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APPEAL AND ERROR.

1. *From Court of Appeals of District of Columbia; law applicable.*

Under the act of February 9, 1893, c. 74, § 8, 27 Stat. 436, appeals from and writs of error to the Court of Appeals of the District of Columbia are governed by § 705, Rev. Stat., as to procedure, and by §§ 997 and 1012, Rev. Stat., as to filing the transcript and assignment of error as from a Circuit Court. *Columbia Heights Realty Co. v. Rudolph*, 547.

2. *Same; application of Rules 35 and 21; assignment of errors.*

Rule 35 refers in terms only to writs of error and appeals under § 5 of the Court of Appeals Act of March 3, 1891, but by Rule 21, it is in effect extended to every writ of error and appeal; and, although errors may not be assigned on a writ of error to the Court of Appeals of the District of Columbia, the court is not under obligation to dismiss the writ in case the assignment of errors are not filed as required by §§ 997 and 1012, Rev. Stat., having by its rules reserved the option to notice plain error whether assigned or not. *Ib.*

3. *Finality of judgment in criminal case for purpose of review.*

A judgment overruling a special plea of immunity under statutory

provisions, with leave to plead over, does not, in a criminal case, terminate the whole matter in litigation, and is not a final judgment to which a writ of error will lie from this court. *Heike v. United States*, 423.

4. *Finality of decree for purpose of review by this court.*

A decree is final for the purposes of review by this court when it terminates the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. (*St. Louis, Iron Mountain & Southern R. R. Co. v. Express Co.*, 108 U. S. 24.) *Ib.*

5. *From adjudication in bankruptcy.*

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6. *What appealable.*

A case cannot be brought to this court by piecemeal; it can only be reviewed here after final judgment. *Heike v. United States*, 423.

7. *When writ of error based on constitutional question will not lie.*

A writ of error based on constitutional question will not lie unless the controversy is a substantial one and the question open to discussion. *Fay v. Crozer*, 455.

8. *Writ of error dismissed where constitutional question foreclosed by prior decision.*

If the identical question has been determined in a suit involving a state statute it is foreclosed although it may subsequently arise in connection with the provision of the constitution of the State under which the statute was enacted, and the writ of error will be dismissed. *Ib.*

9. *Same.*

The questions involved in this case having been determined in *King v. Mullin*, 171 U. S. 404; *King v. West Virginia*, 216 U. S. 92; the writ of error is dismissed. *Ib.*

See PRACTICE AND PROCEDURE, 15;
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Citizens' Savings Bank v. Owensboro, 173 U. S. 636, followed in part in *Citizens' National Bank v. Kentucky*, 443.

Cooper Manuf. Co. v. Ferguson, 113 U. S. 727, followed in *International Textbook Co. v. Pigg*, 91.

- Covington v. First National Bank*, 198 U. S. 100, followed in part in *Citizens' National Bank v. Kentucky*, 443.
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- Gray v. Smith*, 108 U. S. 12, followed in *Will v. Tornabells*, 47.
- In re Chetwood*, 165 U. S. 443, followed in *McClellan v. Carland*, 268.
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- United States v. Rider*, 110 U. S. 729, followed in *Holmgren v. United States*, 509.
- United States v. Welch*, 217 U. S. 333, followed in *United States v. Sewell*, 601.
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CERTIORARI.

1. *Power to issue writ.*

The power of this court to issue writs of certiorari to the Circuit Court of Appeals is not limited to the provisions of the Court of Appeals Act. It may issue them under § 716, Rev. Stat. (*In re Chetwood*,

165 U. S. 443; *Whitney v. Dick*, 202 U. S. 132.) *McClellan v. Carland*, 268.

2. *Scope of review on.*

On certiorari this court will consider only the record in the Circuit Court of Appeals as certified here in return to the writ, and it decides the case solely as presented in such return. *Ib.*

3. *Scope of review on.*

On certiorari granted under the provisions of the Court of Appeals Act of 1891 the entire record is before this court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error issued by it. *Lutcher & Moore Lumber Co. v. Knight*, 257.

4. *To Circuit Court of Appeals; when writ properly granted.*

It is proper for this court to grant certiorari where the questions involve the construction of a prior decree of a United States Circuit Court granting rights of use of railroad tracks and terminal facilities in a great city, and where not only the private interests of the railroad companies and of the shippers, but also the greater interests of the public, require such rights to be settled. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 247.

See JURISDICTION, A 8.

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See COURTS, 3.

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See JURISDICTION, F 2;

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COMBINATIONS IN RESTRAINT OF TRADE.

1. *When legality under common law immaterial.*

Whether a combination is or is not illegal at common law is immaterial if it is illegal under a state statute which does not infringe the Fourteenth Amendment. *Grenada Lumber Co. v. Mississippi*, 433.

2. *Motive and necessity immaterial.*

A combination that is actually in restraint of trade under a statute which is constitutional, is illegal whatever may be the motive or necessity inducing it. *Ib.*

See CONSTITUTIONAL LAW, 7, 8.

COMMERCE.

1. *Term defined.*

Commerce is more than traffic; it is intercourse, and the transmission of intelligence among the States cannot be obstructed or unnecessarily encumbered by state legislation. (*Gibbons v. Ogden*, 9 Wheat. 1; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.) *International Textbook Co. v. Pigg*, 91.

2. *What constitutes commerce between States. Instruction through medium of mails constitutes.*

Intercourse or communication between persons in different States through the mails and otherwise, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States within the commerce clause of the Federal Constitution. *Ib.*

See CONSTITUTIONAL LAW, 1-6, 24;

INTERSTATE COMMERCE.

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See COMBINATIONS IN RESTRAINT OF TRADE, 1.

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See CONSTITUTIONAL LAW, 29.

CONDEMNATION OF LAND.

1. *Assessment of benefits; power of Congress over District of Columbia.*

Under the complete jurisdiction which the United States exercises over the District of Columbia it is within the power of Congress to arbitrarily fix a minimum amount to be assessed for benefits on

property within the assessment district of a street opening proceeding, and so held as to act of June 6, 1900, c. 810, 31 Stat. 668, as to the opening of extension of Eleventh Street. *Columbia Heights Realty Co. v. Rudolph*, 547.

2. *Assessment made under superseding act; effect of statute of limitations as bar.*

Where Congress passes an act superseding a former act in regard to condemnation proceedings and providing for a reassessment of benefits, the reassessment is a continuance of the proceeding under the former act and not a new proceeding; and the assessment for benefits is not barred by the statute of limitations if the proceeding was commenced in time under the original act. *Ib.*

3. *Objections to jurors; timeliness of.*

Objections to qualifications of jurors and their examination and oath in condemnation proceedings must be taken at the time. *Ib.*

4. *Jury; validity of; effect of absence of counsel when impaneled.*

That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury if the statute does not so provide. *Ib.*

5. *Jury; oath of jurors; sufficiency of.*

On condemnation proceedings where the statute directs the court to follow the procedure prescribed for other proceedings, the court will properly vary the oath so as to relate to the property involved, and not to the property in the other proceedings; and if the bill of exceptions does not show that the essential matters were omitted from the oath, the presumption is that the statutory oath was complied with as far as applicable to the proceeding in which it was administered. *Ib.*

6. *Verdict; res judicata effect of part awarding damages on setting aside part assessing benefits.*

Where a verdict of damages and benefits is set aside as to benefits and a reassessment ordered, the remainder of the verdict as to damages alone does not stand as *res judicata* that the property is damaged and there are no benefits that can be assessed under a subsequent act as to procedure for reassessment of benefits. *Ib.*

7. *Review of award by court; scope of.*

Where the jury in a condemnation proceeding exercises its own judgment derived from personal knowledge from viewing the premises

and from expert opinion evidence not taken in presence of the court, the power of the court to review the award is limited to plain errors of law, misconduct or grave error of fact indicating partiality or corruption, and the court is not required to review all the evidence taken before the jury in order to determine whether the award is unreasonable or unjust where no specific wrong or injustice is pointed out. *Ib.*

8. *Payment on; duty of owners to furnish survey.*

Before the Government is required to pay for land held to have been taken by it, the owners should furnish a survey definitely ascertaining the land by metes and bounds. *United States v. Sewell*, 601.

See CONSTITUTIONAL LAW, 17, 18;
PRACTICE AND PROCEDURE, 9, 26.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

To authorize state courts to enforce Federal laws; and to punish perjury committed therein.

Although Congress may not create courts for the States, it may authorize a state court to enforce in a prescribed manner a Federal statute relating to a matter within Federal control, and may punish the offense of perjury if committed in such a proceeding in a state court, as well as in a Federal court. *Holmgren v. United States*, 509.

See CONDEMNATION OF LAND, 1;
CONSTITUTIONAL LAW, 1.

CONSPIRACY.

See CONSTITUTIONAL LAW, 7, 8.

CONSTITUTIONAL LAW.

1. *Commerce clause; power of Congress; police power of State.*

The right to regulate interstate commerce is exclusively vested in Congress, and the States cannot pass any law directly regulating such commerce; but the States may, in the exercise of the police power, pass laws in the interest of public safety which do not interfere directly with the operations of interstate commerce. *Southern Railway Co. v. King*, 524.

2. *Commerce clause; validity of state regulation of operation of railroad trains at crossings.*

The constitutionality of a state statute regulating operation of railroad trains depends upon its effect on interstate commerce; and, in the absence of congressional regulation on the subject, States may make reasonable regulations as to the manner in which trains shall approach, and give notice of their approach to, dangerous crossings, so long as they are not a direct burden upon interstate commerce. *Ib.*

3. *Commerce clause. Statute of State relative to distribution of railroad cars as burden on. Validity of Arkansas act.*

A state statute which compels a railroad to distribute cars for shipments in a manner that subjects it to payment of heavy penalties in connection with its interstate business imposes a burden on its interstate business, and is unconstitutional under the commerce clause of the Constitution; and so held in regard to the Arkansas act and order of the commission in regard to distribution of cars for shipment of freight. *St. Louis S. W. Ry. v. Arkansas*, 136.

4. *Commerce clause; state interference with interstate commerce; what amounts to.*

A transaction is not necessarily interstate commerce because it relates to a transaction of interstate commerce; and so held that a statute of Tennessee prohibiting arrangements within the State for lessening competition is not void as a regulation of interstate commerce as to sales made by persons without the State to persons within the State. *Standard Oil Co. v. Tennessee*, 413.

5. *Commerce clause; burden upon interstate commerce. Gen. Laws, Kansas, 1901, § 1283, held to be.*

A state statute which makes it a condition precedent to a foreign corporation engaging in a legitimate branch of interstate commerce to obtain what practically amounts to a license to transact such business is a burden and restriction upon interstate commerce and as such is unconstitutional under the commerce clause of the Federal Constitution; and so held as to the requirements of § 1283, General Laws of Kansas of 1901, when applied to a foreign corporation carrying on the business of teaching persons in that State by correspondence conducted from the State in which it is organized. *International Textbook Co. v. Pigg*, 91.

6. *Commerce clause; validity of tax imposed on producers of commodities. While taxation discriminating in favor of residents and domestic*

products, and against non-residents and foreign products, might be invalid under the commerce clause, that objection does not apply to uniform taxation on a business which does not discriminate in favor of residents or domestic products. *Brown-Forman Co. v. Kentucky*, 563.

See Infra, 24;
COMMERCE, 2.

7. *Contract impairment clause; police power of State to prohibit agreements in restraint of trade.*

An act harmless when done by one may become a public wrong when done by many acting in concert, and when it becomes the object of a conspiracy and operates in restraint of trade the police power of the State may prohibit it without impairing the liberty of contract protected by the Fourteenth Amendment; and so held that while an individual may not be interfered with in regard to a fixed trade rule not to purchase from competitors, a State may prohibit more than one from entering into an agreement not to purchase from certain described persons even though such persons be competitors and the agreement be made to enable the parties thereto to continue their business as independents. *Grenada Lumber Co. v. Mississippi*, 433.

8. *Contract impairment clause; validity of Mississippi anti-trust statute.*

In this case, in an action by the State in equity and not to enforce penalties, held that the anti-trust statute of Mississippi, § 5002, Code, is not unconstitutional as abridging the liberty of contract as against retail lumber dealers uniting in an agreement, which the state court decided was within the prohibition of the statute, not to purchase any materials from wholesale dealers selling direct to consumers in certain localities. *Ib.*

9. *Contract impairment clause; effect of Kentucky tax act of March 21, 1900.*

Citizens' Savings Bank v. Owensboro, 173 U. S. 636; *Corington v. First National Bank*, 198 U. S. 100, followed to effect that the act of March 21, 1900, of Kentucky, does not impair the obligation of the supposed contract under the Hewitt Bank Act of that State. *Citizens' Nat. Bank v. Kentucky*, 443.

See Infra, 34;
PUBLIC LANDS, 2.

10. *Cruel and unusual punishments; proportioning penalties.*

In interpreting the Eighth Amendment it will be regarded as a precept

of justice that punishment for crime should be graduated and proportioned to the offense. *Weems v. United States*, 349.

