

# INDEX

## TO THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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

### AFFIDAVITS.

1. Affidavits sworn to before a state magistrate, are lawfully taken in cases in which, by the regulations of the treasury department, they were received as evidence of claims on the United States. *United States v. Bailey*. \*238
2. If, in making such an affidavit, the affiant swears falsely, he is liable to be punished in a prosecution instituted by the United States, under the third section of the act of congress of March 1st, 1823, relative to false swearing, touching the expenditure of public money, or in support of any claim on the United States. . . . . *Id.*

### AGENT AND ATTORNEY.

1. Every authority given to an agent or attorney to transact business for his principal, must, in the absence of any counter-proof, be construed to be to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized to be made, in Louisiana, by an executrix, must be presumed to be intended to be done in the manner required by the laws of that state to give it validity; and the purchaser, equally with the seller, is bound, under these circumstances, to know what the laws are, and to be governed thereby; the law will never presume that parties intended to violate its precepts. *Owings v. Hull* . . . . . *Id.*
2. A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals. No doctrine is

better settled, on principle and authority, than this, that the ratification of the act of an agent, previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts; if the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud. . . . . *Id.*

### ANNUITIES.

1. The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute of usury may be evaded; among the earliest and most common of these, is the purchase of annuities secured upon real estate, or otherwise. The statute does not reach these, not only because the principal may be put in hazard; but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit; the purchase of an annuity or rent-charge, if a *bonâ fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet, it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter; courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction; if that be, in fact, a loan, no shift or device will protect it. Though this principle may be extracted from all the cases, yet, as each depends

on its own circumstances, and those circumstances are almost infinitely varied; it ought not to surprise, if there should be some seeming conflict in the application of the rule by different judges; different minds allow a different degree of weight to the same circumstances. *Scott v. Lloyd*.....\*418

2. The covenants in a deed from S., granting the annuity to M., secure the payment of ten per cent. for ever on the sum advanced; there is no hazard whatever in the contract; M. must, in something more than twenty years, receive the money he has advanced, with the legal interest on it, unless the principal sum should be returned after five years; in which event, he would receive the principal with ten per cent. interest. The deed is equivalent to a bond for 5000*l.*, amply secured by a mortgage on real estate, with interest at ten per cent. thereon; with liberty to repay the same in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute.....*Id.*

APPEAL.

1. A decree of a circuit court, perpetuating an injunction, in a case on which some matters of account were left open for further consideration, is not a final decree; and an appeal will not lie in such a case. *Brown v. Swann*.....\*1
2. An appeal does not lie from the decree of the district court in the United States for the district of Louisiana, dissolving an injunction. *Huriart v. Ballou*.....\*156
3. No persons but those appearing to be parties to the record, can be permitted to be heard on an appeal or writ of error. *Harrison v. Nixon*.....\*483
4. After a case had been fully heard in the superior court of Middle Florida, the judge of that court, in examining the evidence in the case, with a view to its decision, considered, that he had discovered in the date of the water-mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument; no objection of this kind had been made during the argument of the cause; and after the supposed discovery, no opportunity was permitted, by the court of Florida, to the claimants, to explain or account for the same; after the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony, which it was alleged, would fully explain the circumstance, and offered to read *ex parte* depositions to the

same purpose. This is refused, because, in an appellate court, no new evidence can be taken or received, without violating the best-established rules of evidence; under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say, what course would have been taken, if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents, tending to establish the grant, the validity of which is but little, if it could be in any degree, affected by the date of the permission. *Mitchell v. United States*.....\*711

ASSETS.

1. During the pendency of a suit to rescind a contract for the purchase of a tract of land, on an allegation that there had been a fraudulent misrepresentation by the vendor, it was agreed, that the rents and profits of the land should be received by an agent, to abide the event of the suit; the supreme court affirmed the decree of the circuit court, rescinding the contract, and ordering the part of the purchase-money paid by the purchaser, repaid to him. The vendor of the land died, and the rents and profits which had been received by the agent, were adjudged to be assets in the hands of his executor, who had been the receiver. *Boyce's Executors v. Grundy*..\*275

ASSUMPSIT.

1. The ancient doctrine that a corporation can act, in matters of contract, under its seal only, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it, and subject it to an action of *assumpsit*. *Chesapeake and Ohio Canal Co. v. Knapp*.....\*541
2. When a special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration; but if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it.....*Id.*
3. It is a well-settled principle, that where a special contract has been performed, a plaintiff may recover on the general counts...*Id.*

## BAIL.

1. The recognisance of special bail being a part of the proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. *Beers v. Haughton*. \*329
2. By the rules of the circuit court of Ohio, adopted as early as January 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time, before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "*nihil*" against the bail; and this, in fact, constituted a part of the law of Ohio, at the time the present recognisance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed as a part of the "modes of proceeding in suits," and to have been adopted by it; so that the surrender of the principal, within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of legal right. . . . . *Id.*
3. It is not strictly true, that on the return of *non est inventus* to a *capias ad satisfaciendum* against the principal, the bail is fixed, in courts acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them, in a summary manner, and direct an *exoneretur* to be entered, in cases, by the indulgence of the court, by giving them time to render the principal, until the appearance day of the last *scire facias* against them, as in cases of strict right. . . . . *Id.*
4. When bail is entitled to be discharged, *ex debito justitie*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as a bar to a suit, in their defence; but when the discharge is matter of indulgence only, the

- application is to the discretion of the court; and an *exoneretur* cannot be insisted on, except by way of motion. . . . . *Id.*
5. When the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance; he is, *à fortiori*, entitled to insist on it by way of defence, when he is entitled, *ex debito justitie*, to surrender the principal. . . . . *Id.*
  6. The doctrine is fully established, that where the principal would be clearly entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender; and, *à fortiori*, this doctrine will apply, when the law prohibits the party from being imprisoned at all, or when, by the positive operation of law, a surrender is prevented. . . . . *Id.*

## BANK OF THE UNITED STATES.

1. The office of the Bank of the United States, at Lexington, Kentucky, in February 1822, held a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value expressed on the face of them, as equivalent to gold and silver, and were so considered by the bank; on the amount of these notes so held, the Bank of Kentucky had agreed to pay interest, at the rate of six per centum, until the same should be redeemed; all the notes of the Bank of Kentucky, held by the Bank of the United States, were finally paid with the interest. In February 1822, when the notes of the Bank of Kentucky were at a depreciation of between thirty-three and forty per cent., Owens applied to the office of the Bank of the United States, for a loan of \$5000 of the said notes, saying, they would answer his purpose as well as gold or silver; after repeated refusals and re-applications, with the consent of the board of directors of the Bank of the United States, at Philadelphia, the sum of \$5000, in the notes of the Bank of Kentucky, was loaned to him, on a promissory note, signed by him, and by Waggener, Miller and Wagley, payable in three years, with interest, at the rate of six per cent. per annum; the money so loaned was paid to the borrower in the notes of the Bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the Bank of Kentucky to the Bank of the United States, ceased from the date of the loan. In an action on the note given by Owens and others, the defence set up was, that the transaction was usurious, contrary to the charter

- of the Bank of the United States, and void : *Held*, that there was no usury in the transaction. *Bank of United States v. Waggener* .....\*378
2. The statute of usury of Kentucky, of 1798, declares that all bonds, notes, &c., taken for the loan of money, where "is reserved or taken" a greater rate of interest than six per cent, shall be void. In this case, no interest at all was taken, the interest being payable at the termination of the three years mentioned in the note; and if the case can be brought within the statute, it must be, not as a taking, but a reservation of more than legal interest. .... *Id.*
  3. The ninth article of the fundamental articles of the charter of the Bank of the United States, declares, among other things, "that the bank shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for on its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article; according to the interpretation thereof given by this court in the case of *Fleckner v. Bank of United States*, 8 Wheat. 338, 351, to which the court deliberately adhere. . . *Id.*
  4. The words of the article are, that the bank shall not take (not, shall not "reserve" or "take") more than at the rate of six per cent. In the construction of statutes of usury, this distinction between the reservation and the taking of usurious interest has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, and the party is only liable for the excess. .... *Id.*
  5. In the case of the *Bank of United States v. Owens*, 2 Pet. 527, 538, it was said, that in the charter, the word "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value ..... *Id.*
  6. The case of the *Bank of the United States v. Owens*, 2 Pet. 527, turned upon considerations essentially different from those presented in the present record; the question certified in that case, arose upon a demurrer to a plea of usury; and the demurrer, in terms, admitted, that the agreement was unlawfully, usuriously, and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put; the transaction was usurious and the agreement corrupt; and the question there was, whether, if so, it was contrary to the prohibitions of the charter, and the contract void. In the present case, the questions are very different; whether the agreement was corrupt or usurious, or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points which the jury were called upon, and under the instructions were asked, to decide; the decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy. .... *Id.*
  7. In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for and to take usurious interest; for if neither party intend it, and act *bonâ fide* and innocently, the law will not infer a corrupt agreement. This principle would seem to apply to the charter of the bank; there must be an intent to take illegal interest; or, in the language of the law, a corrupt agreement to take it, in violation of the charter; the *quo animo* is, therefore, an essential ingredient, in all cases of this sort. *Id.*
  8. There has been no taking of usury, and no reservation of usury on the face of this transaction; the case, then, resolves itself into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device, or shift to reserve or take usury; and none of these appear in the case. . . *Id.*
  9. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand a higher price for it, before he consents to part with it; he may possess bank-notes which, to him, are of par value in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less. If he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bonâ fide* what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury. . . *Id.*
- BILL OF EXCEPTIONS.
1. A bill of exceptions to evidence cannot be taken in the district court of the United states in Louisiana, when the case was not tried by a jury. *Field v. United States* .....\*182

2. In the course of the trial of the cause in the circuit court, the counsel for the plaintiff objected to a question put by the defendant's counsel to a witness, as being a leading one. Although the plaintiff's counsel objected to this question and said, that he excepted to the opinion of the court, no exception is actually prayed by the party and signed by the judge; this court cannot consider the exception as actually taken, and must suppose it was abandoned. *Scott v. Lloyd*. . . . . \*428

BILL OF PARTICULARS.

