INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ADMIRALTY AND ADMIRALTY PRACTICE.

1. A libel was filed in the district court of Maryland, for a salvage service performed by the libellant, the master and owner of the sloop Liberty, and by his crew, in saving certain goods and merchandise on board of the brig Spark, while aground on the bar at Thomas's Point, in the Chesapeake Bay. The goods were owned by a number of persons, in several and distinct rights; and a general claim and answer were interposed in behalf of all of them, by Jarvis & Brown (the owners of a part of them), without naming who, in particular, the owners were, or distinguishing their separate proprietary interests. This proceeding was doubtless irregular in both respects; Jarvis & Brown had no authority, merely as co-shippers, to interpose any claim for other shippers with whom they had no privity of interest or consignment; several claims should have been interposed by the several owners, or by other persons authorized to act for them in the premises; each intervening in his own name for his proprietary interest, and specifying it. If any owner should not appear to claim any particular parcel of the property, the habit of courts of admiralty is, to retain such property, or its proceeds, after deducting the salvage, until a claim is made, or a year and a day have elapsed from the time of the institution of the proceedings. And when separate claims are interposed, although the libel is joined against the whole property, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. This is very familiar in practice in prize causes and seizures *in rem* for forfeitures; and is equally applicable to all other proceedings *in rem*, whenever there are distinct and independent claimants. *Stratton* v. *Jarvis*.....*4
2. The district court decreed a salvage of one-fifth of the gross proceeds of the sales of the goods and merchandises, and directed the same to be sold accordingly; the salvage thus decreed was afterwards ascertained, upon the sales, to be, in the aggregate, $2728.38; but no formal apportionment thereof was made. From this decree, an appeal was interposed in behalf of all the owners of the goods and merchandise to the circuit court; but no appeal was interposed by the libellant; the consequence is, that the decree of the district court is conclusive upon him as to the amount of salvage in his favor; he cannot in the appellate court, claim anything beyond that amount; since he has not, by any appeal on his part, controverted in sufficiency .....*Id.*
3. Although no apportionment of the salvage among the various claimants was formally directed to be made by any interlocutory order of the district court, an apportionment appears to have been in fact made, under its authority; a schedule is found in the record, containing the names of all the owners and claimants, the gross sales of their property, and the amount of salvage apportioned upon each of them respectively; by this schedule, the highest salvage chargeable on any distinct claimant, is $906.17, and the lowest $47.60,

the latter sum being below the amount for which an appeal, by the act of 3d of March 1803, is allowed from a decree of the district court in admiralty and maritime causes. . *Id.*

4. In the appeal here, as in that from the district court, the case of each claimant having a separate interest, must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellants; with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true, that the salvage service was in one sense entire; but it certainly cannot be deemed entire, for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage; on the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*; it would otherwise follow, that the property of one claimant might be made chargeable with the payment of the whole salvage; which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter; and their decrees would be utterly unintelligible upon any other; their decrees, respectively, in giving a certain proportion of the gross sales, must necessarily apportion that amount *pro rata* upon the whole proceeds, according to the distinct interests of each claimant. This court has no jurisdiction to entertain the present appeal in regard to any of the claimants, and the cause must for this reason be dismissed. The district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy; but the appellate jurisdiction of this court and of the circuit courts, depends upon the sum or value of the matter in dispute between the parties, having independent interests. . . . *Id.*

5. Nothing is better settled, both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. *Carrington* v. *Merchants' Insurance Company* *495

AGREEMENT.

1. N. stipulated in certain articles of agreement to transport and deliver, by the steamboat Paragon, to R., a certain quantity of subsistence stores, supposed to amount to 3700 barrels, for the use of the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one-half in specie funds or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there at the period of the delivery of the stores at St. Louis; under the agreement was the following memorandum: "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company or its equivalent." The court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time that payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated. *Robinson* v. *Noble's Administrators* *181

2. The plaintiff, the owner of the steamboat, was not entitled, under the contract, to recover in damages more than the stipulated price for the freight actually transported. If R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R. *Id.*

3. There is no pretence, that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract; in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity. . . . . *Id.*

APPEAL.

1. A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again. *Yeaton* v. *Lenox* *123

2. In the circuit court of Alexandria, in 1817, several suits were brought against sundry individuals, who had associated to form a bank, called the Merchants' Bank of Alexandria; the proceedings were regularly carried on, in

one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed; on a hearing, the decree was reversed and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal. It appears, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs; appeals were entered in these cases from the decrees of the court; under such circumstances, the court can only reverse the decree in each case for want of a bill. *Mandeville* v. *Burt.* *256

3. The whole business appearing to have been conducted, in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other causes, the cases were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law..... *Id.*

See ADMIRALTY AND ADMIRALTY PRACTICE.

ARBITRAMENT AND AWARD.

1. In the circuit court of the county of Washington, Linthicum instituted an action of covenant, on articles of agreement, by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and keep the same for five years; Linthicum was evicted by Lutz, before the time expired. The articles were spread upon the record, by which it appeared, that they were made "by and between John Lutz, agent of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, on the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part;" and it was witnessed, "that the said John Lutz, agent as aforesaid, has rented and leased," &c., the premises to Linthicum; and on the other hand, Linthicum covenanted to pay the rent, &c., as stated in the declaration; there was no covenant in the lease, by Lutz, for quiet enjoyment, as stated in the declaration; but the latter was founded upon the covenant implied by law in cases of demise; "the articles concluded with these words, "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above." The defendant Lutz pleaded performance, without praying *oyer*, and issue was joined; afterwards, the parties, by consent, agreed to refer the cause; and accordingly, by a rule of court, it was ordered, "that Wm. S. Nichols and Francis Dodge, be appointed referees between the parties aforesaid, with liberty to choose a third person; and that they, or any two of them, when the whole matter concerning the premises, between the parties aforesaid in variance, being fairly adjusted, have their award in writing under their hands, and return the same to the court here; and judgment of the court to be rendered according to such award, and to be final between the said parties." The referees so named, on the 28th of January 1833, chose John Kurtz the third referee; and afterwards, on the same day, made their award in the following words, "We, the subscribers, appointed arbitrators to settle a dispute between Otho M. Linthicum and John Lutz, in which the executors of the late John McPherson, of Frederick, are interested, do award the sum of $1129.93, to be paid to the said Linthicum, in full for all expenses and damages sustained by him, in consequence of not leaving him in quiet possession of the house, at the corner of Bridge and High streets, in Georgetown (the demised premises), for the full term of the lease for five years. Any arrear of rent due from Linthicum, to be paid by him." Judgment was given by the circuit court for the full amount of the award so made and costs. *Lutz* v. *Linthicum*..... *165

2. The articles purport to be made by Lutz, and to be sealed by him; and not to be made and sealed by his principal. The description of himself, as agent, does not, under such circumstances, exclude his personal responsibility; but this very liability was necessarily submitted to the referees, and came within the scope of their award..... *Id.*

3. It was objected to the award, that it was uncertain, not mutual and final: that it did not state whether the money was to be paid by Lutz, or the executors of McPherson; that it did not find the arrears of rent due, and to whom due; that it did not appear to be an award in the cause; that the award and the proceedings thereon were not according to the laws of Maryland; that the appointment of the third referee ought not to have been made, until after the other two referees had met and heard the cause, and disagreed thereon. The court held all these objections invalid..... *Id.*

4. Without question, due notice should be given to the parties, of the time and place for hearing the cause by the referees; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside; but it is by no means necessary that it should appear upon the face of the award, that such notice was given; there is no statute of Maryland, whose laws govern in this part of the district, which requires such facts to be set forth in the award. If no notice is, in fact, given, and no due hear-

ing had, the proper mode is to bring such facts, not appearing on the face of the award, before the court, upon affidavit, and motion to set aside the award; but *primâ facie*, the award is to be taken to have been regularly made, where there is nothing on its face to impeach it ..... *Id.*

5. The statute of Maryland requires that notice of an award shall be given to the party against whom it is made, by service of a copy, three days before judgment is moved; and judgment is not to be entered but on motion and direction of the court; it was alleged, that a copy of the award was not delivered. How that may have been, we have no means of knowing, for nothing appears upon the record respecting it, and there is no ground to say, that it ought to constitute any part of the record, or that it is properly assignable as error; it is matter purely collateral, and *in pais;* if no such copy had been delivered, the proper remedy would have been to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections before judgment. But in the present case, sufficient does appear upon the record, to show that the party had full opportunity to avail himself of all his legal rights in the court below; the cause was referred at November term 1832; pending the term, to wit, on the 18th of January 1833, the award was filed in court; the cause was then continued until the next term, viz., the fourth Monday in March 1833; at which time, the parties appeared by their attorneys, and upon motion, and after argument of counsel, judgment was entered. We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment ..... *Id.*

ATTORNEY AT LAW.

1. An attorney at law, in virtue of his general authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof, by a levy on lands or otherwise, and to receive the money due on the execution, and thus to discharge the execution; and if the judgment-debtor has a right to redeem the property sold under the execution, within a particular period of time, by payment of the amount to the judgment-creditor, who has become the purchaser of the property, there is certainly strong reason to contend, that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land. At least, if (as is asserted at the bar) this be the common course of practice in the state of Tennessee, it will furnish an unequivocal sanction for such an act. *Erwin* v. *Blake*..... *18

BILLS OF EXCEPTION.

1. This court have frequently remonstrated against the practice of spreading the charge of the judge at length upon the record, instead of the points excepted to, as productive of no good, but much inconvenience. *Gregg* v *Sayre*..... *244

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In the case of the Bank of the United States *v.* Dunn, 6 Pet. 51, this court decided, that a subsequent indorser was competent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement; by the same rule, the maker of the note is equally incompetent to prove facts which tend to discharge the indorser. *Bank of the Metropolis* v. *Jones*..... *12
2. The officers of the bank have no authority, as agents of the bank, to bind it, by assurances which would release the parties to a note from their obligations..... *Id.*

BILLS OF REVIEW.

1. The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery" under which the real estates of persons descending to minors, and persons *non compos mentis*, were authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case. *Bank of United States* v. *Ritchie*..... *128
2. From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the

chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers..... *Id.*

3. The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review. *Bank of United States* v. *White*.....*262

BOTTOMRY.

