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TO THE

MATTERS CONTAINED IN THIS VOLUME.

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1. It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal, when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the principal has, by his declarations or conduct, authorized the opinion, that he had given more extensive powers to his agents than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. *Schimmelpennich* v. *Bayard*.....*264

AGREEMENT.

1. Where property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time, more was bid for the same, than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the *cestui que trust*, to those interested in the proceeds of the sale, for the amount offered at the auction; it is not an objection, on the part of the purchaser, to release him from his contract. *Greenleaf* v. *Queen*.....*138

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ARMY OF THE UNITED STATES.

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2. The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post. The law granting this authority is not imperative; and in the exercise of his discretion, the president may allow or refuse to allow additional rations, as in his opinion he may deem proper.....*Id.*
3. The secretary of war, as the legitimate organ of the president, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command.....*Id.*
4. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.....*Id.*
5. In the discharge of his ordinary duties, the adjutant and inspector general has no distinct command; his duties consist in details of service, and not in active military command .....*Id.*
6. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command, in the neighborhood; he must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer .....*Id.*
7. The general order of the war department, of 16th March 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding each department; it does not relate to the law of the 3d of March 1813, "for the better organization of the general staff of the army."..... .....*Id.*

ASSIGNMENT.

1. In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; but that vested rights, *ad rem* and *in re*, possibilities coupled with an interest and claim, growing out of, and adhering to property, may pass by assignment. *Comegys* v. *Vasse*. 195
2. The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish; the underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction .....*Id.*
3. It is clear, that the right to compensation for damages and injuries, to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation, passed by abandonment to the underwriters upon property, which had been seized or captured .. ..*Id.*
4. The right to indemnity for an unjust capture, on the sovereign, whether remediable in his own courts, or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes by cession to the account of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded .....*Id.*
5. It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice; claims and debts due by a sovereign, are not commonly capable of being so enforced. It does not follow, that because an unjust sentence cannot be reversed, the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration .....*Id.*
6. The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4th, 1800...*Id.*

ATTACHMENT.

1. The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error; Robert Barry appeared, gave special bail, and discharged the attachment; the plaintiff below then filed a declaration in "*indebitatus assumpsit*," "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue; the parties went to trial, and a verdict and judgment were rendered for the defendant in error. *Barry* v. *Foyles* *311

2. The court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved, by the entry of bail, and the appearance of the defendant; the defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment.....*Id.*

AWARD.

1. There is a class of cases, upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod;* but the rule is to be understood, with this qualification; that in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. *Karthaus* v. *Ferrer*.....*222
2. It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it.....*Id.*
3. If a submission be of all actions real and personal, and the award be only of actions personal the award is good; for, it shall be presumed, no actions real were depending between the parties.....*Id.*

BANKRUPT AND BANKRUPTCY.

1. The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them, for damages and injuries, which were to be satisfied under the treaty, by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4th, 1800. *Comegys* v. *Vasse*.....*195

BILLS OF EXCHANGE.

1. The deposit of a bill in one bank, to be transmitted to another for collection, is a common usage, of great public convenience, the effect of which is well understood; and the duty of a bank, receiving such a bill for collection, is precisely the same, whoever may be the owner thereof; and, if it was unwilling to undertake the collection without precise information on the subject, the duty ought to have been declined. *Bank of Washington* v. *Triplett*.....*25
2. By failing to demand payment of a bill held for collection, the bank makes the bill its own, and becomes liable to its real owner for the amount.....*Id.*
3. The allowance of days of grace for the payment of a bill of exchange or note, is now universally understood to enter into every bill or note of a mercantile character; and so, to form a part of the contract, that the bill does not become due until the last day of grace.....*Id.*
4. It is the usage of the Bank of Washington, and of other banks in the district of Columbia, to demand payment of a bill on the day after the last day of grace; and this usage has been sanctioned by the decisions of this court; this usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable.....*Id.*
5. The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed.....*Id.*
6. The failure of a bank, holding a bill, payable after date, for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability.....*Id.*
7. A bill of exchange, payable after date, need not be presented for acceptance, before the day of payment; but, if presented, and acceptance be refused, it is dishonored, and notice must be given. The absence from his home, of the drawee of a bill, payable after date, when the holder of a bill, or his agent, calls with it, for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest.....*Id.*
8. In a suit instituted by the holder of a bill, against the bank, for negligence, in relation to demand, or notice of non-payment of the bill, the court, although required, are not bound to declare the law as between the holder and the drawer. The bank is the agent of the holder, and not of the drawer, and may consequently, so act, as to discharge the drawer, without becoming liable to its principal.....*Id.*
9. A stranger to the drawer and indorser of a non-accepted bill of exchange, may intervene, *supra* protest, to pay the same for the honor of an indorser or drawer. *Konig* v. *Bayard*.*250
10. It is no objection to this intervention, that it has been done at the request and under

the guarantee of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payer of the dishonored bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honor it has been paid ..... *Id.*

11. If A., at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defence which he could have had, if the bill had been paid *supra* protest for the honor of the indorser, by the drawee, and suit brought for the same... *Id.*

12. The court confirm the principle established in the case of Coolidge *v.* Payson, 2 Wheat. 75, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise. *Schimmelpennich* v. *Bayard*.. *264

13 If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill, as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act; they can acquire no right, as the holders of the bill paid *supra* protest, if they were bound to honor it, in the character of drawees..... *Id.*

14. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper, to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the shipper: *Held*, that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipment being received by them..... *Id.*

15. A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment; and the consignee must pay the bills, if the shipment places funds in his hand..... *Id.* *288

See Promissory Notes.

BILLS OF LADING.

1. By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods; this is the result of the principle, that bills of lading are transferrible by indorsement, and thus may pass the property. *Conard* v. *Atlantic Insurance Co.* *386

2. Strictly speaking, no person but the consignee can, by any indorsement of the bill of lading, pass the legal title to the goods; but, if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee..... ... *Id.*

BONDS.

See Pleas and Pleading, 8.

BOTTOMRY AND RESPONDENTIA.

See Respondentia.

CHANCERY AND CHANCERY PRACTICE.

1. Where a bill had been filed against a trustee of real estate, and after his death, administration had been granted to A., who, on the petition of creditors interested in the trust, was also appointed by the court, the substituted trustee; and the court went on to decree, that A., as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding being rather to make the decree against A., in the character of administrator, because he claimed, as administrator under a title derived from the original trustee, and was the person designated by law, to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which, all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. *Greenleaf* v. *Queen*..... *318

2. A decree of a court of chancery is erroneous, which, after ordering certain acts to be

done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of court, and renders the decree ineffectual; and it is no answer to this objection, that it appears by the record in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution..... *Id.*

3. A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so; but this must be done, on demurrer, plea or answer, pointing out the person or persons whom, the defendant insists, ought to be made parties..... *Id.*
4. Where a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary, that the heirs-at-law of the first trustee, shall be parties to the same, as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs..... *Id.*
5. A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* v. *Baker*..... .....*232
6. After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it..... *Id.*
7. A bill had been filed, originally for discovery. and afterward became a bill for relief; the relief prayed for, was a forfeiture, which might be enforced at law: under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as an absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish..... .....*Id.*
8. If, in a case where the loss of a deed or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill fail to demur for such cause, but answer over to the bill, or permit it to be taken for confessed, by default, against him; it seems, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. *Findlay* v. *Hinde*.....*241
9. Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase-money, binding the party to convey the estate; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same..... *Id.*
10. The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants; all the defendants appealed together, to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantors, and vendees; although the defendants, against whom there was a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened..... .....*Id.*
11. Although it seems to be a general rule, that a court of chancery will not decree a specific performance of contracts, except for the purchase of lands, or things which relate to the reality, and are of a permanent nature; and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, contracts of this description, than such as relate to lands. *Mechanics' Bank of Alexandria* v. *Seton*.*299
12. Although an objection for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail, upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting..... .....*Id.*
13. All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but

this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree. The relief granted will always be so modified, as not to affect the interests of others.....*Id.*

14. It is a well-settled rule, that a court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute.....*Id.*
15. If a bill charges a defendant with notice of a particular fact, an answer must be given without a special interrogatory to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. *Mechanics' Bank of Alexandria* v. *Lynn* ..*376
16. The rules which govern the practice of the circuit courts in chancery, have been prescribed by this court; and ought to be observed. *McDonald* v. *Smalley*.....*620

CONCEALMENT.