11. *Cruel and unusual punishments; definition of.*

What constitutes a cruel and unusual punishment prohibited by the Eighth Amendment has not been exactly defined and no case has heretofore occurred in this court calling for an exhaustive definition. *Ib.*

12. *Cruel and unusual punishments; what prohibited by Eighth Amendment.*

The Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice, and a similar provision in the Philippine bill of rights applies to long continued imprisonment with accessories disproportionate to the offense. *Ib.*

13. *Cruel and unusual punishment; history of adoption of Eighth Amendment.*

The history of the adoption of the Eighth Amendment to the Constitution of the United States and cases involving constitutional prohibitions against excessive fines and cruel and unusual punishment reviewed and discussed in the opinion of the court and the dissenting opinion. *Ib.*

See CRUEL AND UNUSUAL PUNISHMENTS;
PHILIPPINE ISLANDS.

14. *Double jeopardy; re-trial after reversal on appeal by accused not unconstitutional.*

Where one has been tried in a state court for murder and convicted of manslaughter, and, on his own motion, obtains a reversal and new trial, on which he is convicted of a higher offense, and the constitution of the State provides that no one shall be put in second jeopardy for the same offense save on his own motion for new trial or in case of mistrial, there is no question involved of twice in jeopardy under the Constitution of the United States. *Brantley v. Georgia*, 284.

15. *Due process of law; deprivation of property; state law requiring railroads to put in switches at own expense held invalid.*

It is beyond the police power of a State to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It amounts

to deprivation of property without due process of law; and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections. *Missouri Pacific Ry. Co. v. Nebraska*, 196.

16. *Due process of law; deprivation of property; quære as to right of railroad to hearing as to reasonableness of demand by State for switch connections.*

Quære whether even if a statute requiring railroad companies to make such switch connections at their own expense be construed as confined to such demands as are reasonable, it does not deprive the railroad company of its property without due process of law if it does not allow the company a hearing as to the reasonableness of the demand prior to compliance therewith, where, as in this case, failure to comply involves heavy and continuing penalties. *Ib.*

17. *Due process of law—Condemnation of land; valuation of interest.*

While in condemnation proceedings the mere mode of occupation does not limit the right of an owner's recovery, the Fourteenth Amendment does not require a disregard of the mode of ownership, or require land to be valued as an unencumbered whole when not so held. *Boston Chamber of Commerce v. Boston*, 189.

18. *Due process of law—Condemnation of land; valuation of interest.*

Where one person owns the land condemned subject to servitudes to others, the parties in interest are not entitled to have damages estimated as if the land were the sole property of one owner, nor are they deprived of their property without due process of law within the meaning of the Fourteenth Amendment because each is awarded the value of his respective interest in the property. *Ib.*

19. *Due process of law; forfeiture of land for non-payment of taxes.*

There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseized. *Fay v. Crozer*, 455.

20. *Due process of law; validity of statutory provision of new remedy for old liability.*

A statute is not lacking in due process of law within the Fourteenth Amendment if it simply provides a new remedy for collecting a tax liability already legally existing under prior law. *Citizens' Nat. Bank v. Kentucky*, 443.

21. *Due process of law; equal protection of the laws—Validity of Michigan Sales-in-Bulk Act.*

Where this court has held a state statute constitutional it will follow that decision in a case involving the constitutionality of a statute of another State which fundamentally is similar and which is attacked on the same ground by persons similarly situated; and so held that the Michigan Sales-in-Bulk Act of 1905 which is fundamentally similar to the Sales-in-Bulk Act of Connecticut, sustained in *Lemieux v. Young*, 211 U. S. 489, is not unconstitutional under the due process or equal protection clauses of the Fourteenth Amendment. *Kidd, Dater & Co. v. Musselman Grocer Co.*, 461.

See Infra, 26, 34;

CONTEMPT OF COURT.

22. *Equal protection of the law; latitude allowed in taxation.*

The function of taxation is fundamental to the existence of the governmental power of the States, and the restriction against denial of equal protection of the law does not compel an iron rule of equal taxation, prevent variety in methods, or the exercise of a wide discretion in classification. *Brown-Forman Co. v. Kentucky*, 563.

23. *Equal protection of the law; classification in taxation—Validity of Kentucky act of 1906 imposing license tax.*

A classification which is not capricious or arbitrary and rests upon reasonable consideration of difference or policy does not deny equal protection of the law, and so held that the classification in the Kentucky act of 1906, imposing a license tax on persons compounding, rectifying, adulterating, or blending distilled spirits, is not a denial of equal protection of the law because it discriminates in favor of the distillers and rectifiers of straight distilled spirits. *Ib.*

24. *Equal protection of the laws; validity of act imposing license tax where non-residents are not so taxed.*

A State cannot impose an occupation tax on a business conducted outside of the State, and a license tax imposed on those doing a specified business within the State is not unconstitutional as denying equal protection of the law or violating the commerce clause because not imposed on those who carry on the same business beyond the jurisdiction of the State and who ship goods into the State. *Ib.*

25. *Equal protection of the law; discrimination in taxation of resident and non-resident producers.*

While a state tax on goods which discriminates arbitrarily against the

products of that State and in favor of other States denies equal protection of the law, as both classes of goods are within the taxing power of the State, where the license tax for the business of producing the product cannot be imposed on the business beyond the State, it is not discriminatory. *State v. Hoyt*, 71 Vermont, 59, distinguished. *Ib.*

26. *Equal protection of the laws and due process—Validity of occupation tax imposed by Kennedy Act of Texas of 1905.*

An occupation tax on all wholesale dealers in certain specified articles does not on its face deprive wholesale dealers in those articles of their property without due process of law or deny them the equal protection of the law because a similar tax is not imposed on wholesale dealers in other articles, and so held as to the Kennedy Act of Texas of 1905 levying an occupation tax on wholesale dealers in coal and mineral oils. *Southwestern Oil Co. v. Texas*, 114.

27. *Equal protection of the laws—Classification by State for taxing purposes.*

Except as restrained by its own or the Federal Constitution, a State may prescribe any system of taxation it deems best; and it may, without violating the Fourteenth Amendment, classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class. *Ib.*

28. *Equal protection of the laws; differences of treatment allowable.*

The Fourteenth Amendment will not be construed as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. *Standard Oil Co. v. Tennessee*, 413.

29. *Equal protection of the laws; differences in method of determining guilt of corporations and individuals; validity of anti-trust act of Tennessee.*

Where a distinction may be made in the evil that delinquents are forced to suffer, a difference in establishing the delinquency may also be justifiable, and a State may provide for a different method of determining the guilt of a corporation from that of an individual without violating the equal protection clause of the Fourteenth Amendment; and so held as to the provisions in the anti-trust statute of Tennessee of 1903 prohibiting arrangements for lessening competition under which corporations are proceeded against by bill in equity for ouster while individuals are proceeded against as criminals by indictment, trial and punishment on conviction. *Ib.*

30. *Equal protection of the laws; what constitutes denial by State.*

State legislation which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws within the meaning of the Fourteenth Amendment if within the sphere of its operation it affects alike all persons similarly situated. (*Barbier v. Connolly*, 113 U. S. 27.) *Williams v. Arkansas*, 79.

31. *Equal protection of the laws—Reasonableness of classification by State.*

When a state legislature has declared that, in its opinion, the policy of the State requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can clearly see that there is no reason why the law should not be extended to classes left untouched. (*Missouri, Kansas & Texas Railway Co. v. May*, 194 U. S. 267.) *Ib.*

32. *Equal protection of the laws—Validity of classification in Arkansas anti-drumming law of 1907.*

A classification in a state statute prohibiting drumming or soliciting on trains for business for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeon or other medical practitioner" will not be held by this court to be unreasonable and amounting to denial of equal protection of the laws, after it has been sustained by the state court as meeting an existing condition which was required to be met; and so held that the anti-drumming or soliciting law of Arkansas of 1907 is not unconstitutional because it relates to the above classes alone and does not prohibit drumming and soliciting for other purposes. *Ib.*

33. *Equal protection of the laws—Right of foreign corporations to sue and defend in courts of State.*

Quere how far a foreign corporation carrying on business in a State may claim equality of treatment with individuals in respect to the right to sue and defend in the courts of that State; but where a condition precedent to a foreign corporation doing business at all in a State is unconstitutional, the further condition that it cannot maintain any action in the courts of the State until it has complied with such unconstitutional condition is also stricken down as being inseparable therefrom. *International Textbook Co. v. Pigg*, 91.

34. *Equal protection of the laws; liberty of contracts; deprivation of property—Validity of Michigan Sales-in-Bulk Act.*

It is within the police power of the State to require tradesmen making

sales in bulk of their stock in trade to give notice to their creditors and also to prescribe how such notice shall be given, and unless the provisions as to such notice are unreasonable and arbitrary a statute to that effect does not amount to deprivation of property, abridge liberty of contract or deny equal protection of the law within the meaning of the Fourteenth Amendment; nor is the requirement in the Michigan Sales-in-Bulk Act of 1905 that such notice be either personal or by registered mail unreasonable or arbitrary. *Kidd, Dater & Co. v. Musselman Grocer Co.*, 461.

See Supra, 21.

35. *Naturalization; validity of acts authorizing proceedings in state courts.* The validity, under Art. I, § 8, cl. 4, of the Constitution of the acts of Congress regulating naturalization of aliens and authorizing naturalization proceedings in state as well as Federal courts, has never been questioned. *Holmgren v. United States*, 509.

36. *Property; what constitutes a taking.*

Requiring the expenditure of money takes property whatever may be the ultimate return for the outlay. *Missouri Pacific Ry. Co. v. Nebraska*, 196.

See Supra, 34;

EASEMENTS.

Self-incrimination. *See* CONTEMPT OF COURT.

37. *States; effect of Fourteenth Amendment on taxing power.*

The Fourteenth Amendment was not intended to cripple the taxing power of the States or to impose upon them any iron rule of taxation. *Southwestern Oil Co. v. Texas*, 114.

See STATES, 7.

Unreasonable searches and seizures. *See* CONTEMPT OF COURT.

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTEMPT OF COURT.

Commitment for, on failure to comply with order of court; propriety of.

Judgments of the state court committing plaintiffs in error for failure to comply with orders of the court directing them to turn over property to receiver of a corporation, affirmed without opinion notwithstanding contention that the orders amounted to unrea-

sonable searches, required plaintiffs in error to incriminate themselves and denied them due process of law. *Rhodus v. Manning*, 597.

CONTINUANCE.

See MANDAMUS, 3, 4.

CONTRACTS.

1. *Breach; retention of securities held not a breach of agreement to turn certain of them over to Government.*

An agreement on the part of one holding securities in trust, to turn over all that have not been disposed of *bona fide*, is not necessarily broken by a failure to turn over some that are held under claim that they were retained for services and disbursements properly earned and incurred, even if the claim cannot be sustained, if it is made in good faith and the question submitted to the court. *United States v. Carter*, 286.

2. *Performance; duty of Government.*

Where a stipulation for surrender of securities in suit is made by the Government and other parties, even though the Government may make what appears to be bad bargain, the stipulation must be observed if it is actually a contract. *Ib.*

3. *Performance; damages as adequate remedy for breach.*

Damages in a suit at law for failure to comply with the terms of a contract for delivery of crops is an adequate remedy and specific performance and an injunction against delivery to others should have been refused in this case. *Javierre v. Central Altagracia*, 502.

4. *Termination; sufficiency of happening of condition on which dependent.*

A contract for delivery for a term of years, of sugar, terminable meanwhile only in case a specified new Central was built, could not, in this case, be terminated unless the particular Central contemplated was built; it was not enough that a Central called by the same name had been built. *Ib.*

5. *Construction of contract for counsel fees.*

In this case a contract made by the attorney of record with associate counsel for professional services to be paid out of fees in an Indian litigation in the Court of Claims construed; and, although the contract provided that in case the fees were not provided for by legislation but had to be proved each party should prove his fee independently, *held*, that as the attorney of record had collected

without legislation the entire fee originally contemplated and allowable he must account for the amount so collected by him and pay the associate counsel the amount agreed under the contract. *Owen v. Dudley & Michener*, 488.

6. *Effect of legislation providing for competition for public building, to create obligation on part of United States.*

An act of Congress appropriating for a competition for plans of a proposed building, the successful ones to be transmitted to Congress, and which does not appropriate for the building itself creates no obligation on the part of the United States to use the plans of the successful competitor, and so held in regard to the act of March 2, 1901, c. 805, 31 Stat. 922, 938, providing for competition for building for Department of Agriculture. *Lord & Hewlett v. United States*, 340.

7. *Same.*

Under the act of February 9, 1903, c. 528, 32 Stat. 806, providing for plans for a building for the Department of Agriculture not to exceed \$1,500,000, the Secretary of Agriculture was not obliged to use the successful plans under the competition provided in the act of March 2, 1901, and in the absence of a contract to use such plans the architects submitting them have no claim for fees against the United States. *Ib.*

8. *Essentials; meeting of minds; sufficiency of.*

There is no contract unless the minds of the parties meet; and although there were negotiations in this case the architects, having declined to accept a contract submitted by the Department of Agriculture, have no contractual claim against the United States. *Ib.*

9. *Of sale; effect of provision to make voidable and not void.*

Where, as in this case, a condition of forfeiture in a contract of sale of real estate declaring it to be null and void in case of failure on the part of the vendee to perform is plainly for the benefit of the vendor, the word void means voidable with election to the vendor to waive or to insist upon the condition. *Stewart v. Griffith*, 323.

