INDEX

OF THE

PRINCIPAL MATTERS.

ADMINISTRATOR.

1. This court decided, in 17th Howard, 274, that the interest in one of the shares of the Mexican Company did not pass to a trustee in insolvency in 1819, the contract with Mina having been declared by the Court of Appeals of Maryland to be utterly null and void, so that no interest could pass to the trustee of an insolvent. *Mayer* v. *White*, 318.
2. But in 1824, Mexico assumed the debt as one of national obligation, and the United States made it the subject of negotiation until it was finally paid. *Ibid.*
3. A second insolvency having taken place in 1829, there was a right of property in the insolvent which was capable of passing to his trustee. *Ibid.*
4. The claim of the latter is therefore better than that of the administrator of the insolvent. *Ibid.*

ADMIRALTY.

1. In a collision which took place in the harbor of New York, between a ship which was towed along by a steam tug, to which she was lashed, and a lighter loaded with flour, by which the latter vessel was capsized, the evidence shows that she was not in fault, and is entitled to damages. Neither the ship nor the tug had a proper look-out, and being propelled by steam they could have governed their course, which the lighter could not. *Sturgis* v. *Boyer et al.*, 110.
2. Both the tug and tow were under the command of the master of the tug, who gave all the orders. None of the ship's crew were on board except the mate, who did not interfere with the management of the vessel, the persons on board being all under the command of a head stevedore. The tug must therefore be responsible for the whole loss incurred. *Ibid.*
3. The vessel must be responsible because her owners appoint the officers, and the master of the tug was their agent, and not the agent of the owners of the ship, who had made a contract with him to remove the ship to her new position. *Ibid.*
4. Some of the cases examined as to the distinction between principal and agent. *Ibid.*

ADMIRALTY, (*Continued.*)

5. Cases arise when both the tow and the tug are jointly liable for the conse quences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. *Ibid.*

6. Other cases may be supposed when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. *Ibid.*

7. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels. *Ibid.*

8. In a collision which took place in the Ohio river between a steamboat ascending and a flat-boat descending, the steamboat was in fault. *Pearce* v. *Page*, 228.

9. When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. *Ibid.*

10. Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current, and this is the established rule of navigation. *Ibid.*

11. In a collision which took place in Elizabeth river, in 1855, between the steamship Pennsylvania and the steamship Jamestown, the Pennsylvania was in fault, and the collision cannot be imputed to inevitable accident. *Union Steamship Co.* v. *New York and Virginia Steamship Co.*, 307.

12. Inevitable accident must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. *Ibid.*

13. If the night was very dark, it was negligence in the master of the Pennsylvania to remain in the saloon until just before the collision occurred; and if the night was not unusually dark, there was gross negligence in those who had the management of the deck. *Ibid.*

14. The helm of the Pennsylvania was put to starboard when it ought not to have been, and the supposition that she was backing is shown not to have been correct by the force with which she struck the other vessel, which had taken every precaution to avoid the danger. *Ibid.*

15. At Mobile, it is necessary for a vessel drawing much water to lie outside

ADMIRALTY, (*Continued.*)

of the bar and have her cargo brought to her by lighters. *Bulkley* v. *Naumkeag Steam Cotton Company*, 386.

16. The usage is for the lighterman to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel. *Ibid.*

17. Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged; the vessel was held responsible for the loss upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed. *Ibid.*

18. The delivery of the cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston. When delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed. *Ibid.*

19. The cases in this court and in England examined. *Ibid.*

APPELLATE COURT.

1. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Nations* v. *Johnson*, 195.

2. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*

3. The American and English cases upon this point examined. *Ibid.*

BASTARDY.

1. The code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount. *Gaines* v. *Hennen*, 553.

2. But the legal relations of adulterous bastardy do not arise in this case. The law examined relative to putative marriages, which are where, in cases of bigamy, both parents, or either of them, contracted the second marriage in good faith. The issue of such a marriage is legitimate. *Ibid.*

3. The Louisiana cases, the Spanish law, and the Code Napoleon, examined as bearing upon this point, and the principles established by them applied to the present case. *Ibid.*

4. Clark, the father, was capable of contracting marriage; the consequence examined of his testamentary recognition of his child's legitimacy. *Ibid.*

BIGAMY.

1. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Gaines* v. *Hennen*, 553.

BONDS.

1. Where there was an action of replevin in Wisconsin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties. *Martin* v. *Thomas*, 315.

CALIFORNIA.

1. An instrument of writing, purporting to be a grant of land in California by Pio Pico, in 1846, is not sustained by the authority of the public archives or in conformity with the regulations of 1828, and therefore comes within the previous decisions of this court, declaring such grants void. *Palmer et al.* v. *United States*, 125.
2. Moreover, the evidence in the case shows that the alleged grant was utterly fraudulent. *Ibid.*
3. The decision of this court in the cases of United States *v.* Nye, 21 Howard, 408, and United States *v.* Rose, 23 Howard, 262, again affirmed; and as the testimony in the present case is similar to that offered in the above cases, the judgment of the District Court in favor of the claimant is reversed. *United States* v. *Chana et al.*, 131.
4. Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States and a survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendants to show that the survey was incorrect, the defendants claiming under a merely equitable title. *Greer et al.* v. *Mezes et al.*, 268.
5. Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. *Ibid.*
6. The mode of proceeding by petition does not alter the law of ejectment under the old system of pleading. *Ibid.*
7. As a general rule, in order to support a title to land in California under a Mexican grant, the written evidence of the grant in the forms required by the Mexican law must be found in the public archives and records, where they were required by law and regulations to be deposited and recorded. *United States* v. *Castro*, 346.
8. In order to support a title by secondary evidence, the claimant must show that these title papers had been deposited and recorded in the proper office; that the records and papers of that office, or some of them, had been lost or destroyed; and also, that he entered into the possession of the premises and exercised authority as owner within a reasonable

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time after the date of the grant. The possession is an essential part of the secondary evidence of title. *Ibid.*

9. Parol proof of a grant produced from a private receptacle, without proof that it had been deposited and recorded in the proper office and the loss and destruction of papers in that office, is not sufficient to support a title, even if possession be proved by the oral testimony of witnesses. *Ibid.*

CANAL COMPANY.

See CORPORATION.

CHANCERY.

1. The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property. *Fitch* v. *Creighton*, 159.
2. The City Council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments. *Ibid.*
3. The contractor who executed the work, and who was a citizen of another State, filed a bill upon the equity side of the Circuit Court to enforce this lien. *Ibid.*
4. The court had jurisdiction of the case. *Ibid.*
5. The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States. *Ibid.*
6. It was not necessary to make the contractor who had sold out a party, nor was the bill multifarious because it claimed to enforce the liens upon several lots. *Ibid.*
7. Where creditors, who were so upon simple contract debts, filed a bill in chancery to set aside a deed made by the debtor as being fraudulent against creditors, and other creditors came in as parties complainants, the court below was right in ordering a pro rata distribution amongst all the creditors, none of them having a judgment or other lien at law. *Day* v. *Washburn*, 353.
8. The complainants who first filed the bill have no preference thereby over the other creditors. *Ibid.*
9. In Maryland, the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence. *Lessee of Smith et al.* v. *McCann*, 398.
10. The statute of George the Second which made lands in the American colonies liable to be sold under a *fieri facias* issued upon a judgment in a court of common law, did not interfere with this distinction, and under it a legal estate only and not an equitable interest could be seized under a *fi. fa.* *Ibid.*

CHANCERY, (*Continued.*)

11. In 1810, an act of Assembly was passed making equitable interests subject to this process. *Ibid.*

12. But the purchaser at the sale of an equitable interest under this process only buys the interest which the debtor had, and thus becomes the owner of an equitable and not a legal estate. *Ibid.*

13. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property, and not a barren legal title held in trust. *Ibid.*

14. In the action of ejectment, in Maryland, the lessor of the plaintiff must show a legal title in himself to the land which he claims, and the right of possession under it, at the time of the demise laid in the declaration and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery. *Ibid.*

15. Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.;* and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed. *Ibid.*

16. But the plaintiff in the ejectment suit offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. And this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts. *Ibid.*

17. This parol evidence could not be introduced to enlarge or change the legal estate of the grantee against the plain words of the instrument. *Ibid.*

18. If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor. *Ibid.*

19. The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court. *Ibid.*

20. The instruction of the court below was therefore correct, that the plaintiff could not recover in the action of ejectment. *Ibid.*

21. Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue. *Perin et al.* v. *Carey et al.*, 465.

