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ACTION. See *False Warranty; Municipal Bonds*, 1–5.

I. Right to Commence.

1. Where an award, made under submission by parties plaintiff and defendant to that effect, awards that one party shall pay to the other a certain sum on one day specified, another sum on another day specified, and that to secure the payments he shall give a bond in a penal sum, and the party against whom the award is made refuses to do any of the things awarded, an action of debt will lie against him even although the time when both sums of money were awarded to be paid has not yet arrived. The right of action is perfect on the party's refusal to give the bond. *Bayne* v. *Morris*, 97.

2. While it is true that in an executory contract of purchase of land, the possession is originally rightful, and it may be that until the party in possession is called upon to restore possession, he cannot be ejected without demand for the property or notice to quit; it is also true that by a failure to comply with the terms of sale, the vendee's possession becomes tortious, and a right of immediate action arises to the vendor. *Gregg* v. *Von Phul*, 274.

3. A non-compliance, by a person who has purchased real estate and gone into possession, with a request to pay the purchase-money, on the ground that he is not prepared to do so, and a return to the vendor, without promise to pay at a future time, and without further remark of any sort, of a deed offered, is a failure to comply with the terms of purchase. And ejectment lies at once, without demand or notice, even though the vendor may not himself have been perfectly exact in the discharge of parts, merely formal, of his duty,—such want of formality on his part having been waived by the vendee,—and, though the vendee may have made valuable improvements on the land. *Ib.*

II. Defences to.

4. In an action for the price of goods which the purchaser by his own agents examined and selected, and which he himself afterwards received and kept without objection, it is no defence that the price, as agreed on, was above that of the market; there having been neither fraud, misrepresentation, nor warranty in the case. *Miller* v. *Tiffany*, 298.

5. A discharge obtained under the insolvent law of one State is not a bar to an action on a note given in and payable in the same State; the party to whom the note was given having been and being of a different State, and not having proved his debt against the defendant's estate

ACTION (*continued*).

in insolvency, nor in any manner been a party to those proceedings. *Baldwin* v. *Hale*, 223.

6. The fact that a debt for which suit is brought arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact, is no defence to the suit; the bills themselves having been actually current at the time the defendants received them, and they not having proved worthless in *his* hands, nor he being bound to take them back from persons to whom he had paid them away. *Orchard* v. *Hughes*, 73.

III. MISCELLANEOUS.

7. Where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *malum in se;* and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole. *Gelpcke* v. *City of Dubuque*, 221.

8. A contract made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt,—as well *interest to become due* as interest already due,—is not a "borrowing of money," but is a contract for the payment of a debt; and, as the last, will be sustained, when, if the former, it might fall within certain prohibitions against the city's borrowing money. *Ib.*

ADMIRALTY. See *Intendment.*

1. Parties excepting to a report of a commissioner in admiralty proceedings, should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is: *Ex. gr.* If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected. *Commander-in-chief*, 43.

2. This same necessity for specification it is declared—though the case was not decided on that ground, the point not having been raised on argument—exists in a high degree in regard to an *answer* put in to an admiralty claim, which answer ought to be full, explicit, and distinct; and hence a defence to a libel for collision, which sets forth that the injured vessel "lay in an improper manner, and in an improper place," without showing in any respect wherein the manner, or why the place was improper, is insufficient, *it seems*, as being too indefinite. *Ib.*

3. Objections to want of proper parties being matter which should be taken in the court below, a party cannot, in an admiralty proceeding by the owners of a vessel, to recover damages for a cargo lost on their

ADMIRALTY (*continued*).
ship by collision, object in the Supreme Court, for the first time, that the owners of the vessel were not the owners of the *cargo*, and therefore that they cannot sustain the libel. Independently of this, as vessels engaged in transporting merchandise from port to port are "carriers"—if not exactly "common carriers"—and as carriers are liable for its proper custody, transport and delivery, so that nothing but the excepted perils of the sea, the act of God, or public enemies, can discharge them—it would seem that they might sustain the action within the principle of the *Propeller Commerce* (1 Black, 582). *Ib.*

AGENCY.
Authority without restriction to an agent to sell, carries with it authority to warrant. *Schuchardt* v. *Allens*, 359.

AGREED STATEMENT. See *Case Stated.*

ALIENAGE. See *Rhode Island.*

ALMONDS.
Under the Tariff Act of 1846, as amended by the Tariff Act of 1857, almonds are subject to a duty of 30 p. c. *ad valorem.* *Homer* v. *The Collector*, 486.