See Insurance, 15, 16.

CONSIGNMENT AND CONSIGNEES.

See Bills of Lading, 1, 2.

CONSTRUCTION OF STATUTES.

1. It is a general rule in the construction of public statutes, that the word "may," is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. *Minor* v. *Mechanics' Bank of Alexandria*.....*46
2. In the construction of the registry act of Ohio, the term "purchasers" is usually taken in its limited legal sense; it means a complete purchaser, or in other words, a purchaser clothed with a legal title. *Steele's Lessee* v. *Spencer*.....*552
3. Construction of the act of congress, passed March 2d, 1807, entitled "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated." *Jackson* v. *Clark*.....*628
4. The reservation made by the law of Virginia of 1783, ceding to congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami; it is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands, in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio; the residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose.....*Id.*
5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust..*Id.*
6. If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence.....*Id.*
7. If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularity; if this effect be denied to the proviso, it becomes itself a nullity...*Id.*
8. Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented. It cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid; the clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times.....*Id.*

See District of Columbia: Jurisdiction, 1: Lands and Land Titles: Mechanics' Bank of Alexandria.

CONTRACTS.

1. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary inti-

mation clearly appears. *Bank of Columbia* v. *Hagner* *455
2. Although many nice distinctions are to be found in the books, upon the question whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the intimation of courts have strongly favored the latter construction, as being obviously the most just..... *Id.*
3. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal ..... *Id.*
4. An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof..... *Id.*
5. The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller be not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end; but equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed..... *Id.*
6. It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration, performance of the contract on his part, or an offer to perform, at the day specified for the performance; and this averment must be sustained by proof; unless the tender has been waived by the purchaser..... *Id.*
7. If, before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases where the act which is construed into a waiver, occur previous to the time for performance ..... *Id.*
8. The taking possession of property by the vendee, before conveyance, is a circumstance from which may be inferred, that he considered the contract closed, but will not deprive him of the right to relinquish the property, if the vendor cannot make a title, or neglected to do so; after a relinquishment for such causes, the vendee can sustain an action to recover back the purchase-money, if it has been paid..... *Id.*
9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase-money; it would be compelling him to take a lawsuit, instead of the land..... *Id.*
10. When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand..... *Id.*
11. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement, forms no part of it, nor are the propostions or representation which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself. Had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself; if he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. *Tayloe* v. *Riggs* *591
12. When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations, ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support..... *Id.*
13. Where parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself; the safety which is expected from them would be much impaired, if they could be established upon unknown and vague impressions, made by a conversation antecedent to the reduction of the agreement..... *Id.*

See CHANCERY AND CHANCERY PRACTICE.

CORPORATION.

1. A subsequent board of directors of a bank, is to be considered as knowing all the circumstances communicated, or known, to a previous board. *Mechanics' Bank of Alexandria* v. *Seton* *299

COURTS.

1. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury; and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury; but care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. *McLanahan* v. *Universal Insurance Co*.....*170
2. Little stress ought to be laid upon general expressions falling from judges, in the course of trials; where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury; this ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognisance of the jury, but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause; and the like expression, in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court; this is so familiarly known, that it needs only to be stated, to be at once admitted.....*Id.*
3. Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done, on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection. *Elliott* v. *Peirsol*.....*328
4. The construction of words belongs to the court, and the materiality of an alteration in a deed is a question of construction. *Steele's Lessee* v. *Spencer*.....*552
5. Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the court.....*Id.*
6. A special verdict was found by the jury, upon which judgment was to be entered, according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof; a deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record: the court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it. *McArthur* v. *Porter*.*626

COURTS OF THE SEVERAL STATES.

1. If the court of a state had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. *Elliott* v. *Peirsol*.....*328
2. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal; they constitute no justification: and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.....*Id.*
3. The jurisdiction of any court, exercising authority over any subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings.....*Id*
4. The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the state.....*Id*
5. The clerk of Woodford county court had no authority to alter the record of the acknowledgment of a deed, at any time after the record was made.....*Id.*
6. A decree of the supreme court of Ohio ordered that the patentee of a certain tract of land, should within six months, make a deed, &c., with covenants of warranty, conveying a portion of the land held under a patent, to the complainants in that suit, and on the failure

of A. to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him;" the decree of the supreme court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed, as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bonâ fide* deed, of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. *Steele's Lessee* v. *Spencer*.....*552

7. It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. *Waring* v. *Jackson*.*570
8. Where, by the established practice of courts in particular states, the courts, in actions of ejectment, look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the same in these states; and the supreme court of the United States regard those rules of decision in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. *Ross* v. *Barland*.....*655

COURTS OF THE UNITED STATES.

1. The course of prudence and duty, in judicial proceedings in the United States courts, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach; the duty is reciprocal, and will no doubt be met in the spirit of moderation and comity; in the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the constitution, to conform as nearly as possible to the administration of justice in the courts of the several states. *Fullerton* v. *Bank of the United States*.....*604

See COURTS OF THE SEVERAL STATES: JURISDICTION: PRACTICE.

DEEDS.

1. If a deed has not been proved, acknowledged and recorded, and would, therefore, be insufficient against subsequent purchasers, without notice, parties who claim under such deed, have a right to come into a court of equity for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. *Findlay* v. *Hinde*.....*241
2. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot legally be proved by parol testimony. *Elliott* v. *Peirsol*.....*328
3. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.....*Id.*
4. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed.....*Id.*
5. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid.....*Id.*
6. It is the construction of the act of 1810, that the clerks of the county court of Kentucky, have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. *Id.*
7. What the law requires to be done, and appear of record, can only be done, and made to appear, by the record itself, or an exemplification of it. It is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.....*Id.*
9. A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a reconveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodland county court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was

certified as follows:—"Attest, J. McKenny, Jun., Clerk."

"Woodford County, ss.

September 11th, 1813.

"This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

"John McKenny, Jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, nor give validity to the deed..... *Id.*

9. Whether erasures and alterations in a deed are material or not, is a question for the court. *Steele's Lessee* v. *Spencer*.....*552
10. The provisions of the laws of Kentucky relative to the acknowledgment of deeds. *Elliott* v. *Peirsol*..... .....*328

See Feme Covert, 1.

DEPOSITIONS.

