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2. Robertson was domiciled at Norfolk, in Virginia, and there contracted a debt on bond to T.; he was also indebted to the Union Bank of Georgetown, in the district of Columbia, on simple contract; he died intestate, at Bedford, in Pennsylvania; leaving personal estate in the city of Washington, in the district of Columbia, of which administration was there granted; by the laws of Maryland, all debts are of equal dignity in administration; and by the laws of Virginia, where R. was domiciled, debts on bond are preferred; the assets in the hands of the administrator were insufficient to discharge the bond and simple-contract debts : *Held*, that the effects of the intestate, in the hands of the administrator, were to be distributed among his creditors according to the laws of Maryland and not according to the laws of Virginia. *Smith* v. *Union Bank of Georgetown*...........................*518

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1. In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets; by the law, the executor or administrator is required, out of the legal assets, to pay the creditors of the estate, according to the dignity of their demands, but the equitable assets are applied equally to all the creditors in proportion to their claims: legal and equitable assets were in the hands of an administrator, he being also a commissioner to sell the real estate of a deceased person; and by a decree of the court of chancery, he was directed to make payments of debts due by the intestate out of the funds in his hands, without directing in what manner the two funds should be applied; payments were made under this decree, to the creditors, by the administrator and commissioner, without stating, or in any way making known, whether the same were made from the equitable or legal assets; a balance remaining in his hands, unpaid, to those entitled to the same, the sureties of the administrator, after his decease, claimed to have the whole of the payments made under the decree credited to the legal assets, in order to obtain a discharge from their liability for the due administration of the legal assets: *Held*, that their principal having omitted to designate the fund out of which the payments were made, they could not do so. *Backhouse* v. *Patton* *160
2. Where debts of different dignities are due to a creditor of the estate of an intestate, and no specific application of payment made by an administrator is directed by him; if the creditor applies the payment to either of his debts, by some unequivocal act, his right to do so cannot be questioned. *Quære?* Whether the application must be made by the creditor, at the time, or within a reasonable time afterwards? .... *Id.*
3. There may be cases where no indication having been given as to the application of the payment, by the debtor or creditor, the law will make it; but it cannot be admitted, that in such cases, the payment will be uniformly applied to the extinguishment of a debt of the highest dignity; that there have been authorities which favor such an application, is true; but they have been controverted by other adjudications. Where an administrator has had a reasonable time to make his election as to the appropriation of payments made by him, it is too late to do so, after a controversy has arisen; and it is not competent for the sureties of the administrator to exonerate themselves from responsibility, by attempting to give a construction to his acts, which seems not to be given by himself.............................. *Id.*
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ATTACHMENT.

1. A sheriff having a writ of foreign attachment, issued according to the laws of New Jersey, proceeded to levy the same on the property of the defendant in the attachment; after the attachment was issued, the plaintiff took the promissory notes of the defendant for his debt, payable at a future time, but no notice of this adjustment of the claim of the

plaintiff was given to the sheriff, nor was the suit on which the attachment issued discontinued; the defendant brought replevin for the property attached, the sheriff having refused to deliver it: *Held*, that the sheriff was not responsible for levying the attachment for the debt so satisfied, or for refusing to deliver the property attached. *Livingston* v. *Smith*............................*90

2. A previous attachment, issued under the law of New Jersey, of property, as the right of another, could not divest the interest of the actual owner of the property in the same; so as to prevent the sheriff attaching the same property, under a writ of attachment issued for a debt of the same actual owner.....*Id.*

ATTORNEY AT LAW.

1. The attorney of the plaintiff, in an action on a promissory note, agreed with the defendant, whose intestate was indorser of the note, that if he would confess judgment, and not dispute her liability upon the note, he, the attorney, would immediately proceed, by execution, to make the amount from the maker of the note, the principal debtor; who, he assured her, had sufficient property to satisfy the same; upon the faith of this promise she did confess the judgment: *Held*, that this agreement fell within the scope of the general authority of the attorney, and was binding on the plaintiffs in the suit. The plaintiffs in the suit having failed to proceed by execution against the maker of the note, and having suffered him to remove with his property out of the reach of process of execution, the circuit court, on a bill filed, perpetually enjoined proceedings on the judgment confessed by the administratrix of the indorser; and the decree of the circuit court was, on appeal, affirmed by the supreme court. *Union Bank of Georgetown* v. *Geary*..........................*99
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See Power of Attorney.

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BILL OF EXCEPTIONS.

1. It is to be understood as a general rule, that where there are various bills of exception, filed according to the local practice, if, in the progress of the cause, the matters of any of these exceptions become wholly immaterial to the merits, as they are finally made out on the trial, they are no longer assignable as error, however they have been ruled in the court below. *Greenleaf's Lessee* v. *Birth*.......................... *132
2. Exceptions taken on the trial of a cause before a jury, for the purpose of submitting to the revision of this court questions of law decided by the circuit court during the trial, cannot be taken in such a form as to bring the whole charge of the judge before this court; a charge in which he not only states the results of the law from the facts, but sums up all the evidence. *Ex parte Crane*............................*190
3. The decision of this court in the case of Carver *v.* Jackson, 4 Pet. 80, re-examined and confirmed...................... *Id.*

CHANCERY AND CHANCERY PRACTICE.

1. It is a well-settled rule, that, in a bill praying relief, when the facts charged in the bill as the ground for the decree are clearly and positively denied by the answer, and proved only by a single witness, the court will not decree against the defendant; and it is equally well settled, that when the witness on the part of the complainant is supported and corroborated by circumstances sufficient to outweigh the denial in the answer, the rule does not apply. *Union Bank of Georgetown* v. *Geary*...................... *99
2. An injunction bill was filed, upon the oath of the complainant, against a corporation, and the answer was put in, under their common seal, unaccompanied by an oath: the weight of such an answer is very much lessened, if not entirely destroyed, as it is not sworn to....................... *Id.*
3. The court is inclined to adopt it as a general rule, that an answer, not under oath, is to be considered merely as a denial of the allegation in the bill; analagous to the general issue at law; so as to put the complainant to the proof of such allegation........... *Id.*
4. The attorney of the plaintiffs, in an action on a promissory note, agreed with the defendant, whose intestate was indorser of the note, that if he would confess judgment, and not dispute her liability upon the note, he, the attorney, would immediately proceed, by execution, to make the amount from the maker of the note, the principal debtor;

who, he assured her, had sufficient property to satisfy the same; upon the faith of this promise she did confess the judgment: *Held*, that this agreement fell within the scope of the general authority of the attorney, and was binding on the plaintiffs in the suit. The plaintiffs in the suit having failed to proceed by execution against the maker of the note, and having suffered him to remove with his property out of the reach of process of execution, the circuit court, on a bill filed, perpetually enjoined proceedings on the judgment confessed by the administratrix of the indorser; and the decree of the circuit court was, on appeal, affirmed by the supreme court................................*Id.*

5. In an original bill filed by the United States, in the circuit court of Rhode Island, the claim of the United States to payment of a debt due to them, was asserted, on the ground of an assignment made to the United States, by an insolvent debtor, who was discharged from imprisonment, on the condition that he should make such an assignment; the debtor had been previously discharged under the insolvent law of Rhode Island; aud had made, on such discharge, a general assignment for the benefit of his creditors; afterwards, an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States by the act of congress against their debtors who have become insolvent; it was objected, that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case; but the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains. *Hunter* v. *United States*............................ *173

6. Where a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment, in such a case, proceedings at law might not be adequate, and it was proper to proceed in equity..................*Id.*

7. Excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent a decree for a specific performance; but though it will not, standing alone, prevent a court of chancery enforcing a contract; it is an ingredient which, associated with others, will contribute to prevent the interference of a court of equity. *Cathcart* v. *Robinson*...................*264

8. The difference between that degree of unfairness which will induce a court of equity to interfere actively, by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said, that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks; omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid; if to any unfairness, a great inequality between the price and value be added, a court of chancery will not afford its aid.............................*Id.*

9. The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable; such subjects are within the settled and common jurisdiction of the court. It is equally well settled, that if the jurisdiction attaches, the court will go on to do complete justice; although in its progress it may decree on a matter which was cognisable to law.......................... ...*Id.*

10. Courts of equity adopt the same rule as to possession, to bar a recovery in ejectment, as courts of law. *Peyton* v. *Stith*........*485

11. After an arbitrament and award, an action was instituted at law upon the award, and the court being of opinion, the award was void for informality, judgment was given for the defendant; a bill was then filed by the plaintiff, on the equity side of the circuit court for the county of Alexandria, to establish the settlement of complicated accounts between the parties, which was made by the arbitrators; and if that could not be done, for a settlement of them, under the authority of a court of chancery. This is not a case proper for the jurisdiction of a court of chancery. *Fowle* v. *Lawrason*.............*49

12. Although the line may not be drawn with absolute precision, yet it may be safely affirmed, that a court of chancery cannot draw to itself every transaction between individuals, in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted; it is the appropriate tribunal.. *Id.*

See SPECIFIC PERFORMANCE.

CHEROKEE INDIANS.

1. The Cherokee Nation is not a foreign state, in the sense in which the term "foreign state"

is used in the constitution of the United States. *Cherokee Nation* v. *State of Georgia*.....*1

2. The Cherokees are a state; they have been uniformly treated as a state, since the settlement of our country; the numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community; laws have been enacted in the spirit of these treaties; the acts of our government plainly recognise the Cherokee Nation as a state; and the courts are bound by those acts............ .... *Id.*

See INDIANS: JURISDICTION.

CHOSES IN ACTION, ASSIGNMENT OF.

1. A shipment of tobacco was made at New Orleans, by the agent of the owner, consigned to a house in Baltimore; the shipment being for the account and risk of the owner, he being at the time indebted to the consignees for a balance of account; the owner of the shipment drew two bills on the consignees, and on the same day, made an assignment on the back of a duplicate invoice of the tobacco, in the following words: "I assign to James Jackson (the drawee of the bills) so much of the proceeds of the tobacco alluded to in the within invoice, as will amount to $2400 (the amount of the two bills); to I. & L. $600, &c., and Messrs. Tiernan & Sons (the consignees) will hold the net proceeds of the within invoice, subject to the order of the persons above named, as directed above;" the bills were dishonored. This assignment, by its terms, was not intended to pass the legal title in the tobacco, or its proceeds, to the parties; but to create an equitable title or interest only in the proceeds of the sale, for the benefit of the assignees; and they cannot maintain an action against the consignees, in their own name, for the same; the receipt of the consignment by the consignees did not create a contract, express or implied, on the part of the consignees, with the assignees, to hold the proceeds for their use, so as to authorize them to sue for the same. *Tiernan* v. *Jackson*.... .... *580

2. The general principle of law is, that *choses in action* are not at law assignable; but if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action against the debtor as for money received to his use....................*Id.*

3. In Mandeville *v.* Welsh, 5 Wheat. 277, 286, it was said by this court, that in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and after notice to the drawee, it binds that fund in his hands; but where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee; unless he consents to the appropriation, by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. The court were there speaking in a case where the suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor; and it was, therefore, unnecessary to consider, whether the remedy, if any, for the assignee, was at law or in equity.... *Id.*

4. Until the parties receiving a consignment or a remittance, under such circumstances as those in this case, had done some act recognizing the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a privity between them, the property and its proceeds remained at the risk, and on the account, of the remitter or owner....*Id.*

COMMISSION.

See DEPOSITIONS: EVIDENCE.

COMMON LAW OF THE UNITED STATES.

1. The statutes passed in England before the emigration of our ancestors, applicable to our situation, and in amendment of the law, constitute a part of our common law. *Patterson* v. *Gwinn*.........................*233

CONSIDERATION.