APPEAL.
When a bond is given for appeal from the Circuit Courts of the United States to the Supreme Court, in a bill of foreclosure of mortgage, the condition of the bond being simply that the appellant shall pay *costs and damages*, it does not operate to stay a sale of mortgaged premises already decreed. *Orchard* v. *Hughes*, 73.

ARBITRATORS.
The power of arbitrators is exhausted when they have once finally determined matters before them. Any second award is void. *Baync* v. *Morris*, 97.

ATTORNEY-GENERAL.
An appeal to the Supreme Court of a case originating below under the statute of June 14, 1860, relating to surveys of Mexican grants in California, and in which the appellants appear on the record as *The United States*, simply (no intervenors being named) remains within the control of the Attorney-General; and a dismissal of the case under the 29th rule of the court is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case, even although it is obvious that below there were some private owners contesting the case under cover of the government name, and that some such were represented by the same counsel who now profess to represent them here. *United States* v. *Estudillo*, 710.

AWARD.

The power of arbitrators is exhausted when they have once finally determined matters before them. Any second award is void. *Bayne* v. *Morris*, 97.

BANK BILLS.

It is no defence to a suit for debt that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in *his* hands, nor he being bound to take them back from persons to whom he had paid them away. *Orchard* v. *Hughes*, 73.

BANKRUPTCY.

A discharge obtained under the insolvent or bankrupt law of one State is not a bar to an action on a note given in and payable in the same State; the party to whom the note was given having been and being of a different State, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings. *Baldwin* v. *Hale*, 223.

BILL OF EXCEPTION. See *Practice*, 4, 13, 14, 15.

BRIDGE AS DISTINGUISHED FROM VIADUCT. See *Interpretation of Language*, 2.

CALIFORNIA. See *Attorney-General; Evidence*, 14; *Judicial Sale; Warrant and Survey*, 1.

I. GENERAL LAW.

1. By the law of California, one tenant in common of real property can sue in ejectment, and recover the demanded premises entire as against all parties, except his co-tenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his co-tenants. *Hardy* v. *Johnson*, 371.
2. According to the system of pleading and practice in common law cases which prevails in the courts of California, and which has been adopted by the Circuit Court of the United States in that State, a title acquired by the defendant in ejectment after issue joined in the action can only be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. *Ib.*
3. By the law of California, deeds conveying real property may be read in evidence in any action when verified by certificates of acknowledgment, or proof of their execution by the grantors before a *notary public*. *Houghton* v. *Jones*, 702.
4. Where from a tract of land known by a particular name grants of two parcels had been made, and a petition for a grant of the surplus remaining was presented to the Governor of the Department of Cali-

CALIFORNIA (*continued*).

fornia, and to the description of the land solicited, these words were added, "the extent of which is about five leagues, more or less"—*Held*, that these words were not a limitation upon the quantity solicited, but a mere conjectural estimate of the extent of the surplus. The case distinguished from *United States* v. *Fossat* (20 Howard, 413), and *Yontz* v. *United States* (23 Id., 499). *United States* v. *D'Aguirre*, 311.

II. IN SUPPORT OF MEXICAN GRANTS.

5. The cession of California to the United States did not impair the rights of private property. These rights were consecrated by the law of nations, and protected by the treaty of Guadalupe Hidalgo. The act of March 3d, 1851, to ascertain and settle private land claims in the State of California, was passed to assure to the inhabitants of the ceded territory the benefit of the rights thus secured to them. It recognizes both legal and equitable rights, and should be administered in a liberal spirit. *United States* v. *Moreno*, 400.

6. The tribunals of the United States, in passing upon the rights of the inhabitants of California to the property they claim under grants from the Spanish and Mexican governments, must be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They are not required to exact a strict compliance with every legal formality. *United States* v. *Johnson* (1 Wallace, 326) approved. *United States* v. *Auguisola*, 352.

7. Objections to Mexican grants ought not to be taken as if the case was pending on a writ of error, with a bill of exceptions to the admission of every item of testimony offered and received below. *United States* v. *Johnson*, 326.

8. The want of approval of a grant by the Departmental Assembly does not affect its validity. *Ib.*

9. Where no suspicion, from the absence of the usual preliminary documentary evidence in the archives of the former government, arises as to the genuineness of a Mexican grant produced, the general rule is, that objections to the sufficiency of proof of its execution must be taken in the court below. They cannot be taken in this court for the first time. *United States* v. *Auguisola*, 352; *Same* v. *Johnson*, 326; *Same* v. *Yorba*, 412.