1. On an appeal from the decree of the circuit court of Maryland, on a libel on a bottomry-bond, originally filed in the district court, it appeared, that commissioners appointed by the circuit court had reported, that a certain sum, being a part of the amount of the bond, was absolutely necessary for the ship, as expenses and repairs in the common course of her employment; no exception was taken to this report by either party, in the circuit court, and it was accordingly confirmed by that court. The report is not open for revision in this court, there being nothing on its face impeaching its correctness. *The Virgin*..... *528

2. It is no objection to a bottomry-bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry-bond may be good in part and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity..... *Id.*

3. It is notorious, that in foreign countries supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem* in our courts of admiralty, even if the bottomry-bond, were, as it certainly is not, void *in toto*..... *Id.*

4. An objection was taken to the bond, that the supplies and advances might have been obtained on the personal credit of the owners of the ship, without an hypothecation: *Held*, that the necessity of the supplies and advances being once made out, it was incumbent upon the owners, who assert, that they could have been obtained upon their personal credit, to establish that fact by competent proofs; unless it was apparent from the circumstances of the case..... *Id.*

5. It was objected, that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore, could not be afterwards made a lien on the ship: *Held*, that the lender on the bottomry-bond might well trust the credit of the master as auxiliary to his security; and the fact that the master ordered the supplies and repairs, before the bottomry was given, could have no legal effect to defeat the security, if they were ordered by the master, upon the faith, and with the intention, that a bottomry-bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry-bond is, in practice, ordinarily given after the whole supplies and repairs have been furnished; for the plain reason, that the advances required can rarely be ascertained with exactness, until that period..... *Id.*

6. It was objected, that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and without any freight, returned to Baltimore. It may be admitted, that if a bottomry-lender, in fraud of the owners, and by connivance with the master, for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry-bond may be set aside as invalid; but there is no pretence to say, that if the master does deviate from his instructions, without any participation or co-operation or fraudulent intent of the bottomry-lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities..... *Id.*

7. Seamen have a lien, prior to that of the holder of a bottomry-bond, for their wages; but the owners are also personally liable for such wages; and if the bottomry-holder is compelled to discharge that lien, he has a resulting right to compensation over, against the owners, in the same manner as he would have, if they had previously mortgaged the ship..... *Id.*

8. Graf, one of the owners, had the ship delivered up to him, upon an appraisement at the value $1800, and he gave a stipulation according to the course of admiralty proceedings, to refund that value, together with damages, interest and costs, to the court. He is not at liberty now to insist, that the ship is of less than that value in his hands, or that he has discharged other liens diminishing the value

for which the owners were personally liable, *in solido*, in the first instance..... *Id.*
9. To the extent, then, of the appraised value of the ship delivered upon the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere*; but beyond this, there is no personal obligation upon the owners..... *Id.*
10. In this case, the value of the ship, the only fund out of which payment can be made, fell far short of a full payment of the amount due upon the bottomry-bond; but this is the misfortune of the lender, and not the fault of the owners; they are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry-bond, to pledge the ship and also the personal responsibility of the owners. The consequence is, that the loss *ultra* the amount of the fund pledged, must be borne by the libellant..... *Id.*

CASES CITED AND AFFIRMED.

1. The principles of the case of the Bank of the United States *v.* Dunn, 6 Pet. 51 affirmed. *Bank of the Metropolis* v. *Jones*....*12
2. The case of Craig *v.* State of Missouri, 4 Pet. 410, in which it was decided, that the act of the legislature of the state of Missouri, passed 27th July 1821, entitled an act for establishing loan-offices, was repugnant to the constitution of the United States, revised and confirmed. *Byrne* v. *State of Missouri*.....*40
3. The cases of the United States *v.* Quincy, 6 Pet. 466; and The William King, 2 Ibid. 153, cited. *Lee* v. *Lee*.....*44
4. The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 2 Wheat. 266; and Satterlee *v.* Mathewson, 2 Pet. 380, cited. *Watson* v. *Mercer*.....*88
5. The cases of Bingham *v.* Cabot, 3 Dall. 328; Abercrombie *v.* Dupuis, 1 Cranch 343; Wood *v.* Wagnon, 2 Ibid. 9; Capron *v.* Vanorden, Ibid. 126, cited. *Brown* v. *Keene*.....*112
6. Opinion of the circuit court of the district of Columbia in the case of Mason *v.* Muncaster, as to poundage fees payable by the United States to the marshal of the district of Columbia, in cases where the debtor to the United States has been discharged from custody under execution by the United States. *United States* v. *Ringgold*.....*154

CHANCERY AND CHANCERY PRACTICE.

1. A bill was filed in the circuit court of the district of Columbia, claiming a legacy under an alleged codicil, made in Paris, to a will made in the United States; the testator was a native of Poland; at the time of the making of the codicil, he resided in France; and when he made the will, to which the instrument, upon which the legacy was claimed was said to be a codicil, he was in the United States; he went to Europe, soon after he made the will, and many years afterwards, he died, in Switzerland. The bill alleged, that the instrument on which the legacy was claimed had been duly proved in the orphans' court of Washington county, in the district of Columbia, where the administrator with the will annexed resided; there was no allegation, that the codicil had been established to be a valid will by the law of France, the place of the domicil of the testator, where the same was made; the administrator submitted to the court, whether it would decree the payment of the money to the complainant, "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said testator's will, solemnly executed and left in the hands of his executors in this country," &c. This is certainly a very informal and loose mode of putting in issue (if upon the bill such a question can be tried) the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence. The answer contained an allegation, that certain persons residing in Europe have filed a bill in the circuit court of the district of Columbia against him, the administrator claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the testator: and certain persons, also residing in Europe have filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the testator, and therefore, as distributees of the said assets; none of the parties to either of these latter bills are made parties to the present bill. The persons claiming as heirs of the testator should be made parties, that they may have an opportunity to contest the plaintiff's title, as the real parties in interest, the administrator being but a mere stakeholder. The heirs and legal representatives of the testator filed a bill in the circuit court claiming from the administrator of the testator with the will annexed, the funds which had come into his hands; which bill was still pending; the allegations in the bill went to defeat the validity of the will made in the United States, and also asserted other grounds of claim. All the bills ought, if possible, to be brought to a hearing at the same time, in

the circuit court, in order that a final disposition may, at the same time, be made of all the questions arising in all of them. If the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a *will*, it is material, that the law of France, the place of the domicil of the testator, at the time of its execution, should be brought before the court, and established as a matter of fact; for the court cannot judicially take notice of foreign laws, but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose; and they should be amended and made more distinct and direct. *Armstrong* v. *Lear*.....*52

2. There may arise some nice questions of inter national law in which the fact of the domicil of the testator, at the time of his birth, at time of his making the will made in the United States, and at the time of his death, may become material; the court do not mean to say, what is the rule that is to govern in cases of wills of personalty, whether it be the rule of the native domicil, or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil; these are points, which ought, under the circumstances of this case, to be left open for argument. But the facts on which the argument should rest ought to be distinctly averred in the bill, and met in the answer..... *Id.*

3. The place of domicil of the testator, at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession, *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers in the case; the persons claiming as such heirs, must establish their title under and according to the law of his domicil, at the time of his death; so that, perhaps, it may become material, if Switzerland was the domicil of the testator, at the time of his death, to bring the law of that country distinctly, as matter of fact, before the court..... *Id.*

4. The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes given to the defendants; these are several contracts, having no connection with each other; the parties cannot join their claims in the same bill. *Yeaton* v. *Lenox*.....*123

5. Several creditors cannot unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill..... *Id.*

6. The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery," under which the real estates of persons descending to minors, and persons *non compos mentis*, were authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit, and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case. *Bank of United States* v. *Ritchie*.....*128

7. From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers..... *Id.*

8. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court; they defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. It is not error, but it is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person, not appearing, from his name, or shown on the record, to be connected with them was appointed their guardian *ad litem*..... *Id.*

9. The answer of the infant defendants, in the original proceedings, was signed by their guardian, but not sworn to; it consented to the decree for which the bill prayed; and, without any other evidence, the court proceeded to decree a sale of their lands. This

is entirely erroneous; the statute under which the court acted, authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper, that such debts should be paid by a sale of the real estate; independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.....*Id.*

10. The insufficiency of the personal estate of A. R. to pay his debts, was stated in the answer of his administrator, but was not proved; and was admitted in that of the guardian of the infants, but his answer was not on oath; and it were, the court ought to have been otherwise satisfied of the fact.....*Id.*
11. The justice of the claims made by the complainants in the original proceeding, was not established otherwise than by the acknowledgment of the infant defendants in their answer, that, "according to the belief and knowledge of their guardian, they are as alleged in said bill, respectively due." The court ought not to have acted on this admission; the infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient; the court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate..*Id.*
12. There was error in the original proceedings in ordering the sale of the real estate of A. R., for the payment of his debts, before the amount of the debts should be judicially ascertained by the report of an auditor..*Id.*
13. The eighth section of the law which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to, and confirmed by, the chancellor, before any conveyance of the property shall be made." This provision was totally disregarded; the sale was never confirmed by the court; yet the conveyance was made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.....*Id.*
14. The conveyances of the real estate, made under the original proceeding, were properly set aside by the decree of the court below; the relief might be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him.....*Id.*
15. The 20th of the rules made by this court, at February term 1822, for the regulation of proceedings in the circuit courts, in equity causes, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." *Bank of United States* v. *White*.....*262.
16. By the terms of this rule, no service of any copy of the interlocutory decree taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on, as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; it may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.....*Id.*
17. No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.....*Id.*
18. The principle is unquestionable, that all the parties to the original decree ought to join in a bill of review.....*Id.*
19. In 1799, the heir of a vendor, he having died, obtained a complete title to the land by patent, and the vendee did not die until seven years after; after his death, in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim to a performance of the contract for the sale of the land, until 1819; and no suit was commenced, until 1823; in the meantime, the property had materially risen in value, from the general improvement and settlement of the country. The objection from lapse of time, is decisive; courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances; even where time is not of the es-

sence of the contract, they will not interfere, where there have been long delay and *laches* on the part of the party seeking a specific performance; and especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill was brought after a lapse of twenty-nine years. *Holt* v. *Rogers*..*420

CHESAPEAKE AND OHIO CANAL COMPANY.

1. A bill was filed in the circuit court of the district of Columbia, against the Chesapeake and Ohio Canal company, claiming, as riparian proprietor, from the company, a right to use, for manufacturing purposes, the water of the Potomac, introduced through the land of the appellant, when the quantity of water so introduced should exceed that required for navigation. The bill charged, that the land of the appellant was susceptible of being improved, and was intended so to be, for the purpose of manufacturing, by employing the water of the Potomac, prior to 1784, in which year the Potomac company was chartered; all the chartered rights of that company, and all their obligations were, in 1825, transferred to the Chesapeake and Ohio Canal company. By the improvements made by the Potomac company, much surplus water was introduced and wasted on the land of the appellant; the Chesapeake and Ohio Canal company had deepened the canal, and made other improvements on the land of the appellant; thus introducing a large quantity of water for navigation and manufacturing. The appellant claimed, that under the charter of the Potomac company, held by the Chesapeake and Ohio Canal company, he was entitled to use this surplus water for manufacturing purposes; if the water was insufficient for this purpose, he claimed to be allowed to have the works enlarged, to obtain a sufficient supply. The court held, that under the provisions of the charter, the purposes for which lands were to be condemned and taken were for navigation only; limiting the quantity taken to such as was necessary for public purposes. By the 13th section of the charter of the Potomac Canal company of 1784, the company were authorized, but not compelled, to enter into agreements for the use of the surplus water; the owner of the adjacent lands required no such special permission by law; this was a right incident to the ownership of land; the authority, on both sides, was left open to the mutual agreements of the parties; but neither could be compelled to enter into an agreement relative to the surplus water. *Binney* v. *Chesapeake and Ohio Canal Co*.....*201
2. The 13th section of the act of Virginia, of January 1824, incorporating the Chesapeake and Ohio Canal company, declares, that upon such surrender and acceptance, the charter of the Potomac company shall be, and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac company, shall be vested in the company hereby incorporated. By this provision, the Potomac company ceased to exist, and a *scire facias* on a judgment obtained against the company, before it was so determined, cannot be maintained. *Mumma* v. *Potomac Company*.....*281
3. There is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.....*Id.*
4. The dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, by those states, any more than the death of a private person may be said to impair the obligations of his contract. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws....*Id.*

COMMON LAW.

