgments were rendered in actions brought by property-owners against the new cor-

poration for damages caused, as charged in the complaints and recited in the judgments by its negligence. On foreclosure of the outstanding mortgages the holders of these judgments were given priority over the mortgagees, notwithstanding the contention of the latter that the property-owners had no contractual relations with, or right to maintain these actions against, the water company, that the judgments were not conclusive, the mortgagees not being parties thereto, and that only the equity acquired by the new company was subject to any judgment lien. In affirming the decision, *held*, that:
Under the statute the mortgagees agreed to accept the judgments as conclusive of the amounts due. And the record, showing that negligence was alleged in the complaints and adjudged by the state court, discloses judgments in actions of tort.
One may by contract acquire an opportunity for acts and conduct in which parties other than those with whom the contracts are interested and for negligence in which he is liable to such other parties.
While a citizen may have no individual claim against a company contracting to supply water to a city for its failure to do anything under the contract, he may have a claim against it, after it has entered upon a contract and is engaged in supplying the city with water, for damages resulting from negligence and in such a case the action is not for breach of contract but for a tort.
Section 1255 is not a penal statute, but remedial, and should be liberally construed to give effect to the intent of the legislature to make the property of corporations security against its torts, and imposes upon the plant of a corporation responsibility for torts which cannot be avoided by a conveyance to a new corporation. *Guardian Trust Co.* v. *Fisher*, 57.

Porto Rico. Contracts; medium of payment—Foraker Act—Res judicata. A Porto Rican contracted, in 1894, to pay a certain amount of pesos in money current in the commerce, whatever may be the coinage in circulation at the rate of one hundred centavos of the money in circulation for each peso. Section 11 of the Foraker Act, passed April 12, 1900, provided for the retiring of Porto Rican coin and the substitution thereof of United States coin and for the payment of debts at the rate of sixty cents per peso—and thereafter the debtor offered to pay the obligation at that rate but the Supreme Court of Porto Rico held that he was entitled under the contract to one hundred cents for each peso. The creditor also claimed the matter was *res judicata* under a judgment which had been obtained for an instalment of interest. In reversing this judgment *held*, that:
Appellant having claimed, and been denied, the right to pay the indebtedness at the rate fixed by § 11 of the act of April 12, 1900, this court has jurisdiction under § 35 of that act to review the judgment on appeal.
Under Article 1477 of the Porto Rico Code of Civil Procedure judgments rendered in executory actions are not *res judicata*.
The contract only contemplated such change in coin as might occur while Porto Rico was under the same political power, and a strict and literal

construction of the contract will not be entertained where it does not convey the real meaning of the parties.
The indebtedness should be paid at the rate of sixty cents per peso as fixed by the statute, and neither the provisions of the statute, making United States coin the circulating medium, nor the terms of the contract should be construed as making a centavo (the one-hundredth part of a peso) the equivalent of a cent in United States money. *Serralles* v. *Esbri*, 103.
Foraker Act of April 12, 1900 (see Jurisdiction, A 13). *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE.

MEXICAN LAND GRANTS.

See TITLE.

MILITARY SERVICE.

See COURTS.

MISNOMER.

See WILLS, 2.

MISTAKE.

See REAL PROPERTY.

MONEY.

See LOCAL LAW (PORTO RICO).

MORTGAGE AND DEED OF TRUST.

1. *Easement of light and air created by.*
An owner of two adjoining parcels obtained on one of them a building loan and erected an apartment house so near the line of the property mortgaged that ten feet of his adjoining parcel was absolutely necessary for properly conducting the apartment. During the erection of the building, and after it was evident that such ten feet adjoining was essential thereto, he obtained money for its completion on a second mortgage; subsequently he conveyed both parcels subject to the two mortgages on the parcel built on and also to a separate mortgage on the adjoining vacant parcel. The mortgages conveyed the property, together with the improvements, ways, easements, rights, privileges and appurtenances appertaining thereto. On foreclosure of the mortgages *held*, that although an easement for light and air may not have been created by implication, still, under the wording of the conveyances and the circumstances of the case, an easement was created in favor of the mortgagees of the parcel built on against the original owner, and also against his grantee who took with notice, in the ten-foot strip adjoining the parcel on which the building was erected. *Warner* v. *Grayson*, 257.