1. The consideration alleged in a bill for an injunction, for the promise of an attorney to proceed by execution against the maker of a note, and make the amount of the same, was the relinquishment of a defence which the defendant at the time considered legal and valid; by a subsequent judicial decision, it was determined, that the defence would not have been sustained. To permit this decision to have a retrospective effect, so as to annul a settlement or agreement made under a different state of things, would be sanctioning a most mischievous principle. *Union Bank of Georgetown* v. *Geary*..............*99

CONSTITUTIONAL LAW.

1. To bring a case within the protection of the seventh article in the compact between Vir-

ginia and Kentucky, it must be shown, that the title to the land asserted is derived from the laws of Virginia, prior to the separation of the two states. *Fisher* v. *Cockerell*. .*248

CONSTRUCTION OF STATE LAWS.

1. It seems, there is no act of assembly of Maryland which declares a judgment to be a lien on real estate, before execution issued and levied; but by an act of parliament of 5 Geo. II., c. 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; this statute has been adopted and in use in Maryland ever since its passage, as the only one under which lands have been taken in execution and sold. *Tayloe* v. *Thompson*........................*358
2. It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors; and that this construction has been uniform throughout the state...... *Id.*
3. As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely of enactments of their own, or the statutes of England in force or adopted by the legislature; the decisions of their courts, the settled and uniform practice and usage of the state, in the practical operation of its provisions, evidencing the judical construction of its terms, are to be considered as a part of the statute, and as such furnish a rule for the decisions of the federal courts. The statute and its interpretation form together a rule of title and property, which must be the same in all courts; it is enough for this court to know, that by ancient, well-established, and uniform usage, it has been acted on and considered as extending to all judgments in favor of any persons, and that sales under them have always been held and respected as valid.............................*Id.*
4. Though the statute of 5 Geo. II. does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence that it has always been so considered and acted on.................*Id.*
5. There is no principle better established and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of the state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the constitution, treaties or statutes of the United States, do not otherwise provide. *Hinde* v. *Vattier* *398
6. By a statute of Kentucky, passed in 1796, several defendants, who claim separate tracts of land, from distinct sources of title, may be joined in the same suit. *Lewis* v. *Marshall*............................ *470

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CONSTRUCTION OF STATUTES.

1. The rule which has been uniformly observed by this court in construing statutes, is to adopt the construction made by the courts of the country, by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of the states; by adopting them they become our own, as entirely as if they had been enacted by the legislature of the state. *Cathcart* v. *Robinson*...............*264
2. The construction which British statutes had received in England, at the time of their adoption in this country, indeed, to the time of the separation of this country from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however subsequent decisions may be respected, and certainly, they are entitled to great respect, their absolute authority is not admitted; if the English courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them......... *Id.*
3. At the commencement of the American revolution, the construction of the statute of Elizabeth seems not to have been settled. The leaning of the courts towards the opinion, that every voluntary settlement would be deemed void as to subsequent purchases was very strong; and few cases are to be found, in which such conveyance has been sustained; but those decisions seem to have been made on the principle, that such subsequent sale furnishes a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement, the burden of proving it, from the settlement itself, or from extrinsic circumstances, to be made in good faith; rather than as furnishing conclusive evidence, not to be repelled by any circumstances whatever.................... *Id.*
4. There is some contrariety and some ambiguity in the old cases on the subject; but this court conceives that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable considera-

tion—fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the American revolution, and ought not to be followed.......*Id.*

5. A subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bonâ fide;* this principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Elizabeth, as it applies to this case.

CONSTRUCTION OF STATUTES OF THE UNITED STATES.

1. The mother of Aspasia, a colored woman, was born a slave at Kaskaskia, in Illinois, previous to 1787, and before that country was conquered for Virginia; Aspasia was born in Illinois, subsequent to the passage of the ordinance for the government of that territory; Aspasia was afterwards sent as a slave to the state of Missouri; in Missouri, Aspasia claimed to be free, under the ordinance "for the government of the territory of the United States north-west of the river Ohio," passed 13th July 1787. The supreme court of Missouri decided, that Aspasia was free, and Menard, who claimed her as his slave, brought this writ of error, under the 25th section of the act of 1789, claiming to reverse the judgment of that court: *Held*, that the case was not within the provisions of the 25th section of the act of 1789. *Menard* v. *Aspasia*.......................*505
2. The provisions of the compact which relate to "property," and to "rights," are general; they refer to no specific property or class of rights; it is impossible, therefore, judicially, to limit their application. If it were admitted, that Aspasia is the property of the plaintiff in error, and the court were to take jurisdiction of the cause, under the provisions of the ordinance, must they not, on the same ground, interpose their jurisdiction, in all other controversies respecting property, which was acquired in the north-western territory?.............................*Id*
3. Whatever right may be claimed to have originated under the ordinance of 1787, it would seem, that a right to the involuntary service of an individual could not have had its source in that instrument; it declares, that "there shall not be slavery nor involuntary servitude in the territory." If this did not destroy a vested right in slaves, it, at least, did not create or strengthen that right..*Id.*
4. If the decision of the supreme court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the 25th section of the judiciary act, could be exercised; in such a case, the decision would have been against the express provision of the ordinance in favor of liberty; and on that ground, if that instrument could be considered, under the circumstances, as an act of congress, within the 25th section, the jurisdiction of this court would be unquestionable; but the decision was not against, but in favor of the express provision of the ordinance..............*Id.*
5. The general provisions of the ordinance of 1787, as to the rights of property, cannot give jurisdiction to this court; they do not come within the 25th section of the judiciary act...............................*Id.*

See Error, 3: Principal and Surety.

CONTRACT.

1. Excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent a decree for a specific performance; but though it will not, standing alone, prevent a court of chancery enforcing a contract, it is an ingredient which, associated with others, will contribute to prevent the interference of a court of equity. *Cathcart* v. *Robinson*................*264
2. The difference between that degree of unfairness which will induce a court of equity to interfere actively, by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said, that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks; omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid; if, to any unfairness, a great inequality between the price and value be added, a court of chancery will not afford its aid.......*Id.*
3. The contract between the parties contained a stipulation, that the payment of the purchase-money of the property should be secured by the execution of a deed of trust on the whole amount of a claim the purchaser had on the United States; the penalty which was to be paid on the non-performance of the contract being substituted for the purchase-money, it should retain the same protection......*Id.*
4. Whatever may be the inaccuracy of expression, or the inaptness of the words used in an

instrument, in a legal view; if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly. *Tierman* v. *Jackson*................*580

5. Construction of a bond executed by the president and directors of the Bank of Somerset to the United States, for the performance of an agreement made by them with the United States, for the payment of a debt due to the United States, arising from deposits made in the bank for account of the United States. *United States* v. *Robinson*.... *611

CORPORATION OF THE CITY OF WASHINGTON.

1. The plaintiff was the owner of a half-ticket in "the fifth class of the National Lottery," authorized by the charter granted by congress to the city of Washington; the number of the original ticket was 5591, which drew a prize of $25,000; the whole ticket was in the hands of Gillespie, to whom all the tickets in the lottery had been sold by the corporation of Washington; and his agent issued the half-ticket, which was signed by him as the agent of Gillespie, the purchaser of all the tickets in the lottery. After the drawing of the prize, and before notice of the interest of any other person in the ticket No. 5591, Gillespie returned the original ticket to the managers or commissioners of the lottery, and the agents of the corporation; and received back from the corporation an equivalent to the value of the prize drawn by it, in securities deposited by him with the corporation, for the payment of the prizes in the lottery: *Held*, that the corporation of Washington were not liable for the payment of half of the prize drawn by ticket No. 5591, to the owner of the half-ticket. *Shankland* v. *Corporation of Washington*........*390

2. The purchaser of tickets in a lottery, authorized by an act of congress, has a right to sell any portion of such ticket less than the whole; the party to whom the sale has been made would thus become the joint-owner of the ticket thus divided, but not a joint-owner by virtue of a contract with the corporation of Washington, but with the purchaser in his own right and on his own account. The corporation promise to pay the whole prize to the possessor of the whole ticket, but there is no promise on the face of the whole ticket, that the corporation will pay any portion of a prize to any sub-holder of a share; and it is not in the power of a party, merely by his own acts, to split up a contract into fragments, and to make the promisor liable to every holder of a fragment for a share.. *Id.*

COSTS.

1. Where the court ordered the costs to be paid of a former ejectment brought by the plaintiffs, in the names of other persons, but for their use, before the plaintiff could prosecute a second suit in his own name for the same land, this was not a judicial decision, that the right of the plaintiffs in the first suit was the same with that of the plaintiffs in the second suit; it was perfectly consistent with the justice of the case, that when the plaintiffs sued the same defendant, in their own name, for the same land, that they should reimburse him for the past costs to which they had subjected him, before they should be permitted to proceed further. Rules of this kind are granted by the court to meet the justice and exigencies of cases as they occur; not depending solely on the interest which those who are subjected to such rules may have in the subject-matter of suits which they bring and prosecute in the names of others; but on a variety of circumstances, which, in the exercise of a sound discretion, may furnish a proper ground for their interference. *Henderson* v. *Griffin*........*151

COURTS OF THE UNITED STATES.

1. There is no principle better established and more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do; the rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of the state, furnish the guides and rules of decision in those of the Union, in all the cases to which they apply, where the constitution treaties or statutes of the United States do not otherwise provide. *Hinde* v. *Vattier*. *398

DECISIONS OF STATE COURTS.

See Local Law, 1–4.

DEPOSITIONS.

1. In the caption of a deposition, taken before the mayor of Norfolk, to be used in a cause depending, and afterwards tried in the circuit court of the United States held in Baltimore, the mayor stated the witness "to be a resident in Norfolk;" and in his certificate he stated, that the reason for taking the deposition was "that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, in the borough of Nor-

folk." It was sufficiently shown by this certificate, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. *Patapsco Insurance Co.* v. *Southgate*...*604

2. The provisions of the 13th section of the act of congress, entitled, "An act to establish the judicial courts of the United States," which relate to taking of depositions of witnesses, whose testimony shall be necessary in a civil cause depending in any district, in the courts of the United States, who reside at a greater distance than one hundred miles from the place of trial, are not confined to depositions taken within the district where the court is held.................... *Id*

3. In all cases where, under the authority of an act of congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to compulsory attendance; the act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted or used on the trial. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; it being considered beyond a compulsory attendance........*Id.*

4. The deposition of a witness living beyond one hundred miles from the place of trial, may not always be absolute; for the party against whom it is to be used may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance; the burden of proving this would rest upon the party opposing the admission of the deposition in evidence. For a witness whose deposition is taken under such circumstances, it is not necessary to issue a *subpœna:* it would be a useless act; the witness could not be compelled to attend personally..........*Id.*

DISTRICT-ATTORNEY.

1. The district-attorney is especially charged with the prosecution of all delinquents for crimes and offences; and these duties do not end with the judgment or order of the court; he is bound to provide the marshal with all necessary process to carry into execution the judgment of the court; this falls within his general superintending authority over the prosecution. *Levy Court of Washington* v. *Ringgold*..................*451

DISTRICT COURT OF ALABAMA.

1. The district court of the United States for the state of Alabama has no jurisdiction of suits instituted by the Bank of the United States; this jurisdiction is not given in the act of congress establishing that court, nor is it conferred by the act incorporating the Bank of the United States. *Bank of United States* v. *Martin*....................*479

DISTRICT OF COLUMBIA.

1. The statute of 27th Eliz. is in force in the district of Columbia. *Cathcart* v. *Robinson*..*264

2. The Levy Court of Washington county are not entitled to one-half of all the fines, penalties and forfeitures imposed by the circuit court in cases at common law, and under the acts of congress, as well as the acts of assembly of Maryland, adopted by congress as the law of the district of Columbia. *Levy Court of Washington* v. *Ringgold*....*451

EJECTMENT.