1. There can be no common law of the United States; the federal goverment is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law; there is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union; the common law could only be made a part of our system, by legislative adoption. *Wheaton* v. *Peters*.....*591
2. When a common-law right is asserted, we look to the state in which the controversy originated.....*Id.*
3. When the ancestors of the citizens of the United States migrated to this county, they brought with them, to a limited extent, the English common law, as part of their heritage; no one will contend, that the common law, as it existed in England, has ever been

in force, in all its provisions, in any state in this Union; it was adopted only so far as its principles were suited to the condition of the colonies; and from this circumstance, we see, what is the common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced, and sanctioned in each.....*Id.*

CONSTITUTIONALITY OF STATE LAWS.

1. In 1785, M. and wife executed a deed, conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was, to vest the lands of the wife in the husband; the deed of M. and wife to T. was not acknowledged, according to the forms established by the law of Pennsylvania, of 20th February 1770, to pass the estates of *femes covert;* and after the death of the wife of M., the land was recovered in an ejectment, from the heirs of M., in a suit instituted against him by the heirs or the wife of M. In 1826, after the recovery in ejectment, the legislature of Pennsylvania passed an act, the object of which was, to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises, under James Mercer, the husband; and the defendants, as heirs-at-law of his wife, who died without issue; this ejectment was brought after the passage of the act of 1826. The authority of this court to examine the constitutionality of the act of 1826, extends no further than to ascertain, whether it violates the constitution of the United States; the question, whether it violates the constitution of Pennsylvania, is, upon the present writ of error, not before the court. *Watson* v. *Mercer*.....*88
2. This court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property; the constitution of the United States does not prohibit the states from passing retrospective laws generally; but only *ex post facto* laws. It has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws; which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the matter prescribed; *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures; and not to civil proceedings which affect private rights retrospectively..... *Id.*
3. The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even affect to touch and title acquired by a patent of any other grant; it supposes the title of the *femes covert* to be good, however acquired; and even provides that deeds of conveyancy made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer title. So far, then, as it has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert;* it gives the very effect to their acts and contracts which they intend to give; and which, from mistake or accident, has not been effected. The cases of Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 5 Cranch 138; Ogden *v.* Saunders, 12 Wheat. 266; and Satterlee *v.* Matthewson, 2 Pet. 380, fully recognise this doctrine. *Id.*

CONSTITUTIONAL LAW.

1. The certificates authorized by the act of the legislature of Missouri, passed on the 27th June 1821, were bills of credit, and the act was repugnant to the constitution of the United States. *Byrne* v. *State of Missouri*.....*40
2. Construction of the act of limitations of Pennsylvania. *Gregg* v. *Sayre*.....*244

CONSTRUCTION OF STATE STATUTES.

1. Construction of the statute of Maryland passed in 1785, entitled "an act for enlarging the powers of the high court of chancery." *Bank of United States* v. *Ritchie*..*128
2. Construction of the acts of the legislature of Tennessee, in relation to the emancipation of slaves. *McCutchen* v. *Marshall*.....*220

CONSULS OF FOREIGN NATIONS.

See *Davis* v. *Packard*, *312.

CONTINUANCE.

1. An appeal was taken at the December term 1832, of the circuit court for the district of Columbia, to the January term 1833, of this court; the appeal was not entered to that term, but was entered to January term 1834. The case being called for argument, the defendant asked for a continuance, which was granted. *Brown* v. *Swann*.....*435
2. Under the 65th section of the duty act of 1766, where a bond has been given for duties on merchandise, and errors in the calcula-

tion thereof are alleged on affidavit. at the first term on which the suit has been brought on the bond, a delay of one term is allowed for examination and correction; where there is a real defence to the claim on the bond, an opportunity to obtain evidence, by a continuance for a longer period, according to the circumstances of the case, must be given. *United States* v. *Phelps*.....*700

CONTRABAND AND ILLICIT TRADE.

See INSURANCE.

CONTRACT.

1. An action was instituted in the district court of the United States for the western district of Virginia, on a promissory note made in the state of Kentucky, and the defendants pleaded the statute of limitations of Virginia; the plaintiffs replied, that by the statute of limitations of Kentucky, the defendants were not discharged; *Held*, that the statute of limitations of Kentucky was not available in Virginia. *United States* v. *Donnally*..*361

2. The general principle adopted by the civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. Because an action of covenant will lie in Kentucky, on an unsealed instrument, it will not lie, in another state, where covenant can only be brought on an instrument under seal.....*Id.*

3. A contract was made for the delivery of rations for the use of the troops of the United States, "thirty days' notice being given of the post or place where the rations may be wanted;" in an action on a bond, with sureties, for a balance claimed to be due to the United States by the contractor, the United States introduced the testimony of one Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed) were then informed of the fixed posts, within the limits of the contract, and the number of troops there stationed; that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; that the contractor was informed he was to continue so to do, without any other notice; that special requisitions and notices of thirty days would be made and given, for all other supplies at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors; but he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything more or less than what the contract specified; and he did not know that there had been any submission or agreement of contractors, to such a construction of their contracts, but that such was the rule adopted by the accounting officers, in settling the accounts of contractors. The defendant, among other things, introduced evidence to show, that the contractor always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies, at all posts where provisions were required, and without regard to their being old established posts, or new ones established after the contract. After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the contractor, in supplying the fixed posts as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, was liable, under the bond and contract upon which this action was founded." The circuit court refused to give this instruction, and the question was, whether it ought to have been given: *Held*, that there was no error in the refusal of the circuit court to give the instructions. *United States* v. *Jones' Administrator*.....*399

4. R. executed a bond to D., conditioned, that he would make him a fair and indisputable title to a certain tract of land, on or before the 1st of January 1795; and if no conveyance was then made, that R. would stand indebted to D., in a certain sum of money, being the sum acknowledged to be paid to R., at the time of the contract. No other just interpretation can, under the circumstances, be put upon this language, than the parties intended, that R. should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to D., on or before the 1st of January 1795; and if not then made, the contract of sale was to be

deemed rescinded, and the forty-five pounds purchase-money was to be repaid to D. *Holt* v. *Rogers*... .....*420

COPYRIGHT.

1. From the authorities cited in the opinion of the court, and others which might be referred to, the law appears to be well settled in England, that since the statute of 8 Ann. the literary property of an author in his works can only be asserted under the statute; and that notwithstanding the opinion of a majority of the judges in the great case of Millar *v.* Taylor was in favor of the common-law right, before the statute, it is still considered in England as a question by no means free from doubt. *Wheaton* v. *Peters*...*591
2. That an author, at common law, has a property in *his manuscript*, and may obtain redress against any one who deprives him of it, or, by obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world .....*Id.*
3. The argument, that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted; and the answer is, that he realizes his product, in the sale of his works, when first published.....*Id.*
4. In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and perhaps, as usefully to the public, as any distinguished author in the composition of his book; the result of their labors may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended, that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly; it would seem, therefore, that the existence of a principle which operates so unequally, may well be doubted. This is not a characteristic of the common law; it is said to be founded on principles of justice, and that all its rules must conform to sound reason.....*Id.*
5. That a man is entitled to the fruits of his own labors must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.....*Id.*
6. It is clear, there can be no common law of the United States; the federal goverment is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law; there is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our system only by legislative adoption.....*Id.*
7. When a common-law right is asserted, we look to the state in which the controversy originated.....*Id.*
8. When the ancestors of the citizens of the United States migrated to this country, they brought with them, to a limited extent, the English common law, as part of their heritage. No one will contend, that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union; it was adopted only so far as its principles were suited to the condition of the colonies; and from this circumstance, we see, what is the common law in one state, is not so considered in another; the judicial decisions, the usages and customs of the respective states must determine how far the common law has been introduced, and sanctioned in each..... .....*Id.*
9. If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on the subject? If no copyright of an author in his work has been heretofore asserted there, no custom or usage established, no judicial decisions been given; can the conclusion be justified, that, by the common law of Pennsylvania an author has a perpetual property in the copyright of his works. These considerations might well lead the court to doubt the existence of this law; but there are others of a more conclusive character.....*Id.*
10. In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions." The word "secure," as used in the constitution, could not mean the protection of acknowledged legal right; it refers to inventors, as well as authors; and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.....*Id.*

11. It is presumed, that the copyright recognised in the act of congress, and which was intended to be protected by its provisions, was the property which an author has, by the common law, in his *manuscript*, which would be protected by a court of chancery; and this protection was given, as well to books published under the provisions of the law, as to manuscript copies.....*Id.*

12. Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.....*Id.*

13. The right of an author to a perpetual copyright, does not exist by the common law of Pennsylvania.....*Id.*

14. No one can deny, that where the legislature are about to vest an exclusive right in an author, or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. This principle is familiar as it regards patent-rights; and it is the same in relation to the copyright of a book; if any difference should be made, as respects a strict conformity to the law, it would seem to be more reasonable, to make the requirement of the author, rather than of the inventor.....*Id.*

15. The acts required by the laws of the United States, to be done by an author, to secure his copyright, are in the order in which they must naturally transpire; first, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.....*Id.*

16. It has been said, these are unimportant acts. If they are, indeed, wholly unimportant, congress acted unwisely in requiring them to be done; but whether they are unimportant or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, the court can only know by their official acts. Judging of those acts, by this rule, the court are not at liberty to say, they are unimportant, and may be dispensed with; they are acts which the law requires to be done; and may this court dispense with their performance?..*Id.*

17. The security of a copyright to an author, by the acts of congress, is not a technical grant on precedent and subsequent conditions; all the conditions are important; the law requires them to be performed, and consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless congress have legislated in vain to render this right perfect. The notice could not be published, until after the entry with the clerk; nor could the book be deposited with the secretary of state, until it was published; but they are acts not less important than those which are required to be done previously; they form a part of the title; and until they are performed, the title is not perfect....*Id.*

18. Every requisite under both the acts of congress relative to copyrights, is essential to the title.....*Id.*

19. The acts of congress authorizing the appointment of a reporter of the decisions of the supreme court of the United States, require the delivery of eighty copies of each volume of the reports to the department of state. The delivery of these copies does not exonerate the reporter from the deposit of a copy in the department of state, required under the copyright act of congress of 1790; the eighty copies delivered under the reporter's act, are delivered for a different purpose, and cannot excuse the deposit of one volume as specially required by the copyright acts.....*Id.*

20. No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court; and the judges of the court cannot confer on any reporter any such right.....*Id.*

CORPORATION.

1. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them; and it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter. *Mumma* v. *Potomac Company*.....*281

2. There is no pretence to say, that a *scire facias* to revive a judgment can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man.....*Id.*

COSTS.

1. It is undoubtedly a general rule, that no

court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States. *United States* v. *Ringgold*.....*150

DAMAGES.