22. He devised certain real and personal property to the city of Cincinnati and its successors, in trust forever, for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference

CHANCERY, (*Continued.*)

was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants. *Ibid.*

23. If there should be a surplus, it was to be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents were living; preference to be given to our relations and collateral descendants. *Ibid.*

24. The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution. *Ibid.*

25. This will can stand; and with reference to the various points of law connected therewith, this court establishes the following propositions, viz:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio; but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.
2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.
3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.
4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.
5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.
6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.
7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.
8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will. *Ibid.*

COLLISION OF VESSELS.

See ADMIRALTY.

COMMERCIAL LAW.

1. An act of Congress passed on the 3d of March, 1851, (9 Stat. at L., 635,) entitled "An act to limit the liability of ship owners, and for other purposes," provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please. *Moore et al.* v. *American Transportation Co.*, 1.
2. The seventh section provides that this act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation. *Ibid.*
3. The exception does not include vessels used on the great lakes. Consequently, where goods were consumed by fire upon Lake Erie, without any design or neglect on the part of the owner of the vessel, he was not responsible for the loss. *Ibid.*
4. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master and others, and also for loss or damage by collisions, and even from any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight. *Ibid.*
5. At Mobile, it is necessary for a vessel drawing much water to lie outside of the bar and have her cargo brought to her by lighters. *Bulkley* v. *Naumkeag Steam Cotton Company*, 386.
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8. The delivery of the cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston. When delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed. *Ibid.*
9. The cases in this court and in England examined. *Ibid.*

CONSTITUTIONAL LAW.

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CONSTITUTIONAL LAW, (*Continued.*)

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2. The seventh section provides that this act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation. *Ibid.*

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5. The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." *Jones* v. *Soulard*, 41.

6. This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. *Ibid.*

7. This rule, so well established as to fresh-water rivers generally, is not varied by the circumstance that the Mississippi, at St. Louis, is a great and public water-course. The rule with respect to tide-water rivers, where the tide ebbs and flows, does not apply to the present case. *Ibid.*

8. Therefore, Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by Congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the State of Missouri by her admission into the Union, in 1820, nor by the act of Congress passed in 1851. *Ibid.*

9. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

10. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State. *Ibid.*

11. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Ibid.*

12. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

13. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him. *Ibid.*
14. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment. *Ibid.*
15. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed. *Ibid.*
16. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him. *Ibid.*
17. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled. *Ibid.*
18. A stamp duty imposed by the Legislature of California upon bills of lading for gold or silver, transported from that State to any port or place out of the State, is a tax on exports, and the law of the State unconstitutional and void. *Almy* v. *State of California*, 169.
19. Whether this court has or has not jurisdiction under the 25th section of the Judiciary act may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. *Medberry et al.* v. *State of Ohio*, 413.
20. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone this court can resort to ascertain the subject-matter of the litigation. *Ibid.*
21. Therefore, where the record showed that the only question presented to the State Court, and decided by them, was, whether the provisions of an act of the Legislature were consistent with the Constitution of the State, this court has no power to review their judgment. *Ibid.*
22. Where an act of Assembly of the State of Kentucky was objected to in the State court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the Legislature to pass the act under the Constitution of the State, and not under the Constitution of the United States. *Porter et al.* v. *Foley*, 415.
23. There is therefore no ground for the exercise of jurisdiction by this court under the 25th section of the Judiciary act. *Ibid.*
24. Subsequently to the decisions of this court in the cases of Williamson *v.* Berry, Williamson *v.* the Irish Presbyterian Church, and Williamson *v.* Ball, reported in 8 Howard, the Court of Appeals of the State of

CONSTITUTIONAL LAW, (*Continued.*)

New York affirmed a different opinion from that of this court respecting the title to the real property involved in those decisions. *Suydam* v. *Williamson*, 427.

25. This court now adopts the decision of the court of New York in conformity with the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals. *Ibid.*

26. Cases cited in support of this rule, and the cases in 8 Howard commented on. *Ibid.*

27. On the 9th of February, 1853, the Legislature of Pennsylvania passed an act entitled, "An act to incorporate the Northwestern Railroad Company." *Curtis* v. *County of Butler*, 435.

28. By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms and in such manner as may be agreed upon by the company and proper county; and the subscription of the counties was to be held to be valid when made by a majority of its commissioners. *Ibid.*

29. The county of Butler was one of the counties through which the railroad was to pass, and coupon bonds were issued, signed by two of the three commissioners of the county, in payment of a subscription of two hundred and fifty thousand dollars on the part of the county of Butler. *Ibid.*

30. Other parts of the act required certain other things to be done, which were complied with. *Ibid.*

31. The proper construction of this act is, that power was given in the act and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them. *Ibid.*

32. The bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler. *Ibid.*

33. A statute of the State of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree, by *bona fide* creditors of the mortgagor, is unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract. *Howard* v. *Bugbee*, 461.

34. This question was decided by this court in the case of Bronson *v.* Kinzie, 1 Howard, 311, and the decision has been since repeatedly affirmed. *Ibid.*

35. In 1833, the Legislature of Pennsylvania enacted that "the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." *Christ Church of Philadelphia* v. *County of Philadelphia*, 300.

36. In 1851, they enacted that all property, real or personal, belonging to any association or incorporated company, which is now by law exempt from

CONSTITUTIONAL LAW, (*Continued.*)

taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed. *Ibid.*

37. This last law was not in violation of the Constitution of the United States. It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign. *Ibid.*

38. Where the marshal, by virtue of mesne process issuing out of the Circuit Court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular. *Freeman* v. *Howe et al.*, 450.

39. I. The suit upon the replevin was instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts. *Ibid.*

40. II. Also in respect to the appropriate remedy of the mortgagees of the railroad cars for the grievances complained of. *Ibid.*

41. In the case of Taylor et al *v.* Carryl, (20 Howard, 583,) the majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. *Ibid.*

42. This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings *in rem*. *Ibid.*

43. The distinction examined which is alleged to exist between a proceeding in admiralty and process issuing from a common-law court. *Ibid.*

44. Whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court, which had issued the process to determine. *Ibid.*

45. Cases and authorities examined which are supposed to conflict with this principle. *Ibid.*

46. Although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They could have filed a bill on the equity side of the court from which the process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen. It would therefore have been within the juris-

CONSTITUTIONAL LAW, (*Continued.*)
diction of the court, and the proper remedy to have been pursued. *Ibid.*
47. Cases cited to illustrate this. *Ibid.*
CONSTRUCTION OF ACTS OF CONGRESS.
1. The exception in the seventh section of the act of 3d of March, 1851, with respect to the liability of ship owners, does not extend to the navigation of the Lakes. *Moore* v. *American Transportation Co.*, 1.
2. St. Louis, as a riparian proprietor, adjudged to be entitled to Duncan's Island, by virtue of a grant for the support of public schools. *Jones* v. *Soulard*, 41.
CONTRACT.
1. After a railroad company has received goods into their depot on Sunday, their duty to keep them safely is not within the prohibition of the Virginia law for the enforcement of the Sabbath; and if the goods are burned, the company are responsible for their loss. *Powhatan Steamboat Co.* v. *Appomattox Railroad Co.*, 247.
CORPORATION.
1. A corporate franchise to take tolls on a canal cannot be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation. *Gue* v. *Tide Water Canal Co.*, 257.
2. Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. *Ibid.*
3. An act of the Legislature of Maryland examined whereby certain named persons, and such others as might be associated with them, were incorporated by the name of the Frostburg Coal Company. *Frost's Lessee* v. *Frostburg Coal Co.*, 278.
4. The defendants in this suit were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate from the beginning. *Ibid.*
5. Even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity. *Ibid.*
6. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the Government that created it. *Ibid.*
7. The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. The statutes of the State examined by which such authority was conferred. *Bissell* v *City of Jeffersonville*, 287.
8. Under one of these acts, the common council determined that three-fourths had so petitioned; and under a subsequent act, authorizing them to

CORPORATION, (*Continued.*)

revise the subject, they again came to the same conclusion, and issued the bonds. *Ibid.*

9. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question. *Ibid.*
10. When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city. *Ibid.*
11. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity. *Ibid.*

DEEDS.

1. By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court. *McEwen et al.* v. *Bulkley's Lessee*, 242.
2. In 1856, a law was passed allowing this to be done. This statute was prospective. *Ibid.*
3. The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject. *Ibid.*
4. Where a deed was acknowledged in 1839, before the clerk of a court in another State, a copy of it from the record was improperly allowed to be read in evidence to the jury. *Ibid.*

EJECTMENT.