See Lands and Land Titles.

ERROR.

1. Although on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of this court think there is no error; yet the judgment of the district court must be reversed, as on the question of reversal, the minorities unite and constitute a majority of the court. *Smith* v. *United States*......................*295

2. The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach, that at the time of the execution of the bond, there were in the hands of Rector as surveyor, to be applied and disbursed by him, in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done; the jury found for the plaintiff, and assessed the damages for the breach of the condition at $40,000, and the judgment was entered *quod recuperet* the damages, not the debt. This judgment is clearly erroneous. *Farrar* v. *United States*.......................... *373

3. It would seem, that in adopting this form of rendering the judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject; that section, if it sanctions such a judgment at all, is expressly confined to three cases, default, confession or demurrer.........*Id.*
4. This court can only reverse a judgment, when it is shown that the court below has erred; it cannot proceed upon conjecture of what the court below may have laid down for law; it must be shown, in order to be judged what instructions were in fact given, and what were refused. *Bradstreet* v. *Huntington*.............................. *402

EVIDENCE.

1. A witness testified, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, but was acquainted with his daughter only by report; that she never had seen her, or Mr. Scott, but recollected to have heard of their marriage, as she thought, before the death of her father; that she could not state from whom she heard the report, but that she had three cousins who went to college at the time that she lived in Petersburg, and had no doubt, that she had heard them speak of the marriage; that she heard of the marriage of Miss Madison, before her own marriage, as she thought, which was in 1810; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead: *Held*, that so much of this evidence as went to prove the death of Mr. Madison was admissible on the trial, and ought not to have been excluded by the court. *Scott* v. *Ratcliffe*........*81
2. It may be gathered from the decisions of the courts of Maryland, that on the trial of a question of title to land, no evidence can be admitted of the location of any line, boundary or object not laid down on the plats of re-survey; and that a witness, who was not present at the re-survey, is not competent to give evidence as to the lines, objects and boundaries laid down in such plats; these rules appear to rest on artificial reasoning and a course of practice peculiar to Maryland. *Greenleaf* v. *Birth*............*132
3. The court do not find it to have been decided by the courts of Maryland, that no testimony is admissible, to prove a possession of the land within the lines of the party's claim laid down in the plat, except the testimony of some witness who was present at the re-survey; upon the general principles of the law of evidence, such testimony is clearly admissible. A party has a right to prove his possession by any competent witness; whether he was present at the re-survey or not.................................*Id.*
4. In the ordinary course of things, the party offering evidence is understood to waive any objection to its competency as proof; it is not competent for a party to insist upon the effect of one part of the papers constituting his own evidence, without giving the other party the benefit of the other facts contained in the same paper...................*Id.*
5. What should be considered proof of the loss of a deed, or other instrument, to authorize the introduction of secondary evidence? *Patterson* v. *Winn*..................*233
6. An exemplification of a grant of land, under the great seal of the state of Georgia, is, *per se*, evidence, without proceeding or accounting for the non-production of the original; it is record proof of as high a nature as the original; it is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own common seal; and imports absolute verity, as a matter of record................*Id.*
7. The common law is the law of Georgia, and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question, it does not appear, that Georgia has ever established any rules at variance with the common law; though it is not improbable, that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them, in the different circuits of that state; acting as they do, independent of each other, and without any common appellate court to supervise their decision...............*Id.*
8. There was, in former times, a technical distinction existing on this subject; as evidence, such exemplifications of letters-patent seem to have been generally deemed admissible; but where, in pleading, a *profert* was made of the letters-patent, there, upon the principles of pleading, the original, under the great seal, was required to be produced; for a *profert* could not be of any copy or exemplification. It was to cure this difficulty, that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed; so too, the statute of 10 Ann., c. 18, makes copies of enrolled deeds of bargain and sale, offered by *profert* in pleading, evidence...............................*Id.*
9. However convenient a rule established by a circuit court, relative to the introduction of secondary proof, might be, to regulate the general practice of the court, it could not

control the rights of parties in matters of evidence, admissible by the general principles of law........................*Id.*

10. Action of debt, on a bond executed by Alpha Kingsley, a paymaster in the army, and by John Smith T. and another, as his sureties, to the United States; the condition of the obligation was, that Alpha Kingsley, "about to be appointed a district paymaster," &c., "and who will, from time to time, be charged with funds to execute and perform the duties of that station, for which he will be held accountable," &c., shall "well and truly execute the duties of district paymaster, and regularly account for all moneys placed in his hands, to carry into effect the object of his appointment." On the trial, the plaintiff gave in evidence a duly certified copy of the bond, and a "transcript from the books and proceedings of the treasury department, of the account of Alpha Kingsley, late district paymaster, in account with the United States;" in this account, A. K. was charged with moneys advanced to him for pay, subsistence and forage, bounties and premiums, and contingent expenses of the army; and credited with disbursements of the same, for the purposes for which they were paid to him, and showing a large amount of items suspended and disallowed; making a balance due to the United States of $48,492.53; the account was thus settled by the third auditor of the treasury, and was duly certified to the second comptroller of the treasury, and this balance was by him admitted and certified on the 23d of April 1823. The account was further certified, "Treasury department, third auditor's office, 1st of September 1824: pursuant to an act to provide for the prompt settlement of public accounts, approved 3d of March 1817, I, Peter Hagner, third auditor, &c., do hereby certify, that the foregoing transcripts are true copies of the originals, on file in this office;" to this was annexed a certificate, that Peter Hagner was the third auditor, &c., "In testimony whereof I, William H. Crawford, secretary of the treasury, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 1st of September 1824, (signed) Edward Jones, chief clerk, for William H. Crawford, secretary of the treasury." The seal of the treasury department was affixed to the certificate. On the trial, the district court of Missouri instructed the jury, that, "as by the account, it appears there are in it items of debit and credit to Kingsley, as district paymaster, it furnished evidence of his having acted as district paymaster, and of his appointment as such." There are two kinds of transcript which the statute authorizes the proper officers to certify: first, a transcript from "the books and proceedings of the treasury," and secondly, "copies of bonds, contracts and other papers, &c., which remain on file, and relate to the settlement;" the certificate under the first head has been literally made in this case, and is a sufficient authentication of the transcript from "the books and proceedings of the treasury," and is a substantial compliance with the requisitions of the statute. *Smith* v. *United States*............................*292

11. The objection, that this signature of the treasury was signed by his chief clerk, seems not to be important; it is the seal which authenticates the transcript, and not the signature of the secretary; he is not required to sign the paper; if the seal be affixed by the auditor, it would be deemed sufficient under the statute. The question, therefore, is not necessarily involved in deciding this point, whether the secretary of the treasury can delegate to another the power to do an official act, which the law devolves on him personally...........................*Id.*

12. The clerk of the court brought into court, under process, a letter of attorney, and left a copy of it, by consent of the plaintiffs and defendants, returning home with the original; M., a witness, stated that the clerk of the court showed him the instrument, the signature of which he examined, and he believed it to be the handwriting of the party to it; with whose handwriting he was acquainted; another witness stated, that the instrument shown to M. was the original power of attorney. The letter of attorney purported to be delivered and executed by "James B. Clarke, of the city of New York, and Eleanor his wife," to "Carey L. Clarke, of the city of New York," on the 7th of October 1796, in the presence of three witnesses. In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for; when he is dead, or cannot be found, or is without the jurisdiction of the court, or otherwise incapable of being produced the next secondary evidence is the proof of his handwriting; and that, when proved, affords *primâ facie* evidence of a due execution of the instrument; for it is presumed, that he could not have subscribed his name to a false attestation; if, upon due search and inquiry, no one can be found who can prove his handwriting, no doubt, resort may then be had to proof of the handwriting of the party who executed the instrument; such proof may always be produced as corrobora-

tive evidence of its due and valid execution, though it is not, except under the limitation stated, primary evidence. Whatever may have been the origin of the rule, and in whatever reason it may have been founded, it has been too long established, to be disregarded, or to justify an inquiry into its original correctness. The rule was not complied with in the case at bar; the original instrument was not produced at the trial, nor the subscribing witnesses, or their non-production accounted for. The instrument purports to be an ancient one; but no evidence was offered, in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof. The agreement of the parties dispensed with the production of the original instrument, but not with the ordinary proof of the due execution of the original, in the same manner as if the original were present. *Clarke* v. *Courtney*..............................*319

13. It is certainly very difficult to maintain, that in a court of law, any parol evidence is admissible, substantially to change the purport and effect of a written instrument, and to impose upon it a sense which its terms not only do not imply, but expressly repel. *Shankland* v. *Corporation of Washington*..............................*390

14. The book called the Land Laws of Ohio, published by the authority of a law of that state, is evidence in the circuit court of the United States of an application made in 1787, for the purchase of a tract of land on the Ohio river, between the mouths of the Great and Little Miami, by John Cleves Symmes and his associates, and of the various acts of congress relative to that application and purchase, and of a patent from the president of the United States, pursuant to an act of congress, granting to Symmes and his associates, the land described therein; and the production of any other evidence of title in Symmes is unnecessary. *Hinde* v. *Vattier*..........................*398

15. It would be productive of infinite inconvenience to settlers and all persons interested in the lands embraced in this patent, if its publication among the laws of the state, and the admission of the book of laws, as evidence of the grant, after its solemn adoption by the supreme court of Ohio as a settled rule of property, should be questioned in the courts of the United States................*Id.

16. The entries on the register of burials of Christ Church, St. Peter's and St. James's, in Philadelphia, and the entries of the death of the members of a family in a family Bible, are evidence, in an action for the recovery of land in Kentucky, to prove the period of the decease of the person named therein. *Lewis* v. *Marshall*......................*470

17. In the caption of a deposition, taken before the mayor of Norfolk, to be used in a cause depending, and afterwards tried in the circuit court of the United States held in Baltimore, the mayor stated the witness "to be a resident in Norfolk," and in his certificate he stated, that the reason for taking the deposition was "that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, from the borough of Norfolk." It was sufficiently shown by this certificate, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. *Patapsco Insurance Co.* v. *Southgate*....*604

18. The provisions of the 13th section of the act of congress, entitled "an act to establish the judicial courts of the United States," which relate to the taking of depositions of witnesses, whose testimony shall be necessary in any civil cause depending in any district, in the courts of the United States, who reside at a greater distance than one hundred miles from the place of trial, are not confined to depositions taken within the district where the court is held......................*Id.*

19. In all cases, where, under the authority of the act of congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to a compulsory attendance; the act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted or used on the trial. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered beyond a compulsory attendance........*Id.*

20. The deposition of a witness living beyond one hundred miles from the place of trial, may not always be absolute; for the party against whom it is to be used may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance; the burden of proving this would rest upon the party opposing the admission of the deposition in evidence. For a witness whose deposition is taken under such circumstances, it is not necessary to issue a *subpœna*; it would be a useless act;

the witness could not be compelled to attend personally..........................*Id.*

21. By the act of 2d March 1793, *subpœnas* for witnesses may run into districts other than where the court is sitting; provided, the witness does not live at a greater distance than one hundred miles from the place of holding the court....................*Id.*

EXTORTION UNDER COLOR OF OFFICE.

1. Where the United States instituted an action for the recovery of a sum of money on a bond, given, with sureties, by a purser in the navy, and the defendants, in substance, pleaded, that the bond, with condition thereto, was variant from that prescribed by law, and was, under color of office, extorted from the obligor and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of the purser's remaining in office and receiving its emoluments; and the United States demurred to this plea; it was held, that the plea constituted a good bar to the action. *United States* v. *Tingey*....*115
2. No officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of his holding his office, that he should execute a bond, with a condition different from that prescribed by law; that would be, not to execute, but to supersede the requisites of the law. It would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office.............................*Id.*

EXECUTORS AND ADMINISTRATORS.