1. N. stipulated in certain articles of agreement, to transport and deliver by the steamboat Paragon, to R., a certain quantity of subsistence stores supposed to amount to 3700 barrels for the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one half in specie funds, or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there at the period of the delivery of the stores at St. Louis; under the agreement was the following memorandum: "It is understood that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company, or its equivalent." The circuit court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company bank, at the time the payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated. *Robinson* v. *Noble*.....*181
2. The plaintiff, the owner of the steamboat, was not entitled, under the contract, to recover in damages more than the stipulated price for the freight actually transported; if R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R... *Id.*
3. There is no pretence that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract: in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through a loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity..... *Id.*

DEVISE.

1. William King, in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Ellzabeth, wife of John Mitchell, and to their issue." Upon the construction of the terms of this clause, it was decided by this court, in 3 Pet. 346, that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons: and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, would take effect. The case was again brought before the court, on an appeal by William King, in whom, it had been decided, the estate devised was vested in trust; and the court held, that William King did not take a beneficial estate in fee in the premises, but a resulting trust for the heirs-at-law of the testator. There is no doubt, that the words "in trust," in a will may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense

or the term is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained, until the other sense is clearly established to be that intended by the testator. In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and, of course, if such issue should come *in esse*, a long minority must follow; during this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse;* and if first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning. *King* v. *Mitchell*.....*326

2. Emancipation of slaves by devise, under the laws of Tennessee. *McCutchen* v. *Marshall*.....*220

DUTIES ON MERCHANDISE.

1. The denomination of merchandise, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense; and it is to be presumed, that congress so used and intended them to be understood. *United States* v. 112 *Casks of Sugar* *227

2. Under the 65th section of the duty act of 1799, where a bond has been given for duties, and errors in the calculation thereof are alleged on affidavit, at the first term to which suit has been brought on the bond, a delay of one term is allowed for the purpose of examination and correction; where there is a real defence to the claim on the bond, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given. *United States* v. *Phelps*.....*700

EJECTMENT.

1. A declaration in ejectment was dated on the 22d of May 1831, and a judgment was rendered on the 14th of January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the first day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which was subsequent to the demise on which the plaintiff counted. Though the demise is a fiction, the plaintiff must count on one which, if real, would support his action. *Lessee of Binney* v. *Chesapeake and Ohio Canal Co.*.....*214

ENTRIES OF LAND, FOR THE PURPOSES OF SURVEY.

See LANDS AND LAND TITLES: *Garnett* v. *Jenkins*. *75.

ERROR AND WRIT OF ERROR.

1. In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company, by a justice of the peace, in the county of Washington, district of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through the land, at $1000; certain objections being filed to the inquisition, the court quashed the same; and a writ of error was brought on this judgment. The order or judgment, in quashing the inquisition in this case, is not final; the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken;" the order or judgment, therefore, quashing the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de nova*. *Chesapeake and Ohio Canal Co.* v. *Union Bank of Georgetown*.....*256

2. A writ of error will not lie to the supreme court, from such an order.....*Id.*

3. A writ of error brought in the name of "Mary Deneale *and others*;" dismissed for irregularity: a new one in due form may be brought. *Deneale* v. *Stump's Executors*.*526

EVIDENCE.

1. In the case of the Bank of United States *v.* Dunn, 5 Pet. 51, the court decided, that a subsequent indorser was not competent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement; by the same rule, the maker of a note is equally incompetent to prove facts which tend to discharge the indorser. *Bank of the Metropolis* v. *Jones*.....*12

2. The acts of 1715 and of 1766 of Maryland, require that all conveyances of land shall be enrolled in the records of the same county

where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be; the courts of Maryland are understood to have decided, that copies of deeds thus enrolled may be given in evidence. *Dick* v. *Balch*.....*30

3. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves.....*Id.*
4. The receipts of a contractor, for moneys paid to him by the United States, are *primâ facie* evidence that the money was received by him on account of the contract, and it is incumbent, in an action on the bond given, with sureties, for the performance of the contract, for the parties to show that the money was not paid on account of the contract, as stated in the receipts; but they are not bound to show, that it was so stated by mistake or design on the part of the government and the contractor, and intended to be applicable to some other contract. *United States* v. *Jones*.....*399

See TREASURY TRANSCRIPT.

FLORIDA LAND-CLAIMS.

1. Construction of the articles of the treaty between the United States and Spain, ceding Florida, relating to the confirmation of grants of land made by the Spanish authorities, prior to the treaty. *United States* v. *Clarke*.....*436
2. An examination of the authority of the governors of Florida, and of other Spanish officers, under the crown of Spain, to grant lands within the territory, and of the manner in which that authority was exercised.....*Id.*
3. An examination of the legislation of the United States, on the subject of the examination and confirmation of Spanish grants of land in the territory of Florida, made before the cession of the same to the United States.....*Id.*
4. As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction.....*Id.*
5. In courts of a special limited jurisdiction, which the superior court of East Florida unquestionably is, in this case, the pleadings must contain averments which bring the cause within the jurisdiciton of the court, or the whole proceedings will be erroneous.....*Id.*
6. It was obviously the intention of congress, to extend the jurisdiction of the court to all existing claims, and to have them finally settled; the purpose for which the act was made could not be otherwise accomplished; any claim which the court was unable to decide, on the petition of the claimant, would remain the subject of ligitation; this would defeat the obvious intention of congress, which ought to be kept in view in construing the act.....*Id.*
7. The words in the law, which confer jurisdiction, and describe the cases on which it may be exercised are, "all the remaining cases which have been presented according to law, and not finally acted upon;" the subsequent words, "shall be adjudicated," &c., prescribe the rule by which the jurisdiction previously given shall be exercised.....*Id.*
8. Confirmation of a grant of land by governor Coppinger, made in June 1828. *United States* v. *Richard*.....*470
9. The grant was made to the appellee, on his stating his intention to build a saw-mill; the decree granted to the petitioner, "license to construct a water saw-mill, on the creek known by the name of Pottsburg, bounded by the lands of Strawberry Hill, and this tract not being sufficient, I grant him the equivalent quantity in Cedar Swamp, about a mile east of McQueen's mill, but with the precise condition, that, as long as he does not erect said machinery, this grant will be considered null, and without value nor effect, until that event takes place; and then, in order that he may not receive any prejudice from the expensive expenditures which he is preparing, he will have the faculty of using the pines and other trees comprehended in the square of five miles, or the equivalent thereof, which five miles are granted to him in the mentioned place, avails of which he will enjoy without any defalcation whatever." The judge of the superior court construed this concession to be a grant of land, and we concur with him.....*Id.*
10. The decree of the superior court of East Florida, confirming a concession of land by Governor Kindelan, to Antonio Huertas, affirmed. *United States* v. *Huertas*....*475
11. The decree of the superior court of East Florida, confirming a grant of land to Eusebio M. Gomez, affirmed. *United States* v. *Gomez*.....*477
12. The decree of the superior court of East Florida, confirming a grant of land to George Fleming, affirmed. *United States* v. *Fleming's Heirs*.....*478
13. The decree of the superior court of East

Florida, confirming grants of land claimed by Moses E. Levi, affirmed in part *United States* v. *Levi*.....*479
14. The decree of the superior court of East Florida, confirming a grant of land to Philip R. Younge, affirmed. *United States* v. *Younge* *484
15. The decree of the superior court of East Florida, confirming a concession of land by Governor Coppinger, to Joseph H. Hernandez, affirmed. *United States* v. *Hernandez* *485
16. The decree of the superior court of East Florida, confirming a concession of land to John Huertas, by Governor Coppinger, in 1817, affirmed. *United States* v. *Huertas*. *488
17. Confirmation of a Spanish grant of land in Florida, to Philip P. Fatio. *United States* v. *Fatio*.....*492
18. Confirmation of the decree of the superior court of Florida, in favor of a grant of land to Francis P. Fatio. *United States* v. *Gibson*.....*494

FLORIDA TREATY.

1. Construction of the articles of the treaty between the United States and Spain, ceding Florida, relating to the confirmation of grants of land made by Spanish authorities, prior to the treaty. *United States* v. *Clarke*....*436

See Florida Land-Claims.

FOREIGN JUDGMENT.

1. An adjudication made by a Spanish tribunal in Louisiana, is not void, because it was made after the cession of the country to the United States; for it is historically known, that the actual possession of the country was not surrendered, until some time after the proceedings and adjudication in the case took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered, whilst the country, though ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws; such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid. *Keene* v. *McDonough*. *308

FRAUD.

1. It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character. *Gregg* v. *Sayre*.....*244
2. Fraud, it is said, will never be presumed, though it may be proved by circumstances. Now, where an act does not necessarily import fraud; where it has more likely been done through a good than bad motive, fraud should never be presumed.....*Id.*
3. Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and, when they received their deeds, had no knowledge of it, but accepted the same in good faith, the deeds upon their face purporting to convey a title in fee, and showing the nature and extent of the premises; there can be no doubt, the deeds do give color of title under the statute of limitations .....*Id.*

INDICTMENT.

1. The defendant was indicted, in April 1833, in the circuit court for the district of Pennsylvania, for passing a counterfeit note of the denomination of ten dollars, purporting to be a note of the Bank of the United States, with intent to defraud the bank, &c.; he pleaded, that the note described in the indictment had been heretofore given in evidence on the trial of the defendant, upon a former indictment found against him for passing another counterfeit ten dollar note, upon which indictment he had been acquitted. The offence for which the defendant was indicted, and to which indictment he pleaded the plea of a former acquittal, was entirely a distinct offence from that on which the verdict of acquittal was found; the plea does not show that he had ever been indicted for passing the same counterfeit bill, or that he had ever been put in jeopardy for the same offence; the matter pleaded is no bar to the indictment. *United States* v. *Randenbush*.....*289

INFANT AND INFANCY

1. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves in a considerable degree, upon the court; they defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question It is not error, but is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person not appearing from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*. *Bank of United States* v. *Ritchie*.....*128

INJUNCTION.

1. A bill for an injunction is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent, at least, an original bill. *Dunn* v. *Clarke*.....*1

INQUISITION.

1. In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company, by a justice of the peace, in the county of Washington, district of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through their land, at $1000; certain objections being filed to the inquisition, the court quashed the same; and a writ of error was brought on this judgment. The order or judgment, in quashing the inquisition in this case, is not final; the law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken;" the order or judgment, therefore, quashing the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*. *Chesapeake and Ohio Canal Co.* v. *Union Bank of Georgetown*.... *259

INSURANCE.