10. *Of sale; differentiated from option to purchase.*

A contract of purchase and sale of real estate, the tenor of which imports mutual undertakings, held in this case to be an absolute contract and not merely an option to purchase. *Ib.*

11. *Of sale; specific performance; waiver of right to compel.*

In this case a letter from an executor to a purchaser under an uncompleted contract of sale held not to be a waiver of right to compel specific performance. *Ib.*

12. *Of sale; effect of agency on right to avoid specific performance of sealed instrument.*

The party executing a sealed contract for purchase of real estate as principal cannot avoid specific performance on the ground that he executed as agent for another not mentioned in the instrument. *Ib.*

See ACTIONS;

COMMERCE, 2;

CONSTITUTIONAL LAW, 7,

8, 9, 34;

EVIDENCE, 4;

EXECUTORS AND ADMINISTRATORS, 1, 2;

LOCAL LAW (PORTO RICO, 4);

PUBLIC LANDS, 2.

CONVERSION.

See EXECUTORS AND ADMINISTRATORS, 3.

CONVEYANCES.

See EXECUTORS AND ADMINISTRATORS;

MORTGAGES AND DEEDS OF TRUST.

CORPORATIONS.

1. *Foreign; what constitutes doing business within State.*

The reasonable construction of a state statute relating to foreign corporations doing business within the State does not include the doing of a single act or the making of a single contract, but does include a continuous series of acts by an agent continuously within the State. (*Cooper Manufacturing Company v. Ferguson*, 113 U. S. 727.) *International Textbook Co. v. Pigg*, 91.

2. *Foreign; what constitutes doing business within State by correspondence school.*

A foreign corporation engaged in teaching by correspondence and which continuously has an agent in a State securing scholars and receiving and forwarding the money obtained from them, is doing business in the State; and such a corporation does business in Kansas within the meaning of § 1283 of the general statutes of that State of 1901. *Ib.*

See BANKRUPTCY;

CONSTITUTIONAL LAW, 5, 29, 33;

JURISDICTION, C 1.

CORRESPONDENCE SCHOOLS.

See COMMERCE, 2;
CONSTITUTIONAL LAW, 5;
CORPORATIONS, 2.

COSTS.

Boundary disputes; division of costs between States.

The division of costs between States in a boundary dispute is one governmental in character in which each party has not a litigious, but a real, interest, for the promotion of the peace and good of the communities, and all expenses including those connected with making the surveys should be borne in common and included in the costs equally divided between the States. *Maryland v. West Virginia*, 577.

COURT AND JURY.

Functions; usurpation by court of functions of jury; what constitutes.

Assertions that parties are not privies to a judgment and cannot plead it as *res judicata* and that a judgment can be collaterally attacked as rendered against one insane at the time, raise questions of law, and where, as in this case, such questions are to be determined on the facts appearing in such judgments and in the pleadings the court does not usurp the functions of the jury by determining that the contentions raised by such assertions are without merit. *Souffront v. Compagnie Des Sucrieries*, 475.

See EVIDENCE, 2.

COURT OF CUSTOMS APPEALS.

For table of fees to be charged in, see p. 611.

COURTS.

1. *Federal; right to abandon jurisdiction.*

A Federal court cannot abandon its jurisdiction already properly obtained of a suit and turn the matter over for adjudication to the state court. (*Chicot County v. Sherwood*, 148 U. S. 529.) *McClellan v. Carland*, 268.

2. *Federal; effect of pendency of suit in state court on jurisdiction.*

The pendency of a suit in the state court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction thereover. *Ib.*

3. *Federal; chancery jurisdiction of; impairment by state legislation.*

The constitutional grant of chancery jurisdiction to Federal courts

in cases where diverse citizenship exists, to determine interests in estates, is the same as that possessed by the Chancery Courts of England and it cannot be impaired by subsequent state legislation creating courts of probate. (*Waterman v. Canal-Louisiana Bank*, 215 U. S. 33.) *Ib.*

4. *Federal; interference with enforcement of state statute.*

A Federal court cannot interfere with the enforcement of a state statute merely because it disapproves of the terms of the act, questions the wisdom of its enactment, or is not sure as to the precise reasons inducing the State to enact it. *Southwestern Oil Co. v. Texas*, 114.

5. *Federal and state; power to determine efficiency of rules of railroad association relative to cars moving in interstate commerce.*

Whether or not the rules of an association of railroads in regard to exchange of cars are efficient to secure just dealings as to cars moved in interstate commerce is a matter within Federal control, and it is beyond the power of a state court to determine that they are inefficient and to compel a member of the association to violate such rules. *St. Louis S. W. Ry. v. Arkansas*, 136.

<i>See</i> CONDEMNATION OF LAND, 7;	FEDERAL QUESTION;
CONGRESS, POWERS OF;	GOVERNMENTAL POWERS, 2, 3;
CONSTITUTIONAL LAW, 35;	JURISDICTION;
CONTEMPT OF COURT;	STATUTES, A 8

CRIMINAL LAW.

1. *Immunity from prosecution under act of February 25, 1903.*

The immunity of one testifying before a grand jury, under the act of February 25, 1903, 32 Stat. 904, as amended June 30, 1906, 34 Stat. 798, does not render him immune from any prosecution whatever, but furnishes a defense which, if improperly overruled, is a basis for reversal of a final judgment of conviction. *Heike v. United States*, 423.

2. *Informations; sufficiency of description of offense under Criminal Code of Philippine Islands.*

Under the Philippine Criminal Code of Procedure a public offense need not necessarily be described in the information in exact words of the statute but only in ordinary and concise language, so as to enable a person of common understanding to understand the charge and the court to pronounce judgment. *Weems v. United States*, 349.

3. *Same.*

A charge describing the accused as a public official of the United States Government of the Philippine Islands and his offense as falsifying a public and official document in this case held sufficient. *Carrington v. United States*. 208 U. S. 1, distinguished. *Ib.*

4. *Perjury in naturalization proceedings; law applicable.*

One falsely swearing in a naturalization proceeding, whether in a state or in a Federal court, is punishable under § 5395, Rev. Stat. *Holmgren v. United States*, 509.

5. *Perjury in naturalization proceedings in state courts; application of Revised Statutes.*

The Revised Statutes were compiled under authority of the act of Congress of June 27, 1866, c. 140, 14 Stat. 75, the purpose of which was revision and codification and not the creation of a new system of laws; and the courts will not infer, in the absence of clearly expressed intent, that Congress in adopting the Revised Statutes intended to change the policy of the laws, *United States v. Rider*, 110 U. S. 729; and so held that §§ 5395 and 5429, adopted from the act of July 14, 1870, c. 254, 16 Stat. 254, in regard to naturalization, should be construed so as to continue to include the penalties for perjury in all naturalization proceedings notwithstanding that, owing to rearrangement, § 5395 was not one of the five preceding sections to § 5429, as was its corresponding section in the act of 1870 to the corresponding section in that act from which § 5429 was taken. *Ib.*

<i>See</i> CONGRESS, POWERS OF;	EVIDENCE, 3, 5;
CONSTITUTIONAL LAW, 10,	JURISDICTION, D 1;
11, 12, 13;	PHILIPPINE ISLANDS;
PRACTICE AND PROCEDURE, 14.	

CRUEL AND UNUSUAL PUNISHMENT.

What constitutes; considerations in determining.

In determining whether a punishment is cruel and unusual as fixed by the Philippine Commission, this court will consider the punishment of the same or similar crimes in other parts of the United States, as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitations formed to establish justice. *Weems v. United States*, 349.

See CONSTITUTIONAL LAW, 10, 11, 12, 13;
PHILIPPINE ISLANDS.

CUSTOMS APPEALS COURT.

For table of fees to be charged in, see p. 611.

DAMAGES.

A judgment of the state court for damages for personal injuries affirmed without opinion. *Morgan's Louisiana & Texas R. & S. Co. v Street*, 599.

See CONSTITUTIONAL LAW, 18;

CONTRACTS, 3;

EASEMENTS, 2.

DEBT.

See PENALTIES AND FORFEITURES.

DEEDS.

See MORTGAGES AND DEEDS OF TRUST.

DEFENSES.

See CRIMINAL LAW, 1;

ESTOPPEL.

DEPRIVATION OF PROPERTY.

See CONSTITUTIONAL LAW, 15, 16, 18, 34;

EASEMENTS.

DISTRICT OF COLUMBIA.

See ACTIONS;

APPEAL AND ERROR, 1;

CONDEMNATION OF LAND, 1.

DOUBLE JEOPARDY.

See CONSTITUTIONAL LAW, 14.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 15-21, 26, 34;

CONTEMPT OF COURT.

EASEMENTS.

1. *Right to compensation for the taking of.*

A private right of way is an easement and is land, and its destruction for public purposes is a taking for which the owner of the dominant estate to which it is attached is entitled to compensation. *United States v. Welch*, 333.

2. *Value; how ascertained.*

The value of an easement cannot be ascertained without reference to

the dominant estate to which it is attached. In this case an award for destruction of a right of way and also for damages to the property to which it was an easement sustained. *Ib.*

EIGHTH AMENDMENT.

See CONSTITUTIONAL LAW, 10-13;
PHILIPPINE ISLANDS, 1.

EMBEZZLEMENT.

See PENALTIES AND FORFEITURES, 4.

EMINENT DOMAIN.

See CONDEMNATION OF LAND;
CONSTITUTIONAL LAW, 17, 18;
EASEMENTS, 1.

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW, 21, 22-34.

EQUITY.

See COURTS, 3;
PUBLIC OFFICERS, 2.

ESCHEAT.

See JUDGMENTS AND DECREES, 4.

ESTATES OF DECEDENTS.

See COURTS, 3;
EXECUTORS AND ADMINISTRATORS;
JUDGMENTS AND DECREES, 4.

ESTOPPEL.

To set up equitable character of claim in action at law by one who has successfully asserted its non-equitable character in a suit in equity.

A party who as defendant in an equity case has successfully asserted that his adversary's claim is not cognizable in equity, cannot subsequently in an action at law brought by him against the plaintiff involving the same matter assert that the same claim set up as a defense is of an equitable character. *Lutcher & Moore Lumber Co. v. Knight*, 257.

See FORGED INSTRUMENTS, 1;
JUDGMENTS AND DECREES, 3.

EVIDENCE.

1. *Admissibility; must conform to pleadings.*

Proof must conform to the allegations and without proper allegations testimony cannot be admitted. *Southern Ry. Co. v. King*, 524.

2. *Credibility of witness—Duty of court to caution jury as to testimony of accomplice.*

While the court should caution the jury against relying on uncorroborated testimony of an accomplice, it cannot assume as a fact, when controverted, that a witness was an accomplice and that his testimony required corroboration. *Holmgren v. United States*, 509.

3. *Of nationality of vessel; sufficiency.*

A copy of the original certificate of enrollment of a vessel certified under seal by the deputy collector of customs of the port where issued which is in form as required by § 4155, Rev. Stat., held to be sufficient under the conditions of identification of the signature and seal and § 882, Rev. Stat., to prove the national character of the vessel upon which the crime was committed by one indicted and tried under § 5339, Rev. Stat. *Wynne v. United States*, 234.

4. *Onus probandi to establish exception in contract dependent upon condition subsequent.*

Where a proviso carves an exception, dependent on a condition subsequent, out of the body of a statute or contract, the party setting up the exception must prove, and has the burden, that the condition subsequent has actually come to pass. *Javierre v. Central Altagracia*, 502.

5. *Presumptions; effect of failure of material witness to appear in behalf of accused.*

The fact that a close friend of the accused, having intimate relations with him in connection with the matter in suit, and whose testimony would benefit him if statements made by accused in regard to their relations are true, does not voluntarily appear in any of several proceedings, but sees the accused convicted, justifies a presumption that his testimony would not have borne out the defense. *United States v. Carter*, 286.

6. *Privileged communications; when communication to attorney properly excluded.*

While the privilege of communication may not extend to the concealment of crime, where an attorney testifies that the vendor dis-

closed to him a plan to make fraudulent conveyances to hinder and delay creditors, but the court finds that the conveyances as made were not under the local law illegal, the testimony is properly excluded, as there is no sufficient foundation to relieve the witness from the professional obligation of secrecy. *Will v. Tornabells*, 47.

7. *Privileged communications—Husband and wife.*

The statements made by the widow of the vendor whose conveyances were attacked to the effect that such conveyances were fraudulent were properly excluded in this case by the lower court. *Will v. Tornabells*, 47.

See CONDEMNATION OF LAND, 7.

EXECUTORS AND ADMINISTRATORS.

1. *Title to real estate in Maryland; right to maintain action for specific performance of contract of sale.*

Under the law of Maryland an executor may maintain an action for specific performance of a contract made by his testator, to convey real estate, and the title conveyed by him is good and valid if he satisfies the Orphans' Court that the entire purchase price is paid, and such condition is a condition subsequent. *Stewart v. Griffith*, 323.

2. *Power to perform contract of sale of real estate.*

A provision giving executors full and complete power over the entire estate, real, personal and mixed, held in this case to imply a devise to the executor of real estate under contract of sale and authority to convey in order to carry out the contract on receiving the balance due. *Id.*

3. *Same.*

As against heirs, real estate under contract of sale made by testator may be treated as personalty and conveyed by the executor safe from any collateral attack upon the will. *Ib.*

See ACTIONS.

FACTS.

See PRACTICE AND PROCEDURE, 11, 12, 13.

FEDERAL QUESTION.

Construction of state statute; nature of questions as to constitutionality and scope.

While a Federal question exists as to whether unequal protection of

the law is afforded by excluding a class from the defense of the statute of limitations, the construction of the statute as to its scope is for the state court and does not present a Federal question. *Standard Oil Co. v. Tennessee*, 413.