2. *Sale on foreclosure.*
It was not necessary that both parcels should be sold as an entirety, but,

adequate proportionate protection as to the easement being provided for the mortgagee of the vacant plot, the plot with the building should be sold together with the easement on the ten feet adjoining as one parcel, and the vacant parcel subject to the easement, as another parcel, separately. *Ib.*

See JURISDICTION, B 5;
LOCAL LAW (N. C.).

MUNICIPAL CORPORATIONS.

1. *Streets; power to grade.*

The power to grade streets given by a statute is not necessarily exhausted by one exercise thereof. *Mead* v. *Portland*, 148.

2. *Maladministration affecting National Government.*

Maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the National Government, unless it involves the infringement of some Federal right. *Waterworks Company* v. *Owensboro*, 38.

See CONSTITUTIONAL LAW, 1, 2, 7, 8, 15; CORPORATIONS, 4; GRANTS; JURISDICTION, B 1; C 1; PRACTICE AND PROCEDURE, 2.

NATIONAL BANKS.

1. *Powers of—Ultra vires acts; taking stock in corporation organized for speculative business.*

A Minnesota manufacturing corporation having failed, the creditors, a national bank among them, organized a new corporation under the laws of Minnesota for the purchase of the capital stock, evidences of indebtedness and assets of the corporation and for the manufacture of the same articles that it had manufactured. The bank and other creditors exchanged their claims against the old corporation for stock in the new corporation. After the incorporation, and prior to the failure of the new corporation the laws of Minnesota imposing double liability on stockholders of certain corporations were amended and a new method of procedure for enforcing them was provided. Stockholders of corporations organized exclusively for manufacturing purposes are not subject to double liability. Proceedings having been taken under the statute to enforce the double liability of the stockholders, a receiver was appointed, an assessment determined, and a judgment for the *pro rata* amount obtained against the national bank, which denied liability, claiming that the corporation was organized for manufacturing purposes only, and therefore the stockholders were exempt from double liability; that the provisions in the statute providing for enforcing double liability were unconstitutional under the impairment of obligation clause of the Federal Constitution; and that the original taking of the stock by it as a national bank was *ultra vires*. *Held*, that a national bank has no power to engage in or promote a purely speculative business or to take stock in a corporation organ-

ized for that purpose, nor can the power to take such stock as a means of protecting itself from loss on preëxisting indebtedness be inferred from the right to accept it as security for a present loan. *First National Bank* v. *Converse*, 425.

2. *Defense of ultra vires in action to subject bank to liability as stockholder not affected by its subscription.*

Notwithstanding its subscription, a national bank, taking stock in a corporation organized for purely speculative purposes, may plead its want of authority so to do as a defense to the claim of a receiver of such corporation for the double liability imposed by a state statute on the stockholders thereof. *Ib.*

NEGLIGENCE.

Burden of proof in action for—Inference of negligence from fact of injury.

In an action for damages for personal injuries while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty. *Looney* v. *Metropolitan R. R. Co.*, 480.

See Local Law (N. C.);
Removal of Causes, 2.

NUISANCE.

1. *Prescription for public nuisance as between States.*

The reasons on which prescription for a public nuisance is denied or granted to individuals against the sovereign power to which he is subject have no application to an independent State; but it would be contradicting a fundamental principle of human nature not to allow effect to the lapse of time. The fixing of a definite time, however, is usually for the legislature and not for the courts. *Missouri* v. *Illinois*, 496.

2. *Unlawful structure; drainage canal as.*

The mere fact that the drainage canal, constructed by authority of Illinois and also under authority of an act of Congress, brought water from the Lake Michigan watershed into the watershed of the Mississippi does not, in the absence of proof of the deleterious effects of such water, render the canal an unlawful structure, the use whereof should be enjoined at the instance of another State in the Mississippi watershed. *Ib.*

See Jurisdiction, A 12.

OPTIONS.

See Contracts, 4.

PARTIES.

See ACTION;
EQUITY, 1.

PATENT FOR LAND.

See PUBLIC LANDS.

PAYMENT.

Voluntary payment.

Payment of an illegal demand with full knowledge of the facts rendering it illegal, without an immediate and urgent necessity therefor, or unless to release or prevent immediate seizure of person or property, is a voluntary payment and not one under duress. *United States* v. *Cuba Mail S. S. Co.*, 488.

See LOCAL LAW (PORTO RICO);
TAXATION, 6.

PENALTIES.