10. Where there are no subscribing witnesses to a Mexican grant in colonization, the signature of the governor who executed the grant, and of the secretary who attested it, may be proved by any one acquainted with their handwriting. *United States* v. *Auguisola* (1 Wallace, 352), approved. *United States* v. *Moreno*, 400.

11. The fact that Mexico declared, through her commissioners who negotiated the treaty of Guadalupe Hidalgo, that no grants of land were issued by the Mexican governors of California, after the 13th of May, 1846, does not affect the right of parties who, subsequent to that date,

CALIFORNIA (*continued*).

obtained grants from the governors whilst their authority and jurisdiction continued. *United States* v. *Yorba*, 412.

12. The absence from a Mexican grant in colonization of conditions requiring cultivation and inhabitancy and the construction of a house within a year, does not affect the validity of the grant. *Ib.*

13. When the validity of a Mexican grant has been affirmed by a decree of the District Court, and an appeal is taken by the claimant seeking a modification of the decree as to the extent of land embraced by the grant, but no appeal from such decree is taken by the United States, the validity of the grant is not open to consideration upon the appeal. *Malarin* v. *United States*, 282.

14. When a Mexican grant issued to the claimant is alleged to have been fraudulently altered after it was issued in the designation of the quantity granted, a record of juridical possession, delivered to the grantee soon after the execution of the grant, showing that the quantity of which possession was delivered was the larger quantity stated in the grant, is entitled to great consideration in determining the character of the alteration, particularly when there has been a long subsequent occupation of the premises. *Ib.*

III. IN DEFEAT OF MEXICAN GRANTS.

15. Where there is no *archive* evidence of a California grant, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, the claim must be rejected, even when there is very strong parol proof of a grant. *Romero* v. *United States*, 721; *White* v. *Id.*, 660.

The Governor of California had no power, on the 8th June, 1846, to sell and convey either the mission of San Gabriel or San Luis Rey. 745–766.

IV. ACTS OF MARCH 3, 1851, AND OF JUNE 14, 1860.

16. Where a decree of the Board of Commissioners, created under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in the State of California, confirming a claim to a tract of land under a Mexican grant, gives the boundaries of the tract to which the claim is confirmed, the survey of the tract made by the Surveyor-General of California must conform to the lines designated in the decree. There must be a reasonable conformity between them, or the survey cannot be sustained. *United States* v. *Halleck*, 439.

17. When such decree describes the tract of land, to which the claim is confirmed, with precision, by giving a river on one side, and running the other boundaries by courses and distances, a reference at the close of the decree to the original title-papers for a more particular description will not control the description given. The documents to which reference is thus made, can only be resorted to in order to explain any ambiguity in the language of the descriptions given; they cannot be resorted to in order to change the natural import of the language used, when it is not affected by uncertainty. *Ib.*

CALIFORNIA (*continued*).

18. When a decree gives the boundaries of the tract, to which the claim is confirmed, with precision, and has become final by stipulation of the United States, and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies. *Ib.*
19. When the United States do not claim land in California as public land, the Supreme Court will not entertain jurisdiction of an appeal by them from a District Court there, under the act of 3d March, 1851, to ascertain and settle private land claims: it has no jurisdiction under that act—nor has the District Court—when the controversy is between individuals wholly. *United States* v. *Morillo*, 706.
20. Where parties are permitted by the District Court to appear under the act of June 14, 1816; relating to surveys of Mexican grants in California, and contest the survey and location, the order of the court permitting such appearance and contest should be set forth in the record, Only those persons who, by such order, are made parties contestant, will be heard on appeal. *United States* v. *Estudillo*, 710.
21. Where, under this act, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the District Court, and its action on the subject is not subject to revision on appeal. *Ib.*
22. Previous to the act of Congress of June 14th, 1860, the District Courts of the United States for California had no jurisdiction to supervise and correct the action of the Surveyor-General of California, in surveying claims under Mexican grants confirmed by the decrees of the Board of Commissioners created by the act of March 3d, 1851. They possessed no control over the execution of the decrees of the board. *United States* v. *Sepulveda*, 104.
23. Where Mexican grants were by metes and bounds, or where proceedings before Mexican authorities, such as took place upon juridical delivery of possession, had established the boundaries, or where, from any other source pending the proceedings for a confirmation, the boundaries were indicated, it was proper for the board to declare them in its decrees. *Ib.*
24. Where a survey, made by the Surveyor-General of California, of a confirmed claim under a Mexican grant, previous to the act of June 14th, 1860, does not conform to the decree of the Board of Commissioners, the remedy must be sought from the Commissioner of the General Land Office before the patent issues, and not in the District Court. *Ib.*

CARRIERS. See *Admiralty*, 2.