See APPEAL AND ERROR, 7;

JURISDICTION;

PRACTICE AND PROCEDURE, 17.

FEES.

For table of fees to be charged in Customs Appeals Court, see p. 611.

See CONTRACTS, 5, 7.

FINAL JUDGMENTS.

See APPEAL AND ERROR, 3, 4.

FOREIGN CORPORATIONS.

See CONSTITUTIONAL LAW, 5, 33;

CORPORATIONS;

JURISDICTION, C 1.

FORGED INSTRUMENTS.

1. *Effect of, to pass property rights.*

As against the true owner, a right of property cannot be acquired by means of a forged written instrument relating to such property, except when the owner has by laches or gross or culpable negligence induced another who proceeds with reasonable care to act in belief that the instrument was genuine or would be so recognized by the owner. *Unity Banking Co. v. Bettman*, 127

2. *Same.*

Where the owner of property which passes only by written transfer has left it with another who has wilfully forged the name of such owner to a transfer of the property, the person taking it acquires no right thereto merely because the property was left with party committing the forgery. *Ib.*

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW.

FRAUD.

1. *Status of one committing.*

One committing a fraud does not become an outlaw and *caput lupinum*. *Stoffela v. Nugent*, 499.

2. *Rescission of transaction for.*

Although one by reason of fraud may have no standing to rescind his transaction, if it is rescinded by one having the right to do so the court should do such justice as is consistent with adherence to law. *Ib*

See PUBLIC OFFICERS, 3.

GARNISHMENT.

See INTERSTATE COMMERCE.

GOVERNMENTAL POWERS.

1. *Instrumentalities; use of.*

A paramount governmental authority may make use of subordinate governmental instruments, without the creation of a distinct legal entity as is the case of the United States and the United States Government of the Philippine Islands. *Weems v. United States*, 349.

2. *Legislative and judicial powers; superiority of judicial power.*

While the judiciary may not oppose its power to that of the legislature in defining crimes and their punishment as to expediency, it is the duty of the judiciary to determine whether the legislature has contravened a constitutional prohibition and in that respect and for that purpose the power of the judiciary is superior to that of the legislature. *Ib*.

3. *Judicial; power of this court to declare Philippine legislation void.*

It is within the power of this court to declare a statute of the Penal Code defining a crime and fixing its punishment void as violative of the provision in the Philippine bill of rights prohibiting cruel and unusual punishment. *Ib*.

HABEAS CORPUS.

Leave to file petition for, denied.

Motion for leave to file a petition for writ of *habeas corpus* on the ground that petitioner was restrained under a judgment of sentence of imprisonment entered by a court without jurisdiction and in disregard of petitioner's constitutional rights, denied without opinion. *Ex parte Morse*, 596.

HAWAII.

See JURISDICTION, D 1, 2.

HUSBAND AND WIFE

See EVIDENCE, 7.

IMMUNITY FROM PROSECUTION.

See CRIMINAL LAW, 1.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW, 9.

IMPRISONMENT FOR DEBT.

See PENALTIES AND FORFEITURES.

INDICTMENT AND INFORMATION.

See CRIMINAL LAW, 2, 3;

PRACTICE AND PROCEDURE, 14.

INFORMATIONS.

See CRIMINAL LAW, 2, 3.

INJUNCTION.

See CONTRACTS, 3;

JURISDICTION, C 4.

INSOLVENT DEBTORS.

See LOCAL LAW (PORTO RICO, 4).

INSTRUCTIONS TO JURY.

Cure of ambiguity by subsequent elucidation.

Where doubt as to meaning of one part of the charge is eliminated by other parts of the charge, there is no reversible error. *Columbia Heights Realty Co. v. Rudolph*, 547.

See EVIDENCE, 2.

INSTRUMENTALITIES OF GOVERNMENT.

See GOVERNMENTAL POWERS, 1.

INTERSTATE COMMERCE.

Attachment and garnishment in state court of cars engaged in interstate commerce.

Although different views have been taken in several States as to the immunity from seizure and garnishment under attachment of cars engaged in interstate commerce and credits due for interstate

transportation, this court holds that it was within the jurisdiction of the state court to seize and hold the cars and credits seized and garnisheed in this case, notwithstanding their connection with interstate commerce. *Davis v. Cleveland, C., C. & St. Louis Ry. Co.*, 157.

See COMMERCE;

CONSTITUTIONAL LAW, 1-6, 24;

COURTS, 5.

INTERVENTION.

See JURISDICTION, A 9.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 23.

JEOPARDY.

See CONSTITUTIONAL LAW, 14.

JUDGMENTS AND DECREES.

1. *Privies; vendees as privies to judgment obtained by their vendors for their protection.*

Where the vendors bring an action in their own name but to protect their vendees, such vendees, although having acquired title prior to the institution of the action are privies thereto and may plead the judgment in such action as *res judicata*; in such a case the general rule that no one whose interest was acquired prior to the institution of the action is privy to the judgment rendered therein does not apply. *Souffront v. Compagnie Des Sucrieries*, 475.

2. *Privies; rights acquired by vendees under judgment obtained by their vendors for their benefit—Spanish law.*

Under Spanish law it was competent for vendors after parting with title to conduct a litigation in their own names for the benefit of their vendees, and therefore a judgment in such a case inures to the benefit of the vendees as between them and the defendants against whom it was rendered and their respective privies. *Ib.*

3. *Privies; status of one prosecuting or defending suit in name of another but for his own benefit.*

One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as

much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. (*Lovejoy v. Murray*, 3 Wall. 1.) *Ib.*

4. *Res judicata*; effect of judgment as against State not party to suit in which rendered.

The judgment in a suit between claimants of an estate and the administrator does not conclude the rights of the State claiming an escheat so long as it is not a party and has not been allowed to intervene on its own behalf. *McClellan v. Carland*, 268.

See APPEAL AND ERROR, 3, 4; RAILROADS;
JURISDICTION, A 10; C 4; STATES, 5.

JUDICIAL AND LEGISLATIVE POWERS.

See GOVERNMENTAL POWERS, 2.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy that directly and not that contingently involved.* Jurisdiction to review, when dependent on amount, is determined by the amount directly and not contingently involved in the decree sought to be reviewed. *Wallach v. Rudolph*, 561.

2. *Same.*

A writ of error will not lie to review a judgment of the Court of Appeals of the District of Columbia confirming assessments for less than \$5,000, even though plaintiff in error may be contingently liable in case the judgment stands for other assessments exceeding \$5,000, in the same proceeding on other lots disposed of pending the proceeding. *Ib.*

3. *Under § 709, Rev. Stat.—When Federal right set up and denied.*

Where the constitutional defenses asserted in the answer, and embraced in the instructions asked and refused, in an action for penalties for violating an order of a state commission are not confined to the reasonableness of the order as such, but also challenge the power of the State to inflict the penalty at all under the circumstances disclosed by the answer, the judgment does not rest on grounds of local law alone, but a Federal right has been set up and denied which gives this court jurisdiction to review the judgment under § 709, Rev. Stat. *St. Louis S. W. Ry. v. Arkansas*, 136.

4. *Under § 709, Rev. Stat.; rights under authority of United States not involved in claim to use of waters of Los Angeles River.*

The decision of the state court in this case was put upon the effect of

the old Spanish or Mexican law as to the rights of the original pueblo of Los Angeles succeeded to by the present city and such rights were merely confirmed and not originated by proceedings under acts of Congress; and therefore, as no rights existing under an authority of the United States were denied, this court has no jurisdiction to review the judgment under § 709, Rev. Stat. *Los Angeles Milling Co. v. Los Angeles*, 217.

5. *Under § 709; no Federal question involved in decision of who entitled to lands under patent.*

Where the state court only decides who is entitled to lands under a patent no Federal question is necessarily involved and this court does not have jurisdiction to review under § 709, Rev. Stat., and in this case no Federal question was decided directly or by implication. *Rogers v. Clark Iron Co.*, 589.

6. *Under § 5 of act of 1891; effect of improper certificate.*

Even though the certificate is not in proper form this court can review the judgment of the Circuit Court under § 5 of the act of 1891 if the record shows clearly that the only matter tried and decided in that court was one of jurisdiction. *Davis v. Cleveland, C., C. & St. Louis Ry. Co.*, 157.

7. *Under act of 1891; effect of suing out writ of error from Circuit Court of Appeals and its dismissal.*

The fact that a writ of error was sued out from the Circuit Court of Appeals to the Circuit Court and dismissed is not a bar to the jurisdiction of this court to review the judgment of the Circuit Court on the question of its jurisdiction as a Federal Court. *Ib.*

8. *To review decision of Circuit Court of Appeals in case brought under Trade-mark Act.*

Under §§ 17, 18, of the Trade-mark Act of February 20, 1905, c. 592, 33 Stat. 724, and § 6 of the Circuit Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 826, a final decision of the Circuit Court of Appeals in a case brought under the Trade-mark Act can only be reviewed by this court upon certiorari. (*Atkins v. Moore*, 212 U. S. 284.) *Hutchinson, Pierce & Co. v. Loewy*, 457.

9. *Of appeal from Circuit Court on judgment of Circuit Court of Appeals in intervention where original case based upon diverse citizenship.*

Jurisdiction in case of an intervention is determined by that of the main case, and where the original foreclosure case was based solely upon diverse citizenship an appeal from the judgment of

the Circuit Court of Appeals on a petition to enforce rights granted by a decree in an intervention in such foreclosure suit does not lie to this court. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 247.

10. *Same*—Introduction of new questions by Circuit Court after case remanded.

Where the Circuit Court of Appeals remands a suit to the Circuit Court with instructions to enter a decree, the Circuit Court cannot, without permission from the Circuit Court of Appeals, introduce new questions into the litigation; and the unwarranted introduction of new questions cannot be made the basis of jurisdiction. The mere construction of a decree involves no challenge of its validity. *Ib.*

11. *Want of jurisdiction to review judgment of state court where Federal question without merit.*

A writ of error to review a judgment of the Supreme Court of Wisconsin on the ground that ch. 90, Laws of 1903 and §§ 2524, 2530, 2533, Wisconsin statutes, are unconstitutional, as denying due process of law and equal protection of the law, dismissed for want of jurisdiction as the Federal question attempted to be raised is without merit. *Vought v. Wisconsin*, 590.

12. *Order to dismiss not reviewable.*

In this case the decision appealed from, being merely an order to dismiss and not a determination on the merits, is not reviewable here and the appeal is dismissed for want of jurisdiction. *Wenar v. Jones*, 593.

13. *Judgment of the Circuit Court dismissing a case for want of jurisdiction affirmed without opinion.* *American National Bank v. Tappan*, 600.

See APPEAL AND ERROR;

GOVERNMENTAL POWERS, 3.

B. OF CIRCUIT COURTS OF APPEALS.

See MANDAMUS, 3, 4;

WRIT AND PROCESS.

C. OF CIRCUIT COURT.

1. *Under act of March 3, 1875, of action against corporation and stockholders; diversity of citizenship.*

Under the act of March 3, 1875, c. 137, 18 Stat. 470, the Circuit Court

may have jurisdiction of an action brought by a resident of one State against a corporation organized under the laws of another State and stockholders of that corporation for the purpose of removing encumbrances from the property of the corporation in the District in which the suit is brought, even if some of the stockholders are not residents of the District in which they are sued. (*Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1.) *Schultz v. Diehl*, 594.

2. *Action on judgment obtained in patent case not a suit upon a patent and court without jurisdiction.*

An action on a judgment obtained in a patent case is not itself a suit upon a patent, and the Circuit Court, in the absence of diverse citizenship, does not have jurisdiction thereof; and so held in regard to an action against directors of an insolvent corporation to make them personally responsible for a judgment recovered in the United States Circuit Court for damages for infringing Letters Patent; nor in this case can the complaint be construed as making such defendants joint tort-feasors with the corporation in infringing the patent so as to confer jurisdiction on the court. *H. C. Cook Co. v. Beecher*, 497.

3. *Of suits under Trade-mark Act.*

In a suit in the Circuit Court under the Trade-mark Act where diverse citizenship does not exist the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the States with foreign nations and the Indian Tribes. *Hutchinson, Pierce & Co. v. Loewy*, 457.

4. *To enjoin collection of judgment of state court.*

Held, without opinion, that the Circuit Court of the United States had no jurisdiction of this action to enjoin the collection of a judgment entered against appellant in the state court. *Illinois Cent. R. R. Co. v. Sheegog*, 599.

See MANDAMUS, 1, 2.

D. OF DISTRICT COURTS.

1. *Under § 5339, Rev. Stat.; application of words "out of the jurisdiction of any particular State."*

The words "out of the jurisdiction of any particular State" as used in § 5339, Rev. Stat., refer to the States of the Union and not to any separate particular community; and one committing the crimes referred to in that section in the harbor of Honolulu in the Territory of Hawaii is within the jurisdiction of the District Court of

the United States for that Territory. *United States v. Bevans*, 3 Wheat. 337, and *Talbot v. Silver Bow County*, 139 U. S. 438, distinguished. *Wynne v. United States*, 234.

2. Under § 5339, Rev. Stat.; effect of § 5 of Organic Act of Hawaii of 1890. While by § 5 of the Organic Act of the Territory of Hawaii of April 30, 1890, c. 339, 31 Stat. 141, the Constitution of the United States and laws not locally inapplicable were extended to Hawaii, and by § 6 of that act laws of Hawaii not repealed and not inconsistent with such Constitution and laws were left in force, nothing in the act operated to leave intact the jurisdiction of the territorial courts over crimes committed in the harbors of Hawaiian ports exclusively cognizable by the courts of the United States under § 5339, Rev. Stat. *Ib.*

E. OF TERRITORIAL COURTS.

See Supra, D 2.