1. In a policy of insurance, there was a memorandum, stipulating, that "the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." This provision is not to be construed, that there must be a legal or justifiable cause of condemnation, but that there must be such a cause for seizure or detention. *Carrington* v. *Merchants' Insurance Co*.....*495

2. It is not every seizure or detention which is excepted, but such only as is made for and on account of a particular trade; a seizure or detention, which is a mere act of lawless violation, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception; and as little is a seizure or detention, not *bonâ fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for, under such circumstances, it can in no just sense be said to be made for or on account of such trade; it is a mere fraud, to cover a wanton trespass; a pretence and not a cause for the tort. To bring a case then within the exception, the seizure or detention must be *bonâ fide*, and upon a reasonable grounds, if there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it—a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention.....*Id.*

3. The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; she sailed on that voyage from Providence, R. I., with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure.....*Id.*

4. According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty; the penalty is applied to the latter, only when there has been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made *in transitû*, while the contraband goods are yet on board; but when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the

penalty to the ship or cargo, upon the return-voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals, who conduct themselves with fairness and good faith in the arrangement of the voyage; if, with a view to practise a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral..... *Id.*

5. When there has been a *bonâ fide* seizure and detention, for and on account of illicit or contraband trade, and by a clause in the policy of insurance, it was agreed, that "the insurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention, for or on account of illicit trade, or trade in articles contraband of war," a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary, to discharge the underwriters. If the seizure or detention be lawfully made, for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception; they are properly attributable to such seizure and detention, as the primary cause, and relate back thereto; if the underwriters be discharged from the primary hostile act, they are discharged from the consequence of it..... *Id.*

6. Insurance was effected in Boston, Massachusetts, on the ship Dawn, from New York to the Pacific ocean, on a whaling voyage, and until her return; the letter ordering insurance was written in New York, by the owner of the ship, who resided there; and she was represented to be a "coppered ship." The ship, on the outward passage, struck at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands; where she arrived in a leaky condition, and upon examination by competent surveyors, she was found to be so entirely perforated by worms, in her keel, stem and stern-post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold. The vessel, on her outward voyage, had put into St. Salvador, and both at the Cape de Verds, and at St. Salvador, her bottom was examined by swimmers; it was in evidence, that the terms "a coppered ship," had a different meaning, and were differently understood in Boston and in New York: *Held*, that the assured, in making the representation in the letter, was bound by the usage and meaning of the terms contained therein, in New York, where the letter was written and his ship was moored, and not by those of Boston, where the insurance was effected. *Hazard* v. *New England Marine Insurance Co*..... *557

7. A representation to obtain an insurance, whether it may be made in writing or by parol, is collateral to the policy; and as it must always influence the judgment of underwriters, in regard to the risk, it must be substantially correct. It differs from an express warranty; as that always makes a part of the policy, and must be strictly and literally performed..... *Id.*

8. The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade and the political condition of foreign nations; men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country, and also those of foreign countries; this knowledge is essentially connected with their ordinary business; and by acting on the presumption that they possess it, no violence or injustice is done to their interests..... *Id.*

9. It is upon the represention, that the underwriters are enabled to calculate the risk, and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided; it is, therefore, immaterial, in what way the loss may arise, where there has been such a misrepresentation as to avoid the policy..... *Id.*

10. The judge of the circuit court, on the trial of the case, charged the jury, that "if they should find that, in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In the form in which this instruction was given, there was no error..... *Id.*

11. The circuit court instructed tho jury, "that if there was no misrepresentation in regard

to the ship, and she substantially corresponded with the representation, if the injury which occurred to the vessel at the Cape de Verds were reparable, and could have been repaired there, or at St. Salvador, or at any other port at which the vessel stopped in the course of her voyage, the master was bound to have caused such repairs to be made, if they were material to prevent any loss; and if he omitted to make such repairs, because he did not deem them necessary; and by such neglect alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss." If the loss by worms is not within the policy, as has been decided, the court did not err in giving this instruction; the negligence or vigilance of the master would be of no importance, under the circumstances, in regard to the liability of the underwriters..... *Id.*

JURISDICTION.

1. The complainants filed their bill in the circuit court of Ohio, praying for an injunction to a judgment in an ejectment, and for a conveyance of the premises; all the complainants were residents in the state of Ohio, and so were the defendants; the judgment was obtained in the circuit court, by G., a citizen of Virginia, and the defendant Clarke held the land recovered, under the will of G., in trust. Jurisdiction may be sustained, so far as to stay execution at law against D.; he is the representative of Graham, and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of an equitable control over the judgment; but beyond this, the decree of this court cannot extend. *Dunn* v. *Clarke*. *1
2. Of the action at law, the circuit court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached; if G. had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as D. is his representative, the court may do the same thing, as against him. The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered to that extent, at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties..... *Id.*
3. Several persons are made defendants, who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court; but as there appear to be matters of equit in the case, which may be investigated by a state court, it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court..... *Id.*
4. The district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy; but the appellate jurisdiction of this court and of the circuit courts, depends upon the sum or value of the matter in dispute between the parties, having independent interests. *Stratton* v. *Jarvis*..... *4
5. The pleadings in the cause brought up the question, whether an act of the legislature of the state of Missouri, by virtue of which certificates in the nature of bills of credit were issued, and which formed the consideration of a writing obligatory, upon which a suit had been instituted by the state, on which the judgment of the state court was rendered, were constitutional or not, directly and plainly before the court, and the decision of the state court was in favor of its validity; consequently, the case is within the 25th section of the judiciary act. *Byrne* v. *State of Missouri*..... *40
6. The plaintiffs in error filed a petition for freedom, in the circuit court of the United States for the county of Washington, and proved that they were born in the state of Virginia, as slaves of Richard B. Lee, now deceased, who moved, with his family, into the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves, until the year 1820, when the petitoner Barbara was removed to the county of Alexandria, in the district of Columbia, where she was hired to Mrs. Muir, and continued with her, thus hired, for the period of one year; that the petitioner Sam was, in like manner, removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months; that after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside, as the slaves of the said Richard B. Lee, until his death, and since, as the slaves of his widow, the defendant. On the part of the defendant in error, a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2d of April 1816, which declares, that no cause shall be removed from the circuit court for the district of Columbia, to the supreme court, by appeal or writ of

error, unless the matter in dispute shall be of the value of $1000, or upwards. The matter in dispute in this case, is the freedom of the petitioners; the judgment of the court below is against their claims to freedom; the matter in dispute is, therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation; had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value; but affidavits, estimating the value of freedom, are entirely inadmissible; and no doubt is entertained of the jurisdiction of the court. *Lee* v. *Lee*.....*44

7. A petition, filed in the district court of Louisiana, averred, that the plaintiff, Richard Raynal Keene, was a citizen of the state of Maryland, and that James Brown, the defendant, was a resident of the state of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The decisions of this court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends; it is not sufficient, that jurisdiction may be inferred, argumentatively, from its averments. *Brown* v. *Keene*.....*112

8. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States ....*Id.*

9. The constitution extends the judicial power to "controversies between citizens of different states;" and the judiciary act gives jurisdiction, "in suits between a citizen of the state where the suit is brought, and a citizen of another state."..... *Id.*

10. It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts and determine their character. *Gregg* v. *Sayre*.....*244

11. T. Boon, a citizen and resident of Pennsylvania, filed a bill in the circuit court of Kentucky, against W. Chiles and others, praying that the defendant and such others of the defendants as might hold the legal title to certain lands, might be decreed to convey them to him, and for general relief; the bill stated, that Reuben Searcy, being entitled to one moiety of a settlement and pre-emption right of 1400 acres of land, located in Licking, sold the same to William Hay, in September 1781, and executed a bond for a conveyance; in December following, Hay assigned this bond to George Boon, who, in April 1783, assigned it to the plaintiff; Hay, while he held the bond, obtained an assignment of the plat and certificate of survey, which he caused to be registered, and the patent was issued in his name, in 1785; in 1802, the plaintiff made a conditional sale of this land to Hezekiah Boon, but the conditions were not complied with, and the contract was considered by both parties as a nullity; yet a certain William Chiles, and the said Hezekiah Boon, and George Boon, fraudulently uniting the plaintiff's name with their own, without his consent or knowledge, filed a bill in chancery, praying that the heirs of Hay might be decreed to convey the legal title to the said William Chiles, who claimed the right of Searcy, through the plaintiff, under his pretended sale to Hezekiah Boon; a decree was obtained, under which a conveyance was made to Chiles, by a commissioner appointed by the court; the plaintiff averred his total ignorance of these transactions at the time, and disavowed them. While this suit was depending, the decree of Bourbon court was reversed in the court of appeals of the state, and the cause remanded to that court for further proceedings; the complainant died, and the suit was revived in the name of his heirs; the complainants amended their bill, showing a reversal of the decree of Bourbon court and making the heirs of Hay defendants, and praying a conveyance from them; their amended bill, was not in the record; they also filed an amended bill, making the heirs of George Boon parties, and stating that these heirs disclaimed all title to the property. One of them answered and disclaimed title; it was not stated, whether process was, or was not, executed on the other heirs of George Boon; the defendant William Chiles, in his answer stated, that there were other heirs of Hay than those mentioned in the bill and made defendants, who were not residents of Kentucky. The circuit court of Kentucky were divided in opinion on two questions, which were certified to this court as follows: 1st. This court being then divided, and the judges opposed in opinion as to the jurisdiction over the case, and unable therefore to render a decree on the merits, they resolve to adjourn that question to the supreme court; to wit, under all the circumstances appearing as above, can this court entertain cognisance of the case? 2d. The judges were also opposed in opinion on the point, whether the complainants were entitled to a decree, in the absence of any proof that the persons made defendants in the

amended bill, as heirs of George Boon, were in fact his heirs; both of which points occurred, and became material in this case. The question between the plaintiffs, and the defendant William Chiles, is within the jurisdiction of the circuit court for the district of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit; that they were made parties, cannot oust the jurisdiction as between those who are properly before the court. *Boon's Heirs* v. *Chiles*.....*532

12. It is not intended to say, that where there are several heirs, some out of the jurisdiction of the court, a decree may not be made for a conveyance of their own shares, from those on whom process has been served; but it is not thought necessary to decide that question, in this case, as it is stated.....*Id.*

13. The principles settled in the answer to the first question decide the second; George Boon's heirs are not necessarily defendants; they can have no interest in the contest, nor is any decree asked against them; if they are made defendants, and the answer admits that they are heirs, as is admitted by the defendant who has answered, no further proof can be required; if they do not answer, and the process is executed, so that the bill is taken for confessed, no further proof is necessary; if the process be not executed, they are not before the court .....*Id.*

JURY AND TRIAL BY JURY.

1. When the intention with which an act is done becomes the subject of inquiry, it belongs exclusively to the jury to decide; whatever is done in fraud of law, is done in violation of it. *Lee* v. *Lee*.....*44

LANDS AND LAND TITLES.

1. The following entry of lands in Kentucky is invalid: "May, 10th, 1780, Ruben Garnett enters 1164 2-3 acres, upon a treasury-warrant on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek, and running upon both sides thereof for quantity." It is a well settled principle, that if the essential call of an entry be uncertain as to the land covered by the warrant, and there are no other calls which control the special call, the entry cannot be sustained. In the case under consideration, there are no calls in the entry which control the call for the "seventh big fork," and that this call would better suit a location at the mouth of McConnell's than at Lecompt's run, has been shown by the facts in the case; this uncertainty is fatal to the complainant's entry. *Garnett* v. *Jenkins*.....*75

2. To constitute a valid entry, the objects called for must be known to the public, at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate the vacant land adjoining; it is not necessary that all the objects called for shall be known to the public, but some one or more leading calls must be thus known, so that an inquirer, with reasonable diligence, may find the land covered by the warrant.....*Id.*

3. If an object called for in an entry is well known by two names, so that it can be found by a call for either, such a call will support the entry.....*Id.*

4. Some of the witnesses say, that being at Bryant's station, with the calls of Garnett's entry to direct them, they could have found his land on Lecompt's run, without difficulty; if this were correct, the entry must be sustained, for it is the test by which a valid entry is known.....*Id.*

5. If the complainants clearly sustain their entry by proof, their equity is made out, and they may well ask the aid of a court of chancery to put them in possession of their rights; but if their equity be doubtful, if the scale be nearly balanced, if it do not preponderate in favor of the complainants, they must fail.....*Id.*

LEX LOCI AND LEX FORI.