1. A bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded; this is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant, rather than to enlighten him. *Chesapeake and Ohio Canal v. Knapp*. . . \*541
2. As the bill of particulars is filed before the trial, it is always in the power of the defendant to object to its want of precision, and the court will require it to be amended, before the commencement of the trial; and if this be not the only mode of taking advantage of any defect in the bill, it is certainly the most convenient for the parties. . . . . *Id.*

CASES CITED.

1. *Barr v. Gratz*, 4 Wheat. 213. An ancient deed, accompanied with possession, admitted as evidence, without proof of its execution. *Coulson v. Walton*. . . . . \*62
2. *Fleckner v. Bank of United States*, 8 Wheat. 338, 351. Charter of the Bank of the United States. *Bank of United States v. Waggener*. . . . . \*378
3. *Lenox v. Roberts*, 2 Wheat. 373. Demand of payment of a promissory note. *Bank of Alexandria v. Swann*. . . . . \*33
4. *Mills v. Bank of United States*, 11 Wheat. 431. Notice of dishonor of promissory note. . . . . *Id.*
5. *Patterson v. Jenks*, 2 Pet. 216. Grants. *Winn v. Patterson*. . . . . \*663
6. *Patterson v. Winn*, 5 Pet. 233. Evidence: Grants of land. . . . . *Id.*
7. *Sturges v. Crowninshield*, 4 Wheat. 200; *Mason v. Haile*, 12 *Ibid.* 370; *Wayman v. Southard*, 10 *Ibid.* 1; *United States Bank v. Halstead*, 10 *Ibid.* 51. *Beers v. Haughton*. . . . . \*329
8. *United States v. Arredondo*, 6 Pet. 691. Florida land-claims. *Delassus v. United States*. . . . . \*117
9. *United States v. Arredondo*, 6 Pet. 733. *New Orleans v. De Armas*. . . . . \*224

10. *United States v. Clarke*, 8 Pet. 436. Florida land-claims. *Delassus v. United States*. . \*117
11. *United States v. Percheman*, 7 Pet. 51. Florida land-claims. . . . . *Id.*

CERTIFICATE OF DIVISION.

1. The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the circuit court to the supreme court, when the judges of the circuit court are opposed in opinion, shows conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into the supreme court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeals, until the judgment or decree be final; it has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges; and this is a case of that description. *United States v. Bailey*. \*267

CHANCERY AND CHANCERY PRACTICE.

1. G. K., the father of the wife of the complainant, T., a few days after the marriage of his daughter, proposed to his son-in-law, that he should repair a house and lot in Georgetown, saying he intended it for his daughter; at this time, G. K. was in good circumstances; T. laid out a considerable sum in the repairs, afterwards occupied the property, removed from it, and received the rents, and afterwards left Georgetown to reside elsewhere, the rents of the property being collected and paid to him by G. K.; some time after the repairs of the property were finished, a correspondence took place as to the terms on which G. K. was to convey the property to T. and wife, in which G. K. acknowledged the right of T. to have the amount paid for the repairs secured or repaid to him, and stated, that he would convey part of the property to T., and part to his daughter, so that the property should be possessed and enjoyed by them both; no specific agreement was made on the subject, and G. K. afterwards died insolvent; T. and wife filed a bill against the heirs of G. K., and the trustee of the creditors of G. K., claiming a conveyance of the property, and for general relief. In no point of view, could such a contract as that in this case be considered voluntary; there was not only a good con-

- sideration, that of natural affection, but a valuable one; to constitute a valuable consideration, it is not necessary, that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consideration. *King's Heirs v. Thompson*.....\*204
2. In testing the validity of the transaction of 1812, the subsequent fall of property in Georgetown, or the failure of K., cannot be taken into view; the inquiry must be limited to his circumstances at that time. It is not shown, that the persons for whom he was bound, as indorser, were then unable to pay the respective sums for which he was responsible; and it would be improper to consider those sums as debts due by K.; he was responsible for their payment on certain contingencies; but the fact that his credit remained unimpaired for several years after the contract, shows, that neither his credit nor the credit of those for whom he was indorser, was considered doubtful. In this state of facts, K. was in a condition to dispose of the house and lot, not worth more than \$2500, on the terms stated. ....*Id.*
3. The terms of the contract not being sufficiently established by the evidence, the court decreed that the property should be sold, and the proceeds of the sale first applied to the payment of the money expended by T. in making improvements on the property; and the balance, if any, paid over for the benefit of the creditors of G. K.—T. not to be charged with rent of the premises while he occupied them, nor with the rent collected and paid to him after he removed. ....*Id.*
4. Statutes of limitations are applied by courts of equity, in all cases where, at law, they might be pleaded. *Coulson v. Walton*...\*63
5. A bill was filed in the circuit court of Ohio, for a conveyance of the legal title to certain real estate in the city of Cincinnati, and the statute of limitations of Ohio was relied on by the defendants; the complainant claimed the benefit of an exception in the statute, of non-residence and absence from the state; and evidence was given, tending to show that the person under whom he made his claim in equity, was within the exception; the non-residence and absence were not charged in the bill, and of course, were not denied or put in issue in the answer: *Held*, that the court could take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. If the merits of the case were not otherwise clear, the court might remand the cause for the purpose of amending the pleadings. *Piatt v. Vattier* .....\*405
6. A bill was filed in the circuit court of the United States for the eastern district of Pennsylvania, to recover the estate of the testator, bequeathed to "his heir-at-law;" The court considered, on an examination of the bill and proceedings, that there was not a sufficient averment of the testator's actual domicile, at the time of making the will, at the time of his death, or at any intermediate period; and remanded the cases to the circuit court, to have sufficient averments inserted. *Harrison v. Nixon*.....\*483
7. Every bill must contain, in itself, sufficient matter of fact, *per se*, to maintain the case of the plaintiff; the proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them, as a ground for decision, for the pleadings do not put them in contestation. ....*Id.*
8. Upon motions made to the court, and from proceedings in the circuit court, laid before the court, it appeared, that there were certain claimants of the bequest, asserting themselves to be "heirs-at-law," whose claims were not adjudicated upon in that court, on account of their having been presented at too late a period. As the cause is to go back again, for further proceedings, and must be opened there, for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims; and they ought to be let into the cause for that purpose. ....*Id.*
9. The district court of the United States in Louisiana, has jurisdiction in all cases which are cognisable in courts of equity, as contradistinguished from courts of common law; and the modes of proceeding in that court must be according to the usages, principles and rules which belong to courts of equity. *Livingston v. Story*....\*632
10. If there are no equitable claims or rights, cognisable in the courts of the state of Louisiana, nor any courts of equity, and no state laws regulating the practice in equity causes, the law of 1824 does not apply to a case of chancery jurisdiction, and the district court of Louisiana is bound to adopt the antecedent modes of proceeding, authorized under the former acts of congress. ....*Id.*
11. If any part of a bill in chancery is good, and entitles the complainant to relief or discovery, a demurrer to the whole bill cannot be sustained. ....*Id.*
12. It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence; he may demur, answer and plead to different parts of the bill; so that, if a bill for a discovery contain proper matter for the one, and not for the other, the defendant

should answer the proper, and demur to the improper matter; and if he demurs to the whole bill, the demurrer must be overruled. . . . .*Id.*  
 13. Congress has the power to establish circuit and district courts in any, and all the states of the Union, and to confer on them equitable jurisdiction, in cases coming within the constitution; it falls within the express words of the constitution. . . . .*Id.*

CONSTITUTIONAL CASES.

1. The court refused to take up cases involving constitutional questions, when the court was not full. *New York v. Miln*, \*85; *Briscoe v. Commonwealth Bank*. . . . . \*85

CONSTRUCTION OF STATUTES OF THE UNITED STATES.

1. The relief which is given by the act of congress, passed 15th of May 1820, entitled "an act providing for the better organizing the treasury department," on which a warrant of distress may be issued, by application to any district judge of the United States, for an injunction to stay proceedings on such warrant, is not confined to an officer employed in the civil, military or naval departments of the government, to disburse the public money appropriated for the service of those departments, respectively, who shall fail to render his accounts, or pay over, in the manner required by law, any sum of money remaining in the hands of such officer. *United States v. Nourse*. . . . . \*8  
 2. Opinions of Chief Justice MARSHALL and of Judge BARBOUR, delivered in the circuit court of the United States for the eastern district of Virginia, in the case of the United States *v. Randolph*, upon the construction of the act of congress of 15th May 1820, authorizing the issuing of a warrant of distress in certain cases. . . . . \*12  
 3. Construction of the act of congress of 25th May 1824, "enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims." *Delasus v. United States*. . . . . \*117  
 4. Construction of the 3d section of the act of congress of March 1st, 1823, relating to false swearing touching expenditures of public money. *United States v. Bailey*. . . . . \*238

CONSTRUCTION OF STATE STATUTES.