1. The statutes of Illinois require that a declaration in ejectment shall be served upon the actual occupant, and the practice of that State authorizes the appearance of the landlord and his defence of the suit, either in his own name or that of the tenant with his consent. *Kellogg et al.* v. *Forsyth*, 186.
2. And when a landlord has undertaken the defence of a suit in the name of the tenant with his consent, the tenant cannot interfere with the cause to his prejudice. *Ibid.*
3. Therefore, when the defendant in ejectment in the court below died after judgment, and his attorney and landlord, who had conducted the suit in the name and with the consent of the deceased, sued out a writ of error in the name of the heirs, gave bond for the prosecution of the writ and for costs, a motion to dismiss the writ will not be entertained, although the heirs of the deceased authorize the motion to dismiss. *Ibid.*
4. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and prosecuting the writ of error in good faith. *Ibid.*

EJECTMENT, (*Continued.*)

5. The motion to dismiss the writ of error is therefore overruled. *Ibid.*
6. Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States and a survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendants to show that the survey was incorrect, the defendants claiming under a merely equitable title. *Greer et al.* v. *Mezes et al.*, 268.
7. Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. *Ibid.*
8. The mode of proceeding by petition does not alter the law of ejectment under the old system of pleading. *Ibid.*
9. In Maryland, the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence. *Lessee of Smith et al.* v. *McCann*, 398.
10. The statute of George the Second which made lands in the American colonies liable to be sold under a *fieri facias* issued upon a judgment in a court of common law, did not interfere with this distinction, and under it a legal estate only and not an equitable interest could be seized under a *fi. fa.* *Ibid.*
11. In 1810, an act of Assembly was passed making equitable interests subject to this process. *Ibid.*
12. But the purchaser at the sale of an equitable interest under this process only buys the interest which the debtor had, and thus becomes the owner of an equitable and not a legal estate. *Ibid.*
13. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property, and not a barren legal title held in trust. *Ibid.*
14. In the action of ejectment, in Maryland, the lessor of the plaintiff must show a legal title in himself to the land which he claims, and the right of possession under it, at the time of the demise laid in the declaration and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery. *Ibid.*
15. Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.;* and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed. *Ibid.*
16. But the plaintiff in the ejectment suit offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. And this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts. *Ibid.*
17. This parol evidence could not be introduced to enlarge or change the legal

EJECTMENT, (*Continued.*)
estate of the grantee against the plain words of the instrument. *Ibid.*
18. If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor. *Ibid.*
19. The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court. *Ibid.*
20. The instruction of the court below was therefore correct, that the plaintiff could not recover in the action of ejectment. *Ibid.*
21. By a statute of Texas, actions of ejectment, trespass to try title, &c., can be maintained upon certificates for head rights or other equitable titles. *Sheirburn* v. *Cordova*, 423.
22. But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. *Ibid.*
23. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action. *Ibid.*

ESTOPPEL.
1. The general rule of law is, that the judgment of a court of law or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit. *Thompson et al.* v. *Roberts et al.*, 233.
2. Where the court left it to the jury to say whether the defence made at law was the same which was made in a prior equity suit, this error, if it be one, does not invalidate the judgment of the court below. *Ibid.*
3. The parties to the suit at law having been parties to the suit in equity, the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Ibid.*
4. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*
5. The record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts. *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles et al.*, 333.
6. This rule is not varied by the circumstance that after the verdict was rendered the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count. *Ibid.*
7. The authorities upon the doctrine of estoppel examined. *Ibid.*

EVIDENCE.

1. The volumes of American State Papers, Public Lands, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof. *Gregg et al.* v. *Forsyth*, 179.
2. A party cannot object to the reading of a record and deed of sale, upon the ground that the proceedings had been irregular, when the parties to the decree had not complained of it. The objectors were strangers to these proceedings. *Ibid.*
3. The decisions of this court in the cases of the City of Boston *v.* Lecraw, 17 How., 426, and Richardson *v.* City of Boston, 19 How., 263, referred to and explained. *Richardson* v. *City of Boston*, 188.
4. Indictments against the city of Boston, in 1848, for permitting unhealthy vapors and exhalations to arise in that part of the city which the sewer in question was erected to remedy, were admissible in evidence, on the part of the city, to show that the conduct of the city did not tend to oppression, and as part of the history of the case. An instruction of the court below was correct, viz: that a former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law. *Ibid.*
5. So, also, an instruction was correct which told the jury that there was no evidence in the case which would authorize them to find that the city of Boston had ever dedicated to the public use a public highway, town way, dock, or public way, between the wharves in question, for the access of boats and vessels between said wharves to high-water mark or the egress therefrom to the sea. *Ibid.*
6. These instructions were in conformity with the previous decisions of this court. *Ibid.*
7. In a suit in the District Court of the United States for the western district of Texas, a transcript of a record of the high court of errors and appeals and the chancery court for the northern district of the State of Mississippi was properly allowed to be offered as conclusive proof of the value of certain slaves, and of the amount of their annual hire until given up. *Nations et al.* v. *Johnson et al.*, 195.
8. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Ibid.*
9. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*
10. The American and English cases upon this point examined. *Ibid.*
11. The decree of the court was also properly allowed to go to the jury as evidence of the value of the hire of the slaves after its rendition; evi

EVIDENCE, (*Continued.*)

dence having also been offered at the trial of the value of such hire at that time. *Ibid.*

12. The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side. *Ibid.*
13. On a petition for freedom, the petitioner proved that one Kirby had emancipated all his slaves by will, some immediately and some at a future day. *Vigel* v. *Naylor*, 208.
14. The petitioner, in order to bring herself within this category and show that she had been the slave of Kirby, offered to prove that her mother and brother and sister had recovered their freedom by suits brought against George Naylor, whose administrator, Henry Naylor, the defendant in the present suit was; and that it was very unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death. *Ibid.*
15. Proofs of these circumstances were not allowed by the court below to go to the jury. In this the court was in error. *Ibid.*
16. The recoveries of the mother and sister against George Naylor ought to have been allowed to go to the jury. They were not *res inter alios acta.* This case distinguished from that of Davis *v.* Wood, 1 Wheaton, 6. *Ibid.*
17. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.
18. Therefore, where, in a land suit in Texas, the defendants pleaded the statute of limitations, and the documentary evidence showed that neither the plea of five years' possession nor three years' possession (see preceding case in this volume) could be sustained, it was errroneous for the judge to leave that question to the jury. *Ibid.*
19. It was also error in the judge to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The Supreme Court of Texas have decided that conveyances made with an intent to defraud creditors are void. *Ibid.*
20. The general rule of law is, that the judgment of a court of law or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit. *Thompson et al.* v. *Roberts et al.*, 233.
21. Where the court left it to the jury to say whether the defence made at law was the same which was made in a prior equity suit, this error, if it be one, does not invalidate the judgment of the court below. *Ibid.*
22. The parties to the suit at law having been parties to the suit in equity,

EVIDENCE, (*Continued.*)

the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Ibid.*

23. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*

24. What the plaintiff must prove in an action for a malicious prosecution. *See Malicious Prosecution.*

25. A paper called an ecclesiastical record was not admissible in evidence on a question of bigamy. *Gaines* v. *Hennen*, 553.

26. The evidence examined which is supposed to sustain the position that the connection between Clark and Zulime Carriere was adulterous, so as to bar the offspring from taking as a legatee under her father's will. The evidence declared to be sufficient in a civil suit to establish the fact that Des Grange committed bigamy when he married Zulime. *Ibid.*

27. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Ibid.*

28. The evidence of Coxe and Bellechasse examined, and also that relating to the parentage of Caroline Barnes. *Ibid.*

29. The paper misnamed the ecclesiastical record, purporting to be an acquittal of Des Grange of bigamy, is not admissible evidence in this case. But if it was so, it would neither of itself, nor in connection with all that is evidence in the record, serve to prove the adulterous bastardy of the complainant, as the rule of evidence requires that to be done, in opposition to the testamentary declaration of her father, in his own handwriting, that she was his legitimate and only daughter, and, as such, by him constituted his universal legatee. *Ibid.*

30. The charge of adulterous bastardy, as made by the defendant, is not in response to the complainant's bill, but is an affirmative allegation of a fact by them, and the burthen of proof is upon them to establish it in contradiction to the declaration of her father, in his written will, that she was his legitimate child. *Ibid.*

31. The paper or record, as called, is not that of a legally-constituted tribunal, according to either the ecclesiastical usages or the laws of Spain, as they prevailed in Louisiana at any time when that province was a part of the dominion of Spain. And neither the Canon Hasset, the Alcalde Caisergues, nor the Notary Franco Bermudez, had either individual or conjoined authority to take cognizance of a charge of bigamy in the way it was done. *Ibid.*

EXECUTION.