F. OF FEDERAL COURTS GENERALLY.

1. *Appellate jurisdiction; character of.*
Appellate jurisdiction in the Federal system of procedure is purely statutory. (*American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372.) *Heike v. United States*, 423.
2. *Distribution of jurisdiction under Circuit Court of Appeals Act.*
The great purpose of the Court of Appeals Act to which all its provisions are subservient is to distribute jurisdiction of the Federal courts and to relieve the docket of this court by casting on the Circuit Courts of Appeals the duty of deciding cases over which their jurisdiction is final. *Lutcher & Moore Lumber Co. v. Knight*, 257.

See COURTS, 1, 2.

G. OF STATE COURTS.

See INTERSTATE COMMERCE.

H. GENERALLY.

Right of one not personally served to appear specially to contest jurisdiction over property.

- A court cannot without personal service acquire jurisdiction over the person, and it is open to one not served, but whose property is attached, to appear specially to contest the control of the court over such property; and in this case the appearance of the de-

fendant for that purpose was special and not general. *Davis v. Cleveland, C., C. & St. Louis Ry. Co.*, 157.

See CONDEMNATION OF LAND, 1;
PRACTICE AND PROCEDURE, 15.

JURY AND JURORS.

See CONDEMNATION OF LAND, 3, 4;
COURT AND JURY;
PRACTICE AND PROCEDURE, 16.

LACHES.

See FORGED INSTRUMENTS.

LAND GRANTS.

See MAILS;
PUBLIC LANDS.

LEASE.

See MAILS.

LEGISLATIVE AND JUDICIAL POWERS.

See GOVERNMENTAL POWERS, 2.

LIBERTY OF CONTRACT.

See CONSTITUTIONAL LAW, 7, 8, 34.

LICENSE TAX.

See CONSTITUTIONAL LAW, 23-26;
TAXES AND TAXATION, 3.

LIMITATION OF ACTIONS.

See CONDEMNATION OF LAND, 2.

LIS PENDENS.

See LOCAL LAW (PORTO RICO).

LOCAL LAW.

Arkansas. Anti-drumming law of 1907 (see Constitutional Law, 32).
Williams v. Arkansas, 79.
Distribution of freight cars on railroads (see Constitutional Law, 3). *St. Louis S. W. Ry. v. Arkansas*, 136.

- District of Columbia.* Maintenance of action by foreign executor under § 329 of Code (see Actions). *Stewart v. Griffith*, 323.
- Georgia.* Pleading (see Pleading, 1). *Southern Ry. Co. v. King*, 524.
- Hawaii.* Organic act of April 30, 1890, § 5 (see Jurisdiction, D 2). *Wynne v. United States*, 234.
- Kansas.* Gen. Laws of 1901, § 1283, regulating the transaction of business by foreign corporations (see Constitutional Law, 5; Corporations, 2; Statutes, A 1). *International Textbook Co. v. Pigg*, 91.
- Kentucky.* Act of March 21, 1900, § 3, for back assessment of shares of national banks (see Taxes and Taxation, 4). *Citizens' Nat. Bank v. Kentucky* (see Constitutional Law, 9). *Ib.*
Act of 1906, imposing license tax on rectifiers, etc., of distilled spirits (see Constitutional Law, 23). *Brown-Forman Co. v. Kentucky*, 563.
- Maryland.* Right of action by executor to compel specific performance of contract made by testator (see Executors and Administrators, 1). *Stewart v. Griffith*, 323.
- Michigan.* Sales-in-Bulk Act of 1905 (see Constitutional Law, 21, 34). *Kidd, Dater & Co. v. Musselman Grocer Co.*, 461.
- Mississippi.* Anti-trust statute, § 5002, Code (see Constitutional Law, 8). *Grenada Lumber Co. v. Mississippi*, 433.
- Nebraska.* Elevator switch law (see Constitutional Law, 15). *Missouri Pacific Ry. Co. v. Nebraska*, 196.
- Philippine Islands.* Cruel and unusual punishments. Validity of § 56 of Penal Code (see Philippine Islands, 2; Statutes, A 7). *Weems v. United States*, 349.
Provision of bill of rights relative to cruel and unusual punishments (see Constitutional Law, 12). *Ib.*
Imprisonment for debt (see Penalties and Forfeitures). *Freeman v. United States*, 539.
Criminal pleading (see Criminal Law, 2). *Weems v. United States*, 349.
- Porto Rico.* 1. *Cautionary notice of pending suit; necessity for.* In Porto Rico a cautionary notice must be filed in accordance with

the local law in order to render an innocent third party liable to dismembership of ownership by reason of purchase during pendency of a suit to set aside a simulated sale. (*Romeu v. Todd*, 206 U. S. 358). *Todd v. Romeu*, 150.

2. *Cautionary notice of pending suit; right to file.* The right to file a cautionary notice in Porto Rico under the existing mortgage law is not absolute in all cases; in certain classes of cases the right but depends on an express permissive order of the court, and one having knowledge of a suit to dismember title of his grantor in which such order is not a matter of right and no such order is applied for or granted is not bound because he had general knowledge of the pendency of the suit. *Ib.*

3. *Cautionary notice of pending suit. Quære as to effect of want of such notice on one having actual knowledge.* *Quære*, whether one buying property in Porto Rico with actual knowledge of pendency of a suit to dismember title for fraud in which the law gives an absolute right to a cautionary notice without the prerequisite of judicial permission would be liable for the ultimate result of the suit even if no cautionary notice were registered. *Ib.*

4. *Rescission of contracts of insolvent debtors.* Under the law of Porto Rico contracts made by an insolvent debtor which are not fraudulent simulations are not susceptible of rescission merely because they operate to prefer a creditor. *Will v. Tornabells*, 47.

Tennessee. Anti-trust act of 1903 (see Constitutional Law, 4, 29). *Standard Oil Co. v. Tennessee*, 413.

Texas. Kennedy Act of 1905 (see Constitutional Law, 26). *Southwestern Oil Co. v. Texas*, 114.

Wisconsin. Laws of 1903, ch. 90, and §§ 2524, 2530, 2533, Wisconsin statutes (see Jurisdiction, A 11). *Vought v. Wisconsin*, 590.

Generally. See Riparian Rights, 2.

LOS ANGELES RIVER.

See RIPARIAN RIGHTS, 1.

MAILS.

1. *Transportation; compensation to which lessee of land-aided railroad entitled.*

The acts of May 15, 1856, c. 28, 11 Stat. 9; March 3, 1857, c. 99, 11 Stat.

195, and § 13 of the act of July 12, 1876, c. 179, 19 Stat. 78, providing that mails should be transported over railroads constructed in whole or in part by aid of land grants at eighty per cent of the authorized price, apply to such transportation by companies which carry the mail over a leased line which was partly constructed by such aid, although the transporting company itself received no land grant aid from the Government. *Chicago, St. P., Minn. & O. Ry. Co. v. United States*, 180.

2. *Transportation; application of obligation as to rates to be received by land-aided railroads.*

The reduction in mail service which the Government exacts in return for land grants for building railroads attaches to all tracks including those subsequently built, and to all companies operating thereover. *Ib.*

See COMMERCE, 2.

MANDAMUS.

1. *Will not lie to compel Circuit Court to remand case to state court.*

Where the Circuit Court has jurisdiction to determine questions presented on a motion to remand a case to the state court and denies the motion mandamus will not lie to compel it to remand the case. (*In re Pollitz*, 206 U. S. 323.) *Ex parte Gruetter*, 586.

2. *Same.*

In this case diverse citizenship existed but plaintiff moved to remand because the suit was not of a civil nature but for a penalty, the record did not show that plaintiff or defendant resided in the District to which removal was sought, and because defendant did not specifically pray for removal of cause; *held* that the Circuit Court had jurisdiction to determine whether the case was removable and that mandamus would not lie to compel the Circuit Judge to remand the cause. *Ib.*

3. *Power of Circuit Court of Appeals to issue writ to compel Circuit Court to vacate stay of proceedings.*

Where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below; and so held that the Circuit Court of Appeals may issue mandamus to compel the Circuit Court to vacate a stay pending proceedings in the state court to determine and thus render *res judicata* questions within the jurisdiction of the Circuit Court, and involved in the action in which the stay was granted. *McClellan v. Carland*, 268.

4. *Duty of Circuit Court of Appeals to compel Circuit Court to vacate stay of proceedings therein.*

In this case *held* that the Circuit Court of Appeals should have issued an alternative writ of mandamus to, or order to show cause why, the Circuit Judge should not vacate a stay in an action brought against an administrator by one claiming to be an heir while and until proceedings brought by the State for escheat in the state court should be finally determined. *Ib.*

5. *Leave to file petition for, denied.*

Motion for leave to file petition for a writ of mandamus to a Circuit Judge to remand a case removed from the state to the Federal court denied. *Ex parte Coyle & Co.*, 590.

MANDATE.

See PRACTICE AND PROCEDURE, 27.

MARYLAND.

See STATES, 3, 5, 6.

MERCANTILE PURSUITS.

See BANKRUPTCY.

MEXICAN TITLES.

See RIPARIAN RIGHTS, 1.

MORTGAGES AND DEEDS OF TRUST.

1. *Right to enforce; effect of fraud of holder of mortgage.*

Although one holding a mortgage may have fraudulently endeavored to prevent another from acquiring the fee of the property, he may still be entitled to have his mortgage paid if the other finally gets the property. *Stoffela v. Nugent*, 499.

2. *Discharges; setting aside.*

Deeds and discharges of mortgages although different instruments may be parts of one transaction; and one setting aside the deed may also be required to give up the discharge so as to restore other parties to the condition in which they stood prior to the transaction. *Ib.*

NATIONAL BANKS.

See TAXES AND TAXATION, 4, 5, 6.

INDEX.

NATURALIZATION.

See CONSTITUTIONAL LAW, 35;
CRIMINAL LAW, 4, 5.

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See CONDEMNATION OF LAND, 5.

OBJECTIONS.

See PRACTICE AND PROCEDURE, 14, 15, 16.

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See CONSTITUTIONAL LAW, 6, 24, 25, 26, 27;
TAXES AND TAXATION, 3.

OFFICERS.

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See EVIDENCE, 4;
PRACTICE AND PROCEDURE, 12, 13.

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See JUDGMENTS AND DECREES;
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See JURISDICTION, C 2.

PATENTS FOR LAND.

See JURISDICTION, A 5;
PUBLIC LANDS.

PENALTIES AND FORFEITURES.

1. *Imprisonment for debt; construction of provision in Philippine bill of rights.*

Provisions carried into the Philippine bill of rights by the statute of July 1, 1902, c. 1369, 32 Stat. 691, such as "that no person shall be imprisoned for debt," are to be interpreted and enforced according to their well-known meaning at the time. (*Kepner v. United States*, 195 U. S. 100.) *Freeman v. United States*, 539.

2. *Same.*

Statutes relieving from imprisonment for debt, as generally interpreted, relate to commitment of debtors for liability on contracts, and not to enforcement of penal statutes providing for payment of money as a penalty for commission of an offense and the provision against imprisonment for debt in the Philippine bill of rights as contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691. *Ib.*

3. *Imprisonment for debt; alternative of payment to creditor of penalty for embezzlement is not.*

The fact that a money penalty imposed for embezzlement goes to the creditor and not into the public treasury does not make imprisonment for non-payment of the penalty imprisonment for debt; and so held as to § 5, Art. 535, of the Penal Code of the Philippine Islands. *Ib.*

4. *For embezzlement under Philippine Penal Code.*

Where the statute provides a penalty for embezzlement to the amount proved, to go to the creditor, and a subsidiary sentence of imprisonment in case of non-payment, the court may, without violating fundamental principles of justice, find the amount wrongfully converted for the purpose of fixing sentence in the criminal action, leaving the creditor his remedy in a civil action for any excess due him over the amount of the sentence; and so held as to a conviction for embezzlement under Article 535 of the Penal Code of the Philippine Islands. *Ib.*

See CONSTITUTIONAL LAW, 10-13, 19; PHILIPPINE ISLANDS;
CRUEL AND UNUSUAL PUNISHMENTS; STATUTES, A 7.

PERJURY.

See CONGRESS, POWERS OF;
CRIMINAL LAW, 4, 5.

PERSONAL INJURIES.

See DAMAGES.

PHILIPPINE ISLANDS.

1. *Bill of rights; interpretation of provision against cruel and unusual punishments.*
- A provision of the Philippine bill of rights taken from the Constitution of the United States must have the same meaning, and so held that the provision prohibiting cruel and unusual punishments must be interpreted as the Eighth Amendment has been. *Weems v. United States*, 349.
2. *Bill of rights; invalidity of § 56 of Penal Code under provision against cruel and unusual punishments.*

In this case the court declared § 56 of the Penal Code of the Philippine Islands and a sentence pronounced thereunder, void as violating the provision in the Philippine bill of rights contained in § 5 of the act of July 1, 1902, c. 1369, 32 Stat. 691, against the imposition of excessive fines and the infliction of cruel and unusual punishment in so far as being prescribed for an offense by an officer of the Government of making false entries as to payments of 616 pesos in public records, the punishment being a fine of 4,000 pesos, and *cadena temporal* of over twelve years with accessories, such accessories including the carrying of chains, deprivation of civil rights during imprisonment and thereafter perpetual disqualification to enjoy political rights, hold office, etc., and subjection besides to surveillance. *Ib.*

See CONSTITUTIONAL LAW, 12; GOVERNMENTAL POWERS, 1,
CRIMINAL LAW, 2, 3; 3;
CRUEL AND UNUSUAL PUN- PENALTIES AND FORFEITURES.
ISHMENTS;

PLEADING.