1. The executor or administrator cannot discharge his own debt, in preference to others of superior dignity; though he may give the preference to his own over others of equal degree. In some of the states, this rule would not apply, as there is no difference made in the payment of debts, between a bond and simple contract. *Page* v. *Patton*..........................*304
2. If the creditor appoint the debtor his executor, in some cases, it operates as a release; this, however, is not the case, as against creditors; the release is good against devisees, when the debt due has not been specifically devised...........................*Id.*

EXECUTION.

1. It seems, there is no act of assembly of Maryland which declares a judgment to be a lien on real estate, before execution issued and levied; but by an act of parliament of 5 Geo. II., c. 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold. *Tayloe* v. *Thompson*............... *358
2. It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors; and that this construction has been uniform throughout the state..*Id.*
3. As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely of enactments of their own, or the statutes of England, in force or adopted by the legislature. The decisions of their courts; the settled and uniform practice and usage of the state in the practical operation of its provisions, evidencing the judicial construction of its terms; are to be considered as a part of the statute, and as such furnish a rule for the decisions of the federal courts; the statute and its interpretation form together a rule of title and property which must be the same in all courts. It is enough for this court to know, that by ancient, well-established, and uniform usage, it has been acted on and considered as extending to all judgments in favor of any persons; and that sales under them have always been held and respected as valid ....*Id.*
4. Though the statute of 5 Geo. II. does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence, that it has always been so considered and acted on..................*Id.*
5. The plaintiff in a judgment has an undoubted right to an execution against the person and the personal or real property of the defendant; he has his election; but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution; his remedies are cumulative and successive, which he may pursue, until he reaches that point at which the law declares his debt satisfied..........................*Id.*
6. A *capias ad satisfaciendum* executed, does not extinguish the debt for which it is issued; if the defendant escape, or is discharged by operation of law, the judgment retains its lien, and may be enforced on the property of the defendant; the creditor may retake him, if he escape, or sue the sheriff..........*Id.*
7. We know of no rule of law which deprives the plaintiff in a judgment of one remedy, by

the pursuit of another, or of all which the law gives him; the doctrine of election, if it exists in any case of a creditor, unless under the statutes of bankruptcy, has never been applied to a case of a defendant discharged under an insolvent act, by operation of law. . . . . *Id.*

8. The greatest effect which the law gives to a commitment on a *capias ad satisfaciendum* is a suspension of the other remedies, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them as fully as if he had never made use of any. . . . . *Id.*
9. The escape of the defendant, by his breach of prison-bounds, could not effect the lien of the judgment; the plaintiff is not bound to resort to the prison-bond as his only remedy: a judgment on it against the defendant is no bar to proceeding by *fieri facias*. . . . . *Id.*
10. The fifth section of the act of congress for the relief of insolvent debtors declares, "that no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, and attachment in the nature of execution, which shall have been put into the hands of the marshal, antecedent to the application;" the application of this clause in the section was intended only for a case where one creditor sought to obtain a preference by process against the debtor's property, after his application; in such case, the execution shall have no effect or operation; but where the incumbrance or lien had attached before the application, it had a priority of payment out of the assigned fund. . . . . *Id.*

FACTOR.

See Assignment of Choses in Action.

FRAUD.

1. A conveyance of the whole of his property by a husband, to trustees, for the benefit of his wife and his issue, is a voluntary conveyance; and is, at this day, held by the courts of England, to be absolutely void, under the statute of the 27th Elizabeth, against a subsequent purchaser, even although he purchased with notice. These decisions do not maintain, that a transaction, valid at the time, is rendered invalid by the subsequent act of the party; they do not maintain, that the character of the transaction is changed; but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser. *Cathcart* v. *Robinson*. *264
2. A subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bonâ fide;* this principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Eliz., as it applies to this case. . . . . *Id.*

See Construction of Statutes.

GEORGIA.

See Evidence, 6–8: Cherokee Nation *v.* State of Georgia.

GUARANTEE.

See Letter of Credit.

INDIANS.

1. The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other; the term foreign nation is with strict propriety applicable by either to the other; but the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. *Cherokee Nation* v. *State of Georgia*. *1
2. The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States, can, with strict accuracy, be denominated foreign nations; they may, more correctly, perhaps, be denominated domestic dependent nations; they occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases —meanwhile they are in a state of pupilage; their relations to the United States resemble that of a ward to his guardian; they look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the president as their great father. . . . . *Id.*

See Cherokee Nation.

INJUNCTION.

1. Injunction refused, on a motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia in the territory of the Cherokee Nation of Indians, on behalf of the Cherokee Nation; they claiming to proceed in the supreme court of the United States, as a foreign state, against the state of Georgia; under the provision of the constitution of the United States, which gives to the court jurisdiction in controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens or subjects thereof, are parties. *Cherokee Nation* v. *State of Georgia* *1

INSOLVENT LAWS.

1. An assignment under the insolvent law of Rhode Island can only take effect from the time it is made; until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party; it is the transfer which vests in the assignee the property of the insolvent for the benefit of his creditors. If, before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, as though he had not applied for the benefit of the law; and if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution. *Hunter* v. *United States*.......................... *173
2. The property placed on the inventory of an insolvent may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor who obtains a judgment before the assignment. *Id.*

INSURANCE.

1. Damages to a vessel, by any of the perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money to an amount exceeding half the value of the vessel, at that port, after such repairs, constitute a total loss. *Patapsco Insurance Co.* v. *Southgate*...*604
2. The rule laid down in the books is general, that the value of the vessel, at the time of the accident, is the true basis of calculation; and if so, it necessarily follows, that it must be the value at the place where the accident occurs. The sale is not conclusive with respect to such value; the question is open for other evidence, if any suspicion of fraud or misconduct rests upon the transaction...... *Id.*
3. As a general proposition, there can be no doubt, that the injury to the vessel may be so great as to justify the sale by the master; there must be this implied authority in the master, from the nature of the case; he, from necessity, becomes the agent of both parties, and is bound, in good faith, to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity...... *Id.*
4. There must be a necessity for a sale of the vessel, and good faith in the master in making it; and the necessity is not to be inferred, from the fact of the sale in good faith; but must be determined from the circumstances. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale to all concerned, would not justify it; unless the circumstances under which the vessel was placed rendered the sale necessary, in the opinion of the jury. . *Id.*
5. There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed, that no particular form is necessary; nor is it indispensable, that it should be in writing; but in whatever form it is made, it ought to be explicit, and not left open as matter of inference, from some equivocal acts; the assured must yield up to the underwriter all his right, title and interest in the subject insured; for the abandonment, when properly made, operates as a transfer of the property to the underwriters, and gives him a title to it, or what remains of it, so far as it was covered by the policy...................... *Id.*
6. The consul of the United States at the port where a vessel was sold, in consequence of her having, in the opinion of the master, sustained damages, the repairs of which would have cost more than half her value at that port, declared in the protest of the master, made at his request, that the master abandoned the vessel, &c., to the underwriters; this protest, as soon as it was received by assured, the owners of the vessel, was sent to the underwriters; and the owners wrote, at the same time, that they would forward a statement of the loss, with the necessary vouchers, and they soon afterwards did forward the further proofs, and a statement of the loss to them: This constituted a valid abandonment....................... *Id.*

INTEREST.

1. Interest is not chargeable on money collected

by the marshal of the district of Columbia for fines due to the Levy Court, the money having been actually expended by the marshal in repairs and improvements on the jail, under the opinions of the comptroller and auditor of the treasury department, that these expenditures were properly chargeable upon this fund, although those opinions may not be well founded. *Levy Court of Washington* v. *Ringgold*........................*451

JUDGMENT.

See EXECUTION.

JURISDICTION.

1. The supreme court of United States has not jurisdiction in the matter of a bill filed by the Cherokee Nation of Indians, against the state of Georgia, praying for an injunction to prevent the execution of certain laws passed by the legislature of Georgia relative to lands within the boundaries of the lands of the Cherokee Nation; the Cherokee Nation not being "a foreign state," in the sense in which the term "foreign state" is used in the constitution of the United States. *Cherokee Nation* v. *State of Georgia*.....*1
2. The third article of the constitution of the United States describes the extent of the judicial power; the second section closes an enumeration of the cases to which it extends, with "controversies between a state and the citizens thereof, and foreign states, citizens or subjects;" a subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party—the state of Georgia may, then, certainly be sued in this court ....*Id.*
3. The bill filed on behalf of the Cherokees seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the state denies. On several of the matters alleged in the bill; for example, on the laws making it criminal to exercise the usual power of self-government in their own country, by the Cherokee Nation, this court cannot interpose, at least, in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful; the mere question of right might perhaps be decided by this court, in a proper case, with proper parties; but the court is asked to do more than decide on the title; the bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned; it savors too much of the exercise of political power, to be within the proper province of the judicial department.... ....*Id.*
4. The clerk of the Union County circuit court of Kentucky certified, that certain documents were read in evidence, and among them, a patent under which F. claimed, issued by the governor of Kentucky, founded on rights derived from the laws of Virginia: this court cannot notice this patent; it cannot be considered a part of this record. In the view which has been taken of the record by the court, it does not show that the compact with Virginia was involved in the case; consequently, the question whether the act for the benefit of occupying claimants was valid, does not appear to have arisen; and nothing is shown on the record which can give jurisdiction to this court. *Fisher* v. *Cockerell*..*248
5. A review of the cases, as to jurisdiction, of Harris *v.* Dennie, 3 Pet. 892; Craig *v.* Missouri, 4 Ibid. 410; Owing *v.* Norwood, 5 Cranch 344; Miller *v.* Nicholls, 4 Wheat. 312.................................*Id.*
6. To bring a case within the protection of the seventh article in the compact between Virginia and Kentucky, it must be shown, that the title to the land asserted is derived from the laws of Virginia, prior to the separation of the two states.................*Id.*
7. Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution. *New Jersey* v. *State of New York*......................... *284
8. It has been settled, on great deliberation, that this court may exercise its original jurisdiction, in suits against a state, under the authority conferred by the constitution and existing acts of congress; the rule respecting the process, the persons on whom it is to be served, and the time of service, is fixed; the course of the court, after due service of process, has also been prescribed..........*Id.*
9. In a suit in this court, instituted by a state against another state of the Union, the service of the process of the court on the governor and attorney-general of the state, sixty days before the return-day of the process, is sufficient service........................*Id.*
10. At a very early period in our judicial history, suits vere instituted in this court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.....................*Id.*
11. The cases of Georgia *v.* Brailsford; Oswald *v.* New York; Chisholm's Executors *v.* Georgia; New York *v.* Connecticut; Grayson

v. Virginia, cited, as to the jurisdiction and modes of proceeding in suits in which a state is a party ... *Id.*

12. The mother of Aspasia, a colored woman, was born a slave, at Kaskaskia, in Illinois, previous to 1787, and before that country was conquered for Virginia; Aspasia was born in Illinois, subsequent to the passage of the ordinance for the government of that territory; Aspasia was afterwards sent as a slave to the state of Missouri; in Missouri, Aspasia claimed to be free, under the ordinance "for the government of the territory of the United States north-west of the river Ohio," passed 13th July 1787. The supreme court of Missouri decided, that Aspasia was free; and Menard, who claimed her as his slave, brought a writ of error, under the 25th section of the act of 1789, claiming to reverse the judgment of that court: *Held*, that the case was not within the provisions of the 25th section of the act of 1789. *Menard* v. *Aspasia* ... *505

13. The provisions of the compact which relate to "property," and to "rights," are general; they refer to no specific property or class of rights; it is impossible, therefore, judicially, to limit their application. If it were admitted, that Aspasia is the property of the plaintiff in error, and the court were to take jurisdiction of the cause, under the provision of the ordinance, must they not, on the same ground, interpose their jurisdiction in all other controversies respecting property, which was acquired in the North-western Territory? ... *Id.*

14. Whatever right may be claimed to have originated under the ordinance of 1787, it would seem, that a right to the involuntary service of an individual could not have had its source in that instrument; it declares, that "there shall not be slavery nor involuntary servitude in the territory;" if this did not destroy a vested right in slaves, it, at least, did not create or strengthen that right ... *Id.*

15. If the decision of the supreme court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the twenty-fifth section of the judiciary act, could be exercised; in such a case, the decision would have been against the express provision of the ordinance in favor of liberty; and on that ground, if that instrument could be considered, under the circumstances, as an act of congress, within the 25th section, the jurisdiction of this court would be unquestionable; but the decision was not against, but in favor of, the express provisions of the ordinance ... *Id.*

16. The general provisions of the ordinance of 1787, as to the rights of property, cannot give jurisdiction to this court; they do not come within the 25th section of the judiciary act ... *Id.*

17. The district court of the United States for the state of Alabama has no jurisdiction of suits instituted by the Bank of the United States; this jurisdiction is not given in the act of congress establishing that court, nor is it conferred by the act incorporating the Bank of the United States. *Bank of United States* v. *Martin* ... *471

See Mandamus.