CASE STATED.

The Supreme Court cannot give judgment as on a case stated, except where facts, and facts only, are stated. If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the case is not a "case stated." *Burr* v. *The Des Moines Co.*, 99; *Pomeroy's Lessee* v. *Bank of Indiana*, 592.

COMITY, STATE AND FEDERAL. See *Jurisdiction.*

1. Where a series of decisions are made by the Supreme Court of a State, construing a statute in one way, and that way is in harmony with numerous decisions of other States upon similar statutes, and meets the approbation of the Supreme Court of the United States, the last-named court will regard such interpretation of the statute as a true one so far as respects investments of money made during the time that those decisions were unreversed. The fact that the same Supreme Court of the State which made such former decision *now* holds that those decisions were erroneous, and ought not to have been made, can have no effect upon transactions in the past, however it may affect those in the future. *Gelpcke* v. *City of Dubuque*, 175.
2. Although it is the practice of the Supreme Court of the United States to follow the latest settled adjudications of the State courts giving constructions to the laws and constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law. *Ib.*
3. The rules of evidence prescribed by the laws of a State being rules of decision for the Federal courts while sitting within the limits of such State, they must be obeyed even though they violate the ancient laws of evidence so far as to make *the parties to the action* witnesses in their own cause; herein adopting a practice in opposition to a specific rule by the Federal court for the circuit. *Ryan* v. *Bindley*, 66.

CONFLICT OF JURISDICTIONS. See *Bankruptcy.*

When the Supreme Court of the United States, under the 24th section of the Judiciary Act of 1789, reverses a judgment on a case stated and brought here on error, remanding the case, with a mandate to the court below to enter judgment for the defendant, the court below has no authority but to execute the mandate, and it is final in that court. Hence such court cannot, after entering the judgment, hear affidavits or testimony, and grant a rule for a new trial; and if it does grant such rule, a mandamus will issue from this court ordering it to vacate the rule. *Ex parte Dubuque and Pacific Railroad*, 69.

CONSTITUTIONAL LAW.

The statute of the legislature of New Jersey, passed A. D. 1790, by which that State gave power to certain commissioners to contract with any persons for the building of a bridge over the Hackensack River; and

CONSTITUTIONAL LAW *(continued)*.

by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the *State of New Jersey*;" and that it should not be "lawful" for any person or persons whatsoever to erect "any *other* bridge over or across the said river for *ninety-nine* years,"—is a contract, whose obligation the State can pass no law to impair. It is one, however, of which the act of Assembly of that same State, passed A.D. 1860, authorizing a company to build a railway, with the necessary *viaduct*, over the Hackensack, does not impair the obligation. *Bridge Proprietors* v. *Hoboken Co.*, 116.

CONTRACT. See *New Jersey*.

I. CONTRACT GENERALLY.

1. Where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *malum in se;* and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole. *Gelpcke* v. *City of Dubuque*, 221.

II. CONTRACT OF SALE.

2. Where a sale has been so far completed that the vendee has bought and received the goods, the vendor cannot hold him to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it as that "no claims for deficiences or imperfections will be allowed, unless made within seven days from the receipt of goods." *Schuchardt* v. *Allens*, 359.

CORPORATE POWERS. See *Municipal Powers*, 1–5.

Where the charter of a bank provided that the bank should itself continue till January 1, 1859; with a proviso that all *banking powers* should cease after January 1, 1857, "*except* those *incidental and necessary* to collect and *close up business;* a motion, in 1862, to dismiss a writ of error in which the bank was defendant was refused. *Pomeroy's Lessee* v. *The Bank of Indiana*, 23.

COURT AND JURY.

1. Where a plaintiff, having a patent for an improved machine, his "improvement" consisting in certain pieces of mechanism *described*, having *peculiar* characteristics *described;* the pieces of mechanism being combined by means *described*, so as to produce a particular result *described*, an admission by him that pieces of mechanism in their general nature like his, and used for "various purposes," were older than his invention, is not an admission that these machines were the same as his; and the fact whether they were or were not, is a question for the jury, and not for the court. *Turrill* v. *Railroad*, 491.