1. *Sufficiency; facts and not conclusions must be stated.*
A pleading must state facts and not mere conclusions; and the want of essential definite allegations renders a pleading subject to demurrer. This general rule is also the practice in Georgia. *Southern Ry. Co. v. King*, 524.
2. *Sufficiency to raise question of constitutionality of state statute.*
General statements that a statute is in violation of the commerce clause of the Federal Constitution, is a direct burden on interstate commerce, and impairs the usefulness of the pleader's facilities for that purpose, are mere conclusions and not statements of the facts which make the operation of the statute unconstitutional, and do not raise any defense to a cause of action based on a violation of such statute. *Ib.*

See CRIMINAL LAW, 2, 3;
JUDGMENTS AND DECREES, 1.

PLEADING AND PROOF.

See EVIDENCE, 1.

POLICE POWER.

See CONSTITUTIONAL LAW, 1, 7, 15, 34;
STATES, 7.

PORTO RICO.

See LOCAL LAW.

POSTAL LAWS.

See MAILS.

POTOMAC RIVER.

See STATES, 4, 6.

POWERS OF CONGRESS.

See CONDEMNATION OF LAND, 1;
CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 1.

PRACTICE AND PROCEDURE.

1. *Assignments of error first raised in this court; when considered.*

Although not raised in the courts below, this court will, under Rule 35, consider an assignment of error made for the first time in this court that a sentence is cruel and unusual within the meaning of the Eighth Amendment to the Constitution or of the similar provision in the Philippine bill of rights. *Weems v. United States*, 349.

2. *Errors not assigned; when noticed.*

Although this court may, under Rule 35, notice a plain error not assigned, it will not exercise the authority, if the error did not prejudice plaintiff in error; and so held in this case in regard to the objection that the jury had taken into the jury-room an indictment with indorsement thereon of former conviction, it also having the indorsement thereon of the granting of a new trial. *Holmgren v. United States*, 509.

3. *Noticing errors not assigned; option exercised.*

In this case the court exercises the option reserved under Rules 35 and 21 to examine the record to ascertain if there are errors not assigned as required by §§ 997, 1012, Rev. Stat., but so plain as to demand correction. *Columbia Heights Realty Co. v. Rudolph*, 547.

4. *Noticing errors not assigned; effect of provision in 35th Rule of this court.*

The provision in Rule 35 that this court may at its option notice a plain error not assigned, is not a rigid rule controlled by precedent

but confers a discretion exercisable at any time, regardless of what may have been done at other times; the court has less reluctance to disregard prior examples in criminal, than in civil, cases; and will act under the Rule when rights constitutional in nature or secured under a bill of rights are asserted. *Weems v. United States*, 349.

See APPEAL AND ERROR, 2.

5. *Affirmance on absence of findings to review.*

Where findings are so irresponsive to the case made by the pleadings and the facts as to be no findings at all this court must affirm on account of absence of any findings to review. (*Gray v. Smith*, 108 U. S. 12.) *Will v. Tornabells*, 47.

6. *Disposition of case where law, prescribing sentence appealed from, declared void.*

Where sentence cannot be imposed under any law except that declared unconstitutional or void the case cannot be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings. *Weems v. United States*, 349.

7. *Construction of findings of lower court.*

Findings of the lower court will not, where another construction is possible, be so construed as to cause them to be silent on an issue, so controlling that the cause could not have been decided on the merits without a finding thereon. *Will v. Tornabells*, 47.

8. *Construction of findings of lower court.*

A finding that the evidence does not entitle the plaintiff to a decree that the conveyance attacked was made to hinder and delay creditors construed in this case to mean that there had been a failure of proof and that the judgment did not rest on a conclusion of law that the local law did not afford a remedy if the plaintiff had proved his case. *Ib.*

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

This court accepts the construction of a state statute as to condemnation of land given to it by the state court. *Boston Chamber of Commerce v. Boston*, 189.

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

This court accepts the construction of the state court; and where that court has held that an agreement between retailers not to purchase from wholesale dealers who sell direct to consumers within pre-

scribed localities amounts to a restraint of trade within the meaning of the anti-trust statute of the State, the only question for this court is whether such statute so unreasonably abridges freedom of contract as to amount to deprivation of property without due process of law within the meaning of the Fourteenth Amendment. *Grenada Lumber Co. v. Mississippi*, 433.

11. *Facts; deference to findings concurred in by lower courts.*

Where two courts in succession have concurred in finding that counsel fees are reasonable as allowed, this court does not feel authorized to disturb the finding. *United States v. Carter*, 286.

12. *Same.*

Where both courts below have found on conceded facts the appellant accountable for illicit gains the burden rests on him to satisfy the courts that such conclusion is erroneous as matter of law. *Ib.*

13. *Facts; burden to show error in conclusions reached by lower courts.*

Where both the courts below have concurred upon material facts, the burden rests on the appellant to satisfy this court that such conclusions are erroneous. *Ib.*

14. *Objection to indictment; when to be taken; too late when first made in this court.*

An objection that a count in the indictment does not charge a crime because the wrong name was written in at one point by mistake must be taken in the demurrer or on the trial; unless it substantially affected the rights of the accused it comes too late in this court for the first time. *Holmgren v. United States*, 509.

15. *Objections to jurisdiction; when made too late.*

The objection in an action at law in the Federal courts that a defense is of equitable cognizance cannot be taken for the first time in the appellate court. (*Burbank v. Bigelow*, 154 U. S. 558.) *Lutcher & Moore Lumber Co. v. Knight*, 257.

16. *Objection to conduct of jury; when properly taken.*

An objection to the jury taking an indictment with indorsement of prior conviction thereon into the jury-room should be taken at the trial. If not taken until the motion for new trial, it cannot be reviewed on error. *Holmgren v. United States*, 509.

See CONDEMNATION OF LAND, 3.

17. *Raising Federal question; timeliness of.*

An attempt to raise a Federal question in this court for the first time is too late. *Rogers v. Clark Iron Co.*, 589.

18. *Scope of review in determining constitutionality of state statute.*

Where the penalty provisions of a statute are clearly separable, as in this case, and are not invoked, this court is not called upon to determine whether the penalties are so excessive as to amount to deprivation of property without due process of law and thus render the statute unconstitutional in that respect. *Grenada Lumber Co. v. Mississippi*, 433.

19. *Considerations in determining constitutionality of state statute.*

In determining the constitutionality of a state statute this court considers only so much thereof as is assailed, construed and applied in the particular case. *Ib.*

20. *Considerations in determining validity of state statute.*

In determining the validity of a state statute, this court is concerned only with its constitutionality; it does not consider any question of its expediency. *Ib.*

21. *Scope of review in determining constitutionality of state statute.*

This court will not consider whether a state statute is unconstitutional under provisions of the Constitution other than those set up in the state court even if those provisions be referred to in the assignment of error. *Southwestern Oil Co. v. Texas*, 114.

22. *Scope of review on writ of error. Effect of decision of state court as to constitutional validity of state statute.*

On writ of error this court is not concerned with the question of whether the statute attacked as unconstitutional under the Fourteenth Amendment violates the state constitution if the state courts have held that it does not do so. *Ib.*

23. *Scope of review where state statute attacked on ground of excessive penalties which are not asked for by the State.*

Whether the severity of penalties for non-compliance with a state statute renders it unconstitutional under the Fourteenth Amendment will not be considered in an action in which the State does not ask for any penalties. *Ib.*

24. *Scope of review; assumption of good faith of State in enacting taxing laws.*

This court will not speculate as to the motive of a State in adopting

taxing laws, but assumes—the statute neither upon its face nor by necessary operation suggesting a contrary assumption—that it was adopted in good faith. *Ib.*

25. *Scope of review; discredited contentions not overlooked.*

A court does not overlook contentions advanced which are necessarily untrue if the proposition upon which its decision rests is true. The statement of such proposition answers opposing contentions. *Chicago, St. P., Minn. & O. Ry. Co. v. United States*, 180.

26. *Scope of review; reasonableness of award in condemnation proceedings not determinable.*

Where the evidence in a condemnation proceeding is not before this court and there is no agreed statement of facts this court cannot determine that the trial court erred in holding the award of the jury made on viewing the premises and expert evidence not so unreasonable or unjust as to require a new trial before another jury. *Columbia Heights Realty Co. v. Rudolph*, 547.

See CERTIORARI, 2, 3.

27. *Mandate; direction of, where certiorari to Circuit Court of Appeals granted on ground of failure of that court to consider case.*

Although ordinarily the mandate of this court in cases coming to it on certiorari to the Circuit Court of Appeals goes directly to the Circuit Court, where certiorari is granted, solely on the ground that the Circuit Court of Appeals has failed to consider the case, the judgment will be reversed and the case remanded to that court with instructions to hear and decide it. *Lutcher & Moore Lumber Co. v. Knight*, 257.

See APPEAL AND ERROR, 1;

CONSTITUTIONAL LAW, 21;

PLEADING.

PREFERENCES.

See LOCAL LAW (PORTO RICO), 4).

PRESCRIPTION.

See STATES, 8, 9.

PRESUMPTIONS.

See CONDEMNATION OF LAND, 5; *PRACTICE AND PROCEDURE*, 24;
EVIDENCE, 5; *STATES*, 8.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 6, 7.

PRIVITY.

See JUDGMENTS AND DECREES, 1, 2, 3.

PROCESS.

See JURISDICTION, H;

MANDAMUS;

WRIT AND PROCESS.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 36;

FORGED INSTRUMENTS, 1.

PUBLIC LANDS.

1. *State patents; setting aside.*

Whether a patent is wrongfully issued or can be set aside is a matter to be settled between the State and the patentee, but no individual is authorized to act for the State. *Frellsen & Co. v. Crandell*, 71.

2. *State patents; effect of tender of statutory price to create contract under Federal Constitution.*

Even if the State could set aside a patent for having been issued on illegal or inadequate consideration the matter is between it and the patentee; and, until set aside, one tendering the statutory price does not thereby become entitled to receive such land from the State, nor does the tender create a contract with the State within the protection of the contract clause of the Federal Constitution. *Ib.*

3. *State patents; when land subject to reëntury or purchase.*

Where the state court so holds, public land of a State, as is the case of public land of the United States, held under patent or certificate of location, is not, until such patent or certificate be set aside at the instance of the State, subject to other entry or purchase. *Ib.*

4. *State lands; power of State in administering.*

In the matter of sale and conveyance each State may administer its public lands as it sees fit so long as it does not conflict with rights guaranteed by the Federal Constitution; nor is any State obliged to follow the legislation or decisions of the Federal Government or of any other State. *Ib.*

See MAILS.

PUBLIC OFFICERS.

1. *Accountability as agent.*

A public official may not retain any profit or advantage realized

through an interest in conflict with his fidelity as an agent.
United States v. Carter, 286.

2. *Right of United States to recover profits wrongfully received by officer.*

Where an officer of the United States secretly receives a part of the profits gained by others in the execution of contracts with the Government over which he has control, the United States is entitled to a decree in equity for the amount so received; and this, even if the Government cannot prove fraud or abuse of discretion on the part of such officer or that it has suffered actual loss.
Ib.

3. *Fraud; evidence to establish.*

In determining whether an officer of the Government has been guilty of fraud in connection with contracts under his control, abnormal profits arouse suspicion and demand clear explanation. *Ib.*

4. *Liability to account for unlawful profits; effect of intervention of third party.*

The receipt in any manner as a gratuity or otherwise by an officer of the United States of a share of profits on government contracts under his control through a third party is the same, as to his liability to account therefor, as though he received such share direct from the contractor. *Ib.*

5. *Recovery of unlawful profits received by—Extent of right of recovery by United States—What property subject to.*

When an officer of the United States has received a share of profits from contracts under his control the Government is not limited, in a suit to recover the same and in which it has impounded securities, to the traced securities; the officer must account for all his gains and, under a prayer for other and general relief, the Government is entitled to a judgment for money had and received to its use, and may enforce it against any property of the defendant including property in the hands of third parties with notice of how it was obtained. *Ib.*

See UNITED STATES.

PUBLIC SAFETY.

See CONSTITUTIONAL LAW, 1, 2.

PUBLIC WRONGS.

See CONSTITUTIONAL LAW, 7.

PUNISHMENTS.

See CONSTITUTIONAL LAW, 10-13;
CRUEL AND UNUSUAL PUNISH-
MENTS;

PHILIPPINE ISLANDS;
PENALTIES AND FORFEIT-
URES.

QUO WARRANTO.

Ouster; judgment of affirmed.

A judgment of ouster rendered in *quo warranto* proceeding, 241 Illinois, 155, affirmed without opinion. *Shedd v. Illinois ex rel. Healy*, 597.

RAILROADS.

Terminal facilities; construction of decree granting to one company use and benefit of right of way of another company.