KENTUCKY.

1. The decision of this court, as to the validity of the law of Kentucky, commonly called the occupying claimants' law, does not affect the question of the validity of the law of Kentucky, commonly called the seven years' possession law. *Hawkins* v. *Barney* ... *457

2. The seventh article of the compact between Virginia and Kentucky declares, "all private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia, prior to such separation, shall remain valid and secure, under the laws of the proposed state (Virginia)." Whatever course of legislation by Kentucky would be sanctioned by the principles and practice of Virginia, should be regarded as an unaffected compliance with the compact; such are all reasonable quieting statutes ... *Id.*

3. From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil; such laws have frequently passed in review before this court; and occasions have occurred, in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights ... *Id.*

4. It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject; she has, in fact, literally complied with the compact in its most rigid construction; for she adopted the very statute of Virginia, in the first instance, and literally gave her citizens the full benefit of twenty years, to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisos and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power ... *Id.*

5. It is not to be questioned, that laws limiting the time of bringing suits constitute a part of the *lex fori* of every country—the laws for

administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction upon which must materially affect both legislative and judicial independence. It can scarce be supposed, that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage; yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing the limitation act were adopted, to assign her a position higher than that of a dependent on Virginia.............................. *Id.*

6. The limitation act of the state of Kentucky, commonly known by the epithet of the seven years' law, does not violate the compact between the state of Virginia and the state of Kentucky.............. .... *Id.*

7. Where a patent was issued for a large tract of land, and by subsequent conveyances, the patentee sold small parts of the said land, within the bounds of the original survey, it has been decided by the courts of Kentucky, that the party offering in evidence a conveyance of the large body held under the patent, containing exceptions of the parts disposed of, is bound, in an action of ejectment, to show that the trespass proved is without the limits of the land sold or excepted............................ *Id.*

See Lands and Land Titles, 1, 2: Limitation of Actions.

LANDS AND LAND TITLES.

1. A patent was issued by the governor of Kentucky for a tract of land, containing 1850 acres by survey, &c., describing the boundaries; the patent described the exterior lines of the whole tract, after which the following words were used, "including within the said bounds 522 acres entered for John Preston, 425 acres for William Garrard; both claims have been excluded, in the calculation of the plat with its appurtenances, &c." Patents of this description are not unfrequent in Kentucky; they have always been held valid, so far as respected the land not excluded, but to pass no legal title to the land excluded from the grant; the words manifest an intent to except the lands of Preston and Garrard from the patent; the government did not mean to convey to the patentee lands belonging to others, by a grant which recognises the title of these others. If this court entertained any doubt on this subject, those doubts would be removed by the construction which it is understood has been put on this patent by the court of the state of Kentucky. *Scot* v. *Ratliffe* *81

2. The defendants claimed under a patent issued by the governor of Kentucky, on the 3d of January 1814, to John Grayham, and two deeds from him, one to Silas Ratliffe, one of the defendants, dated in August 1814, for 100 acres, the other to Thomas Owings, another defendant, for 400 acres, dated 25th March 1816; and gave evidence conducing to prove that they, and those under whom they claimed, had a continued possession, by actual settlement, more than seven years next before the bringing of this suit; the court instructed the jury, that if they believed from the evidence, that the defendants' possession had been for more than seven years before the bringing of the suit, the act commonly called the seven years' limitation act of Kentucky, passed in 1809, was a bar to the plaintiffs' recovery, unless they found that the daughter of the patentee, holding under a patent from the state of Virginia, was a *feme covert*, when her father, the patentee, died; or was so, at the time the defendants acquired their titles by contract or deed from John Grayham, the patentee, under the governor of Kentucky; the words, "at the time the defendants acquired their title by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title: The court cannot say this instruction was erroneous...............*Id.*

3. In the case of Hawkins *v.* Barney (p. 457), it was decided, that when the plaintiff's title, as exhibited by himself, contains an exception, and shows that he has conveyed a part of the tract of land to a third person, and it is uncertain whether the defendants are in possession of the land not conveyed, the *onus probandi* to prove the defendant on the ungranted part, is on the plaintiff. *Clarke* v. *Courtney* *320

4. If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the owner, it is an ouster or disseisin of the owner; but in such case, the possession of the trespasser is bounded by his actual occupancy, and consequently, the owner is not disseised, except as to the portion so occupied..........*Id.*

5. Where a person enters into land, under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed to be disseised to the extent of the boundaries of such deed or title. This, however, is subject to some qualifications; for, if the true owner be, at the same time, in possession of part of the land, claiming title

to the whole, then his seisin extends, by construction of law, to all the land which is not in the actual possession or occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title ....*Id.*

6. In the case of the Society for Propagating the Gospel *v.* Town of Pawlet, 4 Pet. 480, the court held, that where a party entered as a mere trespasser, without title, no ouster could be presumed in favor of such a naked possession; but that when a party entered under a title adverse to the plaintiff, it was an ouster of, and an adverse possession to, the true owner; the doctrines recognised by this court are in harmony with those established by the authority of other courts; especially, by the courts of Kentucky.............*Id.*

7. Where one having no title conveys to a third person, who enters under the conveyance, the law holds him to be a disseisor. *Bradstreet* v. *Huntington*.....................*402.

8. That an actual or constructive possession is necessary, at common law, to the transmission of a right to lands, is incontrovertible; it is seen in the English doctrine of an heir's entering, in order to transmit it to his heirs; but whatever be the English doctrine, and of the other states, as to the right of election to stand disseised, it is certain, that the New York courts have denied that right;, both as to devises and common-law conveyances, without the aid of a statute repealing the common law...............................*Id.*

9. Adverse possession is a legal idea, admits of a legal definition, of legal distinctions; and is therefore, correctly laid down to be a question of law.....................*Id.*

10. Adverse possession may be set up against any title whatsoever, either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession..............*Id.*

11. The common law generally regards disseisin as an act of force, and always as a tortious act; yet out of regard to having a tenant to the *præcipe*, and one promptly to do service to the lord, it attaches to it a variety of legal rights and incidents..................*Id.*

12. Where a patent was issued for a large tract of land, and by subsequent conveyances, the patentee sold small parts of the said land, within the bounds of the original survey, it has been decided by the courts of Kentucky, that the party offering in evidence a conveyance of the large body held under the patent, containing exceptions of the parts disposed of, is bound, in an action of ejectment, to show that the trespass proved is without the limits of the land sold or excepted. *Hawkins* v. *Barney*..........*457

13. Jenkin Phillips, on the 18th of May 1780, "enters 1000 acres on the south-west side of Licking creek, on a branch called Buck-lick creek, on the lower side of said creek, beginning at the mouth of the branch, and running up the branch for quantity, including three cabins;" a survey was made on this entry, on the 20th November 1795, taking Buck-lick branch, reduced to a straight line, as its base, and laying off the quantity in a rectangle, on the north-west of Buck-lick; a patent was granted to Phillips on this survey, on the 26th June 1796. This entry is sufficiently descriptive, according to the well-established principles of this and the courts of Kentucky; and gave Phillips the prior equity to the land, which has been duly followed up and consummated by a grant, within the time required by the laws of Virginia and Kentucky, without any *laches* which can impair it. The proper survey under this entry was to make the line following the general course of Buck-lick the centre instead of the base line of the survey; and to lay off an equal quantity on each side, in a rectangular form, according to the rule established by the court of appeals in Kentucky, and by this court. *Peyton* v. *Stith*........*485

14. Peyton claimed the land under an entry made by Francis Peyton, and a survey on the 9th October 1794, and a patent on the 24th December 1785; so that the case was that of a claim of the prior equity against the elder grant, which, it is admitted, carried the legal title...........................*Id.*

15. Stith took possession as tenant of the heirs of Peyton, under an agreement for one year, at twenty dollars per year; possession was afterwards demanded of him on behalf of the lessors, which he refused to deliver; and a warrant for forcible entry and detainer was, on their complaint, issued against him, according to the law of Kentucky, and on an inquisition, he was found guilty; but on a traverse of the inquisition, he was acquitted, and an ejectment was brought against him by the lessors; eight days after the finding of the inquisition, Stith purchased the land from Phillips. This is the case of an unsuccessful attempt by a landlord to recover possession from an obstinate tenant, whose refusal could not destroy the tenure by which he remained on the premises, or impair any of the relations which the law established between them; the judgment on the acquittal concluded nothing but the facts necessary to sustain the prosecution, and which could be legally at issue; title could not be set up as a defence; Stith could not avail himself of the purchase from Phillips. A judgment for either party left their rights of property wholly unaffected, except as to the mere possession; the ac-

quittal could only disaffirm the forcible entry, as nothing else was at issue; the tenancy was not determined; Peyton was not ousted; and the possession did not become less the possession of the landlord, by any legal consequences as resulting from the acquittal. . *Id.*

16. From the time of the purchase by Stith from Phillips, although it became adverse for the specified purposes, it remained fiduciary for all others. . . . . *Id.*

17. A patent for unimproved lands, no part of which was in the possession of any one at the time it issued, gives legal seisin and constructive possession of all the land within the survey. . . . . *Id.*

See EXECUTION: LIMITATION OF ACTIONS.

LANDLORD AND TENANT.

1. The same principles which would prevent a tenant from contesting his landlord's title in a court of law, apply with greater force in a court of equity, to which he should apply for the quieting of a tortious possession and a conveyance of the legal title. If the relations existing between them could deprive him of defence at law, a court of chancery would not afford him relief as a plaintiff, during their continuance. Before he can be heard in either, in assertion of his title, he must be out of possession, unless it has become legalized by time; and even then, there may be cases, where an equitable title had been purchased under such circumstances as would justify a court of equity in withholding it to a *malâ fide* purchaser. *Peyton* v. *Stith*. *485

2. In the case of Willison *v.* Watkins, 3 Pet. 44, this court considered and declared the law to be settled; that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any disclaimer of tenure, with the knowledge of the landlord, was a forfeiture of his term; that his possession became so far adverse, that the act of limitations would begin to run in his favor from the time of such forfeiture; and the landlord could sustain an ejectment against him, without notice to quit, at any time before the period prescribed by the statute had expired, by the mere force of the tenure, without any other evidence than the proof of the tenancy; but that the tenant could, in no case, contest the right of his landlord to possession, or defend himself by any claim or title adverse to him, during the time which the statute has to run. If the landlord, under such circumstances, suffers the time prescribed by the statute of limitations to run out, without making an entry or bringing a suit, each party may stand upon his right; but, until then, the possession of the tenant is the possession of the landlord. . . . . *Id.*

LETTERS OF CREDIT.