1. A corporate franchise to take tolls on a canal cannot be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation. *Gue* v. *Tide Water Canal Co.*, 257.

EXECUTION, (*Continued.*)

2. Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. *Ibid.*

FIERI FACIAS.

See EXECUTION.

INSOLVENCY.

1. This court decided, in 17th Howard, 274, that the interest in one of the shares of the Mexican Company of Baltimore did not pass to a trustee in insolvency in 1819, the contract with Mina having been declared by the Court of Appeals of Maryland to be utterly null and void, so that no interest could pass to the trustee of an insolvent. *Mayer* v. *White*, 318.

2. But in 1824, Mexico assumed the debt as one of national obligation, and the United States made it the subject of negotiation until it was finally paid. *Ibid.*

3. A second insolvency having taken place in 1829, there was a right of property in the insolvent which was capable of passing to his trustee. *Ibid.*

4. The claim of the latter is therefore better than that of the administrator of the insolvent. *Ibid.*

5. Where a creditor, whose debt was not yet due at the time of bringing the action, brought a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently so as to hinder and defeat the creditors in the collection of their lawful demands, the action will not lie. *Adler et al.* v. *Fenton et al.*, 407.

6. The debtors were the lawful owners of the property at the time the suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demands. *Ibid.*

7. The authorities examined to show that this cannot be done. *Ibid.*

8. In this case, the creditor, by suing and levying an attachment upon the property of the debtor for such parts of the debt as had then become due, had waived the alleged fraud in the contract of sale and confirmed the sale. *Ibid.*

JURISDICTION.

1. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

2. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State. *Ibid.*

3. A writ of mandamus does not issue in virtue of any prerogative power,

JURISDICTION, (*Continued.*)
and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Ibid.*

4. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed. *Ibid.*
5. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him. *Ibid.*
6. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment. *Ibid.*
7. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed. *Ibid.*
8. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him. *Ibid.*
9. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled. *Ibid.*
10. The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property. *Fitch* v. *Creighton*, 159.
11. The City Council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments. *Ibid.*
12. The contractor who executed the work, and who was a citizen of another State, filed a bill upon the equity side of the Circuit Court to enforce this lien. *Ibid.*
13. The court had jurisdiction of the case. *Ibid.*
14. The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States. *Ibid.*
15. It was not necessary to make the contractor who had sold out a party, nor was the bill multifarious because it claimed to enforce the liens upon several lots. *Ibid.*

JURISDICTION, (*Continued.*)

16. Upon a libel to recover damages against ship-owners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000. The party elected to make the set off, saving his right to appeal to this court. *Sampson et al.* v. *Welsh et al.*, 207.
17. The reduced decree was the final decree, and the party cannot save a right of appeal where it is not allowed by act of Congress. *Ibid.*
18. Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. *Board of Commissioners of Knox County* v. *Aspinwall et al.*, 376.
19. The Circuit Courts of the United States have authority to issue such writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court. *Ibid.*
20. It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued. *Ibid.*
19. Whether this court has or has not jurisdiction under the 25th section of the Judiciary act may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. *Medberry et al.* v. *State of Ohio*, 413.
20. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone this court can resort to ascertain the subject-matter of the litigation. *Ibid.*
21. Therefore, where the record showed that the only question presented to the State Court, and decided by them, was, whether the provisions of an act of the Legislature were consistent with the Constitution of the State, this court has no power to review their judgment. *Ibid.*
22. Where an act of Assembly of the State of Kentucky was objected to in the State court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the Legislature to pass the act under the Constitution of the State, and not under the Constitution of the United States. *Porter et al.* v. *Foley*, 415.
23. There is therefore no ground for the exercise of jurisdiction by this court under the 25th section of the Judiciary act. *Ibid.*
24. Where a decree of the Court of Appeals of Maryland affirmed the decree of the court below and remanded the case to that court, this is not such a final decree as will give jurisdiction over the case to this court. *Reddall* v. *Bryan et al.*, 420.
25. The decree of the court below was merely an interlocutory order; and although State laws allow an appeal to State courts from such an order, this cannot enlarge the jurisdiction of this court given by act of Congress. *Ibid.*
26. Moreover, the judgment of the State court was in favor of the authority

JURISDICTION, (*Continued.*)

set up under the laws of the United States, and therefore no appeal lies to this court under the 25th section of the Judiciary act. *Ibid.*

27. By a statute of Texas, actions of ejectment, trespass to try title, &c., can be maintained upon certificates for head rights or other equitable titles. *Sheirburn* v. *Cordova*, 423.

28. But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. *Ibid.*

29. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action. *Ibid.*

30. Where the judgment of the court below reverses the decision of the inferior court and awards a new trial, it is not a final judgment from which a writ of error will lie to this court. *Tracy* v. *Holcombe*, 426.

31. Where the marshal, by virtue of mesne process issuing out of the Circuit Court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular. *Freeman* v. *Howe et al.*, 450.

32. I. The suit upon the replevin was instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts. *Ibid.*

33. II. Also in respect to the appropriate remedy of the mortgagees of the railroad cars for the grievances complained of. *Ibid.*

34. In the case of Taylor et al *v.* Carryl, (20 Howard, 583,) the majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. *Ibid.*

35. This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings *in rem*. *Ibid.*

36. The distinction examined which is alleged to exist between a proceeding in admiralty and process issuing from a common-law court. *Ibid.*

37. Whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court which had issued the process to determine. *Ibid.*

38. Cases and authorities examined which are supposed to conflict with this principle. *Ibid.*

39. Although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They could have filed a bill on the equity side of the court from which the

JURISDICTION, (*Continued.*)
process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen. It would therefore have been within the jurisdiction of the court, and the proper remedy to have been pursued. *Ibid.*

40. Cases cited to illustrate this. *Ibid.*

JURY.

1. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.

2. When the general issue is pleaded to an action on the case for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, that the defendant was himself the prosecutor, or instigated the proceeding, and that it finally terminated in favor of the party accused. *Wheeler* v. *Nesbitt et al.*, 544.

3. He must also prove that the charge against him was unfounded, that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice. *Ibid.*

4. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Ibid.*

5. Where the court told the jury that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty, it was not error in the court to add, in the same connection, that if, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable and dispassionate man to believe that he was guilty of the charge preferred against him, then the jury ought to infer malice, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. *Ibid.*

6. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction; but the error, if it be one, forms no ground of exception by the plaintiff, because it was in his favor. *Ibid.*

7. As the magistrate who issued the warrant was one of the parties sued in this case, it was proper for the court below to instruct the jury that if there was probable cause for the arrest of the party, he could lawfully be detained for a reasonable time, owing to the neglect on his part to offer any satisfactory security for his appearance at the time appointed for examination. *Ibid.*

LANDS, PUBLIC.

1. An act of Congress passed on the 15th of May, 1829, (3 Stat. at L., 605,) authorizes persons who claim lots in the village of Peoria, in Illinois, to notify the register of the land office, who was directed to report to the Secretary of the Treasury, to be laid by him before Congress. *Hall* v. *Papin*, 132.
2. An act of March 3, 1823, (3 Stat. at L., 786,) grants to each one of the settlers who had settled on a lot prior to the 1st of January, 1813, the lot so settled on and improved, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: *Provided*, the right of any other person derived from the United States, or any other source whatever, &c., shall not be affected. *Ibid.*
3. These two statutes were drawn into question in the case of Bryan et al. *v.* Forsyth, 19 Howard, 334, where it was ruled that "in the interval between 1823 and the survey a patent was taken out, which was issued subject to all the rights of persons claiming under the act of 1823. This patent was controlled by the subsequent survey." *Ibid.*
4. In the present case the patent is not controlled by the subsequent survey, for the following reasons:
5. The old village of Peoria was settled very early in the history of the country, but abandoned before the years 1796, 1797, and the new village of Peoria built up at the distance of a mile and a half. *Ibid.*
6. The act of March, 1823, applies only to the new town, and the land in question is an out-lot or field of ten acres near the old village of Peoria. *Ibid.*
7. Papin, the plaintiff below, claimed under a plat of the village made in May, 1837, approved September, 1841, and a deed to himself from the confirmee made in 1854. *Ibid.*
8. Hall, the defendant below, claimed under a pre-emption certificate of 1833, a patent from the United States in 1837 to Seth and Josiah Fulton, and a deed to himself from the patentees in 1838. *Ibid.*
9. Supposing that no out-lot was meant to be confirmed, the inchoate right of the claimant under the act was subject to a survey and designation before it could be matured into a title. *Ibid.*
10. An instruction given by the court below to the jury, viz: that the persons taking under the patent of March 18, 1837, and under the entry of July 11, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1823; and when a party brought himself within those acts, his title was the paramount title, notwithstanding the patent to the Fultons was erroneous. *Ibid.*
11. So, also, it was error in the court below to refuse to instruct the jury, that if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, they were to find for the defendant. *Ibid.*
12. The true construction of the act is, that a claimant was to have one con-

LANDS, PUBLIC, (*Continued.*)

firmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of May 15, 1820; that no claimant, though he shall appear in the register's report as having made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any person whatever. *Ibid.*

13. By the act of March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," the surveyor of public lands was directed to survey the lots. A certified copy of such survey is admissible in evidence. The survey in question was made in 1840. *Meehan et al.* v. *Forsyth*, 175.