Where a decree gives to another company the equal use and benefit of the right of way of a railroad company in a terminal city on a basis of compensation and apportionment of expenses, with provision for modification in case of unexpected changes, it will be construed as applying to the terminal facilities and the connections with industrial establishments as the same naturally increase in a growing city, and not to the mere right of way as it existed when the decree was entered, and the court has power to provide for the use of such increased facilities on a proportionately increased rental based on the increased valuation. *St. Louis, K. C. & C. R. R. Co. v. Wabash R. R. Co.*, 247.

See CONSTITUTIONAL LAW, 2, INTERSTATE COMMERCE;
3, 15, 16; MAILS;
STATES, 7.

REAL PROPERTY.

See EXECUTORS AND ADMINISTRATORS, 3.

RECEIVERS.

See CONTEMPT OF COURT.

RECORD ON APPEAL.

See APPEAL AND ERROR, 1.

REGULATION OF RAILROADS.

See CONSTITUTIONAL LAW, 2, 3.

REMANDING CASE.

See MANDAMUS, 1, 2, 5.

REMEDIES.

See CONSTITUTIONAL LAW, 20;
CONTRACTS, 3.

REMOVAL OF CAUSES.

1. *Diversity of citizenship of parties—Separability of cause.*

For the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it, in good faith, in his pleadings; and if a plaintiff in a suit for personal injuries joined with the foreign corporation one or more of its employés residents of plaintiff's State as defendants, and the state court holds that the joinder is not improper, the cause is not separable and cannot be removed into the Federal court. (*Alabama & Great Southern R. R. v. Thompson*, 200 U. S. 206; *Railway Co. v. Bohon*, 200 U. S. 221.) *Southern Ry. Co. v. Miller*, 209.

2. *Dismissal on removal to Federal court—Right to re-bring action in state court.*

After a case properly removable and moved into the Federal court has been voluntarily dismissed without action on the merits, the case is again at large and plaintiff may begin it again in any court of competent jurisdiction, including the state court from which the first case was removed into the Circuit Court. *Ib.*

See MANDAMUS, 1, 2, 5.

RESCISSION OF CONTRACT.

See FRAUD, 2;

LOCAL LAW (PORTO RICO, 4);

MORTGAGES AND DEEDS OF TRUST, 2.

RES JUDICATA.

See CONDEMNATION OF LAND, 6;

JUDGMENTS AND DECREES, 1, 4.

RESTRAINT OF TRADE.

See COMBINATIONS IN RESTRAINT OF TRADE;

CONSTITUTIONAL LAW, 7, 8.

REVISED STATUTES.

See ACTS OF CONGRESS;

CRIMINAL LAW, 5.

RIGHT OF WAY.

See EASEMENTS.

RIPARIAN RIGHTS.

1. *Effect of act of March 3, 1851, in respect of rights acquired under Spanish and Mexican titles—Right to waters of Los Angeles River.*

In this case both parties claim under Spanish or Mexican titles, confirmed by proceedings under the act of March 3, 1851, c. 41, 9 Stat. 631. The Federal rights alleged by plaintiff in error to have been violated by the decision of the state court, so far as concerns this act, relate to the extent of the right and ownership of the parties in the use of the Los Angeles River. Plaintiff in error contended that by its grant it became the owner of riparian rights without limitations by any right of the city of Los Angeles to use the water of the river, and that the city by failing to present its claim for the use of such water to the commission under the act of 1851 is foreclosed from now asserting them. The state court held that the city of Los Angeles had the exclusive right to the water of the Los Angeles River from its source to the most southern part of the city. In dismissing a writ of error to review the judgment of the state court, *held* that the act of 1851 was a confirmatory act and not one granting titles; that by its terms it did not originate titles nor make the patents to be issued in pursuance of decisions of the commission conclusive except upon the United States. *Los Angeles Milling Co. v. Los Angeles*, 217.

2. *Law governing rights of patentees under act of March 3, 1851.*

The extent of riparian rights belonging to pueblos or persons receiving patents of the United States in pursuance of the decisions of the commission under the act of March 3, 1851, are matters of local or general law. *Ib.*

RIVERS.

See RIPARIAN RIGHTS;
STATES, 4, 6.

RULES OF COURT.

Rule 21. See APPEAL AND ERROR, 2.
Rule 35. See APPEAL AND ERROR, 2;
PRACTICE AND PROCEDURE, 1-4.

SALES.

See CONSTITUTIONAL LAW, 4;
CONTRACTS, 9-12;
LOCAL LAW (PORTO RICO, 1).

SALES IN BULK.

See CONSTITUTIONAL LAW, 21, 34.

SCIRE FACIAS.

See WRIT AND PROCESS.

SEARCHES AND SEIZURES.

See CONTEMPT OF COURT.

SECOND JEOPARDY.

See CONSTITUTIONAL LAW, 14.

SECRETARY OF AGRICULTURE.

See CONTRACTS, 7.

SELF-INCRIMINATION.

See CONTEMPT OF COURT.

SERVICE OF PROCESS.

See JURISDICTION, H.

SOVEREIGNTY.

See STATES, 10.

SPAIN.

See JUDGMENTS AND DECREES, 2.

SPANISH TITLES.

See RIPARIAN RIGHTS, 1.

SPECIAL APPEARANCE.

See JURISDICTION, H.

SPECIFIC PERFORMANCE.

See ACTIONS;

CONTRACTS, 3, 11, 12;

EXECUTORS AND ADMINISTRATORS, 1, 2.

SPIRITOUS LIQUORS.

See CONSTITUTIONAL LAW, 23.

STARE DECISIS.

See APPEAL AND ERROR, 8, 9;

CONSTITUTIONAL LAW, 21.

STATES.

1. *Boundary lines; rule in adjusting disputes as to.*

Boundary disputes between States should be adjusted according to the facts in the case by the applicable principles of law and equity, and in such manner as will least disturb private rights and titles regarded as settled by the people most affected; and it should be the manifest duty of the lawmaking bodies of adjoining States to confirm such private rights in accordance with such principles. *Maryland v. West Virginia*, 1.

2. *Boundary lines; astronomical correctness; effect of want of.*

Even if a meridian boundary line is not astronomically correct, it should not be overthrown after it has been recognized for many years and becomes the basis for public and private rights of property. *Ib.*

3. *Boundary between Maryland and West Virginia.*

The record in this case sustains the proposition that for many years the people of Maryland, Virginia and West Virginia, have accepted as the boundary between Maryland and West Virginia the line known as the Deakins line, and have consistently adhered to the Fairfax Stone as the starting point of such line, and that none of the steps taken to delimitate the boundary since such line was run in 1788 have been effectual, or such as to disturb the continued possession of people claiming rights up to such Deakins line on the Virginia and West Virginia side. *Ib.*

4. *Boundary; right of West Virginia to Potomac River.*

West Virginia is not entitled to the Potomac River to the north bank thereof. (*Morris v. United States*, 174 U. S. 196.) *Ib.*

5. *Boundary line between Maryland and West Virginia; scope of decree determining.*

The decree in this case should provide for the appointment of commissioners to run and permanently mark, as the boundary line between Maryland and West Virginia, the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border. *Ib.*

6. *Boundaries; southern boundary of Maryland defined.*

Consistently with the continued previous exercise of political jurisdiction by the respective States, Maryland has a uniform southern boundary along Virginia and West Virginia at low-

water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia. *Maryland v. West Virginia*, 577.

7. *Police power; constitutional limitation of.*

There are constitutional limits to what can be required of the owners of railroads under the police power. *Missouri Pacific Ry. Co. v. Nebraska*, 196.

8. *Prescription in, by efflux of time.*

Length of time that raises a right by prescription in private parties, likewise raises such a presumption in favor of States. *Maryland v. West Virginia*, 577.

9. *Prescription; effect on State of long-continued possession of territory.*

Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals. *Maryland v. West Virginia*, 1.

10. *Sovereignty; effect of long-continued possession of territory.*

Whether long continued possession by a State of territory has ripened into sovereignty thereover which should be recognized by other States depends upon the facts in individual cases as they arise.
Ib.

See COMMERCE, 1;

CONGRESS, POWERS OF;

CONSTITUTIONAL LAW, 1, 2,

7, 15, 24, 25, 27, 34, 37;

COSTS;

COURTS, 3;

JUDGMENTS AND DECREES, 4;

PUBLIC LANDS, 1-4;

STATUTES, A 5;

TAXES AND TAXATION, 2, 3.

STATUTES.

A. CONSTRUCTION OF.

1. *Constitutionality; when statute unconstitutional in part invalid in toto—Rule applied to § 1283, Gen. Laws Kansas, 1901.*

Where a statute is unconstitutional in part the whole statute must be deemed invalid except as to such parts as are so disconnected with the general scope that they can be separably enforced; and so held as to the provisions in § 1283 of the General Laws of Kansas of 1901 against a foreign corporation maintaining any action until it has complied with another provision as to filing a detailed statement which is unconstitutional as to foreign corporations engaged in interstate commerce. *International Text-book Co. v. Pigg*, 91.

2. *Who may attack constitutionality.*

One not within a class affected by a statute cannot attack its constitutionality. *Grenada Lumber Co. v. Mississippi*, 433.

3. *Who may attack constitutionality.*

The constitutionality of a statute cannot be attacked because it relates to a certain class by one not of that class. *Citizens' Nat. Bank v. Kentucky*, 443.

4. *Who may attack constitutionality.*

One who would strike down a statute as unconstitutional must show that it affects him injuriously and actually deprives him of a constitutional right. *Southern Ry. Co. v. King*, 524.

5. *Affect of Federal laws on attachment laws of States.*

Neither the enactment of § 5258, Rev. Stat., nor of the Interstate Commerce Law by Congress abrogated the attachment laws of the States. *Davis v. Cleveland, C., C. & St. Louis Ry. Co.*, 157.

6. *Latitude in construction, to meet changed conditions.*

While legislation, both statutory and constitutional, is enacted to remedy existing evils, its general language is not necessarily so confined and it may be capable of wider application than to the mischief giving it birth. *Weems v. United States*, 349.

7. *Separation of penalties united in statute.*

Where the statute unites all the penalties the court cannot separate them even if separable, unless it is clear that the union was not made imperative by the legislature; and in this case held that the penalties of *cadena temporal*, principal and accessories, under art. 56 of the Penal Code of the Philippine Islands are not independent of each other. *Ib.*

8. *Duty to declare void law prescribing cruel and unusual punishment.*

Where the minimum sentence which the court might impose is cruel and unusual within the prohibition of a bill of rights, the fault is in the law and not in the sentence, and if there is no other law under which sentence can be imposed it is the duty of the court to declare the law void. *Ib.*

See CORPORATIONS, 1;

FEDERAL QUESTION;

JURISDICTION, D 1, 2; F 2;

PENALTIES AND FORFEITURES;

PHILIPPINE ISLANDS;

PRACTICE AND PROCEDURE, 9, 10,

18-22;

TAXES AND TAXATION, 3.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STATUTE OF LIMITATIONS.

See CONDEMNATION OF LAND, 2.

STAY OF PROCEEDINGS.

See MANDAMUS, 3, 4.

STOCKBROKERS.

See BROKERS.

STOCKHOLDERS.

See JURISDICTION, C 1;

TAXES AND TAXATION, 2, 4, 5.

STREET EXTENSION.

See CONDEMNATION OF LAND.

TAXES AND TAXATION.

1. *Liability; rules applicable.*

Liability for a tax is not subject to rules applicable to the vendor's equity of one buying without notice. (*Seattle v. Kelleher*, 195 U. S. 351.) *Citizens' Nat. Bank v. Kentucky*, 443.

2. *Liability of bank for taxes of shareholders; power of State to create.*

A state statute may make a bank the agent for its own shareholders in compelling returns, and make it liable for taxes assessed against the shareholders. *Ib.*

3. *License and property taxes; tax held to be former.*

This court accepts the construction by the highest court of the State that the tax imposed by the state statute in this case is not a property tax, but a license tax, imposed on the doing of a business which is subject to the regulating power of the State. *Brown-Forman Co. v. Kentucky*, 563.

4. *National bank; validity of state statute assessing stockholders of.*

An act assessing stockholders of national banks, although illegal as to a class of stockholders not similarly taxed on shares in other

moneyed institutions, may be legal as to the class which is similarly taxed; and so held that § 3 of the act of March 21, 1900, of Kentucky, providing for back assessments on shares of national banks, although not legal as to non-resident stockholders, there having been no statute prior to 1900, providing for the assessing of stock of non-resident stockholders of other moneyed corporations, is not illegal as to resident stockholders, as there were statutory provisions for assessing them for stocks in other moneyed corporations of the State prior to 1900. *Covington v. First National Bank*, 198 U. S. 100, distinguished. *Citizens' Nat. Bank v. Kentucky*, 443.

5. *National bank; liability of transferee of stock.*

Shares of stock of a national bank pass from one holder to another subject to the burden of taxes and if not properly returned for taxation as required by law the liability remains until barred by limitation and may be enforced although the stock has been transferred. *Ib.*

6. *National banks; effect of reduction in par value of shares.*

The fact that the par value of shares of a national bank has been reduced does not affect the right of taxation or to back assess unlisted shares. The shares are the same although reduced. *Ib.*

See CONSTITUTIONAL LAW, 6, 19, 20, 22, 23, 24, 25, 26, 27, 37;

PRACTICE AND PROCEDURE, 24.

TERRITORIAL COURTS.

See JURISDICTION, D 2.

TITLE.

See EXECUTORS AND ADMINISTRATORS, 1, 2;

FORGED INSTRUMENTS, 2.

TRADE.

See COMBINATIONS IN RESTRAINT OF TRADE;

CONSTITUTIONAL LAW, 7, 8.