1. A letter of credit was written by Edmondston, of Charleston, South Carolina, to a commercial house at Havana, in favor of J. & T. Robson, for $50,000, "which sum they may invest, through you, in the produce of your island;" on the arrival of Thomas Robson in Havana, the house to whom the letter of Edmondston was adressed, was unable to undertake the business, and introduced Thomas Robson to Drake & Mitchel, merchants at that place; exhibiting to them the letter of credit, from Edmondston; Drake & Mitchel, on the faith of the letter of credit, and at the request of Thomas Robson, made large shipments of coffee to Charleston, for which they were, by agreement with Thomas Robson, to draw upon Goodhue & Co., of New York, at sixty days, where insurance was to be made; of this agreement, Edmondston was informed, and he confirmed it in writing. For a part of the cost of the coffee so shipped, Drake & Mitchel drew bills on New York, which were paid; and afterwards, in consequence of a change in the rate of exchange, they drew for the balance of the shipments on London; this was approved by J. & T. Robson, but was not communicated to Edmondston; to provide for the payment of the bills drawn on London by Drake & Mitchel, the agents of J. & T. Robson remitted bills on London, which were protested for non-payment; and Drake & Mitchel claimed from Edmondston, under the letter of credit, payment of their bills on London: *Held*, that Edmondston was not liable for the same. *Edmondston* v. *Drake*. *624

2. It would be an extraordinary departure from that exactness and precision which is an important principle in the law and usage of merchants, if a merchant should act on a letter of credit, such as that in this case, and hold the writer responsible, without giving notice to him that he had acted upon it. . *Id.*

LIMITATION OF ACTIONS.

1. It would be quite a new principle in the law of ejectment and limitations, that the intention to assert the right, was equivalent to its being actually done. It is settled law, that an entry on land, by one having the right, has the same effect in arresting the progress of limitation as a suit; but it cannot be sustained as a legal proposition, that an entry by one having no right is of any avail. *Henderson* v. *Griffin*. *151

2. Rights accruing under acts of limitation are recognised in terms as, *primâ facie*, originating in wrong, although among the best pro-

tections of right. *Bradstreet* v. *Huntington*............................. *402

3. The decision of this court, as to the validity of the law of Kentucky, commonly called the occupying claimant's law, does not affect the question of the validity of the law of Kentucky, commonly called the seven years' possession law. *Hawkins* v. *Barney*..... *457

4. The seventh article of the compact between Virginia and Kentucky declares, "all private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia prior to such separation, shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in this state (Virginia)." Whatever course of legislation by Kentucky would be sanctioned by the principles and practice of Virginia, should be regarded as an unaffected compliance with the compact; such are all reasonable quieting statutes..*Id.*

5. From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than those laws which gave peace and confidence to the actual possessor and tiller of the soil; such laws have frequently passed in review before this court, and occasions have occurred in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights.............*Id.*

6. It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject; she has, in fact, literally complied with the compact, in its most rigid construction; for she adopted the very statute of Virginia, in the first instance, and literally gave her citizens the full benefit of twenty years to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisos and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power............................*Id.*

7. It is not to be questioned, that laws limiting the time of bringing suits constitute a part of the *lex fori* of every country—the laws for administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed, that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage; yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing the limitation act were adopted, to assign her a position higher than that of a dependent on Virginia........................ *Id.*

8. The limitation act of the state of Kentucky, commonly known by the epithet of the seven years' law, does not violate the compact between the state of Virginia and the state of Kentucky ....*Id.*

9. The statute of limitations of Kentucky, under which adverse possession of land may be set up, describes the limitation of twenty years, within which suit must be brought; and provides, "that if any person or persons entitled to such writ or writs, or title of entry, shall be, or were, under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within the commonwealth, at the time such right occurred or came to them, every such person, his or heirs, shall and may, notwithstanding the said twenty years are, or shall be, expired, bring or maintain his action, or make his entry, within ten years next after such liabilities removed, or death of the person so disabled, and not afterwards. *Lewis* v. *Marshall*........................ *470

10. The statute of limitations of Kentucky is a bar to the claims of an heir to a non-resident patentee, holding under a grant from the state of Kentucky, founded on warrants issued out of the land-office of Virginia, prior to the separation of Kentucky from Virginia, if possession has been taken in the lifetime of the patentee. Had the land descended to the heirs, before a cause of action existed, by an adverse possession, the statute could not operate against them, until they came within the state; if adverse possession commences prior to the decease of the non-resident patentee, his heirs are limited to ten years from the time of the decease of their ancestor for the assertion of their claim..............................*Id.*

11. That a statute of limitations may be set up in defence, in equity as well as at law, is a principle well settled.... .... *Id.*

12. Statutes of limitations have been emphatically and justly denominated statutes of repose; the best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles; nothing so much retards the growth or prosperity of a country as insecurity of titles to real estate; labor is paralyzed, when the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to the individuals. The legislature of Kentucky have, therefore, wisely provided, that unless suits for the recovery of land shall be brought

within a limited period, they shall be barred by an adverse possession..............*Id.*

LOCAL LAW.

1. The supreme court of the state of South Carolina having decided that the act of the legislature of that state of 1744, relative to the commencement within two years of actions of ejectment, after non-suit, discontinuance, &c., is a part of the limitation act of 1812, and that a suit commenced within the time prescribed, arrests the limitation; and this being the decision of the highest judicial tribunal on the construction of a state law relating to titles and real property, must be regarded by this court as the rule to bind its judgment. *Henderson* v. *Griffin*. *151
2. That court having decided on the construction of a will, according to their view of the rules of the common law in that state, as a rule of property, this decision comes within the principle adopted by this court in Jackson *v.* Chew, 12 Wheat. 153, 167, and such decisions are entitled to the same respect as those which are given on the construction of local statutes........................*Id.*
3. Where an estate was devised to A. and B., in trust for C. and her heirs, the estate, by the settled rules of the courts of law and equity in South Carolina, as applied to the statutes of uses of 27 Hen. VIII., c. 10, in force in that state, passed at once to the object of the trust, as soon as the will took effect by the death of the testator; the interposition of the names of A. and B. had no other legal operation than to make them the conduits through whom the estate was to pass, and they could not sustain an ejectment for the land. C., the grandchild of the testator, is a purchaser under the will, deriving all her rights from the will of the testator, and obtaining no title from A. and B.; and A. and B. were as much strangers to the estate, as if their names were not to be found in the will..........................*Id.*
4. The case contemplated in the law of 1744, by which a plaintiff or any other person claiming under one who had brought an ejectment for land, which suit had failed by verdict and judgment against him, or by non-suit, or discontinuance, &c., is empowered to commence his action for the recovery of the said lands *de novo*, is clearly a case where the right of the plaintiff in the first suit passes to the plaintiff in the second; where it must depend upon some interest or right of action which has become vested in him by purchase or descent, from the person claiming the land in the former suit..........*Id.*
5. L., as executor to W., instituted an action of *assumpsit*, on the 8th of April 1826; the declaration stated L. to be executor of W., and claiming as executor for money paid by him as such; the defendant pleaded *non assumpsit*, and a verdict and judgment were given for the plaintiff; after the institution of the suit, and before the trial, the letters testamentary of L. were revoked by the orphans' court of the county of Alexandria, he having, after being required, failed to give bond, with counter-security, as directed by the court. The powers of the orphans' court of Alexandria are made, by act of congress, identical with the powers of an orphans' court under the laws of Maryland; it is a court of limited jurisdiction, and is authorized to revoke letters testamentary in two cases: a failure to return an inventory; or to account. The proceedings against L. were not founded upon either of these omissions; the appropriate remedy, on the failure of the executor to give counter-security, is to take the estate out of his hands, and to place it in the hands of his securities. *Yeaton* v. *Lynn*...........................*224

See Administration: Insolvent Laws, 1, 2: Land Law, 1–4: Recording of Deeds, 1:. As to the Distribution of Assets, in case of Intestacy, in Virginia, *Backhouse* v. *Patton*. *160

LOTTERY.

See Corporation of Washington.

MANDAMUS.

1. The supreme court has power to issue a *mandamus* directed to a circuit court of the United States, commanding the court to sign a bill of exceptions in a case tried before such court. *Ex parte Crane* *190
2. In England, the writ of *mandamus* is defined to be a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or, at least, supposes, to be consonant to right and justice; it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, wherever the same is delayed. It is apparent, that this definition and this description of the purposes to which it is applicable by the court of king's bench as supervising the conduct of inferior tribunals, extend to the case of a refusal by an inferior court to sign a bill of exceptions

where it is an act which appertains to their office and duty which the court of king's bench supposes "to be consonant to right and justice." .... *Id.*

3. The judiciary act, § 13, enacts, that the supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States. A *mandamus* to an officer is said to be the exercise of original jurisdiction, but a *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction; a bill of exceptions is the mode of placing the law of the case on a record which is to be brought before this court on a writ of error.... .... *Id.*
4. That a *mandamus* to sign a bill of exceptions is "warranted by the principles and usages of law," is, we think, satisfactorily proved by the fact, that it is given in England by statute; for the writ given by the statute of Westm. II. is so in fact, and is so termed in the books; the judiciary act speaks of usages of law generally, not of common law. In England, it is awarded by the chancellor, but in the United States, it is conferred expressly on this court; which exercises both common law and chancery powers, is invested with appellate power, and exercises extensive control over all the courts of the United States. We cannot perceive a reason why the single case of the refusal of an inferior court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of *mandamus* to inferior courts, which is conferred by statute................ *Id.*
5. The judiciary act confers expressly the power of general superintendence of inferior courts on this court; no other tribunal exists, by which it can be exercised........... *Id.*

MARSHAL OF THE DISTRICT OF COLUMBIA.

1. The "act concerning the district of Columbia," passed 3d March 1801, does not require the marshal to apply to the district-attorney for executions, in all cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution issued. *Levy Court of Washington* v. *Ringgold*, *451
2. Interest is not chargeable on money collected by the marshal of the district of Columbia for fines due to the Levy Court, the money having been actually expended by the marshal in repairs and improvements on the jail, under the opinions of the comptroller and auditor of the treasury department that these expenditures were properly chargeable upon this fund, although that opinion may not be well founded......................... *Id.*

MORTGAGOR AND MORTGAGEE.

1. It is undoubtedly well settled, as a general rule, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor; yet the legal title is not technically released, by receiving the money. This rule must then be founded on an equitable control by courts of law over parties in ejectment; it would be contrary to the plainest principles of equity and justice, to permit a stranger, who had no interest in the mortgage, to set it up, when it had been satisfied by the mortgagor himself, to defeat his title; but if this stranger had himself paid it off, if this mortgage had been bought in by him; he would be considered as an assignee, and might certainly use it for his protection. *Peltz* v. *Clarke*......... *481
2. The defendant in the circuit court was the owner of the equitable estate, and had paid off the mortgage on his own account, and for his own benefit; the incumbrance, under these circumstances, is the property of him to whom the estate belongs in equity; the reason of the rule does not apply to such a case.............................. *Id.*

NEW JERSEY.

See JURISDICTION : PRACTICE.

NEW YORK.

See JURISDICTION : PRACTICE.

OCCUPYING CLAIMANTS.

See KENTUCKY.

ORPHANS' COURT OF ALEXANDRIA.

See LOCAL LAW, 8.

PARTNERSHIP.