14. Before the survey was made, Ballance made an entry of the quarter section, of which the lot in controversy makes a part, and a patent was issued to him, by which the United States granted it to him and his heirs, subject to the rights of any and all persons claiming under the act of Congress above mentioned. *Ibid.*

15. This saving clause was designed to exonerate the United States from any claim of the patentee in the event of his ouster by persons claiming under the acts of Congress, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of Congress described in it. *Ibid.*

16. The possession of Ballance under this patent was adverse to that of a claimant under the Peoria grant, and therefore the statute of limitations ran upon it; he having had possession for more than seven years, with a connected title in law or equity, deducible of record from the State or the United States. *Ibid.*

17. The possession of Ballance in the fractional quarter section of land spoken of in the preceding report of the case of Meehan and Ballance *v.* Forsyth, so as to entitle him to the benefit of the statute of limitations, need not have been by himself personally, but possession by a tenant under him enured to his benefit. *Gregg et al.* v. *Forsyth*, 179.

18. The circumstance that Ballance had laid out the land into lots and blocks did not make it necessary for him to reside upon every lot. The law only required him to possess and reside upon the premises claimed by his title papers. *Ibid.*

19. The volumes of American State Papers, Public Lands, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof. *Ibid.*

20. A party cannot object to the reading of a record and deed of sale, upon the ground that the proceedings had been irregular, when the parties to the decree had not complained of it. The objectors were strangers to these proceedings. *Ibid.*

21. After the mandate went down to the Circuit Court, in the case of Ballance *v.* Forsyth, 13 Howard, 18, Ballance filed a bill upon the equity

LANDS, PUBLIC, (*Continued.*)
side of the court, setting forth the same titles which were involved in the suit at law, and praying relief. *Ballance* v. *Forsyth et al.*, 183.

22. It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated. *Ibid.*

23. The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the Land Office. He ought to have made opposition there; if he did not, he is concluded by his laches. *Ibid.*

24. In the record there is a paper purporting to be an amended bill. It is doubtful whether this was properly filed; and if it was, it presents no ground of relief. *Ibid.*

25. The fourth and fifth sections of the act of Congress passed on the 31st of March, 1830, (4 Stat. at L., 392,) entitled "An act for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the United States," cited and explained. *Fackler* v. *Ford*, 323.

26. One who covenants to sell lands which he expects to purchase at such sales, cannot afterwards plead his own fraud in obtaining his title from the Government in bar of a decree for specific performance of his agreement. *Ibid.*

27. Under several acts of Congress the register and receiver of the land office were authorized to grant a certificate to every person who should appear to be entitled to land in the section of country east of the Mississippi river and west of the Perdido river. *Tate* v. *Carney*, 357.

28. Under these acts, Robert Yair received a certificate in 1824 for the land now in controversy. *Ibid.*

29. In 1848, the register and receiver decided that Nancy Tate had settled upon this land at a very early day. They annulled the former certificate and granted an order of survey, by means of which a patent was issued in 1853 to the representatives of Nancy Tate. The patent reserves the right of Robert Yair. *Ibid.*

30. The decision of the register and receiver upon this question of title is not conclusive. They have power only to decide how the lands confirmed shall be surveyed and located. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of *bona fide* purchasers. *Ibid.*

31. Before 1819, Mackay had a claim to land in Missouri under a Spanish grant, and in that year gave a bond in the nature of a mortgage on a part of the land to Delassus. *Massey et al.* v. *Papin*, 362.

32. In 1836, Congress confirmed the claim to James Mackay or his legal representatives. This enured to the benefit of the claimants under the mortgage rather than to the heirs of Mackay. *Ibid.*

33. An imperfect Spanish title claimed by virtue of a concession was, by the

LANDS, PUBLIC, (*Continued.*)
laws of Missouri, subject to sale and assignment, and, of course, subject to be mortgaged for a debt. *Ibid.*

34. In 1850, Congress granted to the State of Illinois every alternate section of land for six sections in width on each side of a proposed railroad, and until the State could make its selection, the land on either side of the track of the road was withdrawn from entry or sale. *Clements* v. *Warner*, 394.
35. In 1852, the selections were made, and the land not selected was offered for sale, and such as were not sold became subject to private entry. *Ibid.*
36. In October, 1855, Clements began a settlement upon a portion of one of these sections. *Ibid.*
37. In November, 1855, Warner purchased the same land at private sale at the land office. *Ibid.*
38. In November, 1856, Clements claimed a pre-emption right, and the register and receiver granted a certificate of purchase accordingly. *Ibid.*
39. This court holds that the land in question was subject to a pre-emption right in November, 1855, when Warner made his purchase. Consequently it is invalid, as against the pre-emption right of Clements. *Ibid.*

LIMITATIONS, STATUTE OF.

1. The statute of limitations of Texas provides in its fifteenth section, "that every suit to be instituted to recover real estate, as against him, her, or them, in possession *under title or color of title*, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards; but in this limitation is not to be computed the duration of disability to sue from the minority, coverture, or insanity of him, her, or them, having cause of action. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant, or land scrip, with a chain of transfer down to him, her, or them, in possession; and provided, that this section shall not bar the right of the Government." *Davila* v. *Mumford et al.*, 214.
2. And the sixteenth section provides, "that he, she, or they, who shall have had five years like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying tax thereon, if any, and claiming under a deed or deeds *duly registered*, shall be held to have full title, precluding all claims, but shall not bar the Government; and, saving to the person or persons having superior right and cause of action, the duration of disability to sue arising from nonage, coverture, or insanity." *Ibid.*

LIMITATIONS, STATUTE OF, (*Continued.*)

3. The construction of the fifteenth section is this: that although the elder title was on record, the constructive notice thereof to the holder of the junior title was not sufficient to charge the latter with a "want of intrinsic fairness and honesty," so as to prevent the bar of the statute from running. *Ibid.*
4. The sixteenth section commented on, but its meaning not definitively adjudged. *Ibid.*
5. An act of the Republic of Texas cured whatever defects existed in the power of the commissioner who issued the grants to the defendants. *Ibid.*
6. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.
7. Therefore, where, in a land suit in Texas, the defendants pleaded the statute of limitations, and the documentary evidence showed that neither the plea of five years' possession nor three years' possession (see preceding case in this volume) could be sustained, it was errroneous for the judge to leave that question to the jury. *Ibid.*
8. It was also error in the judge to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The Supreme Court of Texas have decided that conveyances made with an intent to defraud creditors are void. *Ibid.*
9. The decision of the court upon another point having been favorable to the plaintiff, he has no cause of complaint against the ruling of the court. *Ibid.*
10. Where the defendant claimed under the statute of limitations and showed possession of Evans's coal bank; the validity of this plea will depend upon the fact whether or not Evans's coal bank is within the lines of the plaintiff's patent. *McEwen et al.* v. *Bulkley's Lessee*, 242.
11. The case remanded to the Circuit Court for the purpose of ascertaining this by a corrected survey made according to the rules laid down by this court. *Ibid.*
12. Where a mortgagor's interest in land was sold under the bankrupt act of the United States, the statute of limitations began to run from the time when the petitioner was declared a bankrupt, and not from the time when the purchaser took a deed from the assignee in bankruptcy. *Cleveland Insurance Co.* v. *Reed et al.*, 284.
13. By the revised statutes of Wisconsin in 1839, it is provided in the 37th section, that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred. And in the 40th section it is provided, that bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed

LIMITATIONS, STATUTE OF, (*Continued.*)
within ten years after the cause thereof shall accrue, and not after that time. *Ibid.*
14. Therefore, where a bill was filed for a foreclosure or sale of mortgaged property, and the defendant had been in possession for more than ten years prior to the filing of the bill, there was no corresponding remedy at law, and the case fell within the 40th section of the act. *Ibid.*
15. The decree of the Circuit Court dismissing the bill must therefore be affirmed. *Ibid.*

LOUISIANA.
1. Since the case of Mrs. Gaines was before this court, as reported in 12 Howard, 537, the olographic will made by Daniel Clark, in 1813, was ordered by the Supreme Court of Louisiana to be admitted to probate, notwithstanding its loss. *Gaines* v. *Hennen*, 553.
2. The judgment of the Supreme Court of that State is coincident with the conclusions of this court upon the testimony which related to the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death. *Ibid.*
3. This will declared Mrs. Gaines to be his legitimate and only daughter, and universal legatee. *Ibid.*
4. In the bill filed by Mrs. Gaines to recover the property sold by the executors appointed by a former will of 1811, it was not necessary to make these executors parties. The reasons stated. *Ibid.*
5. It was not necessary formally to set aside the will of 1811 before proceeding under that of 1813. Any one who desired to contest this latter will in a direct action was not concluded from doing so. *Ibid.*
6. The title of Mrs. Gaines is not barred by prescription, as defined by the law of Louisiana. The reasons explained. *Ibid.*
7. The decision of this court in 12 Howard, 473, did not overrule the decision in 6 Howard, 550. The two cases explained. *Ibid.*
8. The case in 12 Howard cannot be set up as a defence in the present case as being *res judicata*. They are dissimilar as to parties and things sued for, or what is called the object of the judgment. *Ibid.*
9. The paper misnamed the ecclesiastical record, purporting to be an acquittal of Des Grange of bigamy, is not admissible evidence in this case. But if it was so, it would neither of itself, nor in connection with all that is evidence in the record, serve to prove the adulterous bastardy of the complainant, as the rule of evidence requires that to be done, in opposition to the testamentary declaration of her father, in his own handwriting, that she was his legitimate and only daughter, and, as such, by him constituted his universal legatee. *Ibid.*
10. The charge of adulterous bastardy, as made by the defendant, is not in response to the complainant's bill, but is an affirmative allegation of a fact by them, and the burthen of proof is upon them to establish it in contradiction to the declaration of her father, in his written will, that she was his legitimate child. *Ibid.*
11. The paper or record, as called, is not that of a legally-constituted tribunal, according to either the ecclesiastical usages or the laws of Spain,

LOUISIANA, (*Continued.*)

as they prevailed in Louisiana at any time when that province was a part of the dominion of Spain. And neither the Canon Hasset, the Alcalde Caisergues, nor the Notary Franco Bermudez, had either individual or conjoined authority to take cognizance of a charge of bigamy in the way it was done. *Ibid.*

12. The difference explained between the case now before the court and that which was heretofore presented. If it had been proved, which it never was, that Mrs. Gaines was the offspring of an illicit intercourse, still she could take as universal legatee, from her father's testamentary declaration of her legitimacy. *Ibid.*

13. The code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount. *Ibid.*

14. But the legal relations of adulterous bastardy do not arise in this case. The law examined relative to putative marriages, which are where, in cases of bigamy, both parents, or either of them, contracted the second marriage in good faith. The issue of such a marriage is legitimate. *Ibid.*

15. The Louisiana cases, the Spanish law, and the Code Napoleon, examined as bearing upon this point, and the principles established by them applied to the present case. *Ibid.*

16. Clark, the father, was capable of contracting marriage; the consequence examined of his testamentary recognition of his child's legitimacy. *Ibid.*

17. The evidence examined which is supposed to sustain the position that the connection between Clark and Zulime Carriere was adulterous, so as to bar the offspring from taking as a legatee under her father's will. The evidence declared to be sufficient in a civil suit to establish the fact that Des Grange committed bigamy when he married Zulime. *Ibid.*

18. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Ibid.*

19. The evidence of Coxe and Bellechasse examined, and also that relating to the parentage of Caroline Barnes. *Ibid.*

20. The effect examined of the record from the County Court of New Orleans, in which Zulime prayed for a divorce from Des Grange; and also of the testimony to prove her marriage with Clark. *Ibid.*

21. Whether she married in good faith or not, the weight of testimony is that Clark did so; and therefore Mrs. Gaines is entitled to inherit her father's estate under the olographic will of 1813. *Ibid.*

MALICIOUS PROSECUTION.

1. When the general issue is pleaded to an action on the case for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, that the defendant was himself the prosecutor,

MALICIOUS PROSECUTION, (*Continued.*)

or instigated the proceeding, and that it finally terminated in favor of the party accused. *Wheeler* v. *Nesbitt et al.*, 544.

2. He must also prove that the charge against him was unfounded, that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice. *Ibid.*

3. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Ibid.*

4. Where the court told the jury that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty, it was not error in the court to add, in the same connection, that if, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable and dispassionate man to believe that he was guilty of the charge preferred against him, then the jury ought to infer malice, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. *Ibid.*

5. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction; but the error, if it be one, forms no ground of exception by the plaintiff, because it was in his favor. *Ibid.*

6. As the magistrate who issued the warrant was one of the parties sued in this case, it was proper for the court below to instruct the jury that if there was probable cause for the arrest of the party, he could lawfully be detained for a reasonable time, owing to the neglect on his part to offer any satisfactory security for his appearance at the time appointed for examination. *Ibid.*

MANDAMUS.

1. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

2. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up a fugitive from justice; and upon that ground only a motion for a mandamus was overruled. *Ibid.*

3. Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. *Board of Commissioners of Knox County* v. *Aspinwall et al.*, 376.

4. The Circuit Courts of the United States have authority to issue such

MANDAMUS, (*Continued.*)

writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court. *Ibid.*

5. It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued. *Ibid.*

NEGROES AND SLAVES.

1. On a petition for freedom, the petitioner proved that one Kirby had emancipated all his slaves by will, some immediately and some at a future day. *Vigel* v. *Naylor*, 208.
2. The petitioner, in order to bring herself within this category and show that she had been the slave of Kirby, offered to prove that her mother and brother and sister had recovered their freedom by suits brought against George Naylor, whose administrator, Henry Naylor, the defendant in the present suit was; and that it was very unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death. *Ibid.*
3. Proofs of these circumstances were not allowed by the court below to go to the jury. In this the court was in error. *Ibid.*
4. The recoveries of the mother and sister against George Naylor ought to have been allowed to go to the jury. They were not *res inter alios acta*. This case distinguished from that of Davis *v.* Wood, 1 Wheaton, 6. *Ibid.*

OHIO.

1. For the laws of Ohio respecting charitable devises, see *Wills.*

PARTIES.

1. The parties to a suit at law having been parties to a suit in equity, the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Thompson et al.* v. *Roberts et al.*, 233.
2. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*
3. In a bill filed by Mrs. Gaines to recover property sold by the executors of a will made in 1811, when she claimed under one made in 1813, it was not necessary to make those executors parties. *Gaines* v. *Hennen*, 553.

PARTNERSHIP.

1. To enlarge his business, Goldsmith, the original plaintiff, authorized a third person to go to St. Louis to negotiate an arrangement with some commission house there to accept consignments of cigars from him and to sell the same on his account, agreeing with the person so authorized to give him half the profits, with a guaranty that his compensation should amount to eighteen hundred dollars *per annum*. He made the arrangement with the defendants, stipulating as to their commissions, and that the cigars should be shipped at Baltimore, in bond,

PARTNERSHIP, (*Continued.*)

subject to duties and charges, and notified the plaintiff of the terms and conditions; whereupon the plaintiff wrote the defendants a letter, concluding with these words: "All shipped to your house. I will hold you responsible;" and sent two invoices of cigars, which were duly received. Afterwards, the person who negotiated the arrangement wrote an order to the defendants to deliver all the cigars, not sold, to another firm, upon receiving whatever sums they had advanced. That firm paid the advances, received the cigars, and sold them, but no portion of the proceeds ever came to the hands of the plaintiff. The defence was, that the person who gave the order was either a partner or an agent of the plaintiff, and in either capacity had a right to direct a transfer of the cigars, and thus exonerate the defendants from all liability. *Berthold et al.* v. *Goldsmith*, 536.