See UNLAWFUL COMBINATIONS.

PISCARY.

See HAWAIIAN FISHERIES.

PLEADING.

See CORPORATIONS, 3;
JURISDICTION, B 2, 3, 5.

POLICE POWER.

See CONSTITUTIONAL LAW, 4;
STATES.

POLLUTION OF WATERS.

See JURISDICTION, A;
NUISANCE.

POOLING OF FREIGHTS.

See INTERSTATE COMMERCE, 2.

PORTO RICO.

See JURISDICTION, A 13;
LOCAL LAW.

POWERS OF CONGRESS.

See INTERSTATE COMMERCE, 1.

PRACTICE AND PROCEDURE.

1. *Effect of renewal of motion to dismiss appeal considered and denied by lower court.*

The renewal in this court of a motion to dismiss the appeal which was considered and denied by the Supreme Court of the Territory amounts to no more than an assignment of error to the action of that court in this regard, to be passed or disposed of as such, if this court otherwise has jurisdiction. *Albright* v. *Sandoval*, 9.

2. *Following state court's construction of state statute.*

If a state statute as construed by the highest court of the State is constitutional this court will follow that construction. *Strickley* v. *Highland Boy Mining Co.*, 527.

3. *Following state court's interpretation of state law.*

Owners of property erected wharves on the line of an adjoining street on the river front in Portland under ordinances adopted by municipal authorities. They made an agreement with a private bridge as to keeping the street open. The city having bought the bridge proceeded under legislative authority to change the approaches and in so doing affected the access to the wharves. The owners sought to enjoin on the ground that it took their property without compensation and impaired the obligation of their contract with the bridge owners. The state court held the ordinances were merely permissive, and that the persons constructing the wharves had no interest or easement in the streets and the proposed change was merely a change of grade of street for which consequential damages were not allowed under the law of the State. *Held*, that while the interpretation of a local ordinance by the highest court of the State is not indisputable, and, even though it may conflict with other decisions of the courts of the State, if it does not conflict with any decision made prior to the inception of the rights involved this court will lean to an agreement with the state court. *Burgess* v. *Seligman*, 107 U. S. 20. The power to grade streets given by a statute is not necessarily exhausted by one exercise thereof; and, where no Federal question is involved, the court must accept the interpretation of the highest court of a State of a local statute as to the extent of the power under a statute authorizing a municipality to change the grade of streets. *Mead* v. *Portland*, 148.

4. *Effect of failure of state court to pass on Federal right or immunity specially set up.*

The failure of the state court to pass on the Federal right or immunity specially set up of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

5. *Disturbance of findings of fact concurred in by Circuit Court and Circuit Court of Appeals.*

The rule that this court will not disturb findings of fact where both the

Circuit Court and the Circuit Court of Appeals have concurred should not be departed from except in a very clear case, especially when those findings are against a charge of fraud in an effort to overthrow a patent of the United States. *United States* v. *Clark*, 601.

See JURISDICTION.

PREFERENCE.

See BANKRUPTCY, 1.

PRESCRIPTION.

See NUISANCE, 1.

PRESUMPTIONS.

See NEGLIGENCE.

PRINCIPAL AND AGENT.

See ACTION.

PRINCIPAL AND SURETY.

See BONDS.

PROMISSORY NOTES.

See JURISDICTION, B 5.

PUBLIC GRANTS.

See GRANTS.

PUBLIC IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 1.

PUBLIC LANDS.

1. *Grant to Atlantic & Pacific R. R. Co.; passage of title under.*

Under the Atlantic & Pacific Railroad Company land grant act of July 27, 1866, title to land within the place limits passed to the company on the completion of the road without any selection or approval thereof by the Secretary of the Interior unless the tract was within the classes excepted by the act. *Howard* v. *Perrin*, 71.

