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OF THE

PRINCIPAL MATTERS.

ADMINISTRATORS AND EXECUTORS.

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ADMIRALTY.

1. The jurisdiction of courts of admiralty in torts depends entirely on locality, and this court have heretofore decided that it extends to places within the body of a county. The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Philadelphia, Wilmington, and Baltimore Railroad Co.* v. *Philadelphia and Havre de Grace Steam Towboat Co.*, 209.
2. Hence, where a railroad company employed contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury. *Ibid.*
3. That the vessel so injured was prosecuting her voyage on Sunday, is no defence for the railroad company. The statute of Maryland and the cases upon this point examined. *Ibid.*
4. Where there was conflicting testimony in the court below upon the amount of damages sustained, and there was evidence to sustain the decree, this court will not reverse the decree merely upon a doubt created by conflicting testimony. *Ibid.*
5. In a collision which took place in the Chesapeake bay between a steamer and a sailing vessel, the steamer was in fault. *Haney* v. *Baltimore Steam Packet Co.*, 287.
6. It was the captain's watch, and his duty to be on deck, which he was not. *Ibid.*
7. The only man on deck, acting as pilot, lookout, and officer of the deck, was not in the proper place for a lookout to be. *Ibid.*
8. A former decision of this court referred to, indicating the proper place for a lookout. *Ibid.*
9. When the collision was impending, the order on the steamer was to starboard the helm instead of porting it, the schooner having previ-

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ously kept on her course, as the rules of navigation required her to do. *Ibid.*
10. In a collision which took place between two schooners in the Chesapeake bay, the colliding vessel, being the larger, and fastest sailer, and attempting to pass the smaller to windward, was in fault, because there was not a sufficient lookout. *Whitridge* v. *Dill*, 448.
11. The absence of a lookout is not excusable, because of an accident which had happened, and which required all hands to be called to haul in the damaged mainsail. *Ibid.*
12. She was also in fault, because, being not sufficiently to the windward to have passed the other vessel in safety, she did not seasonably give way and pass to the right, the wind being from the northwest, and both vessels directing their course north by east, the smaller vessel laying one point closer to the wind than the larger. *Ibid.*
13. Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. *Ibid.*
14. Cases cited to illustrate this principle. *Ibid.*
15. Where a decree was made by the Circuit Court, sitting in admiralty, that two persons should pay freight, one in the sum of $583.84, and the other in the sum of $1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than $2,000. *Clifton* v. *Sheldon*, 481.
16. The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal. *Ibid.*
17. The admiralty jurisdiction of the courts of the United States extends to contracts of charter-party and affreightment. These are maritime contracts within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty, by process either *in rem* or *in personam*. *Morewood* v. *Enequist*, 491.
18. Appellants should not expect this court to reverse a decree of the Circuit Court, merely upon a doubt created by conflicting testimony. *Ibid.*

AGENTS.
1. The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal. *Oelricks et al.* v. *Ford*, 49.

ALABAMA, STATE OF.
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ALIENS.
1. The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decisions. *Middleton* v. *McGrew*, 45.

APPEAL BOND.

1. Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants within which to file the bond. If they complied with the order, the appeal was to stand; otherwise, to be dismissed. *Anson, Bangs, and Co.* v. *Blue Ridge Railroad Co.*, 1.
2. The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error. *Ibid.*

APPEALS.

1. Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter. *Day et al.* v. *Washburn*, 309.

BARON AND FEME.

See Married Women.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Commercial Law.

CALIFORNIA.

1. Where two persons appear to have conflicting claims to land in California, and the United States do not appear to have any interest in the matter, and the case is brought to this court by proceedings to which the United States are a party, this court will remand the record to the court in California, with directions to allow the contesting parties to proceed in the manner pointed out by the act of Congress passed in 1851. *United States* v. *White*, 249.
2. The general title of Sutter to land in California again decided to convey no valid title. *United States* v. *Bennitz*, 255.
3. Sutter's general title to lands in California again examined, together with the historical events which preceded and attended it. The court again decides that claims under this title are not valid. *United States* v. *Rose*, 262.
4. Where an island in the bay of San Francisco, in California, was claimed, not under the colonization law of 1824, or the regulations of 1828, but under certain special orders issued to the Governor by the Mexican Government, and the Governor was alleged to have issued a grant in 1838, the petitioner never took possession or exercised acts of ownership of the island under that decree, which therefore affords no foundation for his claim. *United States* v. *Osio*, 273.
5. In 1839, a petition was addressed to the Governor, praying for a new

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title of possession, and it was alleged that a grant was issued, but it does not appear that it was recorded according to law, nor is the testimony satisfactory to show that it was signed by the Governor. *Ibid.*

6. Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did not subscribe the instrument as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim without some other confirmatory evidence. *Ibid.*
7. The special orders above mentioned were contained in a despatch from the Mexican Government, giving the power to the Governor, in concurrence with the Departmental Assembly. *Ibid.*
8. This provision differs essentially from the regulations of 1828, under which the action of the Assembly was separate and independent, and subsequent to the action of the Governor. But the power conferred by this despatch could not be exercised by the Governor without the concurrence of the Departmental Assembly. Both must participate in the adjudication of the title; and as the Assembly did not concur in this grant, it is simply void. *Ibid.*
9. Where a grant of land in California was made in 1841, under the colonization laws, which looked to the settlement and improvement of the country, and eleven years elapsed, during which time the applicant took no step towards the completion of his title or the fulfilment of the obligations it imposed, nor is there any expediente in the archives to show the segregation of the land from the public domain, nor was there any delivery of judicial possession, nor any other assertion of right, the claimant must be considered guilty of an unreasonable delay in fulfilling his part of the engagement, and has slept for a lengthened period on his rights, coming forward at last, when circumstances have changed in his favor, to enforce a stale demand. *United States* v. *Noe*, 312.
10. The excuse for the laches of the applicant, that the Indians were numerous and hostile, is not sufficient. That fact existed at the date of the decree in 1841. *Ibid.*
11. The claim must be treated as one abandoned prior to the date of the treaty of Guadalupe Hidalgo, and is not entitled to confirmation. *Ibid.*
12. Where proceedings for a grant of land in California were commenced by a Mexican in 1838, and continued from time to time, and the claimant has been in possession since 1840, and no suspicion of the truth of the claim exists, this court will not disturb the decree in his favor made by the court below. *United States* v. *Alviso*, 318.
13. This court again decides that a claim to land in California, founded upon "Sutter's general title," is not valid. *United States* v. *Murphy*, 476.
14. Where the archives of California show that a petition for land was presented to the justice of the peace and military commandant at New Helvetia in 1846; that a favorable report was made on the 1st May, 1846; that the prefect certified, on the 18th May, 1846, that the land was vacant; that the Governor, on the 11th of June, 1846, made an

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order for a titulo in form, and the claimant produced from his custody a titulo dated at Los Angeles on the 20th of July, 1846, there is a departure from the regular and usual mode for securing lands under the colonization laws. *United States* v. *Pico et al.*, 321.