2. Instructions are rightly withheld, which would refer to the jury the interpretation of the indorsement on negotiable paper, and leave them to determine a case, special in its circumstances, on the face of the paper and the custom of bankers generally; which, for example, in a case where paper was indorsed "*for collection*," and where, by the course of dealing between the parties, paper was frequently sent for

COURT AND JURY *continued*(.

collection *only*, would leave the jury to find that title passed generally, because bankers testified that, by the *general custom and usage of bankers*, negotiable paper, indorsed as mentioned, and transmitted for collection, would be held and treated as the property of the banker transmitting it. *Sweeny* v. *Easter*, 166.

3. The question of the continuity of an application for a patent, within the meaning of the seventh section of the Patent Acts of 1836 and 1839, is one for the jury. *Godfrey* v. *Eames*, 317.

4. Whenever the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. But if there be evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them. It is not necessary, in order for the court properly to leave the case with the jury, that the evidence leads unavoidably to the conclusion that the plaintiff has no case. If there be evidence proper to be left to the jury, it should be left; and a remedy for a wrong verdict sought in a motion for a new trial. *Schuchardt* v. *Allens*, 359.

COVENANTS FOR TITLE. See *Estoppel in pais*, 1, 2.

CROSS-BILL. See *Equity*, 3.

CUSTOMS OF THE UNITED STATES.

1. While goods remain in the ownership of the importer, the collector of the customs has a reasonable time to fix their true dutiable value; and his right to reappraise them under the act of May 28, 1830, in any case where, from neglect or want of evidence on the part of the appraisers, the appraisement has been under the proper dutiable value, is not lost, merely because they have gone through one form of appraisement, and been delivered to the importer with a memorandum on the invoice that the entry was "*right.*" But the court expresses no opinion on a case where the goods "had passed beyond the reach of the collector." *Iasigi* v. *The Collector*, 375.

2. In a suit to recover duties levied on a reappraisement of goods under the act of May 28, 1830, § 2, and paid under protest,—one ground of the suit being that the reappraisement was not made by the persons authorized by the act to make it,—it is necessary that the objection be specified in the protest. Otherwise, it will not be heard on appeal to the Supreme Court.

3. An appraisement is conclusive upon the fact whether the appraisement of the goods imported was or was not made, as the act of March 3, 1851, § 1, directs that it shall be, as "of the actual market value or wholesale price thereof in the principal markets of the country from which the same shall have been imported." If the importer alleges that it was not so made, and is dissatisfied, his remedy is by appeal to the "merchant appraisers." He cannot use the fact in a suit to recover the money paid as duties under protest. *Ib.*

4. Under the Tariff Act of 1846, as amended by the Tariff Act of 1857, almonds are subject to a duty of 30 p. c. *ad valorem*. *Homer* v. *The Collector*, 486.

DEED. See *California*, 3; *Estoppels in pais*, 1, 2.

When a patent for land, issued and delivered, is subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant. *Malarin* v. *United States*, 285.

DUTY. See *Customs of the United States.*

EJECTMENT. See *Action*, 2, 3.

ENACTMENT BY IMPLICATION. See *Statutes.*

EQUITY. See *Practice*, 17; *Usury*, 3.

I. JURISDICTION.

1. Although equity will, in some cases, interfere to assert and protect future rights,—as *ex. gr.* to protect the estate of a remainder-man from waste by the tenant for life, or to cut down an estate claimed to be a fee to a life interest only, where the language, rightly construed, gives but an interest for life; or will interfere at the request of trustees asking protection under a will, and to have a construction of the will and the direction of the court as to the disposition of the property,—yet it will not decree *in thesi* as to the future rights of parties not before the court or *in esse.* *Cross* v. *De Valle*, 1.

2. A bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor, held by a third party upon a secret trust for him, to the satisfaction of the judgment, until an attempt has been made for their collection at law by the issue of execution thereon. *Jones* v. *Green*, 330.

II. PLEADINGS.

3. A "cross-bill," being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill, it is not a cross-bill even although the matters presented in it have a connection with the same general subject. As an original bill it will not attach to the controversy, unless it be filed under such circumstances of citizenship, &c., as give jurisdiction to original bills; herein differing from a cross-bill, which sometimes may so attach. *Cross* v. *De Valle*, 1.

4. In a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill; and if, being made defendant, his citizenship is not set forth on the record, the bill must be remanded or dismissed. *Gaylords* v. *Kelshaw*, 81.