1. The authority given by the act of congress of 24th September 1789, ch. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. *Bell* v. *Morrison*.....*351
2. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed.....*Id.*
3. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with: and no presumption will be admitted, to supply any defect in the taking the deposition.....*Id.*

DEVISE.

1. The testator devised to his son, Joseph Eden, certain portions of his estate in New York, among which were the premises sought to be recovered, to him, his heirs, executors and administrators for ever; in like manner, he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and added the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden, on the death of his brother Joseph Eden, became seised of an estate in fee-simple absolute. *Waring* v. *Jackson*.....*570
2. Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the courts of New York, prevent the operation of a devise by another, in whom the title to the estate was vested by the death of the defendant in the execution.....*Id.*
3. Testator, residing and owning real and personal estate in the county of Alexandria, district of Columbia, by his will, gave "all his estate, real and personal, to his wife, during her life, for the use and purpose of raising and educating his children," each child, at the age of twenty-one, to be entitled to an equal portion of his estate, real and personal; subject each to a deduction of one-third for the maintenance of his wife; he recommended his wife to sell the negroes, for a term of years, and directed "an appraisement" only of "his estate" should be made; that no sale of the furniture should be made; and then stated, "that he is indebted to no one, and proposes to continue so," that he was surety for his brother, for whom he held a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it:" this will does not charge the real estate of the testator with his debts. *Archer* v. *Deneale*.....*585
4. The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation..... .....*Id.*

DISTRICT OF COLUMBIA.

1. The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law; it enables a "foreigner" to take in the same manner as if he were a citizen. *Spratt* v. *Spratt*. *343
2. A foreigner, who becomes a citizen, is no longer a foreigner, within the view of the act; thus, after-purchased lands, vest in him as a citizen, not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. *Id.*
3. Land in the county of Washington and district of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner..... *Id.*
4. The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress of February 13th, 1801; and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal. *Nicholls* v. *Hodges*. *562

EQUITY.

1. It is a principle of equity, that when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. *Hunt* v. *Rousmaniere*..... *1
2. The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties..... *Id.*
3. So, if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought..... *Id.*
4. If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented, for a court of equity to decree another security to be given, different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed..... *Id.*
5. Courts of equity may compel parties to execute their agreements, but they have no power to make agreements for them; the death of one of the parties, and the consequent inefficiency of a security selected and intended to be valid and complete, but which was not so, will not give the right of interference. *Id.*
6. A mistake arising from ignorance of law, is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar character..... *Id.*
7. If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors..... *Id.*
8. It seems, that there may be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law; but where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security, of a different character, to be given, or decree that to be done, which the parties suppose would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate..... *Id.*
9. Where the vendee of real estate, had purchased it, subject to the dower of the widow, of which dower he might have been informed if he had used proper diligence, a court of equity will not interfere, to release the vendee; but will leave him to such legal remedy, as he may be entitled to, in case his title should, at any future time, be disturbed. *Greenleaf* v. *Queen*..... *138
10. A court of equity ought not to decree speci-

fic performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do; the court may so modify the agreement, as to do justice, so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. *Mechanics' Bank of Alexandria* v. *Lynn*. *376

11. If a bill charge a defendant with notice of a particular fact, an answer must be given, without special interrogatory, to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill..... *Id.*

12. When a judgment-debtor comes into a court asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court modify or grant the prayer, upon such conditions as justice demands..... *Id.*

13. In an appeal, under the testamentary law of Maryland, the court being satisfied by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that such evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the orphans' court which allowed the same. *Nicholls* v. *Hodges* *562

See CHANCERY PRACTICE, 1–3: PAROL EVIDENCE.

EVIDENCE.

1. Where one party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement, in his own handwriting, but not signed by him, and from the nature of the instrument, it was to be fairly presumed, the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary; such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. *Carroll* v. *Peake*.....*18

2. Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents ..... *Id.*

3. If, in any case, in which testimony was offered by a plaintiff, the court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. *Bank of Washington* v. *Triplett*.....*25

4. The cross-examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of his deposition. *Mechanics' Bank of Alexandria* v. *Seton*. *299

5. By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility or any deposition, deed, grant or other exhibit, found in the record, as evidence, unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent."..*Id.*

6. Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence, to charge the parties, whose agent the person giving the certificates was. *Barry* v. *Foyles*..*311

7. Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given, to support such a declaration; and the want of notice has never been considered as justifying an exception to such evidence at the trial.....*Id.*

8. Depositions, how taken under the provisions of the act of congress of 24th September. *Bell* v. *Morrison*..... .....*351

9 The authority given by the act of congress of 24th September 1789, ch. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly: and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible.....*Id.*

10. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed.....*Id.*

11. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to sup-

ply any defects in the taking of the deposition..... .....*Id.*

12. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife, to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. *Elliott* v. *Peirsol*.....*328

13. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted... .....*Id.*

14. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written about the time, stating the pedigree of the claimants, was not considered as excluded, by the rule of law which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence.....*Id.*

15. Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done, on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection.....*Id.*

16. A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond, by that obligor alone; as, under the circumstances, it was *primâ facie* evidence of his execution of the instrument. *Conard* v. *Atlantic Insurance Co.* *388

17. Under the law of the state of Kentucky, and the decisions of their courts, a will, with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis* v. *Mason* *503

18. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.....*Id.*

19. The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind, in the party's possession or power; the witholding of that better evidence raises a presumption, that, if produced, it might not operate in favor of the party who is called upon for it; for this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence, or to prove its contents. *Tayloe* v. *Riggs*.....*591

20. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper, if such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law.....*Id.*

21. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply; questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depend on the oath of the party; an affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection; on incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received.....*Id.*

22. The testimony which establishes the loss of a paper, is addressed to the court, and does not relate to the contents of the paper; it is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause .....*Id.*

23. In an action upon written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it, as laid in the declaration. The con-

versation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself; had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this..... .....*Id.*

24. When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support.....*Id.*

25. When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.....*Id.*

EXECUTION.

1. Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bonds, of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond, if the notice given to the obligees, of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice; nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. *Alexander* v. *Brown*.....*683

EXECUTORS AND ADMINISTRATORS.

1. The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls* v. *Hodges*.....*562

2. If the executor has a claim on the estate of the deceased, it stands on an equal footing with other claims of the same nature ....*Id.*

3. On a plenary proceeding, if either party require it, the court will direct an issue or issues to be made up, and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law; and in Maryland, the decision of the court to which the appeal is made is final.....*Id.*

4. The court being satisfied by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate, of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the orphans' court which allowed the claim.....*Id.*

5. The commission to be allowed to the executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances, and it was obviously the intention of the legislature, that the decision of the orphans' court should be final and conclusive... .....*Id.*

FEME COVERT.

1. By the law of Maryland, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted; a deed, therefore, executed by a married woman, of real property, acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void. *Rhea* v. *Rhenner*. *105

2. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. *Elliott* v. *Peirsol*.....*328

3. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual,

the forms and solemnities prescribed by the statutes must be pursued ..... *Id.*

4. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed..... *Id.*
5. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid..... *Id.*
6. It is the construction of the act of 1810, that the clerks of the county court of Kentucky, have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. *Id.*
7. What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly inmaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it it not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*..... *Id.*
8. A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to by conveyed, for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford county court, "acknowledged by James Elliott and Sarah G. Elliott, September 11th, 1816," and was certified as follows: "Attest–J. McKenney, Jun., Clerk."