15. The titulo bears date on the 20th of July, and the 7th of July, 1846, is the epoch established by the act of Congress of 1851 and the decisions of this court, at which the power of the Governor of California, under the authority of Mexico, to alienate the public domain, terminated. *Ibid.*

16. The evidence that the claimant occupied the land in 1847 is not satisfactory, or that he made any assertion of claim or title until the presentation of the claim in 1853 to the board of commissioners. *Ibid.*

17. When this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon. *United States* v. *Gomez*, 326.

18. A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. *Ibid.*

19. In the present aspect of this case, such a motion is not to be considered. *Ibid.*

20. Cases cited to sustain the above principles. *Ibid.*

21. A grant of land in California, purporting to have been made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico as acting Governor, and countersigned by Jose Maria Covarrubias, secretary, adjudged to be false and forged. *Luco et al.* v. *United States*, 515.

22. Where a claimant of land in California produced as evidence of his title a grant, dated on the 10th February, 1846, made by Pio Pico, "first member of the Assembly of the Department of the Californias, and charged with the administration of the law in the same," the claimant had neither a legal nor an equitable title. *United States* v. *Bolton*, 341.

23. He had no legal title, because—

1. He had not complied with the mode of acquiring a legal title which is found in the regulations of 1828. These require a petition to the Governor, an inquiry by him into certain circumstances, which being satisfactory, a formal grant was to be executed. The petition, grant, and map, were to be recorded. This record was the evidence of grant, and the Government is entitled to require the production of that official

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record. The degree of record evidence required was adjudged in the case of Cambuston, 20 Howard, and of Fuentes, 22 Howard.

2. The claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to the grantee before he could be heard to prove their loss and their contents.

3. That the grantee had presented a petition, is stated incidentally, but indistinctly, by a single witness, and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor. And that the grant was confirmed by the Departmental Assembly early in 1846 is not credible, not being sustained by the journal, and no such confirmation being found in a list of grants which were confirmed.

4. It is not probable, from all the historical circumstances of the case, that the archives have been lost. *Ibid.*

24. He had no equitable title, because—

1. He was a secular priest, and a grant of mission lands to a priest for his own benefit was not heard of in any other case.

2. He was in necessitous circumstances, and subsisted on alms.

3. A condition was, that he should pay the debts of the mission, and there is no evidence of the amount of this debt, to whom it was owing, or how it was to be paid.

4. Until the spring of 1850, none of the large community then building up a city on the land had any suspicion that he claimed to be the owner of ten thousand acres of land, with an outer boundary including three other grants, and embracing nearly thirty thousand acres.

5. He had made some claim for the church, as a priest and administrator of the mission; and when no title was found to justify this, then, for the first time, he made this claim on his own account.

6. In November, 1849, he went to Santa Barbara, and on his return made use of expressions indicating that the acquisition of the deed was newly made. The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither the priest nor his agent were examined as witnesses, nor was Pio Pico interrogated in reference to the authenticity of the grant. *Ibid.*

25. Where there were two separate claimants of land in California, both claiming under one original grant, and the surveyor, in running out their lines, disregarded the limits of the original grant, and included within one of the surveys a large portion of Government land, the Commissioner of the General Land Office was right in refusing to issue a patent founded on such erroneous survey. *Castro* v. *Hendricks*, 438.

26. By a special dispatch from the Minister of the Interior, under the order of the Mexican President, dated 20th July, 1838, the Governor of California, with the concurrence of the Departmental Assembly, was authorized to grant the islands near the coast. *United States* v. *Castillero*, 464.

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27. See the case of the United States *v.* Osio, reported in this volume.
28. On the same day, another special dispatch was sent, reserving out of the general grant such island as Castillero might select, and directing a grant to be made to him for it, which was done. *Ibid.*
29. All the signatures being proved to be genuine, and the index of the concession being found in its proper place amongst the Mexican archives, the claim of the grantee must be confirmed. *Ibid.*
30. There was no necessity, in this case, for the concurrence of the Departmental Assembly. *Ibid.*
31. In California, where a will with its codicils was offered in evidence, the testator of which died in 1848, an objection to its admission because it had never been admitted to probate was not well founded. The codicil was not inadmissible as testimony on that account. *Adams* v. *Norris*, 353.
32. Neither was it inadmissible because the witnesses who were present at its execution had never been examined to establish it as an authentic act. *Ibid.*
33. An objection to the admission of the codicil, because it does not appear on the face of the instrument that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained, was not well founded. *Ibid.*
34. Cases cited to establish this point. *Ibid.*
35. It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. *Ibid.*
36. The Spanish law upon this point examined, and also the decisions of the State courts in California. *Ibid.*
37. It was proper in the court to instruct the jury that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made. *Ibid.*
38. With regard to the proof of the will, as all the witnesses were dead, evidence of their signatures and that of the testator was admissible, and also of a declaration by him that he had made a will with a similar devise. The sindico, who attested it, should be counted among the witnesses. *Ibid.*
39. The binding force and legal operation of the codicil are to be determined by the law as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of trial. It was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by law were complied with. *Ibid.*
40. Where a grant of land in California had this clause, viz: "The tract of which grant is made is of the extent mentioned in the plan, which

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goes with the expediente, with its respective boundaries; the officer giving the possession shall cause it to be measured, according to the ordinance, to mark boundaries; the surplus to remain for the nation, for its uses," according to the face of the grant, it must be confined to two leagues mentioned in the petition. Otherwise, there could be no surplus. *Yontz* v. *United States*, 495.

41. As there was no legal title, but only an equity, this court holds, according to previous decisions, that the petition and concession must be taken together, in which case the result would be the same, viz: that the claimant must be confined to two leagues. *Ibid.*

42. A decree of the District Court affirmed, in a case where the genuineness of the grant of land in California and the fulfilment of its conditions are established. *United States* v. *Heirs of Berreyesa*, 499.

43. This court declines to give instructions to the court below relative to the location and survey of this grant. No question was decided in the court below upon this subject, and it is to be presumed it will act according to the established rules on the subject. *Ibid.*

CARRIERS BY WATER.

See COMMERCIAL LAW.

CHANCERY.

1. The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different States, and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a State. *Green's Administratrix* v. *Creighton*, 90.

2. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Ibid.*

3. Although at law a creditor cannot sue the surety upon an administration bond until he has obtained a judgment against the administrator, yet it is not so in equity; and in the present case, where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of equity is required to call for a discovery of the amount and nature of the assets in hand. *Ibid.*

4. Where the surety upon an administration bond was sued, and judgment recovered against him in Mississippi, and a court in Tennessee (where the principals upon the bond resided) decided that but a small amount was due by the administrators upon their account, and that the judgment against the surety, had been obtained in defiance of an injunction issued by the Tennessee court, and also by fraudulent representations made to the surety, and it was admitted that the decree in Tennessee was supported by the proofs, the surety was entitled to relief by the court in Mississippi, and the creditor must be perpetually enjoined from proceeding upon his judgment. *Cage's Executors* v. *Cassidy*, 109.