2. *Title by prescription.*

The two-year limitation in § 2941, Rev. Stat. Arizona, relates only to a plaintiff showing no better right than the defendant in possession and does not give to a mere occupant of public land a title by prescription against one subsequently acquiring title from the United States. *Ib.*

3. *Competency as evidence, of certified copies of public records.*

Rev. Stat. § 891 determines the question of competency of the public records

therein referred to but not that of their materiality, and in this case certain certified copies of records and papers in the General Land Office were held competent evidence, and, although some may not have been material, the judgment will not be disturbed in the absence of any prejudice to appellant. *Ib.*

4. *Railroad grants—Exclusion of lands within claimed but undetermined limits of a Mexican grant.*

Lands which at the time a railroad grant attached by the filing and approval of the map of definite location were within the claimed but undetermined limits of a Mexican grant did not pass to the railroad company although within the place limits of its grant, and this notwithstanding the fact that by the final survey and patent they were excluded from the Mexican grant. A survey of the Mexican grant made by the proper officers at the instance of the applicant and before the railroad grant attached included the disputed lands. The applicant did not repudiate the survey, but sought a patent based upon it. It was in legal effect his claim to the lands. The Government, not questioning the right to have such a survey at the time it was applied for and made, ordered a resurvey on the ground that the boundaries shown in the first survey were incorrect. The second survey was made after the railroad grant attached and excluded the lands. *Held*, that the lands were *sub judice* at the time the railroad grant attached and were not included within it. *Southern Pacific Railroad* v. *United States*, 354.

5. *Railroad grants; validity of acts providing for adjustment.*

The acts of March 3, 1887, 24 Stat. 556, of February 12, 1896, 29 Stat. 6, and of March 2, 1896, 29 Stat. 42, do not in providing for adjustment of railroad land grants, amount to a taking of the railroad companies' property without compensation because they confirm sales made to *bona fide* purchasers of lands erroneously patented to railroad companies and require such companies to account for and pay to the Government the amounts received by them from such purchasers up to the regular Government price. *Southern Pacific Railroad* v. *United States*, 341, 354.

6. *Bona fide purchaser of timber lands.*

The rule of law concerning good faith is the same in respect to purchases of land and timber as that which obtains in other commercial transactions, and no one is bound to assume that the party with whom he deals is a wrongdoer; but, on paying full value for the property presented, the title to which is apparently valid and in regard to which there are no suspicious circumstances, he will acquire the rights of a *bona fide* purchaser. *United States* v. *Lumber Co.*, 321.

7. *Effect on bona fide purchaser of constructive fraud in entries of land.*

Equity looks at the substance and not at the mere form in which a transaction takes place, and constructive fraud in the entries of land purchased by one company from another will not be charged to the pur-

chaser where there is nothing which casts imputation on its conduct, or tends to show that it was not a purchaser in good faith, because after the actual purchase and payment therefor, but prior to the final conveyance, an officer of the vendee company became an officer of the vendor company for the purpose of closing up its business. *Ib.*

8. *Effect on bona fide purchaser of constructive fraud in entries of land.*

In order to overthrow a patent on charges of fraud on the part of the entryman, and knowledge thereof on the part of a purchaser, the proof must be clear and fraud or knowledge of fraud in the entry will not be inferred from a merely suspicious circumstance; the purchaser is not bound to hunt for grounds of doubt. (*United States* v. *Detroit Timber & Lumber Co.*, *ante*, p. 321, followed.) *United States* v. *Clark*, 601.

9. *Doctrine of relation as applied to patents for public lands.*

Although the doctrine of relation is but a fiction of law it is resorted to whenever justice requires, and under it patents for lands when issued by the United States become operative as of the dates of the entries, —the inception of the equitable right upon which the patent is based— and the doctrine can be applied to uphold a *bona fide* purchaser of timber notwithstanding the wrongful character of the entries of which he is ignorant. But the doctrine of relation never carries a patent back to the date of any entry other than that on which it is issued. *United States* v. *Lumber Co.*, 321.

10. *Effect of final receipt by Government.*

A final receipt is an acknowledgment by the Government that it has received full pay for the land and holds the title in trust for the entryman and will in due course issue to him a patent, and thereupon he becomes the equitable owner of the land. *Ib.*

11. *Title prior to issuance of patent.*

Until the patent which passes the legal title is issued the legal title remains in the Government and is subject to investigation and determination by the Land Department, but this power will not be exercised arbitrarily or without notice, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has been issued to other parties. *Ib.*

12. *Liability of one for timber cut under contract with entryman whose entry subsequently cancelled.*

The principles of equity exist independently of, and anterior to, all Congressional legislation, and the statutes are either annunciations of those principles or their applications to particular cases, and a party dealing with an entryman the evidences of whose entry are in form good and sufficient is justly entitled to the consideration of a court of equity, and one who has in good faith cut and removed timber under contract with such an entryman whose entry is subsequently cancelled and purchase money retained by the Government, cannot be compelled to account to the Government for the timber cut and removed in reliance on such contract. *Ib.*

PUBLIC NUISANCE.
See NUISANCE, 1.