III. EVIDENCE. See *Evidence*, 10, 11.

IV. PRACTICE.

5. Where a bill to set aside a conveyance as fraudulent is remanded or dismissed, because the complainant has not added necessary defendants, costs are allowed to a co-defendant, being the person charged with having received the fraudulent conveyance. *Gaylords* v. *Kelshaw*, 81.

EQUITY (*continued*).

V. General Principles.

6. To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien. *Wright* v. *Ellison*, 16.

7. A transfer by a party of his "*right and claim for any commission or compensation* for services rendered, or to be rendered to *any body corporate*," in a class of claims mentioned generally in the transfer, is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees (without notice) of portions of a *fund* designated and appropriated to answer this claim: the case being one where, on the one hand, the older transferee did *not* make inquiries as to *what* body corporate the claim for commissions was against, and did not give notice of the paper executed in his favor, to such body corporate, nor to a third party to whom this body, subsequently to the older transfer, but prior to the junior ones, devoted a fund to answer these commissions; and where, on the other hand, the junior transferees *did* make exact inquiries and obtain precise evidences and accurate information as to the fund from which the commissions were to be derived, and *did* immediately notify to the party then holding the fund, the nature and extent of their claims, and *did* generally take measures to prevent all other persons being misled by the supposition that the fund still remained in the power of the party who had transferred this claim for commissions upon it. *Spain* v. *Hamilton's Administrators*, 604.

ESCHEAT. See *Rhode Island*.

ESTOPPEL IN PAIS.

1. Whether a contract to give a deed with "full covenants of seizure and warranty," is answered by a deed containing a covenant that the grantor is "lawfully seized in fee simple, and that he will warrant and defend the title conveyed, against the claim or claims of every person whatsoever,"—there not being a further covenant against *incumbrance*, and that the vendor has *a right to sell*—need not be decided in a case where the vendee, under such circumstances, made no objection to the deed offered, on the ground of insufficient covenants but only stated that he was not prepared to pay the money for which he had agreed to give notes; handing the deed at the same time, and without any further remark, back to the vendor's agent who had tendered it to him.

2. Where a vendor agrees to give a deed on a day named, and the vendee to give his notes for the purchase-money at a fixed term from the day when the deed was thus meant to be given, and the vendor does not give the deed as agreed, but waits till the term that the notes had to run expires, and then tenders it—the purchaser being, and having always been in possession—such purchaser will be presumed, in the absence of testimony, to have acquiesced in the delay; or, at any rate,

ESTOPPEL IN PAIS (*continued*).

if when the deed is tendered he makes no objection to the delay, stating only that he is not prepared to pay the money for which he had agreed to give the notes, and handing back the deed offered,—he will be considered, on ejectment brought by the vendor to recover his land, to have waived objections to the vendor's non-compliance with exact time. *Gregg* v. *Von Phul*, 274.

3. Where Congress gives lands to a State for railroad purposes and for "no other," and the State granting the great bulk of them to such purposes allows settlements by pre-emption, where improvement and occupancy have been made on the lands prior to the date of the grant by Congress, and since continued; a purchaser from the railroad company of a part which the State had thus opened to pre-emption cannot object to the act of the State in having thus appropriated the part; the railroad company having, by formal acceptance of the bulk of the land under the same act which opened a fractional part to pre-emption, itself waived the right to do so. The United States as donor not objecting, nobody can object. *Baker* v. *Gee*, 333.

EVIDENCE. See *California*, 3, 9, 10; *Court and Jury*, 1, 4; *Municipal Bonds*, 1.

1. The right to *cross*-examine is limited to matters stated by the witness in his direct examination. *Houghton* v. *Jones*, 702.
2. If the answer to a question asked may *tend* to prove the matters alleged in the *narr*—if it be a link in the chain of proof—the question may be asked. It is not necessary that it be *sufficient* to prove them. *Schuchardt* v. *Allens*, 359.
3. Where the decision of a question depends at all upon the fact, whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper enough to ask what the plaintiff's attorney said *after* the act was done; the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy. *Rogers* v. *The Marshal*, 644.
4. Objection to the sufficiency or competency of evidence must be taken in the court below. It cannot be taken for the first time in the Supreme Court. *United States* v. *Auguisola*, 352; *Schuchardt* v. *Allens*, 359; *Houghton* v. *Jones*, 702; *Commander-in-chief*, 43.
5. To prove payment of a claim, the defendant offered in evidence two *receipts without dates;* and to prove the date, offered two *letters having dates*, which letters inclosed the receipts; also, to prove the date and the agency of the person who had made the payment, and written the letters, offered certain entries in the account books of the parties in behalf of whom the payment was alleged to have been made; these persons residing away from the land, and the clerk who made the entries being dead, of which death and of the handwriting proof was also offered—*Held*, that the evidence was *all* admissible; the receipts on the plainest principles of evidence, the letters and entries on principles not so plain, but still admissible as falling within the category

EVIDENCE (*continued*).

of verbal facts, neither of them being hearsay nor declarations made by the party offering them, and both of them tending to illustrate and characterize the principal fact, to wit, the transmission of the receipts, and to place that fact in its true light, and to give to it its proper effect. *Beaver* v. *Taylor*, 637.