5. Where a bill in chancery was filed by persons residing in Canada, claim-

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ing title to property in Detroit which had been in the exclusive possession of the defendants and those claiming under them since 1793, without, as far as appears, any right being set up by the complainants or by those claiming under them to the title or the possession of the premises until the filing of the bill, or any claim to the rents and profits or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs, the case is one resting upon the enforcement of an implied trust, where courts of equity follow the courts of law in applying the statute of limitations. *Beaubien* v. *Beaubien*, 190.

6. The averments of concealment and fraud on the part of the defendants, which are made in the bill for the purpose of withdrawing the case from the operation of the statute, are too general and indefinite to have that effect. *Ibid.*

7. No acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood and almost in sight of the city which has, in the mean time, grown up on the premises. *Ibid.*

8. Where a levy is made upon goods and chattels under a fi. fa., the officer may confide them to another, for safe keeping, until there has been a settlement of the judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court. *Very* v. *Watkins*, 469.

9. Where the receiver had the custody of goods, and the complainant was ordered to select such a portion of these goods as would pay his claim by a decree of the court below, which was affirmed by this court, and which he refused to do, and this portion was accordingly set apart, the receiver became from that time a trustee for the complainant. *Ibid.*

10. The receiver was entitled to hold this property, as trustee, until a demand was made upon him in proper form by the complainant to surrender it. This proper form should have been under a certified copy of that part of the decree which permitted the complainant to demand the property, and which required the receiver to surrender it with the complainant's acknowledgment of its receipt. These papers should then be filed in court, for the protection of the trustee. *Ibid.*

11. Where a bill in chancery was filed to set aside a deed as being fraudulent against creditors, and it is charged in the bill that the consideration mentioned in the deed was not paid, it is not satisfactory that the defendant relies upon the answer that it was paid, considering the answer, which is responsive to the bill, as evidence of the payment, when the execution of the deed is surrounded by circumstances of suspicion. *Callan et al.* v. *Statham et al.*, 477.

12. In the present case, the payment of the purchase money was alleged to be a secret transaction between the vendor and vendee, and there were other circumstances attending the deed which surrounded it with

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suspicion. The evidence of payment must have been in the possession of the defendants, and they ought to have produced it. *Ibid.*

13. The title of the defendant, although encumbered, could have been made clear; the price alleged to have been paid was inadequate; the vendor remained in possession and collected all the rents without accounting to the vendee; the circumstance that the vendor was heavily in debt, and suits pending and maturing to judgment when he made the deed—all these things induce this court not to disturb the decree of the court below, which directed the property to be sold for the satisfaction of creditors. *Ibid.*
14. Where a married woman became a trustee of land for the benefit of her son in law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed. *Gridley et al.* v. *Wynant*, 500.
15. These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. *Ibid.*
16. Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. *Ibid.*
17. The alleged illegality of the consideration of the deed of trust—viz: that it was intended to protect the property of her son in law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. *Ibid.*

COUPON BONDS ISSUED BY RAILROAD COMPANIES.
See RAILROAD COMPANIES.

COMMERCIAL LAW.

1. The general rules which regulate the delivery of goods by a carrier, by land or water, explained. *Richardson* v. *Goddard*, 28.
2. Where the master of a vessel delivered the goods at the place chosen by the consignees, at which they agreed to receive them, and did receive a large portion of them after full and fair notice, and the master deposited them for the consignees in proper order and condition at midday, on a week day, in good weather, it was a good delivery according to the general usages of the commercial and maritime law. *Ibid.*
3. The fact that the Governor of the State had appointed a day as a general fast day, did not abrogate the right of the master to continue the delivery of the goods on that day. Holiday is a privilege, not a duty. *Ibid.*
4. There was neither a law of the State forbidding the transaction of business on that day; nor a general usage engrafted into the commercial and maritime law, forbidding the unlading of vessels on the day set

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apart for a church festival, fast, or holiday; nor a special custom in the port, forbidding a carrier from unloading his vessel on such a day. *Ibid.*

5. In the absence of these legal restrictions, the master had a right to continue the delivery of the goods on the wharf on a fast day. *Ibid.*
6. Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish an usage. *Oelricks et al.* v. *Ford*, 49.
7. And, moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument. *Ibid.*
8. Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage, was inadmissible, as these were merged in the written instrument. *Ibid.*
9. Where a charter-party stipulated that a vessel should receive a full cargo, the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers. *Ogden* v. *Parsons*, 167.
10. The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port. (See 20 Howard, 571.) *Irvine* v. *Redfield*, 170.
11. Where the notarial protest of a bill of exchange stated that the bill had been handed to him on the day it was due, that he went several times to the office of the acceptors of it in order to demand payment for the same, and that at each time he found the doors closed, and "no person there to answer my demand," this was a sufficient demand. *Wiseman* v. *Chiapella*, 368.
12. It was not necessary to call individually upon one of the partners of the firm who had a residence in the city, or to make any further inquiries for the acceptors, than the repeated calls at their office. *Ibid.*
13. Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor have been deemed proper; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case. *Ibid.*
14. In making a demand for an acceptance, the party ought, if possible, to see the drawee personally, or some agent appointed by him, to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business. But a demand for payment need not be personal, and it will be sufficient if it shall be made at one or the other place in business hours. *Ibid.*
15. The cases upon these points examined. *Ibid.*
16. When, upon presentment for acceptance, the drawee does not happen

COMMERCIAL LAW, (*Continued.*)

to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer, whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. *Ibid.*

17. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested. *Ibid.*
18. Presenting a bill, under such circumstances, at the place of business of the acceptor, will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence. *Ibid.*
19. Where a suit was brought against a notary in Louisiana for negligence in making a protest, he will be protected from responsibility by showing that the protest was made in conformity with the practice and law of Louisiana, where the bill was payable. *Ibid.*
20. An open or running policy of insurance upon "coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels," contained also the following clause, viz: "Having been paid the consideration for this insurance by the assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported." *Orient Mutual Insurance Co.* v. *Wright et al.*, 401.
21. This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. *Ibid.*
22. The rules explained which govern this class of policies. *Ibid.*
23. But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk in case the vessel rates lower than A 2. *Ibid.*
24. Unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding. *Ibid.*
25. Hence, the instruction of the court below was erroneous, which held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle. *Ibid.*

COMMERCIAL LAW, (*Continued.*)

26. The parties stipulated that the additional premium should be fixed when the risk was made known. *Ibid.*
27. The cases upon this point cited. *Ibid.*
28. The principles with respect to a policy of insurance in the preceding case of the Orient Mutual Insurance Company against Wright, reaffirmed in the present case. *Sun Mutual Insurance Co.* v. *Wright et al.*, 412.
29. In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time. *Ibid.*

CONSTITUTIONAL LAW.

1. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper* v. *Scheimer*, 235.
2. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
3. The statutes of Mississippi provide that no plea of non est factum shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation. *Bell* v. *Corporation of Vicksburg*, 443.
4. A plea of that kind was filed without the affidavit, and demurred to by the plaintiff. *Ibid.*
5. Although, upon the general principles of pleading, a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the State courts where such a statute exists have held that the plea of non est factum is demurrable if there be no affidavit, and the course of practice in the Circuit Court conforms to the State practice, this court also holds that such a plea is demurrable. *Ibid.*
6. The following is an article of a treaty concluded between the King of Wurtemberg and the United States in 1844, (8 Stat. at L., 588:) "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases." *Frederickson et al.* v. *State of Louisiana*, 445.
7. This article does not include the case of a citizen of the United States dying at home, and disposing of property within the State of which he was a citizen, and in which he died. *Ibid.*
8. Consequently, where the State of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

9. Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings, changing the cause of action, or by the proviso to the 11th section. *Green* v. *Custard*, 484.
10. The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the State codes to be introduced on their records. *Ibid.*
11. Where proceedings are instituted in the State court of Iowa under certain articles of their code, and then removed into the United States court, although these proceedings do not conform to the mode prescribed for chancery proceedings in the courts of the United States, yet, if the pleadings and proofs show the matter in dispute between the parties, this court will adjudicate the questions which they present. *Gridley et al.* v. *Westbrook*, 503.
12. The boundary line between the States of Georgia and Alabama depends upon the construction of the following words of the contract of cession between the United States and Georgia, describing the boundary of the latter, viz: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof." *State of Alabama* v. *State of Georgia*, 505.
13. It is the opinion of this court that the language implies that there is ownership of soil and jurisdiction in Georgia, in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme drought of the summer or autumn. *Ibid.*
14. The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the above-recited paragraph. *Ibid.*
15. By the contract of cession, the navigation of the river is free to both parties. *Ibid.*
16. See the case of Howard *v.* Ingersoll, 13 Howard, 381, and the correction of its syllabus in the errata in 14 Howard in this, that "the boundary line runs along the top of the high western bank," instead of "the boundary line runs up the river, on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water wherever it covers the bed of the river within its banks." *Ibid.*

CONTRACT.

How far affected by Usage, see USAGE; made by Railroad Companies, see RAILROAD COMPANIES.

1. Where there was a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." *Benjamin* v. *Hillard*, 149.
2. This contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable. *Ibid.*
3. An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled, will not operate to discharge the guarantor. There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other, so as better to arrive at their end, the surety cannot complain. *Ibid.*
4. So, where the machinery delivered was imperfect, and the two contracting parties had exchanged receipts, but the imperfection was afterwards discovered, and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it. *Ibid.*
5. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. *Ibid.*
6. The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery. *Ibid.*
7. Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. *Dermott* v. *Jones*, 220.
8. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. *Ibid.*
9. The general rule of law is, that whilst a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in indebitatus assumpsit, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law im-

CONTRACT, (*Continued.*)

plies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of indebitatus assumpsit is maintainable. *Ibid.*

10. The case must be remanded to the Circuit Court, to be tried upon such counts as are in the original declaration, which charges the defendant in the sum of $5,000 for work and labor done, for materials furnished and used by the defendant in the erection and finishing certain stores and buildings in the city of Washington; and upon the money counts for a like sum paid by the plaintiff for the defendant; for a like sum had and received, and for a like sum paid, laid out, and expended, by the plaintiff, for the use of the defendant, at her request. And in such action the defendant may recoup the damages which she has sustained from the imperfect execution of the work. *Ibid.*

11. Where there was a company incorporated for the purpose of making screws, and they were sued by certain persons with whom they had been in the habit of dealing, for not supplying a sufficient quantity of the manufactured article, according to orders which had been given and received, the defence was, that the supply manufactured was not equal to the demand, and that the plaintiffs knew that the articles were furnished to customers in regular order, according to date. *Bliven et al.* v. *New England Screw Company*, 420.

12. Such custom was not a sufficient defence, unless it was known to the other contracting party, and formed a part of the contract. *Ibid.*

13. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*

14. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*

15. The evidence in this case proved that the plaintiffs knew of the usage of the defendants to supply orders as fast as the articles could be made, and according to a list kept in a book. *Ibid.*

16. It was correct in the court to construe this evidence, and to instruct the jury that if they believed the evidence, it showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted and in proportion with each other, and not in full, according to the strict terms thereof. *Ibid.*

17. Where the screw company sued persons who had received the manufactured articles, and the defence was, that the whole amount which had been ordered had not been delivered, the contracts for the sale and delivery of the screws were subject to the custom of the plaintiffs to fill the same in part only. *Ibid*, 433.

18. See the report of the preceding case. *Ibid.*

CORPORATIONS.

See Railroad Companies.

CITY CORPORATIONS.

1. The charter of the town (now city) of Oakland, in California, which conferred upon the corporation power to regulate ferries, did not give an exclusive power, and therefore the corporation did not possess the power to confer upon others an exclusive privilege to establish them. *Minturn* v. *Larue et al.*, 435.
2. The difference pointed out between this charter and those grants which are exclusive. *Ibid.*

COUNSEL FEES.

1. Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. This point has been directly ruled by this court, and is no longer an open question. *Teese* v. *Huntingdon*, 2.

CURATOR AD HOC.

1. Where a party residing in Maryland sold land in Louisiana with a general warranty to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in, this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a *curator ad hoc* was not sufficient. *Flowers* v. *Foreman*, 133.
2. An action of assumpsit having been afterwards brought against him in the Maryland court by the parties interested, the statute of limitations of Maryland was considered to be applicable to the case. *Ibid.*
3. The eviction of the vendee took place when he held the land under a title different from that which had been conveyed to him by his grantor, without the necessity of the execution of a writ of possession. *Ibid.*

DUTIES AT THE CUSTOM-HOUSE.

1. The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port. (See 20 Howard, 571.) *Irvine* v. *Redfield*, 170.

EJECTMENT.

1. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper* v. *Scheimer*, 235.
2. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
3. It is also the settled doctrine of this court, that a patent carries the fee, and is the best title known to a court of law. *Ibid.*

EVIDENCE.