"Woodford county, ss.

September 11th, 1813.

"This deed from James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

John McKenney, Jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, nor give validity to the deed..... .....*Id.*

See FEME SOLE TRADERS.

FEME SOLE TRADERS.

1. The law seems to be settled, that when a wife, left by the husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. *Rhea* v. *Rhenner*..... ...*105

FLORIDA.

1. The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States; they do not, however, participate in political power; they do not share in the government, until Florida shall become a state. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution, which empowers "congress to make all needful rules and regulations, respecting the territory or other property belonging to the United States." *American Insurance Company* v. *Canter*..... *511
2. The powers of the territorial legislature of Florida extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and constitution of the United States."..... *Id.*
3. All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States; congress recognizes this principle, by using the words "laws of the territory now in force therein." No laws could then have been in force but those enacted by the Spanish government; if, among them, there existed a law on the subject of salvage, and it is scarcely possible, there should not have been such a law, jurisdiction over it was conferred by the act of congress relative to the territory of Florida, on the superior court; but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases as an inferior court, would not have been inconsistent with the seventh section of the act, vesting the whole judicial power of the territory in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish."..... *Id*

4. The judges of the superior courts of Florida hold their offices for four years; these courts, then, are not constitutional courts, in which the judicial powers conferred by the constitution on the general govenment can be deposited; they are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power, which is defined in the third article of the constitution, but is conferred by congress in the exercise of its powers over the territories of the United States.....*Id.*
5. Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories; in legislating for them, congress exercises the combined powers of the general and state government.....*Id.*
6. The act of the territorial legislature of Florida, erecting a court which proceeded, under the provisions of the law, to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States, and is valid; and consequently, a sale of the property made in pursuance of it changed the property.....*Id.*

FLORIDA TREATY.

1. The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable; the parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction; a rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow, that this authority extends to adjust all conflicting rights, of different citizens, to the fund so awarded; the commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he be an American citizen. *Comegys* v. *Vasse*.....*193
2. After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands and those of others, are left to the ordinary course of judicial proceedings, in the established courts of justice.....*Id.*
3. The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity; it was demanded by our government as matter of right, and as such was granted by Spain.....*Id.*

See BANKRUPT AND BANKRUPTCY.

FORFEITURE.

1. A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* v. *Baker*.....*232

FRAUD.

1. Without undertaking to suggest, whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only *primâ facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. *Conard* v. *Atlantic Insurance Co*.....*387
2. In cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulation of the parties, and *à fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud.....*Id.*

FRAUDS.

See STATUTE OF FRAUDS.

INSOLVENCY.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. *Conard* v. *Atlantic Insurance Co*.....*386
2. It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative in the former part of the enactment.....*Id.*

3. Insolvency, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute ..... *Id.*
4. Mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section ..... *Id.*

INSURABLE INTEREST.

1. The master of a vessel, to whom property shipped on board of a vessel under his command is to be consigned, in the absence of proof, that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy. *Buck* v. *Chesapeake Insurance Co.* *151

INSURANCE.

1. To affirm, that "in policies for whom it may concern," there can be no undue concealment as to the parties interested in the property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information, contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. *Buck* v. *Chesapeake Insurance Co.* *151
2. A policy, "for whom it may concern," will, in ordinary cases, cover belligerent property ..... *Id.*
3. A knowledge of the state of the world, of the allegiance of particular countries, of the risk and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters ..... *Id.*
4. The term interest, as used in applications for insurance, does not necessarily imply property in the subject of insurance ..... *Id.*
5. The master of a vessel, to whom property shipped on board the vessel under his command, is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy ..... *Id.*
6. As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation to vitiate a policy, made under the authority and directions of the letter .... *Id.*
7. Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. *McLanahan* v. *Universal Insurance Co.* *170
8. Seaworthiness in port, or while lying in the offing, may be one thing; and seaworthiness for the whole voyage, quite another ..... *Id.*
9. A policy on a ship, "at and from a port," will attach, although the ship be, at the time, undergoing extensive repairs, in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. *Id.*
10. What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground, for the voyage? are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury ..... *Id.*
11. The contract of insurance is one of mutual good faith; and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him ..... *Id.* *185
12. If a party, knowing that his agent is about to procure insurance for him, withhold information, for the purpose of misleading the underwriter, it is a fraud, and vitiates the insurance ..... *Id.*
13. Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated, for the purpose of

countermanding the order, or laying the circumstances before the underwriter..... *Id.*
14. What constitutes due and reasonable diligence, is a question of fact for the jury..... *Id.*
15. The accidental concealment of the time of the sailing of a vessel would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury..... *Id.*
16. The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information and experience; and are, in no sense, judicially cognisable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad ..... *Id.*
17. The question of the materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon contested matters of fact, resolving itself into a mere point of law ..... *Id.*

JUDGMENTS.

1. Under the laws of Virginia, a confession of judgment by the defendant is a release of errors. *Mandeville* v. *Holey*.....*136

JURISDICTION.

1. In the construction of the 25th section of the judiciary act, passed 24th of September 1789, this court has never required, that the treaty or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act. *Hickie* v. *Starke*. *94
2. In the district court of the United States for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served; the case was taken by appeal to the circuit court, and the governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the circuit court, &c.: *Held*, that such a stipulation could not give jurisdiction in the case to the circuit court; as process could not issue legally from the circuit court against the Africans, because it would be the exercise of original jurisdiction in admiralty, which the circuit court. does not possess. *Governor of Georgia* v. *Madrazo*.....*110
3. "It may be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record."..... *Id.*
4. The libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise: *Held*, that the courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendments to the constitution of the United States..... *Id.*
5. In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record ..... *Id.*
6. The complainants were stated, in the bill, to be citizens of the state of South Carolina; the defendant, the Bank of Georgia, was a body corporate, existing under an act of the legislature; but the citizenship of the individual corporators was not stated; the averment, in the original bill, was, that William B. Bullock and Samuel Hale were citizens of Georgia, and resident therein; William B. Bullock was afterwards designated in the bill, as "President of the mother bank, and Samuel Hale, as the president of the branch bank, at Augusta, in the state of Georgia:" the courts of the United States have no jurisdiction of the case; the record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank were citizens of that state. *Breithaupt* v. *Bank of Georgia*.....*238
7. The court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded $2000, the title to a lot of ground, part of the whole tract, which was of less value than $500, was only involved in the case before the court. *Meredith* v. *McKee*..... *248