6. Where a written contract is susceptible on its face of a construction that is "reasonable," resort cannot be had to evidence of custom or usage to explain its language. And this general rule of evidence applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. *Insurance Companies* v. *Wright*, 456.

7. Where a policy requires that a vessel shall not be below a certain "rate," as, *ex. gr.*, "not below A 2," this rate is not, in the absence of agreement to that effect, to be established by the rating-register alone of the office making the insurance;—certainly not unless the vessel was actually rated there;—nor by a standard of rating anywhere in the port merely where that office is. If the party assured be not actually rated on the books of the office insuring, the rate may be established by any kind of evidence which shows what the vessel's condition really was; and that had she been rated at all at the port where the office was, she *would* have rated in the way required. It may even be shown how she would have rated in her port of departure, or in one where the company insuring had an agency through which the insurance in question was effected; this being shown, of course, not as conclusive on the matter of rate, but as bearing upon it, and so fit for consideration by the jury. *Ib.*

8. Evidence is not admissible of a general usage and understanding among shippers and insurers of the port in which the insuring office is, that in open policies the expression used, as *ex. gr.* "not below A 2," refers to the rate of vessels or the register of vessels in making the insurance. *Ib.*

9. Where negotiable paper is drawn to a person by name, with addition of "cashier" to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation. *Baldwin* v. *Bank of Newbury*, 234.

10. Where an answer, as originally filed, to a bill for infringing a patent, admits that the defendants did manufacture and sell the articles alleged to have been patented, the fact thus admitted must be accepted as established. As, however, the admission need go no further than its terms *necessarily* imply, the court will, under special circumstances, and where this is promotive of justice, assume that the smallest number of articles were made consistent with the use of the word involved, in the plural, and with the use by the defendants of any part of the patent which is valid. *Jones* v. *Morehead*, 155.

11. An answer in equity, responsive to the bill, and positively denying the

EVIDENCE (*continued*).

facts charged, is entitled to so great weight, that when confirmed by testimony even of a kind not the most satisfactory, it will countervail a case which on its face is a suspicious one. *Parker* v. *Phetteplace*, 684.

12. Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defence, to be shown by the defendant. *Gelpcke* v. *City of Dubuque*, 221.

13. Where authority is given to a city to take stock in a road, *provided* the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription; the bond being in the hands of *bonâ fide* holders for value. In the case before the court the minutes of council recorded that the citizens, "with great unanimity," had petitioned. *Van Hostrup* v. *Madison City*, 291.

14. The Mexican record-books called the *Toma de Razon* and *The Index of Jimeno*, are public records which the Supreme Court may inspect, though they be not in evidence in form below. *Romero* v. *United States*, 721.

EXECUTION. See *Practice*, 16, 7.

FALSE WARRANTY.

In an action for false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and if averred, need not be proved. *Schuchardt* v. *Allens*, 359.

FIDUCIARY RELATION.

Where a firm, whose business was "a general produce business," held a mortgage on real estate, which real estate itself the firm was desirous to purchase under the mortgage, and intrusted the subject generally to one of the firm,—*Held*, that the legal obligation of the partner intrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit with a third person, without the knowledge of his partners, by which such third person should buy the estate, giving him, the intrusted partner, an interest in it; and if the mortgage debt was fully paid into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; *or at least* that no other partner could recover from *him* a share of profits made by a sale of the real estate; all partners alike having been originally engaged in a scheme to get the real estate by depreciating its value; by entering a judgment for a large nominal amount, and by deceiving or "bluffing off" other creditors. *Wheeler* v. *Sage*, 518.

ILLINOIS.