1. For the purpose of impeaching a witness, a question was asked of another witness, "What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below. *Teese* v. *Huntingdon*, 2.
2. The elementary writers and cases upon this point examined. *Ibid.*
3. Another witness was asked what was the reputation of the first witness for truth and veracity, who replied that he had no means of knowing,

EVIDENCE, (*Continued.*)

not having had any transactions with him for five years. This question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote. *Ibid.*

4. Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. The cases upon this point examined. *Castle* v. *Bullard*, 172.
5. Where the cause of action against the defendants was, that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts at or about the same time, with a view to establish the intent of the defendants with respect to the matters charged in the declaration. *Ibid.*
6. The cases upon this point examined. *Ibid.*
7. So, also, evidence was admissible, to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent. *Ibid.*
8. Where there was a company incorporated for the purpose of making screws, and they were sued by certain persons with whom they had been in the habit of dealing, for not supplying a sufficient quantity of the manufactured article, according to orders which had been given and received, the defence was, that the supply manufactured was not equal to the demand, and that the plaintiffs knew that the articles were furnished to customers in regular order, according to date. *Bliven et al.* v. *New England Screw Company*, 420.
9. Such custom was not a sufficient defence, unless it was known to the other contracting party, and formed a part of the contract. *Ibid.*
10. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*
11. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*
12. The evidence in this case proved that the plaintiffs knew of the usage of the defendants to supply orders as fast as the articles could be made, and according to a list kept in a book. *Ibid.*
13. It was correct in the court to construe this evidence, and to instruct the jury that if they believed the evidence, it showed that the plaintiffs were chargeable with notice of the defendants' custom to fill their contracts only in the order in which they were accepted and in proportion with each other, and not in full, according to the strict terms thereof. *Ibid.*
14. Where a surety upon a bond is sued, a conversation between his co-surety (now dead) and a third person is not admissible in evidence for the purpose of fixing a liability upon the defendant. The co-surety, if alive, would not himself have been a good witness. *Very* v. *Watkins*, 469.

EVIDENCE, (*Continued.*)

15. A paper in the handwriting of the co-surety, offered to impeach the testimony of two witnesses, was not admissible. *Ibid.*

EVIDENCE OF USAGE.

See USAGE.

FAST DAY.

1. The fact that the Governor of the State had appointed a day as a general fast day, did not abrogate the right of the master to continue the delivery of the goods on that day. Holiday is a privilege, not a duty. *Richardson* v. *Goddard*, 28.
2. There was neither a law of the State forbidding the transaction of business on that day; nor a general usage engrafted into the commercial and maritime law, forbidding the unlading of vessels on the day set apart for a church festival, fast, or holiday; nor a special custom in the port, forbidding a carrier from unloading his vessel on such a day. *Ibid.*
3. In the absence of these legal restrictions, the master had a right to continue the delivery of the goods on the wharf on a fast day. *Ibid.*

FERRIES.

1. The charter of the town (now city) of Oakland, in California, which conferred upon the corporation power to regulate ferries, did not give an exclusive power, and therefore the corporation did not possess the power to confer upon others an exclusive privilege to establish them. *Minturn* v. *Larue*, 435.
2. The difference pointed out between this charter and those grants which are exclusive. *Ibid.*

GEORGIA, STATE OF.

See CONSTITUTIONAL LAW.

GUARANTY.

1. Where there was a contract for furnishing a steam engine, the following guaranty was made: "For value received, I hereby guaranty the performance of the within contract, on the part of Hopkins & Leach; and in case of non-performance thereof, to refund to Messrs. Hillard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." *Benjamin* v. *Hillard*, 149.
2. This contract is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a non-performance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs, to the extent to which the principals are liable. *Ibid.*
3. An acquiescence of both parties in the prolongation of the time within which the contract was to be fulfilled, will not operate to discharge the guarantor. There was no change in the essential features of the contract, and if the parties choose mutually to accommodate each other, so as better to arrive at their end, the surety cannot complain. *Ibid.*
4. So, where the machinery delivered was imperfect, and the two contract-

GUARANTY, (*Continued.*)
ing parties had exchanged receipts, but the imperfection was afterwards discovered, and the recipients of the machinery had to expend money upon it, the guarantor is responsible for it. *Ibid.*
5. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. *Ibid.*
6. The damages to be found should be such as would enable the plaintiffs to supply the deficiency, and the jury were not required to assume the contract price as the full value of such machinery. *Ibid.*

INSURANCE.
See POLICIES OF INSURANCE.

JURISDICTION.
1. The courts of the United States, as courts of equity, have jurisdiction over executors and administrators, where the parties to the suit are citizens of different States, and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a State. *Green's Administratrix* v. *Creighton*, 90.
2. In such a case, the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Ibid.*
3. Although at law a creditor cannot sue the surety upon an administration bond until he has obtained a judgment against the administrator, yet it is not so in equity; and in the present case, where the original debtor and his surety are both dead, insolvent, and a portion of the assets of the estate of the latter can be traced to the possession of his administrator and his surety, the power of a court of equity is required to call for a discovery of the amount and nature of the assets in hand. *Ibid.*
4. Where a decree was made by the Circuit Court, sitting in admiralty, that two persons should pay freight, one in the sum of $583.84, and the other in the sum of $1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than $2,000. *Clifton* v. *Sheldon*, 481.
5. The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal. *Ibid.*
6. Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings, changing the cause of action, or by the proviso to the 11th section. *Green* v. *Custard*, 484.
7. The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the State codes to be introduced on their records. *Ibid.*
8. The admiralty jurisdiction of the courts of the United States extends to contracts of charter-party and affreightment. These are maritime contracts within the true meaning and construction of the Constitution

JURISDICTION, (*Continued.*)
and act of Congress, and cognizable in courts of admiralty, by process either *in rem* or *in personam*. *Morewood et al.* v. *Enequist*, 491.
9. Appellants should not expect this court to reverse a decree of the Circuit Court, merely upon a doubt created by conflicting testimony. *Ibid.*

LANDS, PUBLIC.
For Public Lands in California, see California.
1. On the 8th of August, 1846, a grant of land was made to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river, from its mouth to the Raccoon fork, in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States. *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 66.
2. On the 15th of May, 1856, Congress passed an act granting to the State of Iowa, for the purpose of aiding in the construction of a railroad from Dubuque to a point on the Missouri near Sioux city, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road. The State of Iowa regranted the lands to the Dubuque and Pacific Railroad Company. *Ibid.*
3. The land in question is claimed under these two acts by the parties respectively. *Ibid.*
4. The title held under the act of 1846 must prevail, provided the grant extended to lands above the Raccoon fork. *Ibid.*
5. This court has jurisdiction to construe this act in the case now before it, the proceedings before the Executive department, extending through more than ten years, not being sufficient either to conclude the title or to control the construction of the act. *Ibid.*
6. Those proceedings stated. *Ibid.*
7. The grant was confined to lands between the mouth of Des Moines river and Raccoon fork; that was the river to be improved, on each side of which the strip of land granted was to lie. The historical circumstances connected with the grant sustain this view. *Ibid.*
8. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied. *Ibid.*
9. The claimant, under the act of 1846, cannot be considered as an innocent purchaser. The act of Congress was a grant to Iowa of an undivided moiety of the lands below Raccoon fork, and the officers of the Executive department had no further authority than to make partition of those lands. Having extended their acts to lands lying outside of