8. If the court of a state had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. *Elliott* v. *Peirsol*.....*328
9. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers .....*Id.*
10. The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings .....*Id.*
11. The jurisdiction and authority of the court of Kentucky are derived wholly from the statute law of the state.....*Id.*
12. The clerk of Woodford county court had no authority to alter the record of the acknowledgment of a deed, at any time after the record was made.....*Id.*
13. The constitution and laws of the United States give jurisdiction to the district courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. *American Insurance Co.* v. *Canter*.....*511
14. The constitution declares that "the judicial power shall extend to all cases in law and equity arising under it, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction:" The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two; the discrimination made between them is conclusive against their identity.....*Id.*
15. A case in admiralty does not, in fact, arise under the constitution of laws of the United States; such cases are as old as navigation itself; and the law, admiralty and maritime, as it existed for ages, is applied by our courts to the cases as they arise. It is not then to the eighth section of the territorial act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial courts of Florida; consequently, if that jurisdiction is exclusive, it is not made so by the reference, in the act of congress, to the district court of Kentucky.....*Id.*
16. The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress of February 13th, 1801; and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal. *Nicholls* v. *Hodges*.*562
17. It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. *McDonald* v. *Smalley*.....*620
18. M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1100, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the court of the United States, but would fail in the courts of the state; the property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done; the plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving $1000: *Held*, that the title acquired by the purchaser gave jurisdiction to the courts of the United States...*Id.*
19. The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity; a court cannot enter into the consideration of those motives, when deciding on its jurisdiction.....*Id.*
20. In a contract between a mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or bill to foreclose, may be brought in a court of the United States, by the mortgagee, residing in a different state.....*Id.*
21. Both the plaintiff and the defendant claimed title under the provisions of the act of congress, passed 3d March 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee;" and the decision of the supreme court

of the state of Mississippi, was, upon the construction given to that act, by the commissioners acting under its authority: this is a case which draws into question the construction of an act of congress, and the supreme court of the United States has jurisdiction, on a writ of error, by which the decision of the court of the state of Mississippi is brought up for revision, under the 25th section of the judiciary act of 1789. *Ross* v. *Barland* *655

LACHES.

See OFFICIAL BONDS, 4: DOX *v.* POSTMASTER-GENERAL, 318.

LANDS AND LAND TITLES.

1. In order to bring himself within the protection of the act of cession by the state of Georgia to the United States, the party must show that he was "actually settled" on the land, on the 27th of October 1795, the period mentioned in the said act of cession. *Hickie* v. *Starke*.....*94
2. It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory .....*Id.*
3. Construction of the act of congress, passed March 2d, 1807, entitled "an act to extend the time for location Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated." *Jackson* v. *Clark*.....*628
4. The reservation made by the law of Virginia of 1783, ceding to congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the rivers Scioto and Little Miami; it is a reservation of only so much of it as may be necessary to make up the deficiency of good lands, in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose.....*Id.*
5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass so as to enable the government to apply the residue to the general purpose of the trust.....*Id.*
6. If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, followed, as a necessary consequence.....*Id.*
7. If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularitiy; if this effect be denied to the proviso, it becomes, itself, a nullity... *Id.*
8. Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented. It cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times .....*Id.*
9. Under the act of congress of March 3d, 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee," such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof; a right, therefore, to a particular tract of land, derived from a donation certificate, given under that law, is superior to the title of any one who purchased the same land, at the public sale, unless there be some fatal infirmity in the certificate, which renders it void. *Ross* v. *Barland* *655
10. The act of congress requires no precise form for the donation certificate; it is sufficient, if proofs be exhibited to the court of commissioners, to satisfy them of the facts entitling the party to the certificate; it is sufficient, if the consideration, to wit, the occupancy, and the quantity granted, appears; nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent.....*Id.*
11. The second section of the act of congress of

March 3d, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature..... *Id.*

12. The time when the territory over which this law operated was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually, at that time, inhabitants of, and cultivated the soil within it; but whether it was in 1797 or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the courts are disposed to adopt the construction of the act, given by the commissioners west of Pearl river, that the evacuation took place on the 30th March 1798; by which persons coming within the objects of the section, were entitled to donation certificates..... *Id.*
13. Congress have treated as erroneous the construction given to the law by the commissioners to settle claims to land east of Pearl river, who have decided, that only those who were settled on the lands within the territory, in the year 1797, were entitled to donation certificates, and who had granted to others pre emption certificates..... *Id.*
14. The commissioners appointed under the act of congress relative to claims to lands of the United States south of the state of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops; and to decide upon the fact; the law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity; and declared their deliberations shall be final. The court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them, that the final evacuation of the territory by the Spanish troops took place on the 30th of March 1798..... *Id.*

LENGTH OF TIME.

See STATUTE OF LIMITATIONS.

LIEN.

1. Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due; the only question that properly arises in such cases, is the *bona fides* of the transaction. *Conard* v. *Atlantic Insurance Co*..... *386
2. The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States..... *Id.*
3. It is not understood, that a general lien by judgment, on lands, constitutes *per se* a property or right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or otherwise dispose of the land..... *Id.*

LIMITATION.

See STATUTE OF LIMITATIONS.

MANDAMUS.

1. The court refused to issue a *mandamus* to the circuit court for the county of Washington, commanding that court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia. *Bank of Columbia* v. *Sweeny*..... *567

MARRIAGE.

1. By the law of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years, and shall not have been heard of during that time. *Rhea* v. *Rhenner*..... *105

MASTER OF A VESSEL.

See INSURANCE, 5.

MECHANICS' BANK OF ALEXANDRIA.

1. The provisions in the acts of congress, incorporating the "Mechanics' Bank of Alexandria," which requires that the capital stock of the bank shall consist of 50,000 shares of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number

of shares. *Minor* v. *Mechanics' Bank of Alexandria* *46
2. Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain, that such a fraud, which was private between the origininal subscribers to the stock and the commissioners, could be set up to the injury of subsequent purchasers of the stock, who became *bonâ fide* holders of the same, without participation in, or notice thereof.... *Id.*
3. It is not a correct construction of the 3d and 21st sections of the act of congress, incorporating the Mechanics' Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognise the interests of any *cestui que trust*, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. *Mechanics' Bank of Alexandria* v. *Seton* *299

MISTAKE.

See EQUITY, 6, 8.

MORTGAGE.

1. It is true, that in discussions, in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more, it is a transfer of the property itself, as security for the debt; this must be addmitted to be true at law, and it is equally true in equity, for in this respect equity follows the law; the estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security; where the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. *Conard* v. *Atlantic Insurance Co*.... ..... *386

NEW TRIAL.

1. An application for a new trial, on motion, after verdict, addresses itself to the sound discretion of the court, and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial; the application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exception, to the cognisance of the appellate court, the directions of the court below must then stand or fall, upon their own intrinsic propriety, as matters of law. *McLanahan* v. *Universal Insurance Co* *170

NOLLE PROSEQUI.

1. According to modern decisions, a *nolle prosequi* does not a amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. *Minor* v. *Mechanics' Bank of Alexandria*.....*46
2. In an action on a joint and several bond, some of parties, sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards, the principal was called upon to plead, and he did so; judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal; to this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties; the court *held*, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case; the decisions of the courts of the United States, upon this proceeding, have been on the ground that the question is matter of practice and convenience..... *Id.*
3. When the defendants sever in their pleading, a *nolle prosequi* ought to be allowed against one defendant; it is a practice which violates no rules of pleading, and will subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.....*Id.*

NONSUIT.

1. The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff may agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it. *Elmore* v. *Grymes* *471
2. A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff. *De Wolf* v. *Rabaud*..... ....*476

OFFICIAL BOND.

1. The condition of an official bond that the officer who gives it shall "well and truly"

execute the duties of his office, includes not only honesty, but reasonable skill and diligence; if the duties are performed negligently and unskilfully; if they are violated from want of capacity or want of care; they can never be said to have been "well and truly executed." *Minor* v. *Mechanics' Bank of Alexandria* *46

2. No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders, will justify the cashier in acts which are in violation of the stipulation in his official bond "well and truly" to execute the duties of his office; acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trust assumed by them, are on the responsibility of the cashier and of his sureties .....*Id.*

3. The official bond of a cashier must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank, and the sureties in the bond are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws .....*Id.*

4. The claim of the United States, upon an official bond, and upon all parties thereto, is not released by the *laches* of the officer, to whom the assertion of this claim is intrusted by law; such *laches* has no effect whatsoever on the right of the United States, as well against the sureties as the principal in the bond. *Dox* v. *Postmaster-General*....*318

PAROL EVIDENCE.