TRADE-MARKS.

See JURISDICTION, A 8; C 2.

TRADING PURSUITS.

See BANKRUPTCY.

TRANSFER OF STOCK.

See TAXES AND TAXATION, 5.

TRANSPORTATION OF MAILS.

See MAILS.

TRIAL.

See PRACTICE AND PROCEDURE, 14.

UNITED STATES.

Allowance by, of expenses, in suit to recover illicit gains obtained by public officer.

The Government in a suit to recover illicit gains is justified in agreeing to allow the payment of certain expenses connected with the litigation and to determine title of securities which have been impounded by it with difficulty, and in regard to which there are conflicting claims, in consideration of the surrender of the securities to abide the decision of the court in the case. *United States v. Carter*, 286.

See PUBLIC OFFICERS.

UNREASONABLE SEARCHES AND SEIZURES.

See CONTEMPT OF COURT.

VENDOR AND VENDEE.

See CONTRACTS, 9;

JUDGMENTS AND DECREES, 1, 2.

VERDICT.

See CONDEMNATION OF LAND, 6.

VESSELS.

See EVIDENCE, 3.

WAIVER.

See CONTRACTS, 11.

WEST VIRGINIA.

See STATES, 3, 4, 5.

WITNESSES.

See CRIMINAL LAW, 1;

EVIDENCE, 2, 5, 6.

WORDS AND PHRASES.

"*Out of the jurisdiction of any particular State*" as used in § 5339, Rev. Stat. (see Jurisdiction, D 1). *Wynne v. United States*, 234.

WRIT AND PROCESS.

Power of Circuit Court of Appeals to issue writs in aid of jurisdiction.

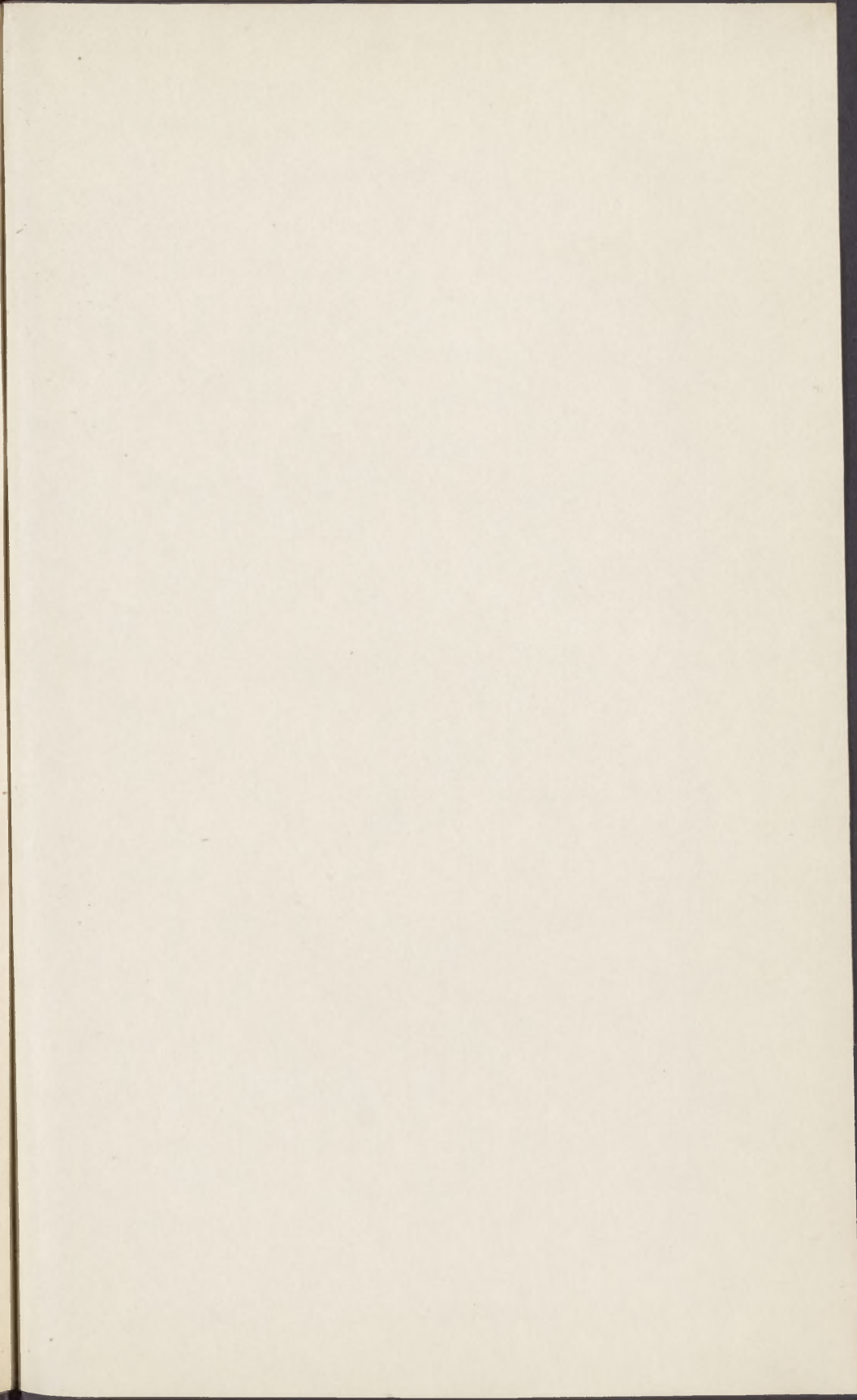
Under § 716, Rev. Stat., and § 12 of the Court of Appeals Act the Circuit Court of Appeals has authority to issue writs of *scire facias* and all writs not specifically provided for by statute and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law. *McClellan v. Carland*, 268.

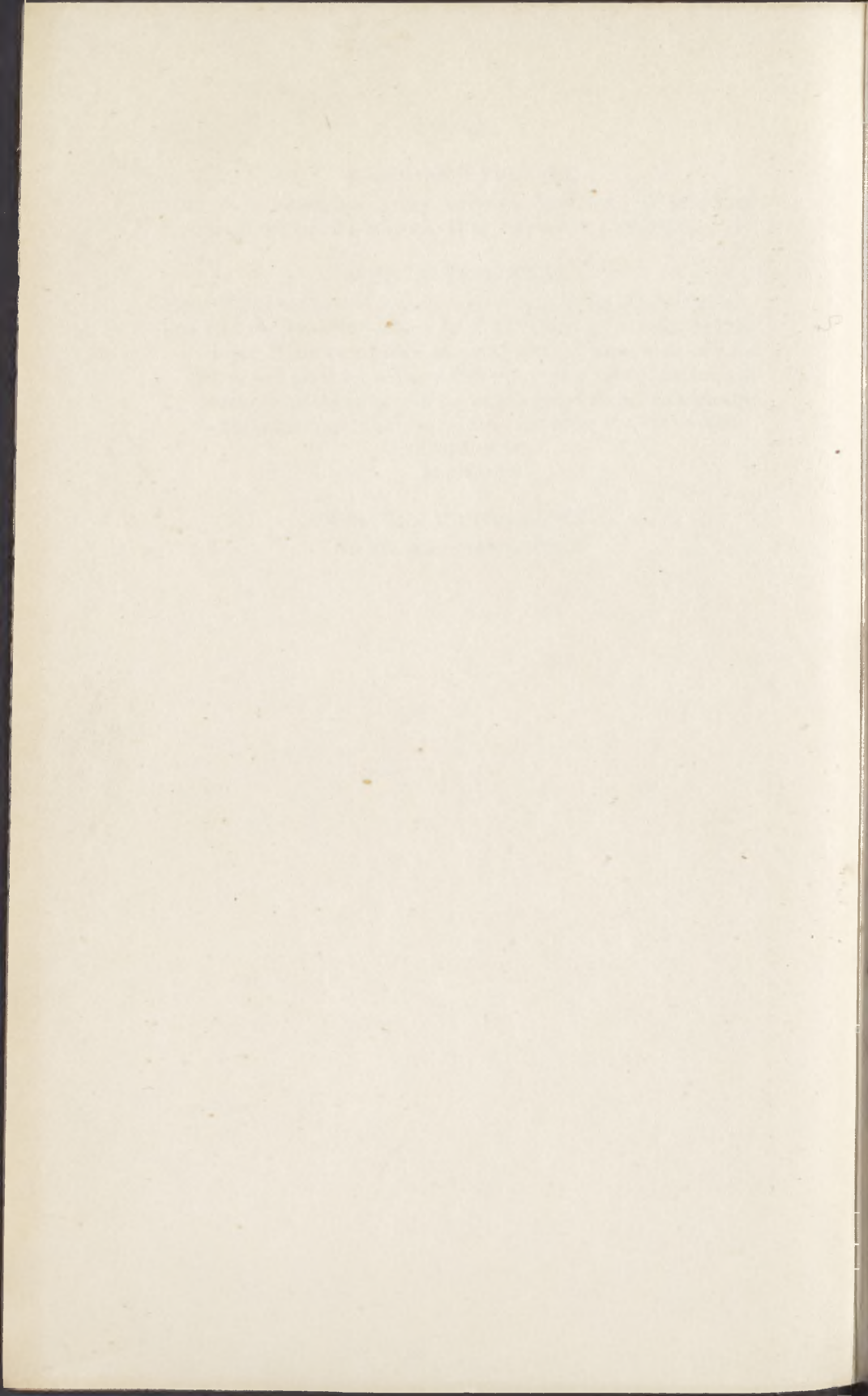
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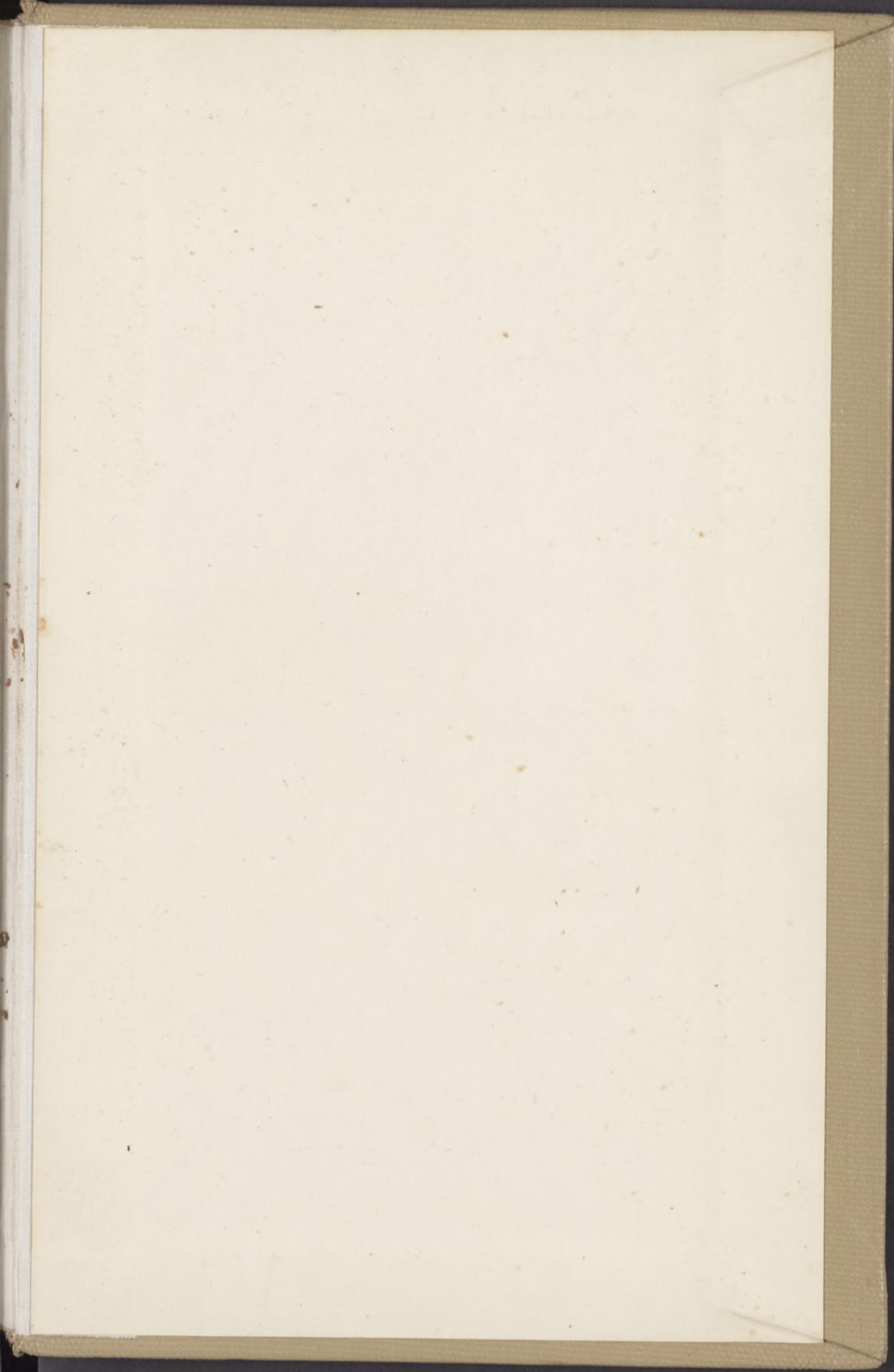
MANDAMUS.

WRITTEN INSTRUMENTS.

See FORGED INSTRUMENTS, 1.







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