PUBLIC OFFICERS.
See CONSTITUTIONAL LAW, 15, 16.

PUBLIC RECORDS.
See PUBLIC LANDS, 3.

PUBLIC WORKS.
See BONDS.

QUO WARRANTO.
See JURISDICTION, A 1.

RAILROADS.
See BRIDGES;
INTERSTATE COMMERCE.

RAILROAD LAND GRANTS.
See PUBLIC LANDS, 5.

RATES.
See INTERSTATE COMMERCE, 1, 2.

REAL PROPERTY.
Conveyance by mistake; remedy of owner where vendee has conveyed to bona fide purchaser.
When by mistake a tract of land is conveyed, and the vendee prior to discovery of the mistake, conveys to a *bona fide* purchaser, the original owner is not limited to a suit to cancel the conveyances and reestablish his own title, but may elect to confirm the title of the innocent purchaser and recover of his own vendee the value of the land up to at least the sum received by him. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. *Southern Pacific Railroad* v. *United States*, 341.

REBATES.
See INTERSTATE COMMERCE, 2.

RECLAMATION OF LANDS.
See BRIDGES;
STATES.

RECORDS.
See PUBLIC LANDS, 3.

RECORD ON APPEAL.
See JURISDICTION, A 2.

RELATION.
See PUBLIC LANDS, 9.

RELIGIOUS INSTITUTIONS.
See WILLS, 1.

REMOVAL OF CAUSES.

1. *Separable controversy—Right of removal of one sued jointly.*

The right of a defendant jointly sued with others to remove the case into the Federal court depends upon the case made in the complaint against the defendants jointly, and that right, in the absence of showing a fraudulent joinder, does not arise from the failure of complainant to establish a joint cause of action. In determining whether a case may be removed by one defendant the question is not what the rule of the Federal court may be as whether or not the action is joint, but whether the controversy is one made removable by Congress in § 2 of the act of March 3, 1887, August 13, 1888. A railroad corporation may be jointly sued with the engineer and conductor of one of its trains when it is sought to make the corporation liable only by reason of their negligence, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence. Such a suit is not removable by the corporation, as a separable controversy, even though the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, if the citizenship of the individual defendants sued with the company as joint tort-feasors is identical with that of the plaintiff. *Alabama Southern Ry.* v. *Thompson,* 206; *Cincinnati & Texas Pacific Ry.* v. *Bohon,* 221.

2. *Separable controversy for purposes of removal where corporation and agents sued jointly for negligence under state law.*

A State has the right by its constitution and laws to regulate actions for negligence; and where it provides, as has been done by § 241 of the constitution and § 6 of the statutes of Kentucky, that a plaintiff may proceed jointly or severally against those liable for the injury, nothing in the Federal removal statute converts such an action into a separable controversy for the purposes of removal, because of the presence of a non-resident defendant therein properly joined under the law of the State wherein it is conducting operations and is duly served with process. *Cincinnati & Texas Pacific Ry.* v. *Bohon,* 221.

REPORTS.

Headnotes to opinions; significance of.

The headnotes to the opinions of this court are not the work of the court but are simply the work of the Reporter, giving his understanding of the decision, prepared for the convenience of the profession. *United States* v. *Lumber Co.,* 321.

RES JUDICATA.

See CONSTITUTIONAL LAW, 19;
LOCAL LAW (PORTO RICO).

RESTRAINT OF TRADE.

See CONTRACTS, 1.

SALES.

See CONTRACTS, 4;
MORTGAGE AND DEED OF TRUST, 2;
PUBLIC LANDS, 6.

SECTARIAN INSTITUTIONS.

See WILLS, 1.

SEWAGE.

See JURISDICTION, A 12;
NUISANCE, 2.

STATES.

Police power; reclamation of lands by draining.

Under the laws of Illinois the draining of bodies of land so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general powers it possesses for the common good, and § 40½ of the Farm Drainage Act of that State was a proper exercise of the police power of the State. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

See CONSTITUTIONAL LAW;
COURTS;
JURISDICTION, A 12;
REMOVAL OF CAUSES, 2;
TAXATION;
NUISANCE, 1, 2.

STATUTES.