LANDS, PUBLIC, (*Continued.*)
the boundaries, their attempts to make partition were merely nugatory. *Ibid.*
10. The court is satisfied, from evidence before it, that this is not merely a fictitious action. *Ibid.*
11. It is the settled doctrine of this court, that no action of ejectment will lie on an entry made with the register and receiver of the land office, such being merely an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. *Hooper* v. *Scheimer*, 235.
12. The law is only binding on the State courts, and has no force in the Circuit Courts of the Union. *Ibid.*
13. It is also the settled doctrine of this court, that a patent carries the fee, and is the best title known to a court of law. *Ibid.*
14. Where there were two separate claimants of land in California, both claiming under one original grant, and the surveyor, in running out their lines, disregarded the limits of the original grant, and included within one of the surveys a large portion of Government land, the Commissioner of the General Land Office was right in refusing to issue a patent founded on such erroneous survey. *Castro* v. *Hendricks*, 438.
15. In a treaty made with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the President of the United States, "after the land shall have been surveyed, and the boundaries shall correspond with the public surveys." *Doe et al.* v. *Wilson*, 457.
16. Before this was done, one of these reservees made a conveyance by a deed in fee simple, with a clause of general warranty. In 1837, patents were issued for the reservations. *Ibid.*
17. This deed vested the title of the reservee in the grantee. The former was a tenant in common with the United States, and could sell his reserved interest; and when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantee took the interest which the reservee would have taken if living. *Ibid.*
18. A prayer to the court that the land patented was not the same as that reserved was properly refused, because the recital in the patent was conclusive evidence to the contrary. *Ibid.*

LIMITATION, STATUTES OF.
1. Where a party residing in Maryland sold land in Louisiana with a general warranty to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in, this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a *curator ad hoc* was not sufficient. *Flowers* v. *Foreman*, 133.
2. An action of assumpsit having been afterwards brought against him in the Maryland court by the parties interested, the statute of limitations of Maryland was considered to be applicable to the case. *Ibid.*
3. The eviction of the vendee took place when he held the land under a title

LIMITATION, STATUTES OF, (*Continued.*)
different from that which had been conveyed to him by his grantor, without the necessity of the execution of a writ of possession. *Ibid.*
4. Where a bill in chancery was filed by persons residing in Canada, claiming title to property in Detroit which had been in the exclusive possession of the defendants and those claiming under them since 1793, without, as far as appears, any right being set up by the complainants or by those claiming under them to the title or the possession of the premises until the filing of the bill, or any claim to the rents and profits or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as co-heirs, the case is one resting upon the enforcement of an implied trust, where courts of equity follow the courts of law in applying the statute of limitations. *Beaubien* v. *Beaubien*, 190.
5. The averments of concealment and fraud on the part of the defendants, which are made in the bill for the purpose of withdrawing the case from the operation of the statute, are too general and indefinite to have that effect. *Ibid.*
6. No acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim had commenced; and this, although the parties lived in the neighborhood and almost in sight of the city which has, in the mean time, grown up on the premises. *Ibid.*

LOUISIANA, STATE OF.
1. The following is an article of a treaty concluded between the King of Wurtemberg and the United States in 1844, (8 Stat. at L., 588:) "The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where said property lies shall be liable to pay in like cases." *Frederickson et al.* v. *State of Louisiana*, 445.
2. This article does not include the case of a citizen of the United States dying at home, and disposing of property within the State of which he was a citizen, and in which he died. *Ibid.*
3. Consequently, where the State of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed. *Ibid.*

MARRIED WOMEN.
1. Where a married woman became a trustee of land for the benefit of her son in law, and executed a deed (without joining her husband) to a bona fide purchaser, who had paid the purchase money to the cestui

MARRIED WOMEN, (*Continued.*)

que use, it was not necessary, under the circumstances of the case, for her husband to join in the deed. *Gridley et al.* v. *Wynant*, 500.

2. These circumstances were, that by executing the deed she did not defeat an estate to which her husband was entitled, nor did he claim adversely to the deed, but it was within the scope of her authority as trustee, and therefore will be sustained by a court of equity against her heirs. *Ibid.*
3. Her children, who were her heirs at law, having brought a suit at law to recover the land from the bona fide purchaser, a court of equity will interpose to restrain their proceedings. *Ibid.*
4. The alleged illegality of the consideration of the deed of trust—viz: that it was intended to protect the property of her son in law, who was insolvent—was not sufficient to destroy the independent equity of the bona fide purchaser, nor was it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. *Ibid.*
5. Where proceedings are instituted in the State court of Iowa under certain articles of their code, and then removed into the United States court, although these proceedings do not conform to the mode prescribed for chancery proceedings in the courts of the United States, yet, if the pleadings and proofs show the matter in dispute between the parties, this court will adjudicate the questions which they present. *Gridley et al.* v. *Westbrook*, 503.
6. The principle adopted in the preceding case respecting the execution of a deed by a married woman as trustee, is equally applicable to a deed executed under a power of attorney granted by her. *Ibid.*

MORTGAGE.

1. Where a mortgage was given to secure the payment of a note for $5,500, and such advances as there had been or might be made within two years, not to exceed in all an indebtment of six thousand dollars, and advances were made, the mortgage was good to cover the advances and the note for $5,500. *Lawrence* v. *Tucker*, 14.
2. The parties to the transaction so understood it, and acted upon it accordingly. *Ibid.*
3. In respect to the validity of mortgages for existing debts and future advances, there can be no doubt. This court has made three decisions directly and inferentially in support of them. *Ibid.*
4. A railroad company authorized to borrow money and issue their bonds, to enable themselves to finish and stock the road, may mortgage as security not only the then acquired property, but such as may be acquired in future. *Pennock et al.* v. *Coe.*, 117.
5. Although the maxim is true, that a person cannot grant what he has not got, yet, in this case, a grant can take effect upon the property when it is brought into existence, and belongs to the grantor in fulfilment of an express agreement, founded on a good and valid consideration, when no rule of law is infringed or rights of a third party prejudiced. The mortgage attached to the future acquisitions as described in it,

MORTGAGE, (*Continued.*)
from the time they came into existence, and were placed on the road. *Ibid.*
6. Hence, where second mortgagees and holders of bonds of a second issue brought suit upon those bonds, recovered judgment, issued execution, and levied it upon a part of the rolling stock, which was not in existence when the first mortgage was given, the judgment creditors must be postponed to the claims of the first mortgagees. *Ibid.*
7. In the present case, a reasonable interpretation of the statutes creating the corporation would justify it in making the road where it was made. *Ibid.*
8. A bondholder of a class covered by a mortgage to secure the class of bonds issued in case of insolvency of the obligors cannot, by getting judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the pro rata distribution among the bondholders, to which they are equitably entitled. *Ibid.*

NONSUIT.
1. The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff. *Castle* v. *Bullard*, 172.
2. And where there are several defendants, against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Ibid.*
3. And besides, in this case, there was evidence for the jury to say whether the party, in whose favor the nonsuit was prayed, was guilty or not. *Ibid.*

PARTNERS.
1. If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commissions, all the partners are responsible for the sale. *Castle* v. *Bullard*, 172.