2. Held:

1. Actual participation in the profits, as principals in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm, but the rule has no application to a case of mere service or special agency, where the employee has no power in the firm and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor. Cases may arise, on one side and the other of the line, where the difference between them is so slight that it may appear to be unsubstantial; yet the distinction itself is well founded in reason, and the only difficulty is in the application of the principle on which it rests. No such difficulty, however, occurs in this case, for the defendants were a party to the arrangement, and knew the relation which the person who negotiated it sustained to them and to the plaintiff, and they also knew that the goods had been sent by the plaintiff and received by them on the terms and conditions specified in the plaintiff's letter. He was not, therefore, a partner in fact, or as between the plaintiff and defendants. *Ibid.*

2. He was not an agent of the plaintiff, authorized to withdraw the consignments, or to exonerate the defendants from their obligation to account for the sales. On the contrary, the arrangement was, that the cigars should remain in their custody and control, and that they should stand responsible for the proceeds, and the case shows that it was never changed. The court below were right in instructing the jury that there was no evidence to sustain the second ground of defence. *Ibid.*

PATENT RIGHTS.

1. In a patent taken out by Page for certain improvements in the construction of the portable circular saw-mill, he claimed the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it (the saw) by friction rollers

PATENT RIGHTS, (*Continued.*)

embracing it near its periphery, so as to leave its centre entirely unchecked laterally. *Phillips* v. *Page*, 164.

2. An instruction by the court below, that the claim was as stated above, but adding "in a saw-mill capable of being applied to the sawing of ordinary logs," was erroneous. *Ibid.*

3. Although the improvements of the patentee may have enabled the machine to be applied to the purpose of sawing logs, when before it was applied only to the purpose of sawing light materials, such as shingles, and blinds for windows, yet there is nothing in the patent to distinguish the new parts of the machine from the old, or to state those parts which he had invented, so as to enable the machine to saw logs. *Ibid.*

4. The patent law does not require the defendant to give notice of the time when any person may have possessed the knowledge or use of the invention in question, but only of the name of the person and of his place of residence, and the place where it has been used. *Ibid.*

5. An instruction of the court below, making the time material, was therefore erroneous. *Ibid.*

PLEAS AND PLEADINGS.

1. After the defendants had put in a plea in bar, they moved the court for leave to withdraw the plea, and to plead in abatement that the plaintiffs had alleged themselves to be citizens of another State, but were in reality the citizens of the same State with themselves, in consequence of which the District Court of the United States had not jurisdiction of the case. *Eberly et al.* v. *Moore et al.*, 147.

2. The court allowed the motion and the plea in abatement to be filed. Being satisfied by the verdict of a jury that the allegation of the plea was true, the petition of the plaintiffs was dismissed. *Ibid.*

3. In this the District Court was right. The jurisdiction has been conferred by acts of Congress upon the courts of the United States so to supervise the various steps in a cause as to prevent hardship and injustice, and that the merits of a cause may be fairly tried. *Ibid.*

4. That the plea was not artistically drawn is not a sufficient reason for reversing the judgment of the court below. *Ibid.*

PRACTICE.

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PRACTICE, (*Continued.*)

4. That the plea was not artistically drawn is not a sufficient reason for reversing the judgment of the court below. *Ibid.*

5. After the mandate went down to the Circuit Court, in the case of Ballance *v.* Forsyth, 13 Howard, 18, Ballance filed a bill upon the equity side of the court, setting forth the same titles which were involved in the suit at law, and praying relief. *Ballance* v. *Forsyth et al.*, 183.

6. It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated. *Ibid.*

7. The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the Land Office. He ought to have made opposition there; if he did not, he is concluded by his laches. *Ibid.*

8. In the record there is a paper purporting to be an amended bill. It is doubtful whether this was properly filed; and if it was, it presents no ground of relief. *Ibid.*

9. The statutes of Illinois require that a declaration in ejectment shall be served upon the actual occupant, and the practice of that State authorizes the appearance of the landlord and his defence of the suit, either in his own name or that of the tenant with his consent. *Kellogg et al.* v. *Forsyth*, 186.

10. And when a landlord has undertaken the defence of a suit in the name of the tenant with his consent, the tenant cannot interfere with the cause to his prejudice. *Ibid.*

11. Therefore, when the defendant in ejectment in the court below died after judgment, and his attorney and landlord, who had conducted the suit in the name and with the consent of the deceased, sued out a writ of error in the name of the heirs, gave bond for the prosecution of the writ and for costs, a motion to dismiss the writ will not be entertained, although the heirs of the deceased authorize the motion to dismiss. *Ibid.*

12. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and prosecuting the writ of error in good faith. *Ibid.*

13. The motion to dismiss the writ of error is therefore overruled. *Ibid.*

14. In a suit in the District Court of the United States for the western district of Texas, a transcript of a record of the high court of errors and appeals and the chancery court for the northern district of the State of Mississippi was properly allowed to be offered as conclusive proof of the value of certain slaves, and of the amount of their annual hire until given up. *Nations et al.* v. *Johnson et al.*, 195.

15. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publi-

PRACTICE, (*Continued.*)
cation in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Ibid.*
16. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*
17. The American and English cases upon this point examined. *Ibid.*
18. The decree of the court was also properly allowed to go to the jury as evidence of the value of the hire of the slaves after its rendition; evidence having also been offered at the trial of the value of such hire at that time. *Ibid.*
19. The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side. *Ibid.*
20. The Circuit Court certified that they had divided in opinion upon a question whether a party had a right to proceed summarily on motion to vacate a decree in that court. *Wiggins* v *Gray*, 303.
21. The question certified is merely one of practice, to be governed by the rules prescribed by this court, and the established principles and usages of a chancery court. And even if a summary proceeding on motion might have been a legitimate mode of proceeding, yet the court, in its discretion, had a right to refuse, and to order a plenary proceeding by bill and answer. The exercise of such a discretionary power by the court below cannot be revised in this court upon appeal or certificate of division, and this court therefore decline expressing any opinion on the question certified. *Ibid.*
22. Docket entries in the courts of the District of Columbia, as in Maryland, stand in the place of, and perhaps are, the record, and receive all the consideration that is yielded to the formal record in other States. *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles et al.*, 333.

PRESCRIPTION.
1. The title of Mrs. Gaines, who claimed under a will made in 1813, was not barred by prescription. The reasons explained. *Gaines* v. *Hennen*, 553.

PROBABLE CAUSE.
1. Defined in an action for a malicious prosecution. *Wheeler* v. *Nesbitt et al.*, 544.

PUBLIC LANDS IN CALIFORNIA.
See CALIFORNIA.

RAILROAD, SUBSCRIPTION TO.
1. The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. The statutes of the State examined by which such authority was conferred. *Bissell* v *City of Jeffersonville*, 287.
2. Under one of these acts, the common council determined that three-fourths had so petitioned; and under a subsequent act, authorizing them to

RAILROAD, SUBSCRIPTION TO, (*Continuea.*)
revise the subject, they again came to the same conclusion, and issued the bonds. *Ibid.*

3. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question. *Ibid.*

4. When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city. *Ibid.*

5. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity. *Ibid.*

6. In 1848, the Legislature of Ohio incorporated certain of its citizens under the name of the Ohio and Pennsylvania Railroad Company; and in 1849, the Legislature of Pennsylvania incorporated the same company by the same style, and adopted the act of Ohio. *Amey* v. *Mayor and Aldermen of Allegheny City*, 364.

7. In 1849, the Legislature of Pennsylvania exempted from taxation, except for State purposes, the certificates of loan theretofore issued or which might be thereafter issued by the city of Allegheny (amongst others) in payment of a subscription to the capital stock of the Pennsylvania Railroad Company, or to the capital stock of the Ohio and Pennsylvania Railroad Company. *Ibid.*

8. The charter of the last-named company had previously authorized the city corporation of the city of Allegheny to subscribe for an amount of the stock not exceeding two hundred thousand dollars. *Ibid.*

9. By virtue of two ordinances, and a supplement thereto, two hundred bonds of one thousand dollars each, with coupons attached, were executed and delivered to the company. They bore date January 1, 1850. *Ibid.*

10. On the 14th of April, 1852, another act was passed by the Legislature, providing "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the Ohio and Pennsylvania Railroad Company to an amount not exceeding the subscription heretofore made by said city, &c.; provided no bonds for the payment of stock subscribed, as aforesaid, shall be issued of a less denomination than one hundred dollars." *Ibid.*

11. On the 19th of June, 1852, an ordinance was passed authorizing the mayor to subscribe for four thousand shares, (equal to two hundred thousand dollars,) &c., &c. This ordinance was never recorded; but the stock was subscribed for and the bonds issued. *Ibid.*

12. On the 8th of May, 1850, the Legislature had passed an act limiting the debt of the city of Allegheny to $500,000, exclusive of the first subscription

RAILROAD, SUBSCRIPTION TO, (*Continued.*)

above mentioned. The debt of the city had reached that limit prior to the second subscription. *Ibid.*

13. These acts of the Legislature, mentioned in the first part of this note, conferred authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise called bonds, with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio and Pennsylvania Railroad Company. *Ibid.*

14. The limitation in the act of 8th of May, 1850, only meant that the city council, by its own authority, should not go into debt to a greater amount than $500,000. But this restriction was not binding on the Legislature. *Ibid.*

15. The circumstance that the ordinance of 19th of June, 1852, was not recorded or published, does not invalidate the bonds. The charter of the city requires that those ordinances only which were passed under the seventh section of the charter should be recorded and published. The ordinance in question did not belong to that class. *Ibid.*

16. This court adopts the judgment of the courts of Pennsylvania, that the above acts of the Legislature were not inconsistent with the Constitution of the State. *Ibid.*

REPLEVIN.