A. CONSTRUCTION OF.

See BONDS;
INTERSTATE COMMERCE, 1, 2;
JURISDICTION, A 14;
LOCAL LAW (ARIZ.) (N. C.);
PRACTICE AND PROCEDURE.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STATUTE OF LIMITATIONS.
See LOCAL LAW (ARIZ.).

STOCKHOLDERS.
See CORPORATIONS, 3;
LOCAL LAW (MINN.);
NATIONAL BANKS, 1.

STREETS AND HIGHWAYS.
See MUNICIPAL CORPORATIONS, 1;
PRACTICE AND PROCEDURE, 2.

SURETIES.
See BONDS.

TAXATION.

1. *Conclusiveness of state court's decision as to uniformity of tax.*
The court will not interfere with the conclusion expressed by the highest court of the State that under the provisions of the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Armour Packing Co.* v. *Lacy*, 226.

2. *Injunction against collection of tax—Tender as prerequisite.*
The rule that the collection of a tax should not be enjoined unless the amount admitted to be due is tendered does not apply where the amount due is for a period not covered by the injunction or affected by the decree. *Gunther* v. *Atlantic Coast Line*, 273.

3. *State—Classification for taxation—Fourteenth Amendment.*
The Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or through its undoubted power to impose different taxes upon different trades and professions; and imposing a license tax on meat packing houses is not an arbitrary and unreasonable classification which will render the tax void under the Fourteenth Amendment, as denying the equal protection of the laws. Nor is it a denial of equal protection of the law because the tax is not imposed on persons not doing a meat packing house business but selling products thereof, or because it is not imposed on persons engaged in packing articles of food other than meat. *Armour Packing Co.* v. *Lacy*, 226.

4. *State—Exemption of foreign corporation doing business in State.*
Where the highest court of the State has so construed the act, a foreign corporation selling its products in the State, but whose packing establishments are not situated in the State, is not for that reason exempt from such a license tax. *Ib.*

5. *State taxation of obligations of Federal Government.*
The principle that the States cannot tax official agencies of the Federal

Government does not apply to obligations such as checks and warrants available for immediate use. A tax upon them is virtually a tax upon the money which can be drawn upon their presentation. *Hibernia Savings Society* v. *San Francisco*, 310.

6. *Voluntary payment of tax—Recovery.*

Affixing stamps required by the war revenue act of 1898 to the manifest of a vessel in order to obtain the clearance required by § 4197, Rev. Stat., without presenting any claim or protest to the collector of internal revenue from whom the stamps are purchased or to the collector of the port from whom the clearance is obtained, is not a payment under duress, but a voluntary payment, and the amount paid for the stamps cannot be recovered either on the ground of the unconstitutionality of the provisions of the war revenue act requiring the stamps to be affixed, or under the act of May 12, 1900, providing for the redemption of stamps used by mistake. (*Chesebrough* v. *United States*, 192 U. S. 253, followed.) *United States* v. *Cuba Mail S. S. Co.*, 488.

See CONSTITUTIONAL LAW, 2, 14, 15, 16, 19;
JURISDICTION, A 14; B 4.

TERRITORIAL COURTS.

See JURISDICTION, A 1, 3;
TITLE, 1.

TIMBER LANDS.

See EQUITY, 1;
PUBLIC LANDS.

TITLE.

1. *Finding of fact to sustain conclusion of law as to title.*

A finding of a territorial court that one of the parties held title to an undivided interest in the land in controversy acquired by conveyance duly made from his grantors to whom the Mexican Government had conveyed it in 1833, by good and sufficient grant, which had in 1900 been recognized and confirmed by the United States Government, is one of fact and sufficient to sustain the conclusion of law that the title to the land is in that party. *Herrick* v. *Boquillas Cattle Co.*, 96.

2. *Conclusiveness as to, of judgment of Court of Private Land Claims.*

A judgment of the Court of Private Land Claims is not only tantamount to a quitclaim from the United States, subject to the rights of third parties, but it is also conclusive as to existence of a record title upon those claiming to hold under rights originating subsequently to the cession of the territory from Mexico and also upon those claiming title by adverse possession. *Ib.*

See CONTRACTS, 4; LOCAL LAW (ARIZ.);
HAWAIIAN FISHERIES; PUBLIC LANDS, 1, 2, 10, 11;

TORTS.
See LOCAL LAW (N. C.).

TRESPASS.
See EQUITY, 1.