PATENT RIGHTS.
1. Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. This point has been directly ruled by this court, and is no longer an open question. *Teese* v. *Huntingdon*, 2.
2. By the fifteenth section of the patent act of the fourth of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. *Ibid.*
3. It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court. *Ibid.*
4. In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages, but no more. *City of New York* v. *Ransom et al.*, 487.

PLEAS AND PLEADINGS.

1. Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. *Dermott* v. *Jones*, 220.
2. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. *Ibid.*
3. The general rule of law is, that whilst a special contract remains open, that is, unperformed, the party whose part of it has not been done cannot sue in indebitatus assumpsit, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of indebitatus assumpsit is maintainable. *Ibid.*
4. The case must be remanded to the Circuit Court, to be tried upon such counts as are in the original declaration, which charges the defendant in the sum of $5,000 for work and labor done, for materials furnished and used by the defendant in the erection and finishing certain stores and buildings in the city of Washington; and upon the money counts for a like sum paid by the plaintiff for the defendant; for a like sum had and received, and for a like sum paid, laid out, and expended, by the plaintiff, for the use of the defendant, at her request. And in such action the defendant may recoup the damages which she has sustained from the imperfect execution of the work. *Ibid.*
5. The statutes of Mississippi provide that no plea of non est factum shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation. *Bell* v. *Corporation of Vicksburg*, 443.
6. A plea of that kind was filed without the affidavit, and demurred to by the plaintiff. *Ibid.*
7. Although, upon the general principles of pleading, a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the State courts where such a statute exists have held that the plea of non est factum is demurrable if there be no affidavit, and the course of practice in the Circuit Court conforms to the State practice, this court also holds that such a plea is demurrable. *Ibid.*

POLICIES OF INSURANCE.

1. An open or running policy of insurance upon "coffee laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, to add an additional premium if by vessels lower than A 2, or by foreign vessels," contained also the following clause, viz: "Having been paid the consideration for this insurance by the

POLICIES OF INSURANCE, (*Continued.*)

assured or his assigns, at and after the rate of one and one-half per cent., the premiums on risks to be fixed at the time of endorsement, and such clauses to apply as the company may insert, as the risks are successively reported." *Orient Mutual Insurance Co.* v. *Wright et al.*, 401.

2. This is different from an ordinary running policy, in which the rate of premium to be paid is ascertained and inserted in the body of the policy at its execution, and in which species of policy the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. *Ibid.*

3. The rules explained which govern this class of policies. *Ibid.*

4. But in the policy in question there is something more to be done, in order to make the contract complete, than merely to declare the ship. The assured must pay or secure the additional premium, which the underwriter has reserved the right to fix at the time of the declaration of the risk in case the vessel rates lower than A 2. *Ibid.*

5. Unless the assured paid or secured this additional premium fixed by the underwriter, the contract of insurance, in respect to the particular shipment, did not become complete or binding. *Ibid.*

6. Hence, the instruction of the court below was erroneous, which held that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle. *Ibid.*

7. The parties stipulated that the additional premium should be fixed when the risk was made known. *Ibid.*

8. The cases upon this point cited. *Ibid.*

9. The principles with respect to a policy of insurance in the preceding case of the Orient Mutual Insurance Company against Wright, reaffirmed in the present case. *Sun Mutual Insurance Co.* v. *Wright et al.*, 412.

10. In the correspondence which took place between the insurer and the insured, there was no waiver by the former of the right of fixing the premium, nor was it claimed or suggested in the communications between the parties at the time. *Ibid.*

PRACTICE.

1. Where a motion was made to dismiss an appeal, upon the ground that no appeal bond had been given, time was allowed the appellants within which to file the bond. If they complied with the order, the appeal was to stand; otherwise, to be dismissed. *Anson, Bangs, and Co.* v. *Blue Ridge Railroad Co.*, 1.

2. The appeal bond must be taken and approved by any judge or justice authorized to allow the appeal or writ of error. *Ibid.*

3. By the fifteenth section of the patent act of the fourth of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to

PRACTICE, (*Continued.*)
the plaintiff or his attorney thirty days before the trial. *Teese* v. *Huntingdon*, 2.

4. It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court. *Ibid.*
5. The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff. *Castle* v. *Bullard*, 172.
6. And where there are several defendants, against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Ibid.*
7. And besides, in this case, there was evidence for the jury to say whether the party, in whose favor the nonsuit was prayed, was guilty or not. *Ibid.*
8. Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. The cases upon this point examined. *Ibid.*
9. Where the cause of action against the defendants was, that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts at or about the same time, with a view to establish the intent of the defendants with respect to the matters charged in the declaration. *Ibid.*
10. The cases upon this point examined. *Ibid.*
11. So, also, evidence was admissible, to show that the purchaser was largely in debt and insolvent, and that the defendants represented him to be in good credit. The force and effect of such circumstantial evidence is for the jury to judge of the intent. *Ibid.*
12. If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commission, all the partners are responsible for the sale. *Ibid.*
13. In the present case, the instructions given by the court below cannot justly be complained of by the counsel, and moreover were accompanied by explanations which constitute a part of them. *Ibid.*
14. Where a motion was made to dismiss an appeal, upon the ground that the appeal was taken by part only of the complainants below, and that the other complainants had not been made and were not parties to the appeal; and it appeared from the record that a fund had been decreed by the court below to be distributed ratably amongst two classes of creditors, one of which was composed of judgment creditors, and the other of those who had come in after the filing of a creditor's bill; and the first class only conceived themselves aggrieved by the decree admitting the others to a ratable proportion, and therefore became the appellants; this court will, in such a state of things, refuse the motion to dismiss and reverse this, together with all other points to be decided, when the case shall come up for argument hereafter. *Day et al.* v. *Washburn*, 309.

PRACTICE, (*Continued.*)

15. Where parties were sued on a promissory note executed by them, did not pretend to have any defence, entered a false plea which was overruled on demurrer, refused to plead in bar, and had judgment entered against them for want of a plea, this court will affirm the judgment with ten per cent. damages. *Sutton* v. *Bancroft*, 320.
16. Where a case is brought up to this court, and the writ of error appears to have been sued out for delay, the judgment will be affirmed with costs and ten per cent. damages. *Jenkins* v. *Banning*, 455.
17. When this court is satisfied, from the evidence before it, that no appeal to it had been granted by the court below, and that the cause was not before it when an order was passed, at the instance of the appellee, to docket and dismiss the case, it will rescind and annul the decree of dismissal, and revoke and cancel the mandate issued thereupon. *United States* v. *Gomez*, 326.
18. A motion to docket and dismiss a case from the failure of the appellant to file the record within the time required by the rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. *Ibid.*
19. In the present aspect of this case, such a motion is not to be considered. *Ibid.*
20. Cases cited to sustain the above principles. *Ibid.*

RAILROAD COMPANIES.