1. Construction of the statutes of limitations of North Carolina of 1815 and 1819. *Coulson v. Walton*. . . . . \*62  
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 3. Construction of the statute of Maryland of 1796, ch. 67, § 13, relative to the manumission of slaves. *Fenwick v. Chapman*. . . \*461

CONTINUANCE OF CAUSES.

See *Mitchel v. United States*, \*711.

CONTRACT.

1. Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement, must show that he has done everything on his part, which could be done, to carry it into effect; he cannot compel the payment of the amount claimed, unless he procure the kind of evidence required by the contract; or show that, by time or accident, he is unable to do so. *United States v. Robeson*. . . . . \*319

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DAMAGES.

1. The allowance of damages in cases of affirmation of judgments or decrees of the circuit court, when brought up by writ of error or appeal, is solely for the decision of the supreme court. *Boyce's Executors v. Grundy*. . . . . \*275

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See CHANCERY AND CHANCERY PRACTICE: WILLS AND PROBATE OF WILLS.

ERROR.

1. Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which will take from the jury the right of weighing what effect the evidence shall have; an instruction to the jury, founded on part of the evidence only, is error. *Greenleaf v. Birth*. . . . . \*292

EVIDENCE.

1. The bill of exceptions stated, that during the trial of the cause in the district court, the counsel for the marshal stated, that he had made a seizure, or given notice that he seized, in the hands of the defendants, as syndics, any funds in their hands to a suffi-

- cient amount to satisfy a judgment obtained in the case of the *United States v. John Brown, sen., and Lewis E. Brown*; this testimony was objected to, as being contrary to the statement of facts in the case, in which it was stated, that a return of *nulla bona* had been made by the marshal; and because the act was done in a case to which the defendants were not parties, and because the best evidence was the notice or true and proved copies of it; the return of the marshal in the case of the *United States v. John Brown, sen., and Lewis E. Brown* was also offered, and was objected to. The evidence was properly admitted, as notice to the syndics of the debts due to the United States. *Field v. United States*. . . . . \*182
2. S. obtained a sum of money of M., securing him by an annuity equal to ten per cent. per annum for ten years; he afterwards resisted the payment of the annuity, on the ground, that the contract was usurious, and having sold the estate to L., on which the annuity was secured, he, in writing, promised to indemnify and save him harmless for prosecuting a writ of replevin, should a distress be made for the annuity. On the trial of the action of replevin, S. was not a competent witness to show the original contract between him and M. was usurious. *Scott v. Lloyd*. . . . . \*418
3. The attorney in fact, residing in New Orleans, of certain executrices, residing in Baltimore, of the will of a person who left certain slaves in New Orleans, sold the slaves, without conforming to the provisions of the law of Louisiana; and received a part of the proceeds of the sale, but having failed, did not pay over the same to his constituents; the heirs of the testatrix instituted a suit for the recovery of the slaves, in a court of Louisiana; and by a decree of the court, they were adjudged to them; the purchaser instituted a suit in the circuit court of the district of Maryland, against the executrices, to recover the amount paid for the slaves, and his expenses, and offered the record of the proceedings in the suit in Louisiana in evidence, which was objected by the defendants. The suit and the proceedings was *res inter alios acta*, and were no further evidence than to show a recovery by a paramount title. *Owings v. Hull*. . . . . \*607
4. By the laws of Louisiana, copies from the notarial register of deeds and bills of sale, certified under the notarial seal of the notary, are evidence—the original register always remaining in the office of the notary. The circuit court was bound to take notice of the laws of Louisiana, and the copy being evidence by these laws, was legal evidence in a suit instituted before the circuit court in another state. . . . . *Id.*
5. A copy of the letters testamentary granted by the parish court of New Orleans, was proved by the oath of the clerk and register of the court of probates, to be a true copy of the original, and that he could not send the original, which was on file in the court of probates. This is the best evidence which the nature in the case admits of. . . . . *Id.*
6. The letters and accounts of J. K. West, the attorney in fact of the executrices, transmitted by him to Mr. Winchester, their attorney in fact, were legal evidence in the circuit court. . . . . *Id.*
7. What evidence is sufficient to introduce secondary proof of the contents of lost deeds, powers of attorney, &c. *Winn v. Patterson*. . . . . \*663
8. The deputy-clerk of the Richmond county court, who, as such, had recorded an original power of attorney, swore that he was well acquainted with Abram Jones, Esquire, and his handwriting, during the year 1793, &c.; that the record of the power of attorney from B. Jones to T. Smith, made by himself, while clerk of the court, was a copy of an original power of attorney, which he believed to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record; and that the copy of that said power of attorney, the one offered in evidence, had been compared with the record of the original made by himself, and was a true copy; upon this evidence, the plaintiff offered the copy in evidence, and it was admitted by the circuit court: *Held*, that there was no error in admitting this evidence. . . . . *Id.*
9. At the time of the admission of this evidence, it was forty years old; Abram Jones, the subscribing witness to the original, was long since dead, and it did not appear that the other witness was alive; the original power did not exist, so that no evidence of the handwriting of the other witness could be given. After the lapse of thirty years from the execution of a deed, the witnesses are presumed to be dead; and this is the common ground for dispensing with the production of them, without any search for them, or proof of their death, when the original deed is before the court for proof; this rule applies not only to grants of land, but to all other deeds, where the instrument comes from the custody of the proper party claiming under it, or entitled to its custody. . . . *Id.*
10. The rule is admitted, that a copy of a copy is not evidence; this rule properly applies to cases where the copy is taken from a copy, the original being still in existence, and can

pable of being compared with it, for then it is a second remove from the original; or when it is a copy of a copy of a record, the record being in existence, and deemed by laws as high evidence as the original, for then it is also a second remove from the original. But it is quite a different question, whether it applies to cases of secondary evidence, where the original is lost, and the record of it is not deemed in law as high as the original, or when the copy of a copy is the highest proof in existence. (In this case, the power of attorney was recorded in Richmond county, and the land in controversy was in Franklin county.) *Held*, that this is not the case of a mere copy of a copy, verified as such; but it is the case of a second copy, verified as a true copy of the original. . . . .*Id.*

- 11. If a certified copy of a duly recorded deed is evidence, it is not necessary to produce the original book in which the same was recorded. . . . .*Id.*
- 12. The confessions of an agent are not evidence to bind his principal, nor is his subsequent account of a transaction to his principal, evidence; but his acts, within the scope of his powers, are obligatory upon his principal; and those acts may be proved in the same manner as if done by the principal. The agent, acting within his authority, is substituted for the principal in every respect; and his statements, which form a part of the *res gestæ* may be proved. *United States v. The Brig Burdett*. . . . .\*682
- 13. The plaintiffs instituted a suit in the circuit court of the United States for the district of Maryland, stating themselves to be citizens of the state of Maryland, and that the defendant was an alien, and a subject of the king of Spain; the defendant pleaded in abatement, that one of the plaintiffs, Domingo De Arbel, was not a citizen of Maryland, nor of any of the United States, but was an alien, and a subject of the king of Spain; upon the trial of the issue joined on this plea, the plaintiffs produced and gave in evidence, under the decision of the circuit court, a passport granted by the secretary of state of the United States, stating De Arbel to be a citizen of the United States: *Held*, that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favor it was given. *Urtetiqui v. De Arbel*. . . . .\*692

14. The defendant in the circuit court offered in evidence the record, duly certified, of the district court of the United States for the district of Louisiana, containing the proceedings in a suit which had been originally instituted against De Arbel, in a state court of Louisiana, and on his affidavit that he was an alien,

and a subject of the king of Spain, had been removed for trial to the district court, under the authority of the act of congress authorizing such a removal of a suit against an alien into a court of the United States; the record was introduced, as containing a copy of the affidavit of De Arbel in the state court, upon which the case was removed: *Held*, that this was legal evidence. . . . .*Id.*

See CONTRACT.

EXECUTION.

- 1. An execution is the end of the law; it gives the successful party the fruits of his judgment, and the distress-warrant is a most effective execution; it may act on the body and estate of the individual against whom it is directed. *United States v. Nourse*. . . \*8

EXECUTORY DEVISE.

- 1. The clauses in the will of John Campbell, under which the land in controversy was claimed, were as follows: "And if, within that time, my said half-brother, Allen Campbell, shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct, that my said trustees, or the survivor or survivors of them, shall convey to my said half-brother, Allen Campbell, his heirs or assigns, in fee-simple, all the land herein-before described in this devise; but if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct, that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said land, hereby directed to be conveyed to him, on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same; but should my said half-brother become a citizen of the United States, or be otherwise qualified to hold real estate within the same, before his death, it is then my will and desire, that he shall have the sole and absolute disposal of all the estate herein-before devised or bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees." The testator died in October 1799; Allen Campbell, a native of Ireland, came to the state of Kentucky, in December 1799, and continued to reside therein until September 1804, when he died; on the 18th of December 1800, the legislature of Kentucky passed a law, under which Allen Campbell was authorized to hold

the land devised to him. The devise to Allen Campbell was a good executory devise, depending on the contingency of his becoming a citizen of the United States, or being otherwise qualified to hold real estate; this contingency was not too remote; it must, necessarily, not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever; and upon the happening of this contingency, there can be no doubt, but the devisee took an estate in fee. *Beard v. Rowan*. . . . . \*301

#### FINAL DECREES AND JUDGMENTS.

1. A decree perpetuating an injunction, leaving some matters of account open for further consideration, is not a final decree. *Brown v. Swann*. . . . . \*1
2. A judgment awarding a writ of restitution in an action of ejectment, where in the execution of a writ of *habere facias possessionem*, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action; it is no more than the action of a court on its own process, which is submitted to its own discretion. *Smith v. Trabue's Heirs*. . . . . \*4