1. Where there was an action of replevin in Wisconsin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties. *Martin* v. *Thomas*, 315.

RIPARIAN PROPRIETORS.

1. The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." *Jones* v. *Soulard*, 41.

2. This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. *Ibid.*

3. This rule, so well established as to fresh-water rivers generally, is not varied by the circumstance that the Mississippi, at St. Louis, is a great and public water-course. The rule with respect to tide-water rivers, where the tide ebbs and flows, does not apply to the present case. *Ibid.*

4. Therefore, Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by Congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the State of Missouri by her admission into the Union, in 1820, nor by the act of Congress passed in 1851. *Ibid.*

SHIPS AND VESSELS.
See COMMERCIAL LAW and ADMIRALTY.
STATUTE OF LIMITATIONS OF TEXAS.
See LIMITATIONS, STATUTE OF.
ST. LOUIS, AS A RIPARIAN PROPRIETOR
See RIPARIAN PROPRIETORS.
SUBSCRIPTION TO RAILROADS.
See RAILROAD SUBSCRIPTIONS.
SUNDAY LAWS.
1. In the code of Virginia, chapter 196, are the following sections, viz:
"Sec. 15. If a free person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit $10 for each offence; every day any servant, apprentice, or slave, is so employed, constituting a distinct offence.
"Sec. 17. No forfeiture shall be incurred under the preceding section for the transportation on Sunday of the mail, or of passengers and their baggage. And the said forfeiture shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day; provided he does not compel a slave, apprentice, or servant, not of his belief, to do secular work or business on Sunday, and does not, on that day, disturb any other person." *Powhatan Steamboat Co.* v. *Appomattox Railroad Co.*, 247.
2. The acts prohibited by these sections are no doubt unlawful, but the following case does not fall within their operation. *Ibid.*
3. The Powhatan Steamboat Company were the owners of a line of steamers employed in the transportation of goods from Baltimore to Richmond, stopping at City Point to deliver goods, which were to be carried thence to Petersburg by the Appomattox Railroad Company. The steamboat company gave receipts for the goods when shipped, undertaking to deliver them at Petersburg, paying the railroad company a portion of the freight. *Ibid.*
4. Leaving Baltimore on Saturday, one of the steamers arrived at City Point on Sunday morning and delivered the goods intended for Petersburg, which were received and locked up in a warehouse, belonging to the railroad company, to remain until the next day. But in the after part of the day, the warehouse and goods were destroyed by fire. The steamboat company were sued by the shippers and compelled to pay the value of the goods, to recoup which they now sued the railroad company. *Ibid.*
5. The instructions of the court below to the jury were erroneous, viz: that if they found that the goods were delivered on a Sunday, under a contract between the parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, their verdict should be for the defendants. *Ibid.*
6. The steamboat company and railroad company each worked for them-

SUNDAY LAWS, (*Continued.*)

selves. The railroad company, having received the goods into their warehouse, were bound to keep them in safe custody, as carriers for hire, although they could not transport them to Petersburg until the next day. To take care of them on the Sabbath day was a work of necessity, and therefore not unlawful. *Ibid.*

7. The cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening or closing of the warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed. *Ibid.*

8. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. *Ibid.*

TARIFF.

1. Where there was a controversy with respect to the amount of duties properly payable upon an importation, the collector and importers entered into an agreement to submit samples of the article to the board of general appraisers to be convened at New York, and to abide by their appraisement in the same manner and to the same extent as if it had been made by merchant appraisers, regularly appointed according to law. *Belcher et al.* v. *Linn*, 508.

2. The article imported was called in the invoice "concentrated molasses," which is syrup boiled down to a denser consistency, and thus evaporating the watery particles, until the point of crystalization is reached. *Ibid.*

3. The appraisers decided that this article was, in point of fact, a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Green sugar was subject to an export duty, but molasses was not. They therefore added, as appeared by their report, a sum equal to the amount of that duty, although none such had been paid. But the statement annexed to the report described the addition made thus, "to add export duty on." *Ibid.*

4. Held:

   1. That in the absence of fraud, the decision of the appraisers as to the character of the article and the dutiable value of the importations was final and conclusive.

   2. That the report and statement must be construed together, and that by their true construction they showed, irrespective of the parol testimony, that the addition was made, not as an export duty, but to bring up the invoice valuation to the actual market value of the merchandise at the place of exportation.

   3. That if the words "to add export duty on" were of doubtful signification, and must be separately considered, then the case would be one where parol testimony would be admissible, so that, in either point of view, there was no error in the action of the Circuit Court.

TARIFF, (*Continued.*)

4. That the importer was not entitled to recover on account of the leakage while the merchandise was detained for the purpose of the appraisement.
5. That the assessment of duties is properly made upon the quantity of merchandise entered at the custom-house. *Ibid.*

5. When barrels are manufactured in the United States and shipped empty to Cuba, there filled with molasses, and brought back to the United States, the duty must be levied upon the value of the barrels, as well as upon the molasses. This conclusion rests upon the following reasons: Molasses barrels, under such circumstances, have been applied to the commercial use for which they were manufactured, and on their re-importation here, even if fit for a second voyage, seldom or never have the same value as when new. When filled in the foreign market, re-imported here, and offered at the custom-house for entry, they have then acquired a new character within the meaning of the revenue laws. With their contents they are then denominated packages, from which one in ten must be selected and ordered to the public stores for appraisement, and as such constitute a part of the charges of importation. *Knight et al.* v. *Schell*, 526.
6. The acts of Congress, and the uniform interpretation placed on them by the Treasury Department, require this to be done. *Ibid.*

TENNESSEE.

1. By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court. *McEwen et al.* v. *Bulkley's Lessee*, 242.
2. In 1856, a law was passed allowing this to be done. This statute was prospective. *Ibid.*
3. The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject. *Ibid.*
4. Where a deed was acknowledged in 1839, before the clerk of a court in another State, a copy of it from the record was improperly allowed to be read in evidence to the jury. *Ibid.*
5. Where the defendant claimed under the statute of limitations and showed possession of Evans's coal bank; the validity of this plea will depend upon the fact whether or not Evans's coal bank is within the lines of the plaintiff's patent. *Ibid.*
6. The case remanded to the Circuit Court for the purpose of ascertaining this by a corrected survey made according to the rules laid down by this court. *Ibid.*

TEXAS.

1. By the colonization laws of Mexico passed in 1824 and 1828, the consent of the federal Executive of Mexico was essential to the validity of a grant of lands within ten leagues of the coast. *League* v. *Egery et al.*, 264.
2. The Supreme Court of Texas has repeatedly so decided, and this court adopts their decision. *Ibid.*
3. Although by the laws of Texas an action of ejectment can be maintained

TEXAS, (*Continued.*)

upon a certificate for a head-right or other equitable title, yet it cannot be so maintained in the courts of the United States. *Sheirburn* v. *Cordova*, 423.

WILLS.

1. Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue. *Perin et al.* v. *Carey et al.*, 465.
2. He devised certain real and personal property to the city of Cincinnati and its successors, in trust forever, for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants. *Ibid.*
3. If there should be a surplus, it was to be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents were living; preference to be given to our relations and collateral descendants. *Ibid.*
4. The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution. *Ibid.*
5. This will can stand; and with reference to the various points of law connected therewith, this court establishes the following propositions, viz:
   1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio; but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.
   2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.
   3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.
   4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.
   5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

WILLS, (*Continued.*)

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.
7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.
8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will. *Ibid.*

6. How a lost olographic will is admitted to probate in Louisiana. *Gaines* v. *Hennen*, 553.
7. It was not necessary formally to set aside a will which had been admitted to probate as being made in 1811 before proceeding under the later one made in 1813. *Ibid.*