1. The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the laws of the country where the contracts are made, or are to be performed; but the remedies are to be governed by the laws of the country where the suit is brought, or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal. *Bank of United States* v. *Donnally*.....*361

2. It is an appropriate part of the remedy which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought; the nature, validity and interpretation of the contract, may be admitted to be the same in other states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought,

may essentially differ. The remedy on a contract made out of the state, by a suit in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia; and not by the description and characters of it, presented in another state.....*Id.*

3. An instrument may be negotiable in one state, which yet may be incapable of negotiability by the laws of another state; and the remedy must be in the courts of the latter on such instruments, according to its own laws.....*Id.*

See CONTRACT.

LIABILITY OF THE UNITED STATES FOR COSTS.

United States v. *Ringgold*, *150.

LIEN.

1. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them; it could not be given in evidence against them. *Deneale* v. *Stump's Executors*....*528

See MORTGAGOR AND MORTGAGEE.

LIMITATION OF ACTIONS.

1. The eighth section of the statute of limitations of Pennsylvania, fixes the limitation of twenty-one years as taking away the right of entry on lands; and the ninth section provides, that if any person or persons, having such right or title, be or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years after attaining full age, &c. The defendant in error was born in 1791, and was twenty-one years of age in 1812; an interest in the property, for which this ejectment was brought, descended to her in 1799; the title of the plaintiff in error commenced on the 13th April 1805, under deeds adverse to the title of the defendant in error, and all others holding possession of the property under the same; on the 13th April 1826, twenty-one years prescribed by the statute of limitations for a right of entry against her possession, expired; and the bar was complete at that time, as more than ten years had run from the time the defendan. in error became of full age; this suit was not commenced until May 1830. *Gregg* v. *Sayre*.....*244

2. By the revised code of Virginia, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." The proceedings in this case were a *scire facias* on a judgment against the testator, against his executrix, and an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution which was issued on the judgment against the executrix, is not an execution on the judgment against George Deneale. *Deneale* v. *Stump's Executors*.....*528

3. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them; it could not be given in evidence against them.....*Id.*

4. If the defence set up by the defendants in the district court had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted that presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act; proceedings against the personal representative, is not one of these exceptions.....*Id.*

See CHANCERY AND CHANCERY PRACTICE: PLEAS AND PLEADING.

MANDAMUS.

1. The district judge of Louisiana refused to sign the record of a judgment rendered in a case by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced, it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error. On a motion for a *mandamus*, the court *held*, the district judge is mistaken in supposing that no one but the judge who renders the judgment, can grant a new trial; he, as the successor of the predecessor, can exercise the same powers, and has a right to act on every

case that remains undecided upon the docket, as fully as his predecessor could have done; the court remains the same, and the change of the incumbents cannot, and ought not, in any respect, to injure the rights of litigant parties. The judgment may be erroneous, but this is no reason why the judge should not sign it; until his signature be affixed to the judgment, no proceedings can be had for its reversal; he has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. The court, therefore, directed, that a writ of *mandamus* be issued, directing the district judge to sign the judgment. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

2. On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require an inferior court to decide. But so far as regards the case under consideration, the signature of the judge was not a matter of discretion; it followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial; the act of signing the judgment is a ministerial and not a judicial act. On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial.....*Id.*
3. The writ of *mandamus* is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right; but it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it.....*Id.*
4. Motion for an attachment against the judge of the nothern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law; the motion also asked for a rule to show cause why a *mandamus* should not issue to the district judge. A judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made. *Ex parte Martha Bradstreet*.....*588
5. A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in a case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict; the affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial; the verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term; there is then nothing extraordinary in the fact, that the judge should take time till the next term to decide on the motion for a new trial; this court entertains no doubt of his power to grant it.....*Id.*

MANDATE.

See *Davis* v. *Packard*, *312 : Proceedings of State Courts.

MARSHAL OF THE DISTRICT OF COLUMBIA.

1. The marshal of the district of Columbia, upon the settlement of his accounts at the treasury, claimed an allowance and credit by the United States, the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to jail, and afterwards discharged by order of the United States. *United States* v. *Ringgold*.....*150
2. Admitting the defendant in an execution to be liable for poundage, if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.....*Id.*
3. By the statutes of Maryland, relative to poundage fees, in force in the county of Washington, in the district of Columbia, the marshal is entitled to poundage on an execution executed, and they fix the rate of allowance; those statutes do not designate which of the parties shall pay the poundage....*Id.*
4. It is undoubtedly a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows, from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs; it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him

round to an application to congress; if the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States..... *Id.*

5. The discharge, in this case, was absolute and unconditional; and the marshal had no authority to hold the defendant in custody afterwards; admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit; and the right of the marshal to claim his poundage fees from them, is thereby clearly established. *Id.*

MORTGAGOR AND MORTGAGEE.

1. A mortgage was executed and recorded in 1809, and the mortgagee took no measures to enforce the payment of the money due upon it, until 1821; in the meantime, the property mortgaged was sold by the mortgagor, the mortgagee having given no notice to the purchaser of his lien. If the mortgagee never did assert any claim, or intimate its existence to the purchaser or her friends, he was not restrained from doing so, by having released it; but the mortgage deed was recorded, and this is considered in law as notice to all the world, and dispenses with the necessity of personal notice to the purchasers; a deed cannot, with any propriety, be said to be concealed, which is placed upon the public record, as required by law; nor can a previous conveyance and delivery of the title deeds to a purchaser, be justly denominated collusion, because a subsequent incumbrance is taken on the same property. Common prudence would have directed the purchaser to search the records of the county, before she paid the purchase-money; had she done so, she would have found the deed on record; it is not in proof, that he has done any act to deceive or mislead her; he has been merely silent respecting a deed which was recorded as the law directs. *Dick* v. *Balch*.....*30

NEW TRIAL.

1. A motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion by a circuit court, either by a writ of *mandamus*, or on a certificate of division between the judges. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

PARTNER AND PARTNERSHIP.

1. The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States* v. *Hack*.....*271
2. It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus only is liable for the separate debts of such partner..... *Id.*
3. Construction of articles of copartnership, as they related to the expenses of the copartners. *Withers* v. *Withers*.....*355

PLEAS AND PLEADING.

1. Action of debt, brought by the Bank of the United States, upon a promissory note, made in the state of Kentucky, dated the 25th of June 1822, whereby, sixty days after date, Campbell, Vaught & Co., as principals, and David Campbell, Steeles and Donnally, the defendant, as sureties, promised to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, $12,877, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon, at the rate of six per centum per annum thereafter, if not paid at maturity. The declaration contained five counts; the fourth count stated, that the principal and sureties "made their other note in writing," &c., and thereby promised, &c. (following the language of the note), and then proceeded to aver, "that the said note in writing, so as aforesaid made, at, &c., was, and is, a writing without seal, stipulating for the payment of money; and that the same, by the law of Kentucky, entitled an act, &c. (reciting the title and annexing the enacting clause), is placed upon the same footing with sealed writings, containing the same stipulations, receiving the same consideration in all courts of justice, and, to all intents and purposes, having the same force and effect as a writing under seal;" and then concluded with the usual assignment of the breach by non-payment of the note; the fifth count differed from the fourth, principally, in alleging, "that the principals and sureties, by their certain writing obligatory, duly executed by them, without a seal, bearing date, &c., and here shown to the court, did promise, &c.,"

and contained a like averment with the fourth, of the force and effect of such an instrument, by the laws of Kentucky; the defendant demurred generally to the fourth and fifth counts, and the district court sustained the demurrers. The fourth and fifth counts are, upon general demurrer, good; and the judgment of the court below, as to them, was of law; and the averment that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, does not vitiate the general structure of those counts, founding a right of action on the note set forth thereon; at most, they are surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts. *Bank of United States* v. *Donnally*.....*361

2. According to the laws of Virginia, the defendant had a right to plead as many several matters, whether of law or fact, as he should deem necessary for his defence, and he pleaded *nil debet* to the first three counts of the declaration, on which issue was joined; the defendant also pleaded the statutes of limitation of Virginia to the other counts; the court held the plea of the statute of limitations a good bar to all the counts, and gave judgment in favor of the defendant. The statute of limitations of Virginia provides, that all actions of debt, grounded upon any lending or contract, without specialty, shall be commenced and sued within five years, next after the cause of such action or such suit, and not after. The act of Kentucky of the 4th of February 1812, provides, "that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performonce of any act, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations, receiving the same consideration in all courts of justice, and, to all intents and purposes, having the same force and effect, and upon which the same species of action may be founded, as if sealed:" *Held*, that the statute of limitations of Virginia, precluded the plaintiff's recovery in the court where the action was instituted; the statute pleaded (the statute of Kentucky), not being available in Virginia. As the contract upon which the original suit was brought, was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky.....*Id.*

PRACTICE.

1. In the cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court to deliver any judgment, except in cases of absolute necessity. *Briscoe* v. *Commonwealth Bank of Kentucky*, *118; *City of New York* v. *Miln*.....*120

2. Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that the cases should be re-argued at the next term....*Id.*

3. A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again. *Yeaton* v. *Lenox*.....*123

4. The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes, given to the defendants. They are several contracts, having no connection with each other; the parties cannot join their claims in the same bill. *Id.*

5. Several creditors cannot unite in a suit to attach the effects of an absent debtor; they may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill.....*Id.*

6. The caption of the bill was in the following terms: "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citzens of Virginia, infants, by their father and next freind, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania. In equity." In the body of the bill, it was stated, that "the defendant is of Philadelphia." The title or caption of the bill, is no part of it, and does not remove the objection to the defects in the pleadings; the bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. *Jackson* v. *Ashton*.....*148

7. The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, "that the defendant is, of Philadelphia." If this were a new question, the court might decide otherwise; but the decisions of the court, in cases which have heretofore been before it, have been express upon the point .....*Id.*

8. On the opening of the record for the argument of this case, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court; the provis-

ions of the law permit writs of error to be sued out, without such *allocatur*, when the sum in controversy amounts to $1000 and upwards. *United States* v. *Ringgold*...*250

9. On the application of the counsel, stating, the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved, the court gave the special *allocatur*.....*Id.*

10. A declaration in ejectment was dated the 22d May 1831, and judgment was rendered on the 14th January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the 1st January 1828; his title, as shown in the abstract, commenced on the 17th May 1828, which was subsequent to the demise on which the plaintiff counted; the court held, that although the demise is a fiction, the plaintiff must count on one, which, if real, would support his action. The counsel for the defendants insisted, that, if the cause could not be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as would bring before this court those questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require; but if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it; this court cannot, with propriety, reverse a decision which conforms to law, and remand a cause for further proceedings. *Binney* v. *Chesapeake and Ohio Canal Co*.....*214