#### FLORIDA LAND-CLAIMS AND FLORIDA TREATY.

1. The decree of the supreme court of East Florida, confirming a concession of land to the appellee, granted to him by Governor Coppinger, in December 1817, confirmed. *United States v. Clarke*. . . . . \*168
2. A concession on condition becomes absolute, when the condition is performed. . . . . *Id.*
3. The original concession by Governor Coppinger, on the petition of George J. F. Clarke, was made on the 17th of December 1817, of 26,000 acres of land, in the places he solicited in his petition, and a complete title was made of 22,000 acres, part of the same, in December 1817; 20,000 acres, part of the whole concession, were sold by the appellee; the other 4000 were surveyed in conformity with the decree of 17th of December 1817, and a complete title to the same was made by Governor Coppinger, on the 4th of May 1818. The claimant cannot avail himself of the grant of the 4th of May 1818, made after the 24th of January 1818, the time limited by the Florida treaty; he must rest his claim on the concession made on the 17th of December 1817. . . . . *Id.*
4. The validity of concessions of land, by the authorities of Spain in East Florida, is ex-

- pressly recognised in the Florida treaty, and in the several acts of congress. . . . . *Id.*
5. The eighth article allows the owners of land the same time for fulfilling the conditions of their grants, from the date of the treaty, as is allowed in a grant from the date of the instrument; and the act of the 8th of May 1822, requires every person claiming title to lands, under any patent, grant, concession or order of survey, dated previous to the 24th of January 1818, to file his claim before the commissioners, appointed in pursuance of that act; all the subsequent acts on the subject observe the same language; and the titles under these concessions have been uniformly confirmed, when the tract did not exceed a league square. . . . . *Id.*
  6. A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain, before the cession of Florida by Spain to the United States, confirmed. *Mitchel v. United States*. . . . \*711
  7. It was objected to the title claimed in this case, which had been presented to the superior court of Middle Florida, under the provisions of the acts of congress for the settlement of land claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land: *Held*, that the acts of congress submit these claims to the adjudication of this court, as a court of equity; and those acts, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable. . . . . *Id.*
  8. By the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror; and this is the rule by which we must test its efficacy, according to the act of congress which we must consider as of binding authority. *Id.*
  9. A treaty of cession is a deed or grant by one sovereign to another, which transfers nothing to which he had no right of property; and only such right as he owned, and could convey to the grantee. By the treaty with Spain, the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property, under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king; which words, "grants" or "concessions," were to be con-

- strued in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. . . . .*Id.*
10. The effect of the clauses of the confirmation of grants made was, that they confirmed them presently, on the ratification of the treaty, to those in possession of the lands; which was declared to be, that legal seisin and possession which follows title, is co-extensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation.*Id.*
11. The United States, by accepting the cession under the terms of the eighth article, and the ratification by the king, with an exception of three annulled grants to Allagon, Punon Rostro and Vargas, can make no other exceptions to grants made by the lawful authorities of the king. . . . .*Id.*
12. The meaning of the words "lawful authorities," in the eighth article, or "competent authorities," in the ratification, must be taken to be, "by those persons who exercised the granting power by the authority of the crown;" the eighth article expressly recognises the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority; which is to be deemed competent, till the contrary is made to appear. . . . .*Id.*
13. By "the laws of Spain," is to be understood the will of the king, expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. . . . .*Id.*
14. In addition to the established principles heretofore laid down by this court as the legal effect of a usage or custom, there is one which is peculiarly appropriate to this case; the act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated;" this is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well-established rule of law—that a custom or usage saved and preserved by a statute, has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of
- negative ones, which forbid an act authorized by a custom or usage thus saved and protected; and this is the rule by which its efficacy must be tested, according to the act of congress, which must be considered of binding authority. . . . .*Id.*
15. In the case of the United States *v.* Arredondo, 6 Pet. 691, the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name; but the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general, on a reference to them, finding the fact of abandonment; on which it was decreed, that the lands had reverted to and become annexed to the royal domain. . . . .*Id.*
16. By the common law, the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands; he cannot acquire it, without office found, so as to annex it to his domain. . . . .*Id.*
17. The United States have acted on the same principle, in the various laws which congress have passed in relation to private claims to lands in Florida; they have not undertaken to decide for themselves, on the validity of such claims, without the previous action of some tribunal, special or judicial; they have not authorized an entry to be made on the possession of any person in possession, by color of a Spanish grant or title, nor the sale of any lands, as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories, to decide in the first instance, and to this, on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the 7th section of the act of 1824, is a "final decision against any claimant, pursuant to any of the provisions of the law." . . . . .*Id.*
18. One uniform rule seems to have prevailed in the British provinces in America, by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them, by a perpetual right of possession in the tribe or nations inhabiting them, as their common property, from generation to generation, not as

- the right of individuals located on particular spots; subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians, though possession could not be taken without their consent. . . . . *Id.*
19. Individuals could not purchase Indian lands, without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid, with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete. . . . . *Id.*
20. Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case, their rights became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands, by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia. . . . . *Id.*
21. Grants made by the Indians, at public councils, since the treaty at Fort Stanwix, have been made directly to the purchasers, or to the state in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held, especially in New York. . . . . *Id.*
22. It was a universal rule, that purchases made at Indian treaties, in the presence, and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states, after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their grantees; it has been adopted by the United States, and purchases made at treaties held by their authority have been always held good, by the ratification of the treaty, without any patent to the purchasers, from the United States. This rule in the colonies was founded on a settled rule of the law of England, that, by his prerogative, the king was the universal occupant of all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers. . . . . *Id.*
23. When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes, before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory, as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders, and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force, by the proclamation of the governor, in taking possession of the provinces; and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, to decide, that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain; it would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of congress, so far as either apply to this case, the standard rules for its decision. . . . . *Id.*
24. The treaties with Spain and England, before the acquisition of Florida by the United States, which guarantied to the Seminole Indians their lands, according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy, under Great Britain or Spain, as individuals or nations, by any treaty, to which the United States thus became parties in 1803. . . . . *Id.*
25. The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guarantied by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor, representing the king; such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to

provide for their wants; while they were available to the purchasers, as payment of the considerations, which, at their expense, had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title; such a course was never adopted by Great Britain, in any of her colonies, nor by Spain, in Louisiana or Florida. . . . . *Id.*

26 The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for confirmation; the sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser, and no instance is known where permission to sell has been "refused, or the rejection of an Indian sale." . . . . . *Id.*

27. In the present case, the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians, conformable to treaties, to which the king was a party, and which the United States adopted; and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased; and they made no stipulation which should put it to a severer test than any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt, that the evidence in the record did not establish the fact of a royal license or assent to this purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law, arising from the facts and circumstances of the case, which are admitted or unquestioned. . . . . *Id.*

28. As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants; *à fortiori*, to give license to purchase and to confirm; and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation, as plainly as it does the governor of

East Florida to make original grants, or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven, may be presumed, on an uninterrupted possession of sixty years; or a prescriptive possession of crown lands for forty years. . . . . *Id.*

29. The length of time which brings a given case within the legal presumption of a grant, charter or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances. . . . . *Id.*

FORFEITURE.

1. An information was filed in the district court of the United States, on the 1st of October 1822, against the brig Burdett, alleging her to have been forfeited to the United States, for a violation of the registry acts, she being owned in whole or in part by a foreigner, a subject of the king of Spain. The vessel was purchased by an agent of George S. Steever, a native citizen of the United States, and was sent to Havana; from the time of her arrival at Havana, she was placed under the direction of J. J. Carrera, a merchant of that place, and all her voyages directed by him, professing to act as the agent of Mr. Steever; part of the cost of the brig was paid in cash by Mr. Steever, to his agent, on his return to the United States, and the balance charged by the agent and settled for in account with Mr. Carrera. The counsel for the United States offered in evidence certain letters written by Mr. Carrera to Captain Nabb, the commander of the Burdett, during her several voyages, which had been directed by him, and which letters related to the business and employment of the Burdett; the letters were objected to as evidence, and were admitted in the district and circuit court, to which latter court the case was taken on an appeal by the claimant of the vessel: *Held*, that the letters were not legal evidence. *United States v. The Brig Burdett.* . . . . . \*682
2. The object of this prosecution was to enforce a forfeiture of the vessel, and all that pertains to her, for a violation of a revenue law; the prosecution was a highly penal one, and the penalty should not be inflicted, unless the infractions of the law were established beyond reasonable doubt. . . . . *Id.*
3. That frauds are often practised under the revenue laws, cannot be doubted, and that individuals who practise these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection, is equally notorious; but such acts cannot alter the established rules of evidence, which have been

- adopted as well with reference to the protection of the innocent, as the punishment of the guilty.....*Id.*
4. If, a fair construction of the acts and declarations of an individual do not convict him of an offence, if the facts may be admitted as proved, and the accused be innocent, should he be held guilty of an act which subjects him to the forfeiture of his property on a mere presumption? He may be guilty, but he may be innocent. If the scale of evidence does not preponderate against him, if it hang upon a balance, the penalty cannot be enforced; no individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offence be established beyond reasonable doubt; this is a rule which governs a jury in all criminal prosecutions; and the rule is no less proper for the government of the court, when exercising a maritime jurisdiction.....*Id.*