TRIAL.
See JURY;
LOCAL LAW (KY.).

TRUSTS AND TRUSTEES.
See CORPORATIONS, 1; UNLAWFUL COMBINATIONS;
EQUITY, 1; WILLS, 3, 5.

ULTRA VIRES.
See NATIONAL BANKS.

UNIFORMITY OF TAXATION.
See TAXATION, 1.

UNLAWFUL COMBINATIONS

Scope of penalties imposed for—Effect of ceasing to act under unlawful agreement.

A gas company brought an action against a city in Illinois to restrain the enforcement of an ordinance fixing price of gas on the ground that the low price practically amounted to taking property without compensation and that the ordinance impaired contract rights. The case was tried on these questions but they were ignored by the court which decided adversely to the company, although the master had reported that the rates were confiscatory, on the single ground that the company had for a period violated the anti-trust law of Illinois and thereby was not entitled to relief. *Held,* that although parties making an agreement, unlawful by the anti-trust act of Illinois, may while the agreement is in force be subject to its penalties, whenever they cease to act under the agreement the penalties also cease. As the case had been tried on one theory and decided on another and injustice had probably resulted, the judgment should be reversed and sent back so that the terms and duration of the alleged agreement may be ascertained and taken into consideration in determining the case. *Gas Company* v. *Peoria,* 48.

UNLAWFUL STRUCTURE.
See NUISANCE, 2.

VESTED RIGHTS.
See HAWAIIAN FISHERIES, 1.

VOLUNTARY PAYMENT.

See PAYMENT;
TAXATION, 6.

WAIVER.

See CONSTITUTIONAL LAW, 17, 18.

WAR REVENUE ACT.

See TAXATION, 6.

WATERS.

Public—Subterranean stream; percolating waters.

Section 1 of § 3199 Arizona Rev. Stat. 1887, declaring all rivers, creeks and streams of running water in the Territory to be public, does not apply to percolating water oozing through the soil. Whether the section applies to an actual subterranean stream undecided. *Howard* v. *Perrin*, 71.

See BRIDGES; HAWAIIAN FISHERIES;
CONTRACTS, 1; JURISDICTION, A 12.
NUISANCE.

WHARVES.

See PRACTICE AND PROCEDURE, 2.

WILLS.

1. *Bequest to sectarian institution—Character of institutions incorporated under special acts of Congress.*

Institutions incorporated under special acts of Congress take their character from the act incorporating them and bequests to Georgetown College and other institutions in the District of Columbia under a will made within thirty days of the death of the testator held not void, under § 34 of the Maryland Bill of Rights, as the legatees are not sectarian institutions under any of the acts incorporating them. *Speer* v. *Colbert*, 130.

2. *Effect of misnomer of beneficiary where intent is clear.*

There being no incorporated institution as Georgetown University separate from Georgetown College, and as it was evident that the testator intended not to leave the property to an unincorporated institution but to an incorporated one, able to take the bequest, Georgetown College was entitled thereto. *Ib.*

3. *Effect of death or resignation of trustee, to defeat trust.*

The trusts in this will were not such as could be defeated by the death or resignation of the trustees, although the will made it their duty to supervise the administration of the fund. *Ib.*

4. *Bequests; avoidance for uncertainty.*

Courts will not hold a bequest void for uncertainty unless actually compelled

to do so by the language used, and a bequest of a sum not to exceed a specified amount, if otherwise valid, will be taken to be a bequest of that amount. *Ib.*

5. *Trustees; illegal placing of discretion in.*

It is not an illegal placing of discretion in trustees to empower them to establish a scholarship with a bequest not exceeding a specified sum in "some medical college preferably Georgetown University in the District." *Ib.*

WITNESS.

Failure to produce books as contempt of court—Privilege against self-incrimination.

Where a witness is subpœnaed to produce a cash book showing transactions with certain specified persons, a charge of contempt in failing to produce a cash book must be confined to a failure to produce one showing transactions with such persons. The fact that the witness has denied the existence of a cash book showing transactions with certain specified persons does not debar him, when ordered in general terms to produce his cash book, from pleading his privilege to refuse to testify because it might incriminate him. A person against whom criminal proceedings are pending is no more bound to produce books of account than to give testimony to the facts which it discloses. *Ballmann* v. *Fagin*, 186.

WRIT OF PROCESS.

See JURISDICTION, C 2.