1. If the particular terms of articles of partnership are unknown to the public, they have a right to deal with the firm, in respect to its business, upon the general principles and presumptions of limited partnerships of a like nature; and any special restrictions in the articles do not affect them. In such partnerships, it is within the general authority of the partners, to make and indorse notes, and to obtain advances and credits for the

business and benefit of the firm; and if such was the general usage of trade, that authority must be presumed to exist; but not to extend to transactions beyond the scope and objects of the copartnership. *Winship* v. *Bank of United States*.................... *529

2 Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public; which subserve the purposes of justice; and which society is concerned in sustaining. One of them is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts; another is, that a partner, certainly, the acting partner, has power to transact the whole business of the firm, whatever that may be; and consequently, to bind his partners in such transactions as entirely as himself; this is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership..................... *Id.*

3 When a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way; if that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it; it is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm; this is a general authority held out to the world, and to which the world has a right to trust............................ *Id.*

4. The trading world, with whom the company is in perpetual intercourse, cannot individually examine the articles of partnership; but must trust to the general powers contained in all partnerships. The acting partners are identified with the company; and have power to conduct its usual business, in the usual way; this power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair-dealing requires that the restriction should be made known; these stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law.............................. *Id.*

5. The responsibility of unavowed partners, depends on the general principle of commercial law, not on the particular stipulations of the articles.... .... *Id.*

6. If promissory notes are offered for discount at a bank, in the usual course of the business of a partnership, by the partner intrusted to conduct the business of the partnership, and are discounted by the bank, and such discount was within such business; the subsequent misapplication of the money, the holders not being parties or privy thereto, or to the intention to misapply the money, will not deprive them of their right of action against the dormant partners in such a copartnership. . *Id.*

PEDIGREE.

See Evidence, 1.

PLEAS AND PLEADING.

1. Insufficient and defective pleading. *Livingston* v. *Smith*.................... *90.

2. Action of covenant on a charter-party, by which the owners of the brig James Monroe let and hired her to the plaintiff in error for a certain time; the money payable for the hire of the vessel to be paid at certain periods, and under circumstances stated in the charter-party; after some time, and after the vessel had earned a sum of money, while in the employment of the charterer, she was lost by the perils of the sea. The declaration set out the covenants, and averred performance on the part of the plaintiffs, and that the sum of $2734.17 was due and unpaid upon the charter-party; the defendant pleaded, that he had paid to the plaintiffs all and every such sums of money as were become due and payable from him, according to the true intent and meaning of the articles of agreement. On the trial of the issue upon this plea, the court, at the request of the plaintiffs, instructed the jury, that the plea did not impose any obligation on the plaintiffs to prove any averment in the declaration; but the whole *onus probandi*, under the plea, was upon the defendant, to prove the payment stated in the same, as the plea admitted the demand as stated in the declaration: *Held*, that there was no issue properly joined; the breach assigned in the declaration is special, the non-payment of a certain sum of money for particular and specified services alleged to have been rendered; the plea alleges generally, that the defendant had paid all that was ever due and payable, according to the tenor of the agreement, and not all of the specified sum; this does not meet the allegations in the declaration, nor amount to an admission that the vessel had earned the sum demanded: and there was error in the court, in instructing the jury, that the plaintiffs were not bound to prove the allegations in the declaration. *Simonton* v. *Winter*................. *141

3. The general rule of pleading is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the facts stated in the count.......................................*Id.*

4. An issue is a single, certain and material point arising out of the allegations or pleadings of the parties; and generally, should be made up by an affirmative and negative...*Id.*

5. If matter be not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration..................................*Id.*

6. It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages and money *in numero*, must be attended to............*Id.*

7. L., as executor to W., instituted an action of *assumpsit*, on the 8th of April 1826; the declaration stated L. to be executor of W., and claimed as executor for money paid by him as such; the defendant pleaded *non assumpsit;* and a verdict and judgment were given for the plaintiff. After the institution of the suit, and before the trial, the letters testamentary of L. were revoked by the orphans' court of the county of Alexandria, he having, after being required, failed to give bond, with counter-security, as directed by the court. The issue tried by the jury was on the plea of *non assumpsit;* as the plaintiff was incontestably executor, when the suit was brought, and when issue was joined, and could then rightfully maintain the action, and the revocation of the letters testamentary was not brought before the court by a plea since the last continuance, as it might have been; the defendant must be considered as waiving his defence, and resting his cause on the general issue. *Yeaton* v. *Lynn*........ .... *224

8. A plea since the last continuance waives the issue previously joined, and puts the case on that plea..............................*Id.*

9. It is not doubted, that the revocation might have been pleaded; and it ought to have been pleaded, in order to bring the fact judicially to the view of the circuit court. It ought to appear upon the record, that judgment was given against the plaintiff, in the circuit court, because he was no longer executor of W.; not because the defendant was not indebted to the estate of W. and had not made the *assumpsit* mentioned in the declaration.......................................*Id.*

10. The rule is general, that a plea in bar admits the ability of the plaintiff to sue; and if the parties go to trial on that issue, the presumption is reasonable, that this admission continues.......................*Id.*

11. When a suit is brought by an administrator during the minority of the executor, his powers as administrator are determined, when the executor has attained his full age, and the fact that he has not attained his full age, must be averred in the declaration; but if this averment be omitted, and the defendant pleads in bar, he admits the ability of the plaintiff to sue, and the judgment is not void................. ....*Id.*

12. A distinction seems to be taken between an action brought by a person who has no right to sue, and an action brought by a person capable of suing at the time, but who becomes incapable while it is depending. In the first case, the plaintiff may be nonsuited at the trial; in the last, the disability must be pleaded..........................*Id.*

13. The rule is, that when matter of defence has arisen after the commencement of a suit, it cannot be pleaded in bar of the action, generally; but must, when it has arisen before plea or continuance, be pleaded to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrein continuance*.......... ....*Id.*

14. It may safely be affirmed, that a fact which destroys the action, if it cannot be pleaded in bar, cannot be given in evidence on a plea in bar, to which it has no relation; if any matter of defence has arisen, after an issue in fact, it may be pleaded by the defendant; as, that the plaintiff has given him a release, or, in action by an administrator, that the plaintiff's letters of administration have been revoked....... ....*Id.*

15. The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach, that at the time of the execution of the bond, there were in the hands of Rector, as surveyor, to be applied and disbursed by him, in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done. The jury found for the plaintiff, and assessed the damages for the breach of the condition at $40,000, and the judgment was entered, "*quod recuperet*" the damages, not the debt. This judgment is clearly erroneous. *Farrar* v. *United States*............................ *373

POSSESSION OF LANDS.

1. That an actual or constructive possession is

necessary, at common law, to the transmission of a right to lands is incontrovertible; it is seen in the English doctrine of an heir's entering, in order to transmit it to his heirs; but whatever be the English doctrine, and of the other states, as to the right of election to stand disseised, it is certain, that the New York courts have denied that right; both as to devises and common-law conveyances, without the aid of a statute repealing the common law. *Bradstreet* v. *Huntington*........*402

2. Adverse possession is a legal idea, admits of a legal definition, of legal distinctions; and is, therefore, correctly laid down, to be a question of law........................*Id.*
3. Adverse possession may be set up against any title whatsoever; either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession....................*Id.*

POWER OF ATTORNEY.

1. A power of attorney was given by C., to A. and B., to make, in his name, an acknowledgment of a deed for land in the city of Washington, before some proper officer, with a view to its registration, constituting them "the lawful attorney or attorneys" of the constituent; A. and B. severally appeared before different duly-authorized magistrates, in Washington, at several times, and made a several acknowledgment in the name of their principal: *Held*, that the true construction of the power was, that it vested a several as well as a joint authority in the attorneys; they were appointed "the attorney or attorneys;" and if the intention had been to give a joint authority only, the words "attorney" and "or" would have been wholly useless. To give effect, then, to all the words, it is necessary to construe them distributively, and this is done by the interpretation before stated; they are appointed his attorneys, and each of them is appointed his attorney, for the purpose of acknowledging the deed. *Greenleaf* v. *Birth*............................*132
2. A power of attorney "to sell, dispose of, contract, and bargain for land, &c., and to execute deeds, contracts and bargains for the sale of the same," did not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794; which allowed persons who held lands subject to taxes, to relinquish and disclaim their title thereto, by making an entry of the tract or the part thereof disclaimed, with the surveyor of the county. *Clarke* v. *Courtney*...............................*320
3. A power of attorney from "James B. Clarke and Eleanor his wife," to "Carey L. Clarke," for the sale of lands, is not properly or legally executed in the following form: "I, the said Carey L. Clarke, attorney as aforesaid, &c., do,"—"In witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800.—Carey L. Clarke. [L. S.]" This act does not purport to be the act of the principal, but of the attorney; this may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principals; but the law looks not to the intent alone, but to the fact whether the intent has been executed in such a manner as to possess a legal validity..............................*Id.*

PRACTICE.

1. A case came before the court under an unusual agreement of the parties, by which matters of fact, properly cognisable before a jury, were submitted to the judgment of the court. The court desire to be understood as not admitting that it is competent for the parties, by any such agreement, to impose this duty upon them. *Shankland* v. *Corporation of Washington*.................*390
2. The parol evidence given on the hearing of a petition in the district court of the United States for the eastern district of Louisiana, in the nature of an equity proceeding, should be reduced to writing, and appear in the record. *New Orleans* v. *United States*..*449
3. After due service of the *subpœna*, the state which is complainant has a right to proceed *ex parte*, in a suit against a state; and if, after the service of an order of the court for the hearing of the case, there shall not be an appearance, the court will proceed to a final hearing. *New Jersey* v. *New York*.....*284
4. No final decree or judgment having been given in this court against a state, the question of proceeding to a decree is not conclusively settled in such a case..................*Id.*

PRINCIPAL AND SURETY.

1. By a special act of congress, the principal debtor was discharged from imprisonment, and the expression was omitted in this act, which is used in the general act passed June 6th, 1798, "providing for the relief of persons imprisoned for debts due to the United States," that "the judgment shall remain good and sufficient at law." In the special act, it was declared, that any estate which the debtor "may subsequently acquire, shall be liable to be taken, in the same manner as if

he had not been imprisoned and discharged:" The special act did not release the judgment, and did not affect the rights of the United States against the sureties. *Hunter* v. *United States*..............................*173

2. The act of government in releasing both the principal and surety from imprisonment, was designed for the benefit of unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy; if the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be, that the principal must remain in jail, until the process of the law was exhausted against the surety; this would operate against the liberty of the citizen, and should be waived, unless required to secure the public interest............*Id.*

3. The plaintiffs in error were sureties in an official bond; and it is perfectly clear, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which, of course, can only be, where it is less than the penalty. The statute expressly requires that the surveyors of the public lands shall give bond for the faithful disbursement of public money, and in this bond, the words which relate to disbursement were omitted, and the only words inserted were, "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party. *Farrar* v. *United States*............. *373

4. Rector was commissioned surveyor of the public lands, on the 13th June 1823, and his bond bore date the 17th August 1823; between the 3d of March and the 4th of June, in the same year, there had been paid to Rector, from the treasury, the sum of money found by the jury, and thus it was paid to him before the date of his commission, and before the date of the bond. For any sum paid to Rector, prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money, in bank or otherwise; if still in his hands, he was, up to that time, bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government, and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language; the sureties have not undertaken against his past misconduct; they ought, therefore, to have been let in to proof of the actual state of facts so vitally important to their defence, and whether paid away in violation of the trust reposed in him; if paid away, he no longer stood in the relation of bailee. Such a case was not one to which the act applies, which requires the submission of accounts to the treasury, before discounts can be given in evidence; since this defence goes not to discharge a liability incurred, but to negative its ever existing............*Id.*

PRIORITY OF THE UNITED STATES.