#### FRAUD AND STATUTE OF FRAUDS.

1. G., the executor of his father, who had devised his estate to G. and his other children, sold the estate, and became himself the purchaser of it; and in order to secure the portions of the other devisees, who were minors, confessed a judgment, June 1st, 1819, on a promissory note, in favor of two persons, without their knowledge, in a sum supposed to be sufficient to be a full security for the amount of the portions of the minors; the judgment was kept in full operation, by executions regularly issued upon it, so as, under the laws of South Carolina, to bind the property of G. He was then engaged in mercantile pursuits, and had other property than that so purchased by him; G. afterwards became insolvent, and the claims of the devisees of his father, under the judgment, were contested by his creditors as fraudulent—the plaintiffs in the judgment, having no knowledge of it, when it was confessed, the amount of the sum due to the co-devisees not having been ascertained when it was confessed, no declaration of trust having been executed by the plaintiffs, and false representations of his situation having been made by G., after the judgment, whereby his creditors were induced to give him time on a judgment confessed to them subsequently. The judgment of June 1st, 1819, was held to be valid, and the plaintiffs in that judgment entitled to the proceeds of the sales of the estate of G., for the satisfaction of the amount actually due to the co-devisees by G. *Bank of Georgia v. Higginbottom*.....\*48
2. A bill was filed in the circuit court of the United States for the district of Kentucky,

claiming certain lands in Kentucky, under an agreement by parol, by Carrington with Williams, for an exchange of lands, and in which exchange C., the husband and devisor of the claimant, agreed to give certain lands then owned by him in Virginia, to W., and of which W. took possession, and part of which he sold, and for which W. was to convey certain military lands in Kentucky to C.; the bill prayed that the heir of W. should be decreed to convey the lands; and that certain persons who, knowing of the agreement between C. and W., had purchased from the heir of W., and who had obtained from the heir of W. the legal title to a part of the same lands, should be decreed to convey the same to the complainant. The court held, that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the land he agreed to give to Williams in exchange, prevented the operation of the statute in this case; this was undoubtedly supposed in Virginia to be the sound construction of the statute, when this contract was made; and as the lands then lay in Virginia, Kentucky being then a part of that state, this construction forms the law of contract. *Caldwell v. Carrington*.....\*86

See *King's Heirs v. Thompson*, \*204.

#### GRANTS OF LANDS.

1. No grant of land can affect pre-existing titles. *New Orleans v. De Armas*.....\*224
2. There are cases when grants and securities made contrary to the prohibitions of a statute, in part, are, upon the true construction of the intent of the statute, void *in toto*; but it is very different in cases standing merely on the common law; and therefore, at the common law, in order to make a grant void, *in toto*, for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up in it, as not to be capable of a distinct and separate consideration. *Winn v. Patterson*.....\*664
3. A grant may be good for part of the land granted, and bad as to other parts of the same.....*Id.*

#### HABEAS CORPUS.

1. As the jurisdiction of the supreme court is appellate, it must be shown to the court, that the court has the power to award a *habeas corpus*, before one will be granted. *Ex parte Milburn*.....\*704

2. George Milburn was imprisoned in the jail of the county of Washington, upon a bench-warrant issued by the circuit court of the United States for the district of Columbia, to answer an indictment pending against him, for keeping a faro bank, an offence which, by an act of congress, is punishable by imprisonment at hard labor in the penitentiary of the district; he had been arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency, according to the statute of Maryland, conditioned to appear in court at the return-day of the process, &c.; he did not appear, and the recognisance was forfeited, and a *scire facias* was issued against him and his sureties, returnable to December term 1833; at the same term, another writ of *capias* was issued against him, returnable immediately, and returned *non est inventus*; at June vacation 1834, another writ of *capias* was issued against him, returnable to November term 1834, on which he was arrested, and from which arrest he was discharged on a *habeas corpus*, by the chief justice of the circuit court, on the ground, that the writ of *capias* improperly issued. On a return of this discharge by the marshal, a bench-warrant was issued, by order of a majority of the judges of the circuit court, and on which he was in custody; he applied for a writ of *habeas corpus* to this court, to obtain his discharge: *Held*, that he was properly in custody; the rule for the *habeas corpus* was refused. . . . . *Id.*

INDIANS AND INDIAN GRANTS OF LAND.

See FLORIDA LAND-CLAIMS AND FLORIDA TREATY.

INSOLVENT LAWS.

1. Constitutionality of the insolvent laws of the state of Ohio. *Beers v. Haughton*. . . \*329
2. The legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them; the right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects. . . . . *Id.*

INSTRUCTIONS TO THE JURY.

See TRIAL BY JURY.

INTEREST.

1. No interest can be allowed on the execution of the mandate of the supreme court, issued on the affirmance of a decree of a circuit court, for a stated amount of money; unless the supreme court has, in their decree, ordered the same to be allowed. *Boyce's Executors v. Grundy*. . . . . \*275

JUDGMENTS.

1. A judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter of it, as between the same parties. *United States v. Nourse*. . . . . \*8
2. Where the United States had proceeded on a treasury transcript, by a warrant of distress against a public officer, for a balance alleged to be due to the government, and after an injunction issued by the chief justice of the circuit court of the district of Columbia, an examination of the accounts between the United States and the defendant in the warrant of distress took place, under the order of the chief justice of the circuit court, by which it was found, that the United States were largely indebted to the defendant, and the injunction was perpetuated: it was *held*, that this was a final judgment in the case; and no suit could afterwards be instituted by the United States, on the said treasury transcript, so long as the decree of the chief justice of the circuit court remained unreversed; the accounts between the United States and defendant in the warrant of distress, cannot again be brought into litigation. . . . . *Id.*

JUDGMENTS OF STATE COURTS.

1. A decree of a county court of Virginia, which would be enforced in Kentucky, will be enforced in the circuit court of the United States for the district of Kentucky. *Caldwell v. Carrington*. . . . . \*86

JURISDICTION.

1. A lot of ground, situate in the city of New Orleans, which was occupied, under an incomplete title, for some time, by permission of the Spanish government, granted before the acquisition of Louisiana by the United States, was confirmed to the claimants, under

- the laws of the United States, and a patent was issued for the same, on the 17th of February 1821; the city of New Orleans, claiming this lot as being part of a quay dedicated to the use of the city, in the original plan of the town, and therefore, not grantable by the king of Spain, enlarged the levee in front of New Orleans, so as to include it; the patentees from the United States brought a suit in the district court of the state of Louisiana, for the lot, which pronounced judgment in their favor, and that judgment was affirmed by the supreme court of the state; the judgment was removed to this court, under the 25th section of the judiciary act; a motion was made to dismiss the writ of error for want of jurisdiction. The merits of this controversy cannot be revised in this tribunal; the only inquiry here is, whether the record shows that the constitution, or a treaty, or a law of the United States has been violated by the decision of that court. *New Orleans v. De Armas*. . . . . \*224
2. The 25th section of the judiciary act is limited by the constitution, and must be construed so as to be confined within these limits; but to construe this section so that a case can arise under the constitution or a treaty, only when the right is created by the constitution or treaty, would defeat the obvious purpose of the constitution, as well as the act of congress; the language of both instruments extends the jurisdiction of this court to rights protected by the constitution, treaties or laws of the United States, from whatever source these rights may spring. . . . *Id.*
  3. To sustain the jurisdiction of the court in this case, it must be shown, that the title set up by the city of New Orleans, is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title. . . . . *Id.*
  4. The third article of the treaty of Louisiana stipulates for the admission of Louisiana into the Union, and it obviously contemplates two objects: the one, that stated; and the other, that, until that admission, the inhabitants of the ceded territory shall be protected in the enjoyment of their liberty, property and religion. Had any of these rights been violated, while the stipulation continued in force the individual supposing himself to be injured might have brought his case into this court, under the 25th section of the judiciary act. . . . . *Id.*
  6. But the stipulation ceased to operate, when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" the right to bring questions of title decided

- in a state court before this tribunal, is not classed among those immunities; the inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state. . . . . *Id.*
6. The act of congress admitting Louisiana into the Union, carries into execution the third article of the treaty of cession; and cannot be construed to give appellate jurisdiction to the court, over all questions of title between the citizens of Louisiana. . . . . *Id.*
  7. The patent granted to the claimants of the land did not profess to destroy any previous existing title, nor could it so operate; the patent was issued under the act of May 1820, entitled "an act supplementary to the several acts for the adjustment of land titles in the state of Louisiana;" that act confirms the titles to which it applies, "against any claim on the part of the United States;" the title of the city of New Orleans could not be affected by this confirmation. . . . . *Id.*
  8. Jurisdiction of the supreme court, in cases certified from circuit courts, on a division of opinion between the judges of these courts. *United States v. Bailey*. . . . . \*672

## LIEN.

1. A contract was made for the sale of a tract of land in Mississippi, and a bill was filed in the circuit court of Tennessee to rescind it, and direct the repayment of the part of the purchase-money paid to the vendor, on the ground of misrepresentation of the quality of the land; the court gave a decree in favor of the complainant, by which he became entitled to recover from the defendant the sum of \$2065.21; *Held*, that there was no lien on the land in Mississippi, under the decree, for the sum to which the complainant was entitled; and that the land in Mississippi could not be sold by an order of the circuit court of Tennessee. *Boyce's Executors v. Grundy*. . . . . \*275

## LIMITATION OF ACTIONS.

1. Statutes of limitation are applied by courts of equity, in all cases where at law they might be pleaded; at law, to make the statute a bar, there must be an adverse possession; and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar; but the statute insisted on as a bar in this case, does not depend upon possession; it bars the creditor who does not sue the heir within seven years; there can be no doubt, that the statute applies, where

- a creditor seeks to make the heir liable for the debt of his ancestor, on the ground, that either personal or real property descended to him. And this appears to be the decision of the supreme court of Tennessee on the statute; there is nothing in their decisions referred to, which show that they have given effect to the statute beyond this. By the statute of 1819, which is wholly different in its language from the act of 1815, a bar is created, indiscriminately, to suits in equity, as well as at law; the statutes do not apply to this case. *Coulson v. Walton*.....\*62
2. In a case in which there was a clear adverse possession of the real estate in controversy, without any acknowledgment of a trust in any one, and no circumstances shown to overcome the decisive influence of this adverse possession, the court *held*, that according to the established doctrine in courts of equity, independent of any legislative limitations, it would not entertain so stale a demand. *Piatt v. Vattier*.....\*405
- See CHANCERY AND CHANCERY PRACTICE.