1. The court held, that parol evidence was admissible to show an agreement relative to the place where payment of a note was to be demanded; although such agreement did not appear on the face of the note. Such an agreement is a circumstance extrinsic to the contract made by the note, and its proof, by parol, is regular. *Brent's Executors* v. *Bank of the Metropolis* *89

PARTIES.

1. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents thereof, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law. *Tayloe* v. *Riggs*.....*591

2. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the process of a cause, to which the rule does not apply; questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection; on incidental questions which do not affect the issue to be tried by the jury, the affidavit of the party is received .....*Id.*

See CHANCERY PRACTICE, 3, 9, 12, 13.

PARTNER AND PARTNERSHIP.

1. One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he may bind himself, so as submit his own interests to such decision. *Karthaus* v. *Ferrer*.....*222

See PLEAS AND PLEADINGS, 14.

PAYMENT.

1. When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. *Bank of Columbia* v. *Hagner*.*455

PEDIGREE.

1. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife, to have been written by her husband, who also testified, in her deposition, that the facts stated in the letter had been frequently mentioned by her husband, in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. *Elliott* v. *Peirsol*.....*328

2. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted.....*Id.*

3. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no contro-

versy was then expected to arise about the heirship; a letter then written, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence ..... *Id.*

PLEAS AND PLEADINGS.

1. Surplusage in pleading, does not, in any case, vitiate, after verdict. *Carroll* v. *Peake*. *18
2. In a declaration upon an agreement, by way of lease, by which the lessor stipulated to let a farm, from the first of January 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested, on the said 1st of January, the defendant refused and neglected to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff: this assignment is sufficient ..... *Id.*
3. It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January, generally, and not at the last convenient hour of that day; and if an averment of a personal demand be made, it need not have been on the land ..... *Id.*
4. The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons ..... *Id.*
5. Declarations containing general averments readiness and request have been held ufficient, especially, after verdict, unless in very peculiar cases ..... *Id.*
6. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken, by surprise, and the jury may not be misled by the introduction of various matters. *Minor* v. *Mechanics' Bank of Alexandria* *46
7. What defects in pleading are, and are not, cured by verdict ..... *Id.*
8. On a joint and several bond, the plaintiff may sue one of all of the obligors; but, in strictness of law, he cannot sue an intermediate number; he must sue all or one; but if such error be not taken advantage of by plea in abatement, it is waived, by pleading to the merits ..... *Id.*
9. Where it was omitted to allege in the declaration on a promissory note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration, could not be true, unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and after a verdict, the judgment will be sustained. *Brent's Executors* v. *Bank of the Metropolis*.... *89
10. After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he pleases, abide by his plea already pleaded, and waive his right of pleading *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purport to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old old counts. *Wright* v. *Lessee of Hollingsworth* *165
11. Where, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money; in an action on the bond to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. *Karthaus* v. *Ferrer* *222
12. The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fail to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it, at the time of trial. *Barry* v. *Foyles*. *311
13. The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction; the proceeding is always as if the party sued was the sole contracting party; if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained ..... *Id.*
14. A question of the citizenship of a party to a cause, cannot constitute a part of the issue on the merits; it must be brought forward by a proper plea in abatement, in an earlier

stage of the cause, than the trial on the merits. *De Wolf* v. *Rabaud*..... *476

15. The plaintiff, as administrator of W., had brought a suit in the district court of the United States for the western district of Pennsylvania, and recovered a judgment; and upon this judgment, he instituted a suit in the district court of the United States, of the state of Mississippi, against the defendant in the original suit; the defendant pleaded, that, by the orphans' court of Adams county, in the state of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity: *Held*, that the debt due upon the judgment obtained in Pennsylvania, by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial, whether the defendant was or was not administrator of W., in the state of Mississippi; that would not, in any manner, affect the rights of the plaintiff; the plea tenders an immaterial issue, and is bad on demurrer. *Biddle* v. *Wilkins*.....*686

16. Where the court in which judgment is rendered, has not jurisdiction over the subject-matter of the suit, or where the judgment upon which suit is brought, is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment ..... *Id.*

17. The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground, that no matter of defense can be pleaded in such case, to a suit on a judgment, which existed anterior to the judgment.. ..... *Id.*

18. It has become a settled practice, in declaring in an action upon a judgment, not, as formerly, to set out in the declaration, the whole of the proceedings in the original suit, but only to allege generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatam*..... *Id.*

19. In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a *profert* of the letters of administration; that is not necessary in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make *profert* of the letters of administration; and when he does so name himself, it may be rejected as surplusage .... *Id.*

See ATTACHMENT, 1: NOLLE PROSEQUI, 1–3.

POST-OFFICE DEPARTMENT.

1. The act of congress, for regulating the post-office department, does not, in terms, discharge the obligors, in the official bond of a deputy postmaster, from the direct claim of the United States upon them, on the failure of the postmaster-general to commence a suit against the defaulting postmaster, within the time prescribed by law; their liability, therefore, continues; they remain the debtors of the United States; the responsibility of the postmaster-general is superadded to, not substituted for, that of the obligors. *Dox* v. *Postmaster-General* *318

PRACTICE.

1. In a trial of an action of ejectment, in which, according to the provision of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G., citizens of Massachusetts; the cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri; the parties went to trial without any other pleadings, and the jury found for the plaintiff, upon the third or new count, and a judgment was rendered in his favor: *Held*, to be valid. *Wright* v. *Lessee of Hollingsworth*.... .....*165

2. The allowance and refusal of amendments in the pleadings; the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial; are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice; this court has always declined interfering in such cases..... .....*Id.*

3. On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue, this should be done by a plea in abatement, before the trial; and the omission to do so is a waiver of the objection. *Conard* v. *Atlantic Insurance Co*..... *386

4. Where the state of the record does not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. *Elmore* v. *Grymes*.....*469

5. The state of Ohio, not having been admitted into the Union until 1802, the act of congress,

passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state; but the district court of the United States, established in that state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The district court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule, adopted the state system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit, found the practice of the state adopted, in fact, into the circuit court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued, without any positive rule upon the subject. *Fullerton* v. *Bank of the United States*.....*604

6. The act of 18th February 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and suits have in many instances been prosecuted under it.....*Id.*
7. It will not be contended, that the practice of a court can only by sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court, through a course of years, is to be surprised and turned out of court upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making.....*Id.*
8. Although the act of legislature of Ohio, regulating the mode of proceeding in actions on promissory notes, was passed after the making of the note upon which the action was brought, yet the circuit court of the United States for the district of Ohio, having incorporated the action under that statute, with all its incidents, into his course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted.....*Id.*
9. Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees were willing to submit, upon argument, the whole case to the final decision of the court, but it appeared, that the circuit court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the court; the counsel were directed by this court to argue the point of jurisdiction only. *McDonald* v. *Smalley*.*620

See CHANCERY PRACTICE.

PRESIDENT OF THE UNITED STATES.

See ARMY OF THE UNITED STATES, 2, 3.