11. In the circuit court of Alexandria, in 1817, several suits were brought against sundry individuals, who had associated to form a bank, called the Merchants' Bank of Alexandria; the proceedings were regularly carried on in one of them, brought by Romulus Riggs; and a decree was pronounced by the court, from which the defendants appealed. On a hearing, the decree was reversed, and the cause remanded for further proceedings, in conformity with certain principles prescribed in the decree of reversal It appeared, that decrees were pronounced in all the causes, though regular proceedings were had only in the case of Romulus Riggs; appeals were entered in these cases from the decree of the court; under such circumstances, the court can only reverse the decree in each case, for want of a bill. *Mandeville* v. *Burt*.....*256

12. The whole business appearing to have been conducted in the confidence that the pleadings in the case of Romulus Riggs could be introduced into the other cases, the cases were remanded to the circuit court, with directions to allow bills to be filed, and to proceed thereon according to law.....*Id.*

13. The district judge of Louisiana refused to sign the record of a judgment rendered in a case, by his predecessor in office; by the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced; it is not a final judgment, on which a writ of error may issue, for its reversal; without the action of the judge, the plaintiffs can take no step in the case; they can neither issue execution on the judgment, nor reverse the proceedings by writ of error. *New York Life and Fire Insurance Co.* v. *Wilson*.....*291

14. On a motion for a *mandamus*, the court held, the district judge was mistaken in supposing that no one but the judge who rendered the judgment, could grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done; the court remains the same, and the change of the incumbents cannot, and ought not, in any respect, to injure the rights of litigant parties. The judgment may be erroneous, but this is no reason why the judge should not sign it; until his signature be affixed to the judgment, no proceedings can be had for its reversal; he has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. The court, therefore, directed that a writ of *mandamus* be issued, directing the district judge to sign the judgment.....*Id.*

15. On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require an inferior court to decide; but, so far as regards the case under consideration, the signature of the judge was not a matter of discretion; it followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act; on the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial.....*Id.*

16. A pamphlet relating to a cause depending in the court, was sent to the judges at their chamber, by the agent of one of the parties, without the knowledge or approbation of the counsel in the case; the practice of the court

is not to receive or examine such papers, unless they have been presented in court, and shown to the opposite counsel. *Mitchell* v. *United States*.....*307

17. An appeal was taken at the December term 1832, of the circuit court for the district of Columbia, to the January term 1833, of this court; but the appeal was not entered to that term, but was entered to January term 1834; the case being called for argument, the defendant asked for a continuance, which was granted *Brown* v. *Swann*.....*435

See CONTINUANCE: DUTIES ON MERCHANDISE: PROCEEDINGS OF STATE COURTS: *Davis* v. *Packard*, *312.

PRIORITY OF THE UNITED STATES.

1. The priority of the United States does no extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States* v. *Hack*.....*271

PROCEEDINGS OF STATE COURTS.

1. At a former term of this court, the judgment of the court for the correction of errors of the state of New York, was reversed in this case, this court being of opinion, that Charles A. Davis being consul-general of the king of Saxony, was exempted from being sued in the state court, and that by reason thereof, the judgment rendered against him by the court for the correction of errors, was erroneous, and ordered and adjudged that the judgment of the court for the correction of errors should be and the same was thereby reversed; and that the cause be remanded to the court for the correction of errors, with directions to conform its judgment to this opinion. A mandate issued in pursuance of this judgment, to the court for the correction of errors, and that court declared and adjudged, "that a consul-general of the king of Saxony is, by the constitution and laws of the United States, exempt from being sued in a state court;" and that court further adjudged, that the supreme court of the state of New York, from which court this case had been brought, by a writ of error, to the court of errors of New York, was a court of general common-law jurisdiction, and that the court of errors had no power, jurisdiction or authority, for any error in fact, or any error than such as appeared upon the face of the record of the proceedings of the supreme court, to reverse a judgment of that court; that no other error could be assigned or regarded as a ground of reversal of the judgment of said supreme court than such as appeared upon the record of the proceedings of the said court, and which related to questions actually before the justices of that court, by a plea to its jurisdiction, or otherwise; and that the court of errors was not authorized to notice the allegations of Davis, assigned for error in that court, that he was consul-general of the king of Saxony, or to try or regard said allegation; and there being no error on the face of the record of the proceedings of the supreme court of New York, the defendant in error was entitled to a judgment of affirmance, according to the laws of that state, any matter assigned for error in fact to the contrary notwithstanding. The court of errors further declared, that for any error in the judgment of the supreme court or its proceedings, assignable for error in fact, the party aggrieved by such error might sue out a writ of error *coram vobis*, returnable to the supreme court, upon which the plaintiff might assign errors in fact; and if such fact was admitted or found by the verdict of the jury, the supreme court might revoke their judgment, and for any error in the judgment of the supreme court upon the writ of error *coram vobis*, the court of errors had jurisdiction, upon a writ of error to the supreme court, to review the last judgment. The defendants on error having, upon the filing of the mandate to the supreme court, applied to the court of errors to dismiss the writ of error to the supreme court of that state, the same was quashed, and the defendants in error adjudged to recover their costs against the plaintiff in error. If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact in the proceedings of the supreme court, not apparent on the face of the record, it is difficult to perceive, how that court could conform its judgment to that of this court, otherwise than by quashing its writ of error to the supreme court; the judgment of the court of errors of New York was affirmed. *Davis* v. *Packard*.....*312

RECORDING OF DEEDS.

1. The acts of 1715 and 1766 of Maryland, require that all conveyances of land shall be enrolled in the records of the same county where the lands, tenements or hereditaments conveyed by such deed or conveyance do lie, or in the provincial court, as the case may be. The courts of Maryland are understood

to have decided, that copies of deeds thus enrolled may be given in evidence. *Dick* v. *Balch*.....*30

2. Copies of deeds that are not required to be enrolled, cannot be admitted in evidence; but deeds of bargain and sale are, by the laws of the state, required to be enrolled; and, by the uniform tenor of the decisions of the courts of the state, exemplifications of records of deeds of bargain and sale are as good and competent evidence as the originals themselves.....*Id.*

RULES OF COURT.

1. The 20th of the rules made by this court at February term 1822, for the regulation of proceedings in the circuit courts in equity causes, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." *Bank of United States* v. *White*.....*262

2. By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; that may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.....*Id.*

3. No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.....*Id.*

SALVAGE.

See ADMIRALTY AND ADMIRALTY PRACTICE: *Stratton* v. *Jarvis*, *4.

SEAMEN'S WAGES.

1. Seamen have a lien prior to that of the holder of a bottomry-bond, for their wages; but the owners are also personally liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners; in the same manner as he would have, if they had previously mortgaged the ship. *The Virgin*.....*538

SEIZURE FOR VIOLATION OF THE REVENUE LAWS.

1. A seizure was made in the port of New Orleans, under the 67th section of the act of 1799, for the collection of duties, which authorizes the collector, where he shall suspect a false and fraudulent entry to have been made of any goods, wares and merchandises, to cause an examination to be made, and if found to differ from the entry, the merchandise is declared to be forfeited, unless it shall be made to appear to the collector, or to the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. After hearing the testimony offered in the cause, the court decreed and ordered, that the property seized be restored to the claimant, upon the payment of a duty of fifteen per cent. *ad valorem*; that the libel be dismissed, and that probable cause of seizure be certified of record; the United States appealed from this decree. *United States* v. 112 *Casks of Sugar*.....*277

2. The court not being able to decide, from the evidence sent up with the record, that the article, in point of fact, differed from the entry at the customhouse, affirmed the decree of the court below.....*Id.*

SLAVERY IN THE DISTRICT OF COLUMBIA.

1. The plaintiffs in error filed a petition for freedom, in the circuit court of the United States for the county of Washington, and proved, that they were born in the state of Virginia, as slaves of Richard B. Lee, then deceased, who moved, with his family, into the county of Washington, in the district of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves, until the year 1820, when the petitioner Barbara was removed to the county of Alexandria, in the district of Columbia,

where she was hired to Mrs. Muir, and continued with her, thus hired, for the period of one year; that the petitioner Sam was in like manner removed to the county of Alexandria, and was hired to General Walter Jones, for a period of about five or six months. That after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside, as the slaves of the said Richard B. Lee, until his death, and since, as the slaves of his widow, the defendant. On the part of the defendant in error, a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2d of April 1816, which declares, that no cause shall be removed from the circuit court for the district of Columbia to the supreme court, by appeal or writ of error, unless the matter in dispute shall be of the value of $1000, or upwards. The matter in dispute in this case, is the freedom of the petitioners; the judgment of the court below is against their claims to freedom; the matter in dispute is therefore, to the plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation; had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves, as property, would have been the matter in dispute, and affidavits might be admitted to ascertain such value; but affidavits estimating the value of freedom, are entirely inadmissible; and no doubt is entertained of the jurisdiction of the court. *Lee* v. *Lee*...*44

2. The circuit court refused to instruct the jury, that if they should believe from the evidence, that the bringing the petitioners from Virginia to Alexandria, by their owner, and hiring them there, was merely colorable, with intent to evade the law, then the petitioners were entitled to their freedom. By the Maryland law of 1796, it is declared, that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, and shall be free; and by the act of congress of the 27th of February 1801, it is provided, that the laws of the state of Maryland, as they then existed, should be and continue in force in that part of the district which was ceded by that state to the United States. The Maryland law of 1796 is, therefore, in force in the county of Washington; and the petitioners, if brought directly from the state of Virginia into the county of Washington, would, under the provisions of that law, be entitled to their freedom. By the act of congress of the 24th of June 1812, it is declared, "that hereafter it shall be lawful for any inhabitant or inhabitants, in either of the said counties Washington and Alexandria, owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise, freely and fully, all the rights of property, in and over the said slave or slaves therein, which would be exercised over him, her or them, in the county from whence the removal was made."..... *Id.*

3. The court erred in refusing to give the fourth instruction prayed on the part of the petitioner, which asked, that it should be submitted to the jury whether, from the evidence, the bringing of the petitioners from Virginia to Alexandria, and the hiring them there, was not merely colorable, with intent to evade the law..... *Id.*

4. Patrick McCutchen, of Tennessee, died in 1810, having previously made his last will and testament; by which will, among other things, he bequeathed to his wife Hannah, during her natural life, all his slaves, and provided, that they, naming them, should, at the death of his wife, be liberated from slavery, and be for ever and entirely set free; except those that were not of age, or should not have arrived at the age of twenty-one years at the death of his wife; and these were to be subject to the control of his brother and brother-in-law, until they were of age, at which period they were to be set free; as to Rose, one of the slaves, the testator declared, that she and her children, after the death of his wife, should be liberated from slavery, and for ever and entirely set free. Two of the slaves, Eliza and Cynthia, had children born after the death of the testator, and before the death of his wife; nothing was said in the will as to the children of Eliza and Cynthia. After the decease of the wife, the heirs of the testator claimed all the slaves, and their increase, as liable to be distributed to and among the next of kin of the testator; alleging, that by the laws of Tennessee, slaves cannot be set free by last will and testament, or by any direction therein; that if the law does authorize emancipation, they are still slaves, until the period for emancipation; and that the increase, born after the death of the testator, and before their mothers were actually set free, were slaves, and as such were liable to be distributed. The laws of Tennessee fully authorize the emancipation of slaves, in the manner provided by the last

will and testament of Patrick McCutchen. *McCutchen* v. *Marshall*.....*220

5. As a general proposition, it would seem a little extraordinary, to contend, that the owner of property is not at liberty to renounce his right to it, either absolutely, or in any modified manner he may think proper; as between the owner and his slave, it would require the most explicit prohibition by law, to restrain this right. Considerations of policy, with respect to this species of property, may justify legislative regulation, as to the guards and checks under which such manumission shall take place; especially so as to provide against the public's becoming chargeable for the maintenance of slaves so manumitted....*Id.*
6. It is admitted to be a settled rule in the state of Tennessee, that the issue of a female slave follows the condition of the mother; if, therefore, Eliza and Cynthia were slaves, when their children were born, it will follow, as matter of course, that their children are slaves also. If this was an open question, it might be urged with some force, that the condition of Eliza and Cynthia, during the life of the widow, was not that of absolute slavery; but was, by the will, converted into a modified servitude, to end upon the death of the widow, or on their arrival at the age of twenty-one years, should she die before that time; if the mothers were not absolute slaves, but held in the condition just mentioned, it would seem to follow, that their children would stand in the same condition, and be entitled to their freedom on their arrival at twenty-one years of age. But the course of decisions in the state of Tennessee, and some other states where slavery is tolerated, goes very strongly, if not conclusively, to establish the principle, that females thus situated, are considered slaves; that it is only a conditional manumission, and until the contingency happens, upon which the freedom is to take effect, they remain to all intents and purposes, absolute slaves. The court do not mean to disturb this principle; the children of Eliza and Cynthia must, therefore, be considered slaves.....*Id.*

STAY OF PROCEEDINGS.