LOUISIANA.

1. Provisions of the laws of the United States, establishing the courts of the United States in the district of Louisiana, and regulating the practice in those courts. *Livingston v. Story*.....\*632
2. By the provisions of the act of congress, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States in other states; and the modes of proceeding in that court, were required to be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; and whether there were or not, in the several states, courts of equity proceeding according to such principles and usages, made no difference, according to the construction uniformly given by this court.....*Id.*
3. The provisions of the act of congress of 1824, relative to the practice of the courts of the United States in Louisiana, contain the descriptive term, civil actions, which embrace cases at law and in equity, and may be fairly construed as used in contradistinction to criminal causes; they apply equally to cases in equity, and if there are any laws in Louisiana directing the mode of proceeding in equity causes, they are adopted by that act, and will govern the practice in the courts of the United States.....*Id.*

LOUISIANA TREATY.

1. The stipulations of the treaty ceding Louisiana to the United States, affording that protection or security to claims under the French or Spanish government to which the act of congress refers, are in the first, second and third articles; they extended to all property, until Louisiana became a member of the Union, into which the inhabitants were to be incorporated as soon as possible, "and admitted to all the rights, advantages, and immunities of citizens of the United States;" the perfect inviolability and security of property is among these rights. *Delassus v. United States*.....\*117
2. The right of property is protected and secured by the treaty, and no principle is better settled in this country, than that an inchoate title to lands is property. This right would have been sacred, independent of the treaty; the sovereign who acquires an inhabited country, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property; the language of the treaty ceding Louisiana, excludes any idea of interfering with private property.....*Id.*

MANDAMUS.

1. In the district court of the United States for the district of Louisiana, the district judge refused to extend a judgment previously entered in the district court, so as to cover other instalments due to the plaintiffs which became due after it was entered; and to enter a judgment in favor of the plaintiffs mortgagees, upon a transaction which had been entered into with the mortgagor, in relation to the debt due to the mortgagees, in which it was stipulated, that judgment should be entered for certain instalments to be paid to the plaintiffs, on the non-payment of the same—the district judge not considering the plaintiffs entitled to have the judgment entered according to the terms of the transaction, without notice to the debtor and his syndics, into whose hands his property had passed, under the insolvent law of Louisiana, after the execution of the transaction, and after a judgment for part of the debt had been entered, which was the judgment asked to be extended. The district judge was also required to receive a confession of judgment against the mortgagor and the insolvent, by an agent of the plaintiffs, and whose powers to confess the judgment, the district judge did not consider adequate and legal for the purpose. An execution had been issued for a part of the

- debt, upon the previous judgment in the district court, and the execution was put into the hands of the marshal of the United States; who, finding the property of the insolvent defendant, the property mortgaged to the plaintiffs, in the hands of the syndics of the creditors of the mortgagor, according to the insolvent laws of Louisiana; refused to proceed and sell the same, and returned the execution unexecuted. An application was made to the supreme court for a *mandamus*, to command the district judge to enter the judgment required of him, and to receive the confession of the judgment by the agent of the plaintiffs, and award execution therein; and also to compel him to oblige the marshal to execute the execution in his hands, on the property of the defendant, wherever found. The court refused to award a *mandamus* on any of the grounds, or for any of the purposes stated in the application. *New York Life and Fire Insurance Co. v. Adams* ..... \*573
2. To extend a judgment to subjects not comprehended in it, is to make a new judgment; this court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court on the suggestions of one of the parties; the court is asked to decide that the merits of the cause are with the plaintiff; and to command the district judge to render judgment in his favor; it is an attempt to introduce the supervisory power of this court into a cause, while depending in an inferior court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice ..... *Id.*
3. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court; though the merits of the cause, may have been substantially decided; while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of parties; so, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree; a writ of error might be brought to the judgment, or an appeal prayed from the decree, and a judgment or decree entered in pursuance of the *mandamus* might be afterwards reversed; such a proceeding would subvert our whole system of jurisprudence. .... *Id.*
4. The *mandamus* ordered by this court, 8 Pet. 306, directed the performance of a mere ministerial act ..... *Id.*
5. In the particular case in which the creditor asks for a *mandamus* to the district judge to compel the marshal to seize and sell the property mentioned in the writ, that property is no longer in the possession of the debtor against whom the process is directed; but has been transferred, by law, to other persons, who are directed by the same law in what manner they are to dispose of it. To construe the law, or to declare the extent of its obligation, the questions must be brought before this court in proper form, and in a case in which it can take jurisdiction; this case, so far as it is before any judicial tribunal, is depending in the district court of the United States, and perhaps, in a state court in Louisiana; the supreme court of the United States has no original jurisdiction over it; and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform; this court cannot, in such a condition of a case, construe judicially the laws which govern it, nor decide in whom the property is vested; in so doing, it would intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers. .... *Id.*
6. Though the supreme court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment; should it be possible, that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but, to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out. .... *Id.*

#### MANDATE.

See *Boyce's Executors v. Grundy*, \*275.

#### MANUMISSION.

1. A testatrix, by her will, directed that certain slaves should be manumitted at her death, and charged a portion of her real estate, specifically devised, with the payment of annui-

- ties to some of those slaves; she left a considerable real estate, and some personal estate, but not sufficient to pay her debts; the executor suffered the manumitted persons to go at large, as free, for some years; but afterwards, on finding that the personal estate would not pay the debts of the testator, he obtained an order for the sale of all the personal estate, having included the slaves manumitted in the inventory, and sold those persons as slaves: *Held*, that the persons who had been manumitted by the will were free; and that under the laws of Maryland authorizing manumissions of slaves by will, provided it was not done to the injury of creditors, the manumission was valid; and the executor must resort to the real estate for the funds to pay off the debts of the testator. *Fenwick v. Chapman*...\*461
2. By this statute of Maryland, of 1796, ch. 67, § 13, manumissions of slaves, by will and testament, may be made to take effect at the death of the testator; the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors. ....*Id.*
  3. The right to freedom may be tried at law, in a suit against the executors, at the instance of the manumitted slaves; and the executor may, in such suit, admit the existence of a sufficiency of real assets or real estate to pay the debts of his testator. ....*Id.*
  4. A judgment at law, in favor of manumitted slaves, in a suit against an executor, obtained on the admission by the executor of a sufficiency of assets, may be set aside in equity, if such admission was made without foundation in fact, or in fraud or mistake. In such a proceeding in equity, to which the executor, the manumitted slaves, and all persons interested, have been made parties, there may be an entire review of the administration of the estate, of the conduct of the executor, and that of the creditors, in regard to the estate, and in respect to the vigilance of the executor in paying, and of the creditors in the pursuit of their debts. ....*Id.*
  5. The words in a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts. *Id.*
  6. When a testator manumits his slaves by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events; the manifest intention, without express words to charge the real estate, will charge the real estate for the payment of debts, if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator. ....*Id.*
  7. In such a case, the creditors of the testator must look to the real estate for the payment of debts which remain unpaid, after the personal estate, exclusive of the manumitted slaves, has been exhausted; and they may pursue their claims in equity, or according to the statutes of Maryland subjecting real estate to the payment of debts. ....*Id.*
  8. When an executor permits manumitted slaves to go at large and free, under a manumission to take effect at the death of the testator, he cannot recall such assent; nor can it be revoked, under an order of the orphans' court of Maryland, for the sale of all the personal estate of the testator; that court not having jurisdiction of the question of manumission. ....*Id.*
  9. It being admitted, that a testator left real estate to an amount in value more than sufficient to pay his debts, without the sale of slaves manumitted by his will, those persons are free, notwithstanding a deficiency of personal assets. ....*Id.*
- ### MARSHAL.
1. It is the duty of a marshal of a court of the United States, to execute all process which may be placed in his hands; but he performs this duty at his peril, and under the guidance of law; he must, of course, exercise some judgment in the performance; should he fail to obey the *exigit* of the writ, without a legal excuse, or should he, in its letter, violate the rights of others, he is liable to the action of the injured party. *New York Life and Fire Insurance Co. v. Adams*....\*673
- ### MINORS.
1. It is the duty of the court, to protect the interests of minors. *Coulson v. Walton*..\*62
- ### MISSOURI LAND-CLAIMS.
1. Confirmation of a Spanish grant of a tract of land in Missouri. *Delassus v. United States*.....\*117
  2. A grant or concession made by an officer who is by law authorized to make it, carries with it *primâ facie* evidence that it is within his powers; no excess of them, or departure from them, is to be presumed; he violates his duty by such excess, and is responsible for it; he who alleges that an officer intrusted with an important duty has violated his instructions, must show it. ....*Id.*
  3. The instructions of Governor O'Reilly, relative to granting lands in Louisiana, were considered by the court, in 8 Pet. 455; these regulations were intended for the gen-