PRINCIPAL AND AGENT.

1. The officers of a bank are held out to the public, as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank in favor of third persons, possessing no other knowledge. *Minor* v. *Mechanics' Bank of Alexandria*.....*46

PRIORITY OF THE UNITED STATES.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. *Conard* v. *Atlantic Insurance Co*.....*386
2. It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative, in the former part of the enactment.....*Id.*
3. Insolvency, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute.....*Id.*
4. Mere inability of the debtor to pay all his debts, is not an insolvency, within the statute; but it must be manifested in one of the three

modes pointed out in the explanatory clause of the section..... *Id.*
5. The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterward elect to take in execution, so as to prevent its passing, by virtue of such assignment, to the assignees; but it is a mere right of prior payment out of the general funds of the debtor, in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States..... *Id.*
6. It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt; this must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law; the estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security; when the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible..... *Id.*
7. It has yet never been decided by this court, that the priorty of the United States will divest a specific lien, attached to anything, whether it be accompanied by possession or not..... *Id.*
8. The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognised in this case; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States..... *Id.*
9. It is not understood, that a general lien, by judgment, on lands, constitutes *per se* a property or right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or or otherwise dispose of the land..... *Id.*

PROMISSORY NOTE.

1. In an action against the indorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank; no other notice of non-payment of the note, was sent to the indorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the indorser, as to other notes discounted previously, by the bank, for his accommodation, that payment, and demand of payment, should be made at the bank, the indorser residing a considerable distance from the bank: *Held*, to be sufficient. *Brent's Executors* v. *Bank of the Metropolis*..... .....*89
2. The indorser of such a note is himself bound by the contract made by the maker, and by the established and known usage of the bank..... *Id.*
3. A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the county of Alexandria within the district of Columbia, and having what was alleged to be a place of business in the city of Washington; and the notice of the non-payment of the note, inclosed in a letter and subscribed with his name, was put into the post-office at Georgetown, addressed to him at that place: *Held*, that this notice was sufficient. *Bank of Columbia* v. *Lawrence*..... .....*578
4. In cases where the party entitled to notice resides in the country, unless notice sent by the mail be sufficient, a special messenger may be employed, for the purpose of sending it, but this case is not one which required such a duty..... *Id.*
5. If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good; parties may be, and frequently are, so situated that notice may well be given at either of several places..... *Id.*
6. That is not properly a place of business, in the commercial understanding of the term, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business..... *Id.*
7. The general rule is, that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same; but it is not required of him to see that the notice is brought home to the party; he may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or

not, the holder has done all that the law requires of him..... *Id.*
8. It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law..... *Id.*
9. The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description..... *Id.*
10. When a person has a dwelling-house and a counting-room in the same city or town, a notice sent to either place is sufficient; if parties live in different post-towns, notice through the post-office is sufficient. Notice to a party living at another place than the holder, sent by mail to the nearest post-office, is good, under common circumstances, and in such cases, where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice..... *Id.*
11. Some countenance has lately been given in England, to the practice of sending a notice by a special messenger, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner; the holder is not bound to use the mail for the purpose of sending the notice; he *may* employ a special messenger, if he pleases, but it has not been decided that he *must;* to compel the holder to the expense of a special messenger would be unreasonable..... *Id.*
12. Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions in the circuit court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. *Fullerton* v. *Bank of the United States*..*604

RECORDING OF DEEDS.

1. The registry act of Ohio directs that all deeds made within the state, shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the county where the land lies, within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser, for a valuable consideration, without notice of such deed." *Steele's Lessee* v. *Spencer*..... .....*552
2. In the construction of the registry act of Ohio, the term "purchasers," is usually taken in its limited legal sense; it means a complete purchaser; or, in other words, a purchaser clothed with a legal title..... *Id.*
3. It is not necessary, that a deed made to a subsequent *bonâ fide* purchaser, without notice, shall be recorded, to give it operation against a prior unrecorded deed, as by the provisions of the registry acts, the prior deed is declared, in itself, absolutely void, as against such purchaser..... *Id.*
4. A decree of the supreme court of Ohio ordered that the patentee of a certain tract of land, should, within six months, make a deed &c., with covenants of warranty, conveying a portion of the land held under a patent, to the complainants in that suit, and on the failure of A. to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him:" The decree of the supreme court of Ohio, by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed, as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bonâ fide* deed of the same date with the patent of the land; and the decree gives a legal title as ample as a deed..... *Id.*
5. The provisions of the laws of Kentucky, relative to the acknowledgment of deeds for the purpose of recording the same. *Elliott* v. *Piersol*..... ..*328

See DEEDS, 2, 5–9.

RELEASE.

1. At common law, the release of a debtor whose person is in execution, is a release of the judgment itself; the law will not permit proceedings by a creditor, at the same time, against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. *United States* v. *Stansbury*..... ..*573

RESPONDENTIA.

1. It is not necessary, that a *respondentia* loan should be made, before the departure of the

ship on the voyage; nor that the money loaned should be employed in the outfit of a vessel, or invested in the goods on which the risk is run. *Conard* v. *Atlantic Insurance Co.**386

2. It matters not at what time the loan is made nor upon what goods the risk is taken; if the risk of the voyage be substantially and really taken, if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage..... *Id.*
3. The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bonâ fide* run, upon other goods, and it was not a mere contract of wager and hazard .... *Id.*
4. It seems, that the common and usual form of a *respondentia* bond is that which was used in this case..... *Id.*

SPECIFIC PERFORMANCE.

See CHANCERY PRACTICE, 11: BARRY *v.* COOMBE, 640.

STATE LAWS.

1. Under the law of Virginia, a confession of judgment by the defendant, is a release of errors. *Mandeville* v. *Holey*.....*136
2. The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia and the city of Washington," which by the 6th section, provides for the holding of lands by "foreigners," is an enabling act, and applies to those only who could not take lands without the provisions of that law; it enables a "foreigner" take in the same manner as if he were a citizen. *Spratt* v. *Spratt*....*343
3. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act; thus, after-purchased lands vest in him as a citizen, not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship.....*Id.*
4. Lands in the county of Washington, and district of Columbia, purchased by a foreigner, before naturalization, were held by him under the laws of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but they pass to his heirs and relations, precisely as if he had remained a foreigner .....*Id.*
5. The nature of limitations, in Kentucky, is substantially the same with the statute of 21 James II., c. 16, with the exception, that it substitutes the term of five years instead of six; the English decisions have, therefore, been resorted to, in this case, in the construction of the statute of Kentucky, and are entitled to great consideration; they cannot be considered as conclusive, upon the construction of a statute passed by a state, upon a like subject; for this belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence. *Bell* v. *Morrison* *351
6. If the doctrines of the Kentucky courts, in the construction of a statute of that state, are irreconcilable with the English decisions, upon a statute in similar terms, this court, in conformity with its general practice, will follow the local law, and administer the same justice which the state court would administer between the same parties .....*Id.*
7. The decisions in the courts of New York on the construction of its own statute of frauds, and the extent of the rules deduced from it, present to this court a guide in its decisions upon the construction of their statute. *De Wolf* v. *Rabaud*.....*476
8. In an action of ejectment, to recover land in Kentucky, the law of real estate in Kentucky is the law of this court, in deciding the rights of the parties. *Davis* v. *Mason* *503
9. Under the law of the state of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.....*Id.*
10. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it .....*Id.*
11. The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls* v. *Hodges*. *562
12. Under the laws of Virginia, relative to the estates of deceased persons, lands are never appraised. *Archer* v. *Deneale*.....*585
13. Under the law of Virginia, which directs the sheriff holding an execution against the

goods and effects of defendants, to take forthcoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bond, of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bonds; if the notice given to the obligees, of the plaintiff's intention to proceed, be sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. *Alexander* v. *Brown*.....*683

See COURTS OF THE SEVERAL STATES, 1–5: PRACTICE, 5–8.