1. The same right of priority which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government. *Hunter* v. *United States*...*172

2. The United States obtained a judgment against Smith, an insolvent debtor, previous to his assignment under the insolvent laws of Rhode Island; under his assignment, a debt for money paid by him to the United States as surety on duty-bonds for the Crarys, passed to his assignee; the Crarys had claims upon Spain, which were afterwards paid under the Florida treaty; and the assignee of Smith received the amount of the Spanish claim, in satisfaction of the payments made for the duty-bonds by Smith. The judgment by the United States against Smith having preceded the assignment, and the receipt and distribution of the money received from the Spanish claim under the insolvent law, the government having an unquestionable right of priority of all the property of Smith, it extended to the claim of Smith on the Crarys; if the right of the United States to a priority of payment covers any part of the property of an insolvent, it must extend to the whole, until the debt is paid................ *Id.*

3. The claim of Smith on the Crarys was properly included in his assignment under the insolvent laws, however remote the probability might have been, at the time, of realizing the demand; it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the general government; if, under such circumstances, the priority of the government does not exist, it would be difficult to present a stronger case for the operation of this prerogative................................ *Id.*

PUBLIC AGENTS.

1. The secretary of the treasury was authorized to deduct from the sum payable to a debtor to the United States, a sum due to the United States, and he paid to his assignee the whole sum which was awarded to him under the

Florida treaty, omitting to make the deduction of the debt due to the United States. It cannot be admitted, that an omission of duty of this kind, as a payment by mistake, by an officer, shall bar the claim of the government. If, in violation of his duty, an officer shall knowingly or even corruptly do an act injurious to the public, can it be considered obligatory? He can only bind the government by acts which come within the just exercise of his official powers. *Hunter* v. *United States*.............................. *173

2. The defendant pleaded, that Alpha Kingsley was removed from office, on the first of April 1815, and on the 15th of September, reported himself to the treasurer of the United States as ready for the settlement of his accounts; at which time, and long afterwards, he was solvent, and able to pay the full amount of his defalcation; that no notice was given to him by the treasury, to account for moneys in his hands, nor to the defendant, until the commencement of the suit, and that before the commencement of the suit, Kingsley became insolvent; the United States demurred to this plea; the district court of Missouri sustained the demurrer, and gave judgment for the United States: There was no error in the judgment. *Smith* v. *United States*.*294

3. Sound policy requires, that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable; this is alike due to the public and to the persons who are held responsible as sureties; to the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of government for reimbursement; but there may be some cases of hardship where, after a great lapse of time, and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon considerations of public policy; while various acts of limitation apply to the concerns of individuals, none of them operate against the government; on this point, there is no difference of opinion among the federal or state courts.............................. *Id.*

4. The fiscal operations of the government are extensive and often complicated; it is extremely difficult, at all times, and sometimes impracticable, to settle the accounts of public officers, with as little delay as attends the private accounts of a mercantile establishment; but it is always in the power of an individual, who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled, and the payment of any balance enforced. A notice to the government by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release...................... *Id.*

5. By the act of congress of 3d March 1797, a notice is required to be given by the auditor of the treasury, to any person who had received public moneys, for which he is accountable, fixing a reasonable time for the production of vouchers for the expenditures, and in default, costs are to be charged against the delinquent, whether in a suit judgment be given for or against him—on a revision of the settlement by the comptroller, after having caused notices to be served of the items disallowed, &c., the decision is declared to be final and conclusive. If there had been no subsequent act of congress on this subject, it might be important to inquire, whether the notice authorized by this act was not merely directory to the officers, and essential only to subject the delinquent to the penalties provided. By the acts of the 3d March 1797, and the 3d March 1817, material changes were made in the accounting department of the government; and although the act of 1795 may not be expressly repealed, yet it is abrogated by new and substantive provisions; under the present mode of proceedings against the defaulters, the notice authorized by the act of 1795 is unnecessary............. *Id.*

6. The plaintiffs in error were sureties in an official bond; and it is perfectly clear, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which, of course, can only be, where it is less than the penalty. The statute expressly requires, that the surveyors of the public lands shall give bond for the faithful disbursement of public money, and in this bond, the words which relate to the disbursement were omitted, and the only words inserted were "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party. *Farrar* v. *United States*................ *373

See Principal and Surety: Pursers, 1: Voluntary Bond, 1, 2.

PURSERS.

1. There is no statute of the United States expressly defining the duties of pursers in the navy; what those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this court. If they are regulated by the usage and customs of the navy, or by the official orders of the navy department, they properly constitute

matters of averment, and should be spread upon the pleadings. *United States* v. *Tingey*..........................*115

RECORDS.

1. The clerk of the Union county circuit court certified, that certain documents were read in evidence, and among them, a patent under which F. claimed, issued by the governor of Kentucky, founded on rights derived from the laws of Virginia. This court cannot notice this patent; it cannot be considered a part of the record. *Fisher* v. *Cockerell*.....*248
2. In cases at common law, the course of the court has been uniform, not to consider any paper as part of the record, which is not made so by the pleadings, or by some opinion of the court referring to it; this rule is common to all courts exercising appellate jurisdiction, according to the course of the common law; the appellate court cannot know what evidence was given to the jury, unless it is spread on the record, in proper legal manner; the unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognisance of the court. The court cannot perceive from the record in this ejectment cause, that the plaintiff in error claimed under a title derived from the laws of Virginia; it, therefore, cannot judicially know, that this suit was not a contest between two citizens, claiming entirely under the laws of the state of Kentucky. When the record of the Union county circuit court was transferred to the court of appeals, the course of that court required, that the appellant or the plaintiff in error should assign the errors on which he meant to rely; the assignment in that court contained the first intimation that the title was derived from Virginia, and that the plaintiff in error relied on the compact between those states; but this assignment did not introduce the error into the record, nor in any manner alter it. The court of appeals was not confined to the inquiry, whether the error assigned was valid in point of law; the preliminary inquiry was, whether it existed in the record; if, upon examining the record, that court could not discover that the plaintiff had asserted any right or interest in land, derived from the laws of Virginia; the question whether the occupying claimants' law had violated the compact between the states could not arise..................................*Id.*

RECORDING OF DEEDS.

1. By the laws of Georgia, all public grants are required to be recorded in the proper state department. *Patterson* v. *Wynn*......*233

RELEASE.

1. A discharge from prison, by operation of law, does not prevent the judgment-creditor from prosecuting his judgment against the estate of the defendant; to this rule, a discharge under the special provisions of the bankrupt law may form an exception. *Hunter* v. *United States*..............................*173
2. If the creditor appoint his debtor his executor, in some cases, it operates as a release; this, however, is not the case, as against creditors; the release is good against devisees, when the debt due has not been specifically devised. *Page* v. *Patton*.............*304

See Principal and Surety, 1, 2.

RULES OF COURT.

1. However convenient a rule established by a circuit court, relative to the introduction of secondary proof, might be, to regulate the general practice of the court; it could not control the rights of parties in matters of evidence admissible by the general principles of law. *Patterson* v. *Wynn*...........*233

SEAMEN'S WAGES.

1. The ship Warren, owned in Baltimore, sailed from that port, in 1806, the officers and seamen having shipped to perform a voyage to the north-west coast of America, thence to Canton, and thence to the United States; the ship proceeded, under the instructions of the owners, to Conception Bay, on the coast of Chili, by the orders of the supercargo, he having full authority for that purpose; the cargo had, in fact, been put on board for an illicit trade, against the laws of Spain, on that coast. After the arrival of the Warren, she was seized by the Spanish authorities, the vessel and cargo condemned, and the proceeds ordered to be deposited in the royal chest; the officers and seamen were imprisoned, and returned to the United States; some after eighteen months, and others, not until four years from the time of their departure; the King of Spain subsequently ordered the proceeds of the Warren and cargo to be repaid to the owners, but this was not done; afterwards, the owners having become insolvent, assigned their claims for the restoration of the proceeds, and for indemnity from Spain, to their separate creditors; and the commissioners under the Florida treaty awarded to be paid to the

assignees a sum of money, part for the cargo, part for the freight, and part for the ship Warren. The officers and seamen having proceeded against the owners of the ship by libel for their wages, claiming them by reason of the change of voyage, from the time of her departure. until their return to the United States, respectively, and having afterwards claimed payment out of the money paid to the assignees of the owners under the treaty, it was held, that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners; with interest on the amount from the period when a claim for the same from the assignees, was made by a petition. *Sheppard* v. *Taylor*.......................... *676

2. If the ship had been specifically restored, the seamen might have proceeded against it in the admiralty, in a suit *in rem*, for the whole compensation due to them; they have, by the maritime law, an indisputable lien to this extent. There is no difference between the case of a restitution in specie of the ship itself, and a restoration in value; the lien re-attaches to the thing, and to whatever is substituted for it; this is no peculiar principle of the admiralty; it is found incorporated into the doctrines of courts of common law.............................. *Id.*
3. Freight, being the earnings of the ship in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid; for although the ship is bound by the lien of the wages, the freight is relied on as the fund to discharge it, and is also relied on by the master, to discharge his personal responsibility......................... *Id.*
4. Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction, *in rem*, as well as *in personam;* and wherever the lien for the wages exists and attaches upon the proceeds, it is the familiar practice of that court, to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry, and salvage; and is equally applicable to the case of wages; the lien will follow the ship, and its proceeds, into whose hands soever they may come, by title or purchase from the owner. *Id.*

SEISIN.

1. Where one having no title conveys to a third person, who enters under the conveyance, the law holds him to be a desseisor. *Bradstreet* v. *Huntington*................. *402
2. The common law generally regards desseisin as an act of force, and always as a tortious act; yet, out of regard to having a tenant to the *præcipe*, and one promtly to do service to the lord, it attaches to it a variety of legal rights and incidents.................. *Id.*

See Lands and Land Titles, 3-6.

SPECIFIC PERFORMANCE.

1. The right of a vendor to come into a court of equity to enforce a specific performance, is unquestionable; such objects are within the settled and common jurisdiction of the court; it is equally well settled, that if the jurisdiction attaches, the court will go on to do complete justice; although, in its progress, it may decree on a matter which was cognisable to law. *Cathcart* v. *Robinson.* *264

SUPREME COURT OF THE UNITED STATES.

See Injunction: Jurisdiction: Mandamus: Cherokee Nation *v.* Georgia.

SURETY.

See Principal and Surety.

SURVEYOR-GENERAL.

1. F. and B. were sureties in a bond for $30,000, given to the United States, as sureties for one Rector, described in the bond as "surveyor of the public lands in the state of Illinois and Missouri, and the territory of Arkansas." Upon looking into all the laws on this subject, it can hardly be doubted, that this officer was intended to be included in the provisions of the act ot congress of May 3d, 1822, requiring security of the surveyor-general; literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general, the indiscriminate use of this appellation in the previous and subsequent legislation of congress on this subject, will lead to this conclusion. *Farrar* v. *United States*.......................... *373
2. The surveyors of public lands are disbursing officers, under the provisions of the act of congress.......................... *Id.*

TENANT IN COMMON.

1. If there be a tenant in common, the law ap-

pears to be definitely settled in New York, that the grantee of one tenant in common for the whole, entering on such conveyance, may set up the statute of limitations against his co-tenants in common. *Bradstreet* v. *Huntington*............................*402

TREASURY TRANSCRIPT.

See EVIDENCE: PUBLIC AGENTS.

VOLUNTARY BOND.

1. A bond voluntarily given to the United States, and not prescribed by law, is a valid instrument upon the parties to it, in point of law; the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided by law; it is an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confined to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers; unless brought into operation by express legislation; a doctrine to such an extent is not known to this court as ever having been sanctioned by any judicial tribunal. *United States* v. *Tingey*.........*115

2. A voluntary bond, taken by authority of the proper officers of the treasury department to whom the disbursement of public money is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him and his sureties, and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department; and the United States being authorized in a political capacity to take it, there is no objection to its validity in a moral or legal sense..............................*Id.*

See PUBLIC AGENTS.