- eral government of subordinate officers, and not to control and limit the power of the person from whose will they emanated; the Baron De Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly, and a concession ordered by him is as valid as a similar concession directed by Governor O'Reilly would have been.....*Id.*
4. A concession of land was made by the lieutenant-governor of Upper Louisiana, at the time when the power of granting lands was vested in the governors of provinces; this power was, in 1799, after the concession, transferred to the intendant-general; and after this transfer, in January 1800, the order of survey of the land was made by the lieutenant-governor. The validity of the order of survey depends on the authority of the lieutenant-governor to make it; the lieutenant-governor was also a sub-delegate, and as such was empowered to make inchoate grants. The grant was confirmed. *Chouteau's Heirs v. United States*.....\*137
5. The transfer of the power to make concessions of lands belonging to the royal domain of Spain, from the governor-general to the intendant-general, did not affect the power of the sub-delegate, who made this concession. The order in this case is the foundation of title, and is, according to the act of congress on the subject of confirming titles to lands in Missouri, &c., and the general understanding and usage of Louisiana and Missouri, capable of being perfected into a complete title; it is property, capable of being alienated, of being subjected to debts; and is, as such, to be held as sacred and inviolate as other property.....*Id.*
6. A concession of one league square of land, in Upper Louisiana, was made by Don Zenon Trudeau, the lieutenant-governor of that province, to Auguste Chouteau, and a decree made by him, directing the surveyor-general of the province to put him in possession of the land, and to survey the same, in order to enable Chouteau to solicit a complete title thereof from the governor-general, who, by the said decree, was informed, that the circumstances of Chouteau were such as entitled him to a grant of the land; the land was surveyed, and the grantee put in full possession of it, on the 20th of December 1803; he retained possession of it, until his death. The objection to the validity of the concession was, that the petitioner had not as many tame cattle as the eighth regulation of Governor O'Reilly, governor-general of Louisiana, required; that regulation required that the applicant for a grant of a league square of land should make it appear that he is possessed of one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants, &c. In the spirit of the decisions which have been heretofore made by this court, and of the acts of confirmation passed by congress, the fact that the applicant possessed the requisite amount of property to entitle him to the land he solicited, was submitted to the officer who decided on the application, and he is not bound to prove it to the court, which passes on the validity of the grant; these incomplete titles were transferrable, and the assignee might not possess the means of proving the exact number of cattle in possession of the petitioner when the concession was made. The grant was confirmed. *Chouteau's Heirs v. United States*.....\*47
7. If the court can trust the information received on this subject, neither the governor nor the intendant-general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate.....*Id.*
8. The regulation made by Don O'Reilly, as to the quantity of land to be granted to an individual, is not that no individual shall receive grants for more than one league square, but that no grant shall exceed a league square; the words of the regulation do not forbid different grants to the same person; and, so far as the court are informed, it has never been so construed.....*Id.*

## OPINIONS.

1. Opinions of Mr. Chief Justice Marshall and Judge Barbour, in the case of *Ex parte Robert B. Randolph*, in the circuit court of the United States, in the eastern district of Virginia, delivered December 21st, 1833. *United States v. Nourse*.....\*12

## PASSPORT.

1. A passport granted and certified by the secretary of state, under the impression of the seal of the United States, stating the person named therein to be a citizen of the United States, is not, *per se*, legal evidence of the facts stated therein. *Urtetiqui v. D'Arbel*.....\*692

## PERJURY.

1. Indictment for false swearing, under the third section of the act of congress, of March 1st, 1823, which declares, that "any person who shall swear or affirm falsely, touching the expenditure of public money, or

- in support of any claim against the United States, shall suffer as for wilful and corrupt perjury." *United States v. Bailey*.....\*238
2. The indictment charged the false swearing to be an affidavit made before a justice of the peace of Kentucky, in support of a claim against the United States, under the act of congress of July 1832, to provide for liquidating and paying certain claims of the state of Virginia.....*Id.*
  3. There is no statute of the United States which expressly authorizes any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823.....*Id.*
  4. The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act. By implication, he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832; it was incident to his duty and authority in settling claims under the act. When the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the provision of the act of 1823, ch. 165.....*Id.*
  5. If a state magistrate shall administer an oath, under an act of congress expressly giving him the power to do so, it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under a law of the United States for that purpose; and such an oath, administered under such circumstances, would be within the purview of the act of 1823.....*Id.*
  6. The act of 1823 does not create or punish the crime of perjury, technically considered; but it creates a new and substantial offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had jurisdiction, so as to make the false swearing perjury; it would be sufficient, that it might be

- lawfully administered by the magistrate, and was not in violation of his official duty..*Id.*
7. The language of the act of 1823 should be construed with reference to the usages of the treasury department; the false swearing and false affirmation referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States; the language of the act is sufficiently broad to include all such cases; and there is no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied.....*Id.*
  8. The act does no more than change a common-law offence into the statutory offence.....*Id.*

PRACTICE.

1. The original writ was issued out of the circuit court of the district of Columbia, dated 2d of December 1831, and was returned "executed," on the first Monday of the same December, the return-day of the succeeding term; the defendant appeared by his attorney, on the return-day, and obtained a rule on the plaintiffs to declare against him; the circuit court, on the trial of the cause, directed the jury to find damages against the defendant, for the hire of a steambot, for which the action was brought, from the 20th of November 1831, to the 6th of February 1832, whereas, the suit was instituted on the 2d of December 1831. These instructions were erroneous, as damages were to be given to a time long posterior to the institution of the action. *Bradley v. Steam-Packet Company*.....\*107
2. The district court of the United States for the eastern district of Louisiana, adopted a rule which was analogous to the law of Louisiana, by which the surety, in an appeal bond, shall have a summary judgment entered against him on motion; the appeal having failed, the judgment was entered, he not having appeared, after notice, and the defendant came in subsequently and prayed a trial by jury, which was refused by the court. There was no error in this decision. *Hiriart v. Ballou*.....\*156

PRIORITY OF THE UNITED STATES.

1. The United States obtained judgment, in suits instituted on bonds for duties, in the district court of the United States of Louisiana; before the judgments, the debtor to

the United States had become insolvent, and his property, under the insolvent laws of Louisiana, had passed into the hands of syndics, for distribution among his creditors, according to their respective priorities, and the syndics sold the property, part for cash and part on credits of one, two and three years. The whole proceeds of the estate exceeded \$40,000; the mortgages were about \$27,000; and when all the notes taken by the syndics were paid, there would be sufficient to discharge these mortgages, and all the debts due to the United States. A large amount of the proceeds was not to be received, until after the judgments in a suit against the syndics were obtained in favor of the United States; one moiety of the amount of sales being payable after the suit against the syndics was commenced, and the other, after the judgment against them was rendered: *Held*, that the syndics were not liable to the United States for the debts due to them, unless funds had actually come into their hands; as one moiety of the notes was not paid at the time of the judgment of the United States against them, it does not judicially appear, that they had funds on which the United States were entitled to judgment; if the remaining moiety of the notes has since been paid, the United States will then have a legal claim thereon for their debts. *Field v. United States*. \*182

2. The United States were not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein; the local laws of the state could and did not bind them in their rights; they could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States.... *Id.*
3. The priority of the United States attached, by the laws of the United States, in virtue of the assignment and notice to the syndics; and it was the duty of the syndics to have made known these debts in their tableau of distribution, as having had priority. The mortgages upon particular estates sold, must be first paid out of the sales of those estates; but if there be any deficiency in the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates, except as general creditors..... *Id.*

PROCESS.

1. The process act of 1798, expressly adopts the mesne process, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws:

which, of course, included all the regulations of the state laws as to bail and exemptions of the party from arrest and imprisonment; in regard, also, to writs of execution, and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares they shall be the same as were then used in the courts of the state. *Beers v. Haughton*.....\*329

PROMISSORY NOTES.

1. The general rule, as laid down by this court, in *Lenox v. Roberts*, 2 Wheat. 273, is, that the demand of payment of a promissory note should be made on the last day of grace; and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day. *Bank of Alexandria v. Swann*.....\*33
2. The law, generally speaking, does not regard fractions of a day; and although the demand of payment of a promissory note at the bank is required to be made during banking-hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject..... *Id.*
3. If the time of sending notice is limited to fractions of a day, it will always come in question how swiftly notice could be conveyed; the notice sent by the mail, the next day after the dishonor of the note, was in due time..... *Id.*
4. The law has prescribed no particular form for such notice; the object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof..... *Id.*
5. The note on which the suit was brought was for \$1400, made by H. P., in favor of the defendant in error, and the notice described it as for the sum of \$1457; in the margin of the note was set down in figures \$1457, and the special verdict found that the note was discounted at the bank, as for a note of \$1457. The defendant in error was not an indorser on any other note made by H. P., and discounted at the bank, or placed there for collection. This case falls within the rule laid down by this court in the case of *Mills v. Bank of United States*, 11 Wheat. 431, that every variance, however immaterial, is not fatal to the notice..... *Id.*

RULES OF COURT.