STATUTE OF FRAUDS.

1. The statute of frauds of New York, is a transcript, on this subject, of the statute 29 Charles II., c. 3; it declares, that no action shall be brought to charge a defendant, on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in the writing, and signed by the party, or by some one by him authorized; the words "collateral" or "original" promise, do not occur in the statute; and have been introduced by courts to explain its objects, and expound its true interpretation. *De Wolf* v. *Rabaud*.*476
2. Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very grave deliberation; but it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states where the English authorities have been fully recognised and adopted in practice..... *Id.*
3. If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressly upon the understanding, that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract; the contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act; each is an original promise; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A., not solely upon the promise of either B. or C., but upon the promise of both, *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking; each is a direct original promise, founded upon the same consideration..... *Id.*
4. The case of Wain *v.* Warlters, 5 East 10, was the first case which settled the point, that it was necessary, in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise as well as the promise itself; if it contain it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case had been adopted, to a limited extent, by the courts of New York, into its jurisprudence, as a sound construction of the statute..... ....*Id.*
5. The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance; the words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *Barry* v. *Coombe*.....*640
6. A note or memorandum in writing of the agreement between parties, is sufficient, under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to sustain an action at law; the form is not required, nor the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c..... *Id.*
7. An examination of the cases will show, that courts of equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created; it is written evidence which the statute requires; and a note or letter, and even, in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute..... *Id.*
8. Where, in an account stated by the parties, in

the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit, "By my purchase of your ½, E. B. wharf and premises, this day agreed upon between us, $7578.63;" it was *held*, to be a sufficient memorandum in writing, under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises."....*Id.*

STATUTE OF LIMITATIONS.

1. The statute of limitations, instead of being viewed in an unfavorable light as an unjust and discreditable defence, should have received such support from courts of justice, as would have made it, what it was intended, emphatically, to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. *Bell* v. *Morrison*.....*351
2. An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this court, in the case of Wetzell *v.* Bussard, 11 Wheat. 309, "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional, it must show, positively, that the debt is due, in whole or in part; if it be connected with the circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown ..... *Id.*
3. If the bar of the statute is sought to be removed, by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be, in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to have been performed .....*Id.*
4. The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained, what the parties understood the balance to be, would not, by the courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove *aliunde*, any balance, however large it may be; it is indispensable for the party to prove, by independent evidence, the extend of the balance due to him, before there can arise any promise to pay it as a subsisting debt ..... *Id.*
5. The acknowledgment of a debt by one partner, after a dissolution of the co-partnership, is not sufficient to take the case out of the statute, as to the other partners .....*Id.*
6. A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained, by the delegation of this authority to one partner. .....*Id.*
7. After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for the purpose.....*Id.*
8. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone .....*Id.*

SURETIES.

1. The claim of the United States upon an official bond, and upon all the parties to it, is not released by the *laches* of the officer to whom the assertion of this claim is intrusted; such *laches* has no effect whatsoever on the right of the United States, as well against the sureties, as the principal in the bond. *Dox* v. *Postmaster-General*... .....*318
2. The discharge by the secretary of the treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for tor the amount due upon the judgment, and unpaid. *United States* v. *Stansbury*...*573

TENANCY BY THE CURTESY.

1. It seems, that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of his wife, to entitle himself to a tenancy by cur-

tesy, in waste, or what is sometimes styled "wild lands." *Davis* v. *Mason*.....*503
2. If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists ..... *Id.*
3. At present, it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands..... *Id.*

TERRITORIES.

1. The constitution of the United States confers absolutely on the government of the Union, the power of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. *American Insurance Co.* v. *Canter*..... ...*511
2. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace; if it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change; their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory; the same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly-created power of the state..... *Id.*

See Florida: Jurisdiction.

TRUSTS AND TRUSTEES.

1. Where, by the terms of a deed conveying real estate in trust, to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed, by public auction, the trustee was bound to conform to this mode of sale; this was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although by doing so, he might, in reality, promote the interests of those for whom he acted. *Greenleaf* v. *Queen*.....*138
2. Full notice of a trust draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. *Mechanics' Bank of Alexandria* v. *Seton*.....*299
3. It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust..... *Id.*

See Agreement, 2: Chancery Practice, 1–3.

UNITED STATES.

Lien of the United States for priority of payment. See Lien: Priority of Payment.

USAGE.

See Bills of Exchange, 4, 5: Promissory Notes, 1.

USURY.

1. C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post-notes of the bank, payable at a future day, without interest, while the post-notes were at a discount of one and a half per cent. in the market, at the time of the transaction; such a contract is usurious. The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. *Gaither* v. *Farmers' and Mechanics' Bank of Georgetown*.....*37
2. If a note be free from usury in its origin, no subsequent usurious transactions respecting it can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it..... *Id.*
3. The act of assembly of Maryland declares "all bonds, contracts and assurances whatever, taken on an usurious contract, to be utterly void;" and the indorsement of a promissory note, for a usurious consideration, is a contract within the statute, and void ..... *Id.*

VENDOR AND VENDEE.

1. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears. *Bank of Columbia* v. *Hagner*..... *455
2. Although many nice distinctions are to be found in the books, upon the question, whether the covenants or promises of the respective parties to a contract, are to be considered independent or dependent; yet it is evident, the inclinations of courts have strongly favored the latter construction, as being obviously the most just..... *Id.*
3. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal..... *Id.*
4. An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof..... *Id.*
5. The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller be not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end; but equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed..... *Id.*
6. It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance; and this averment must be sustained by proof; unless the tender has been waived by the purchaser..... *Id.*
7. If, before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases where the act which is constructed into a waiver, occurs previously to the time for performance..... *Id.*
8. The taking possession of property by the vendee, before conveyance, is a circumstance from which is to be inferred, that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title, or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase-money, had it been paid..... *Id.*
9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, nothwithstanding a conveyance of all the right of a vendor to him, the court will not compel him to pay the purchase-money; it would be compelling him to take a law-suit, instead of the land..... *Id.*

WILLS AND TESTAMENTS.

1. Under the law of the state of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis* v. *Mason*..... *503
2. It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it..... *Id.*
3. Where a legacy, for which suit is instituted, is given jointly to several persons, in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. *Pray* v. *Belt*..... *670
4. Testator in his will said, "whereas, my will is lengthy, and it is possible I may have committed some error or errors, I, therefore, authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide, in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice:" Clauses of this description have always received such judicial construction, as would comport with the reasonable intention of the testator..... *Id.*
5. Even where the forfeiture of a legacy has

been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power, so given in a will; one not foreseen, and which could not be intended by the testator; it has been considered as a case, in which the general power of courts of justice to decide on the rights of parties, ought to be exercised..... *Id.*

6. There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice; a court must decide whether the construction of the will adopted by those who are named is the right construction, or the grossest injustice might be done..... *Id.*