1. Several persons were made defendants, who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the circuit court; but as there appear to be matters of equity in the case, which may be investigated by a state court; it would be reasonable and just, to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a state court. *Dunn* v. *Clarke*.....*1

SUPREME COURT OF THE UNITED STATES.

1. In cases where constitutional questions are involved, unless four judges of the court concur in opinion, thus making the decision that of a majority of the whole court, it is not the practice of the court, to deliver any judgment, except in cases of absolute necessity. *Briscoe* v. *Commonwealth Bank of Kentucky*, *118; *City of New York* v. *Miln*, *120
2. Four judges not having concurred in opinion as to the constitutional questions argued in these cases, the court directed that they should be re-argued at the next term....*Id.*

SURETIES.

1. The sureties in the bond of a contractor, given to secure the performance of a contract for the supply of rations for the troops of the United States, are not responsible for any balance in the hands of the principal, at the expiration of the contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies; where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by both parties, and no separate portion had been designated, or set apart for the contract of 1818. *United States* v. *Orr's Administrator*.....*399
2. To say, that the sureties in the bond should be liable for the whole balance, would be to say, that they should be liable for advances made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance; each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party, bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money or accounts of A. and B. And in the present suit, there is no difference in point of law between the liability of the principal and that of the sureties upon the bond; it is the same contract, as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action in another form would lie against the contractor, for any balance, however received, which remained unexpended in

his hands, after the termination of the service for which the advances were made .....*Id.*

See CONTRACT: EVIDENCE: TREASURY TRANSCRIPT.

TREASURY TRANSCRIPT.

1. A treasury transcript, produced in evidence by the United States, in an action on a bond for the performance of a contract for the supply of rations to the troops of the United States, contained items of charge which were not objected to by the defendant; the defendant objected to the following items, as not proved by the transcript: "February 19th, 1818, for warrant 1680, favor of Richard Smith, dated 27th December 1817, and 11th of February 1818, $20,000." And on the 11th of April, of the same year, another charge was made "for warrant No. 1904, for the payment of his two drafts, favor of Alexander McCormick, dated 11th and 17th of March 1818, for $10,000." And on the 14th of May, of the same year, a charge was made "for warrant No. 2038, being in part for a bill of exchange in favor of Richard Smith for $20,000, $12,832.78." And one other warrant was charged June 22d, "for a bill of exchange in favor of Richard Smith, dated June 22d, 1810, $4000; and also a warrant to Richard Smith, *per* order, for $8000." These items, the circuit court instructed the jury, were not sufficiently proved, by being charged in the account and certified under the act of congress. The officers of the treasury may well certify facts which come under their official notice, but they cannot certify those which do not come within their own knowledge; the execution of bills of exchange, and orders for money on the treasury, though they may be "connected with the settlement of an account," cannot be officially known to the accounting officers. In such cases, however, provision has been made by law, by which such instruments are made evidence, without proof of the handwriting of the drawer; the act of congress of the 3d of March 1797, makes all copies of papers relating to the settlement of accounts at the treasury, properly certified, when produced in court, annexed to the transcript, of equal validity with the originals; under that provision, had copies of the bills of exchange and orders, on which these items were paid to Smith and McCormick, been duly certified and annexed to the transcript, the same effect must have been given to them by the circuit court, as if the original had been produced and proved. And every transcript of accounts from the treasury, which contains items of payments made to others, on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorized such payments; and so, in every case, where the government endeavors, by suit, to hold an individual liable for acts of his agent; the agency, on which the act of the government was founded, should be made to appear by a duly certified copy of the power. The defendant would be at liberty to impeach the evidence thus certified: and, under peculiar circumstances of alleged fraud, a court might require the production of the original instrument; this, however, would depend upon the exercise of the discretion of the court, and could only be enforced by a continuance of the cause, until the original should be produced. *United States* v. *Jones*.....*375

2. The following item in the treasury transcript was not admissible in evidence: "To accounts transferred from the books of the second auditor for this sum, standing to his debit under said contract, on the books of the second auditor, transferred to his debit on those of this officer, $45,000." The act of congress, in making a "transcript from the books and proceedings of the treasury" evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. On the trial, the defendant will be allowed no credit on vouchers, which have not been rejected by the treasury officers, unless it was not in his power to have produced them; and how could a proper effect be given to this provision, if the credits be charged in gross? The defendant is unquestionably entitled to a detailed statement of the items which compose his account .....*Id.*

3. The defendant, in an action by the United States, where a treasury transcript is produced in evidence by the plaintiffs, is entitled to the credits given to him in the account; and in claiming those credits, he does not waive any objection to the items on the debit side of the account; he is unquestionably entitled to the evidence of the decision of the treasury officers upon his vouchers, without reference to the charges made against him; and he may avail himself of that decision, without in any degree restricting his right to object to any improper charge. The credits were allowed the defendant on the vouchers alone, and without reference to the particular items of demand which the government might have against him; and the debits, as well as the credits, must be established or distinct and legal evidence.....*Id*

4. The defendant is entitled to a certified statement of his credits, as allowed by the accounting officers, and he has a right to claim the full benefit of them, in a suit by the government; and under no circumstances has the government a right to withdraw credits which have been fairly allowed..... *Id.*

5. The law has prescribed the mode by which treasury accounts shall be made evidence, and whilst an individual may claim the benefit of this rule, the government can set up no exemption from its operation. In the performance of their official duty, the treasury officers act under the authority of law; their acts are public, and affect the rights of individuals as well as those of the government; in the adjustment of an account, they sometimes act judicially, and their acts are all recorded on the books and files of the treasury department; so far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are, in effect, final; for if an appeal be made, they will receive judicial sanction. Accounts amounting to many millions annually, come under the action of these officers; it is, therefore, of great importance to the public, and to individuals, that the rules by which they exercise their powers, should be fixed and known..... *Id.*

6 In every treasury account on which suit is brought, the law requires the credits to be stated as well as the debits; these credits the officers of the government cannot properly either suppress or withhold; they are made evidence in the case, and were designed by the law for the benefit of the defendant. *Id.*

7. O. made a contract with the government to supply the troops of the United States with rations, within a certain district, and executed a bond and contract agreeable to the usages of the war department; the United States brought an action against O. on the bond, and gave in evidence the contract annexed to the bond, and a treasury statement, which showed a balance against O.; the United States also gave in evidence another transcript, to prove that O., under a previous account, had been paid a balance of $19,149.01, stated to be due to him, which was paid to his agent, under a power of attorney, and the receipt for the same indorsed on the back of the account. The circuit court instructed the jury, that the second transcript was not evidence, *per se*, to establish the items charged to O.: *Held*, that there was no error in this instruction. *United States* v. *Jones*..... .*387

8. The counsel for the United States also gave in evidence the power of attorney to R. Smith, and his receipt, proved by Smith, that the money received by him, under the said power of attorney, was applied to the credit of O., in the Bank of the United States, at Washington; which payment the witness supposed was made known to O., though he could not speak positively on the subject, as he did not communicate the information to him. And the counsel who offered this evidence stated, that he offered it to show that the accounts between O. and the government, under the contract of the 15th of January 1817, had been settled up to that time, and that the balance of $19,149.01 had been paid to Smith, as the agent of O., and that he offered the evidence for no other purpose. The counsel for the United States then gave in evidence to the jury, a subsequent account between O., and the government, under the contract. And, on the prayer of the defendant, the circuit court instructed the jury, "that the said accounts were not competent *per se*, upon which to charge the defendant, or his intestate, for any sums therein contained, further than the mere payment of money from the treasury to the said intestate, or to his authorized agent." The items embraced by this instruction were charges made against O., for the acts of certain persons, alleged to be his agents, without annexing to the transcript copies of any papers showing their agency, or offering any proof that they acted under the authority of O.; the circuit court, therefore, properly instructed the jury, that the transcript, *per se*, did not prove these items..... .....*Id.*

9. The plaintiffs then proved by R. S., that he received, as the agent of O. $6350.99, on warrant No. 5471, under the contract, and that the same was applied to the credit of O. in the Bank of the United States, at Washington, of which payment the witness believed O. had notice; the counsel for the plaintiffs stated, that they confined their claim to the above item, which was the first one charged in the treasury account exhibited. The counsel for the defendant then moved the court to instruct the jury, that this account, as also the preceding one offered in evidence by the plaintiffs, was evidence for the defendant, of the items of credits contained in either; and that in claiming them, he did not admit the debits; which instruction was given by the court, and to which an exception was taken. This instruction involves the same question which has already been decided, between the same parties, at the present term; there was no error in giving the instruction..... *Id.*

10. In the further progress of the trial, the plaintiffs offered to withdraw from the jury the said two accounts mentioned in the preceding exception, and all the evidence con-

nected with said accounts, to which the defendant's counsel objected, and the court refused the motion. A treasury account which contains credits as well as debits, is evidence for the defendant as well as the government; and unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury, any part of the credits relied on by the defendant. *Id.*

11. The circuit court, on the prayer of the defendant instructed the jury, that the transcript from the books and proceedings of the treasury, could only be regarded as establishing such of the items of debit, in the account stated in the said transcript, as were for moneys disbursed through the ordinary channels of the treasury department, where the transactions are shown by its books, and where the officers of the department must have had official knowledge of the facts stated; but that the transcript was evidence for the defendant of the full amount of the credits therein stated; and that, by relying on the said transcript, as evidence of such credits, the defendant did not admit the correctness of any of the debits in the said account, of which the transcript was not, *per se*, evidence; and that the said transcript was not, *per se*, evidence of any of the items of debit therein stated, except the first. The correctness of the principle laid down by the circuit court in this instruction, has been recognised by this court, in a case between the same parties, at the present term.....*Id.*

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