1. In 1851, the Legislature of Ohio passed a general law relating to railway companies, which empowered them at any time, by means of their subscription to the capital stock of any other company or otherwise, to aid such other railroad company, provided no such aid shall be furnished until, at a called meeting of the stockholders, two-thirds of the stock represented shall have assented thereto. *Zabriskie* v. *Cleveland, Columbus, and Cincinnati Railroad Co. et al.*, 381.
2. In 1852, another act was passed for the creation and regulation of incorporated companies in Ohio, re-enacting the above section, and providing further, that any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the Secretary of State, that portion of their charters inconsistent with the provisions of this act shall be repealed. *Ibid.*
3. The Cleveland, Columbus, and Cincinnati Railroad Company, when they endorsed the bonds hereafter mentioned, had not formally complied with either of these requirements; had neither convoked a meeting of the stockholders, nor signified their acceptance to the Secretary of State. *Ibid.*
4. In April, 1854, the Cleveland, Columbus, and Cincinnati Railroad Company endorsed a guaranty upon four hundred bonds of one thousand

RAILROAD COMPANIES, (*Continued.*)

dollars each, with interest coupons at seven per cent. interest, issued by the Columbus, Piqua, and Indiana Railroad Company. *Ibid.*

5. A stockholder in the Cleveland, &c., Company filed a bill to enjoin the directors from paying the interest upon the bonds which they had thus guarantied, upon the ground that these directors had exceeded their legal authority in making the guaranty. Some of the bondholders came in as defendants with the corporation. *Ibid.*
6. As between the parties to this suit, the acceptance of the acts of 1851 and 1852 may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility by asserting that they have not filed the evidence required by the statute to evince their decision. *Ibid.*
7. Amongst the acts of the corporators was this—that at a meeting of the stockholders of the Cleveland Company, in July, 1854, the endorsement of the bonds was approved, adopted, and sanctioned, and this resolution has never been rescinded at any subsequent annual meetings, of which there have been several, at which the complainant was represented. His proxy was also present at the meeting of July, 1854, but declined to vote, when his vote would have controlled the action of the meeting. *Ibid.*
8. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence; and a corporation cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. *Ibid.*

RECEIVER.

1. Where a levy is made upon goods and chattels under a fi. fa., the officer may confide them to another, for safe keeping, until there has been a settlement of the judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court. *Very* v. *Watkins*, 469.
2. Where the receiver had the custody of goods, and the complainant was ordered to select such a portion of these goods as would pay his claim by a decree of the court below, which was affirmed by this court, and which he refused to do, and this portion was accordingly set apart, the receiver became from that time a trustee for the complainant. *Ibid.*
3. The receiver was entitled to hold this property, as trustee, until a demand was made upon him in proper form by the complainant to surrender it. This proper form should have been under a certified copy of that part of the decree which permitted the complainant to demand the property, and which required the receiver to surrender it with the complainant's acknowledgment of its receipt. These papers should then be filed in court, for the protection of the trustee. *Ibid.*

SUNDAY.

1. Where a tort was committed which was cognizable in admiralty, it was no defence that the vessel was prosecuting her voyage on Sunday. The

SUNDAY, (*Continued.*)

statutes of Maryland (in which State the tort took place) and the cases upon this point, examined. *Philadelphia, Wilmington, and Baltimore Railroad Co.* v. *Philadelphia and Havre de Grace Steam Towboat Co.*, 209.

SURETY.

1. Where the surety upon an administration bond was sued, and judgment recovered against him in Mississippi, and a court in Tennessee (where the principals upon the bond resided) decided that but a small amount was due by the administrators upon their account, and that the judgment against the surety had been obtained in defiance of an injunction issued by the Tennessee court, and also by fraudulent representations made to the surety, and it was admitted that the decree in Tennessee was supported by the proofs, the surety was entitled to relief by the court in Mississippi, and the creditor must be perpetually enjoined from proceeding upon his judgment. *Cage's Executors* v. *Cassidy*, 109.
2. Where a surety upon a bond is sued, a conversation between his co-surety (now dead) and a third person is not admissible in evidence for the purpose of fixing a liability upon the defendant. The co-surety, if alive, would not himself have been a good witness. *Very* v. *Watkins*, 469.
3. A paper in the handwriting of the co-surety, offered to impeach the testimony of two witnesses, was not admissible. *Ibid.*

TEXAS.

1. The alion heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decisions. *Middleton* v. *McGrew*, 45.

USAGE.

1. Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish an usage. *Oelricks et al.* v. *Ford*, 49.
2. And, moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument. *Ibid.*
3. Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage, was inadmissible, as these were merged in the written instrument. *Ibid.*
4. The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal. *Ibid.*
5. Usage of a company not a sufficient defence unless it was known to the

USAGE, (*Continued.*)
other contracting party, and formed a part of the contract. *Bliven et al.* v. *New England Screw Company*, 420.
6. Parol evidence of usage is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. *Ibid.*
7. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. *Ibid.*
8. Where the screw company sued persons who had received the manufactured articles, and the defence was, that the whole amount which had been ordered had not been delivered, the contracts for the sale and delivery of the screws were subject to the custom of the plaintiffs to fill the same in part only. *Ibid*, 433.
9. See the report of the preceding case. *Ibid*

WILL.
1. In California, where a will with its codicils was offered in evidence, the testator of which died in 1848, an objection to its admission because it had never been admitted to probate was not well founded. The codicil was not inadmissible as testimony on that account. *Adams* v. *Norris*, 353.
2. Neither was it inadmissible because the witnesses who were present at its execution had never been examined to establish it as an authentic act. *Ibid.*
3. An objection to the admission of the codicil, because it does not appear on the face of the instrument that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained, was not well founded. *Ibid.*
4. Cases cited to establish this point. *Ibid.*
5. It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. *Ibid.*
6. The Spanish law upon this point examined, and also the decisions of the State courts in California. *Ibid.*
7. It was proper in the court to instruct the jury that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made. *Ibid.*
8. With regard to the proof of the will, as all the witnesses were dead, evidence of their signatures and that of the testator was admissible, and also of a declaration by him that he had made a will with a similar devise. The sindico, who attested it, should be counted among the witnesses. *Ibid.*
9. The binding force and legal operation of the codicil are to be determined by the law as it existed when the codicil was made. But the mode in

WILL, (*Continued.*)
which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of trial. It was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by law were complied with. *Ibid.*

WITNESS.
1. For the purpose of impeaching a witness, a question was asked of another witness, "What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below. *Teese* v. *Huntingdon*, 2.
2. The elementary writers and cases upon this point examined. *Ibid.*
3. Another witness was asked what was the reputation of the first witness for truth and veracity, who replied that he had no means of knowing, not having had any transactions with him for five years. This question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote. *Ibid.*