1. General rules of court of the district court

- of the United States for the eastern district of Louisiana. . . . . \*157
2. The circuit court of Ohio established a rule of court, conforming to the laws of Ohio, by which a person who had been discharged by the insolvent law of the state, was not to be imprisoned for his debts. An *exoneretur* was entered, so as to discharge the bail of the insolvent, in conformity with the law of Ohio, and the rules of the courts of Ohio; the circuit court acting under the provisions of the act of the 19th of May 1828, regulating process and proceedings in the courts of the United States. Under the authority conferred on the courts of the United States by the acts of 1789 and 1792, there would be no solid objection to the decision of the circuit court of Ohio, in this case; but it is directly within, and governed by, the process act of the 19th of May 1828, ch. 63. *Beers v. Haughton*. . . . . \*330

SET-OFF.

1. The rule as to set-off, in questions arising exclusively under the laws of the United States, cannot be influenced by any local law or usage; the rule must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government. *United States v. Robeson*. . . . . \*319
2. When a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it; he may set up the claim as a credit, in a suit brought against him, for any balance of money claimed to be due by the government; and when the vouchers are not in the power of the defendant, before the trial, or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the off-set may be submitted to the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of set-off, in an action between individuals; and the same rule governs in an action brought by the government. . . . . *Id.*

SPECIFIC PERFORMANCE.

1. A bond was executed in 1787, by which the obligor bound himself to pay 100*l.* for a horse, or to make over to the obligee his interest in a certain entry and warrant of land; and if the deed or grant for the land should issue to him, to transfer the land by deed, and to warrant and defend the said

deed; the obligor elected to pay the bond by giving the land for the same; he made no valid conveyance of the land in his lifetime; but it was taken possession of by the obligee, and had ever since been occupied, under the title so acquired, by the latter. After the son and sole heir of the obligor came of age he commenced an action of ejectment for the land; and those who claimed title under the obligee filed a bill for an injunction, and that the defendant, the plaintiff in the ejectment, be decreed to convey the land, according to the stipulations in the bond; this bill was filed in 1822. The court said, in considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact that occurs to the mind is, the remoteness of the transaction; nearly half a century has elapsed, since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age; it was executed, if at all, when the country was new and unsettled, and the parties to it seem to have been illiterate men, and unacquainted with business transactions; these circumstances are referred to, not to show that this bond should be received without proof, but to show that as strict proof should not be required of its execution, as if it were of recent date; the law makes some allowance for the frailties of memory, and where a great length of time has elapsed, since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question. *Coulson v. Walton*. . . . . \*62

See *King's Heirs v. Thompson*, \*204.

STATE LAWS.

1. State laws cannot control the exercise of the powers of the national government, nor in any manner limit or affect the operation of the process or proceedings in the federal courts; the whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress; so far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws, directly, by substantive enactments; or, they may confide the authority to adopt them, to the courts of the United States. *Beers v. Haughton*. . . . . \*329
2. The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the

states in the Union, in cases to which they respectively apply; the judicial power conferred on the general government by the constitution, extends to many cases arising under the laws of the different states; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of, and administer, the jurisprudence of all the states; that jurisprudence is, then, in no just sense, a foreign one, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same, as the laws of the United States are taken notice of in those courts. *Owings v. Hull*.....\*607

STATE MAGISTRATES.

See AFFIDAVITS: PERJURY.

TRIAL BY JURY.

1. When there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instructions, which will take from the jury the right of weighing what effect the evidence shall have. An instruction founded on part of the evidence, is erroneous. *Greenleaf v. Birth*.....\*292
2. The court was requested to say to the jury, that the facts given in evidence on the trial of the case, did not import such a lending as would support the defence of usury. The court was asked to usurp the province of the jury, and to decide on the sufficiency of the testimony, in violation of the well-established principle, that the law is referred to the court, the fact to the jury. *Scott v. Lloyd*.....\*418
3. An instruction to the jury which would separate the circumstances of the case from each other, and the object of which is, to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one in itself amounted to usury, ought not to be given. *Id.*
4. The court ought not to instruct, and, indeed, cannot instruct, on the sufficiency of evidence; but no instruction to the jury should be given, except upon evidence in the case; where there is evidence on a point, the court may be called upon to instruct the jury on the law, but it is for them to determine on the effect of evidence. *Chesapeake and Ohio Canal Co. v. Knapp*.....\*541

USURY.

1. The branch Bank of the United States, at Lexington, Kentucky, having in its posses-

sion a large amount of the notes of the Bank of Kentucky, on which the latter had agreed to pay interest yearly, until they should redeem the said notes in specie, at the earnest solicitation of the borrower, loaned, on a promissory note, payable, with interest, in three years, the sum of \$5000 in those notes and in a check on the Bank of Kentucky, by which the debt due to the Bank of the United States from the Bank of Kentucky was diminished to the amount of the loan; the borrower, at the time of the loan, declared the notes of the Bank of Kentucky equivalent, for his purposes, to gold or silver. The Bank of Kentucky, long before the note given for the loan became due, redeemed their notes held by the Bank of the United States, and paid all the debt due to that bank, with the interest due thereon: *Held*, that there was no usury in this transaction. *Bank of United States v. Wagener*.....\*378

2. In constructing the usury laws, the uniform construction, in England, has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for, and to take, usurious interest; for if neither party intend it, and act *bona fide* and innocently, the law will not infer a corrupt agreement.....*Id.*
3. There was no taking of usury, and no reservation of usury, on the face of this transaction; the case, then, resolves into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device, or shift, to reserve or take usury.....*Id.*
4. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it; he may possess bank-notes which to him are of par value, in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less; if he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bona fide* what it purports to be, the law will not set aside the contract; for it is no violation of any public policy against usury.....*Id.*
5. The statute against usury not only forbids the direct taking more than six per centum per annum for the loan or forbearance of any sum of money; but it forbids any shift or device by which this prohibition may be evaded, and a greater interest be in fact secured; if a larger sum than six per cent. be not expressly reserved, the instrument will not of itself expose the usury, but the

real corruptness of the contract must be shown by extrinsic circumstances, which prove its character. *Scott v. Lloyd*. . . \*418

6. The statute declares, "that no person shall, on any contract, take, directly or indirectly, for loan of any money, &c., above the value of six dollars, for the forbearance of one hundred dollars, for a year." It has been settled, that to constitute the offence, there must be a loan, upon which more than six per cent. interest is to be received, and it has been also settled, that where the contract is, in truth, for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury, if more than legal interest be secured. . . . *Id.*

See ANNUITIES.

VENDOR AND PURCHASER.

1. Under a power of attorney granted to him to sell personal property in New Orleans, given by constituents residing in Baltimore, the attorney sold certain slaves, without conforming to the provisions of the laws of Louisiana regulating such sales; the property sold was recovered from the purchaser by a paramount title; and he instituted a suit against the grantors of the power of attorney, to recover the money paid to the attorney, but which had not been paid over to his principal, he having become insolvent: *Held*, that the plaintiff, in order to recover in the suit, should have proved that the sale of the slaves was in conformity with the laws of the state of Louisiana. *Owings v. Hull*. . . . \*607
2. The purchaser was bound to see whether the agent acted within the scope of his powers; and at all events, he was bound to know, that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana; the principals could never be presumed to authorize him to violate those laws; and the purchaser, purchasing a title invalid by those laws, must have purchased it with full knowledge. . . . *Id.*

WARRANT OF DISTRESS.

See CONSTRUCTION OF STATUTES OF THE UNITED STATES: JUDGMENT.

WILLS AND PROBATE OF WILLS.

1. The testator made his will, stating that "being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will;" he returned from the journey, and died many years after-

wards. This is not a conditional will; the instrument taking effect as a will, is not made to depend upon the event of the return or not of the testator from his journey; there is, therefore, no color for annulling the will, that it was conditional. *Tarver v. Tarver*. . . . \*174

2. In the case of *Armstrong v. Lear*, 12 Wheat. 175, it was said by this court, that no other evidence of there being a will can be received by the court, than such as would be sufficient, in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence in all questions respecting personalty. But the rule there laid down does not apply to this case; here, the complainant set up the will as a source of his title, and was bound to prove it; this must be done by the probate, which must be set forth in the bill; in this case, the complainant had set forth a copy of the instrument in his bill, alleging it was conditional, and therefore, not valid; the defendant was under no obligation to produce any probate; everything, by the complainant's own showing, was before the court. . . . *Id.*
3. An original bill will not be sustained, on the allegation that the probate of the will is void; if any error was committed by the court of Dallas county, in admitting the will to probate, it should have been corrected by an appeal to the next term of the supreme court in chancery, or in the district of Washington, to the superior court of that district, according to the law of Alabama. . . . *Id.*
4. The words of a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real as well as the personal estate for the payment of debts. *Fenwick v. Chapman*. . . . \*461
5. The language of wills is not of universal interpretation, having the same import, in all countries, and under all circumstances; they are supposed to speak the sense of the testator, according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them; unless there is something in the language which compels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs the distribution thereof, unless it is manifest, that the testator had the laws of some other country in view. *Harrison v. Nixon*. . . . \*483
6. No one can doubt, if a testator, born and domiciled in England, during his life, by his

will, gives his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to, and be governed by, the import of the terms, in the sense of the laws of England; the import of them might be very different, if the testator were born and domiciled in France, in Louisiana, Pennsylvania or Massachusetts..... *Id.*

- 7. A will of personalty speaks according to the testator's domicile, when there are no other circumstances to contract the application. To raise the question what the testator meant, it must first be ascertained, where

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was his domicile, and whether he had reference to the laws of that place, or to the laws of a foreign country.....*Id.*

WRIT OF ERROR.

- 1. A writ of error will not lie, in a case in which a circuit court had awarded a writ of restitution, in an action of ejection, the marshal having erroneously executed a writ of *habere facias possessionem*, which had been previously issued in the case. *Smith v. Trabue's Heirs*.....\*4