1. In Illinois, a judgment for taxes is fatally defective if it does not in terms, or by some mark indicating money, such as $ or *cts.*, show the amount, in money, of the tax for which it was rendered. Numerals merely, that is to say, numerals without some mark indicating that they stand for money, are insufficient. *Woods* v. *Freeman*, 398.
2. Under the *first* section of the Statute of Limitations, of March 2, 1839, of Illinois, "entitled an act to quiet possessions and confirm titles to land,"—which section gives title to persons in actual possession of lands or tenements, under claim or color of title made in good faith, and who for seven successive years continue in such possession, and during said time pay all taxes,—the bar begins with the *possession* under such claim and color of title, and the taxes of one year may be paid in another. But under the *second* section of the same act, which section says, that "whenever a person having color of title made in good faith to vacant and unoccupied land, shall pay all taxes for seven successive years," *he* shall be deemed owner,—the bar begins with the first payment of taxes after the party has acquired color of title. Hence, in a trial of ejectment, when the said different sections of this statute are set up, any instructions outside of the facts which do not keep this distinction between the two sections in view, and by which the jury, without being satisfied as to the requisite possession under the *first* section, might, under the *second* section, have found for the party pleading the statute upon the ground that the taxes had been paid for seven successive years, although the first payment was made less than seven years before the action was commenced, are wrong, and judgment founded on them will be reversed, upon the well-settled principle, that instructions outside the facts of the case, or which involve abstract propositions that *may* mislead the jury to the injury of the party against whom the verdict is given, are fatally erroneous. *Beaver* v. *Taylor*, 637.

IMPLICATION. See *Statutes*.

INSURANCE. See *Evidence*, 6, 7, 8.

INTENDMENT.

Although the language of a *decree* in admiralty, in an inferior court, may declare a decision which might not, if it were construed by its exact words, be capable of being supported, still, if it is obvious from subsequent parts of the record that no error has been committed, the Supreme Court will not reverse for this circumstance.

Ex. gr. Where a *decree* in the Circuit Court allowed a certain sum for repairs to a vessel, and rejected (improperly, perhaps,) a claim for demurrage, the decree was not reversed by the Supreme Court on that account; it appearing from a subsequent part of the record that the judge had in fact considered the sum he allowed for repairs *eo nomine* was too large for repairs simply, but was "about just" for repairs and demurrage together. *Sturges* v. *Clough*, 269.

INTEREST. See *Usury*.

INTERPRETATION OF LANGUAGE.

1. A power of attorney, drawn up in Spanish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence, a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a Commissioner of the United States at Washington; notwithstanding that the first-named power is given with great superfluity, generality, and strength of language. *Wright* v. *Ellison*, 16.

2. A railway viaduct, if nothing but a structure made so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of a river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in railway cars [the only roadway between said shore and said structure being two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder] is not a "bridge" within the meaning of the act of New Jersey, passed A.D. 1790, by which the State enacted that no persons but certain persons named should erect any "bridge" over certain rivers for a term of ninety-nine years. *Bridge Proprietors* v. *Hoboken Co*, 116.

IOWA.

1. The statute of Iowa, of January 25, 1855 (chap. 128), authorizes cities in that State to give their bonds in payment of subscriptions to railroad stock, and authorizes them to be sold at a price even greatly below their par value. *Meyer* v. *City of Muscatine*, 384.

2. By a series of decisions of the Supreme Court of Iowa prior to that, A. D. 1859, in *The State of Iowa, ex relatione*, v. *The County of Wapello* (13 Iowa, 388), the right of the legislature of that State to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, was settled in favor of the right; and those decisions, meeting with the approbation of this court, and being in harmony with the adjudications of sixteen States of the Union, will be regarded as a true interpretation of the constitution and laws of the State so far as relate to bonds issued and put upon the market during the time that those decisions were in force. *Gelpcke* v. *City of Dubuque*, 175.

JUDGMENT. See *Illinois; Intendment; Judicial Sale; Practice*, 6, 7, 8, 13, 18, 19.

JUDICIAL SALE.

The ancient doctrine that all rights acquired under a judicial sale made while a decree is in force and unreversed will be protected, is a doctrine of extensive application. It prevails in California as elsewhere; and neither there nor elsewhere is it open to a distinction between a

JUDICIAL SALE (*continued*).

reversal on appeal, where the suit in the higher court may be said to be a continuation of the original suit, and a reversal on a bill of review, where, in some senses, it may be contended to be a different one. But purchasers at such sale are protected by this doctrine only when the power to make the sale is clearly given. It does not apply to a sale made under an interlocutory decree only; or under a conditional order, the condition not yet having been fulfilled. *Gray* v. *Brignardello*, 627.

JURISDICTION. See *Comity; Conflict of Jurisdiction; Equity*, 1, 2.

I. Of the Supreme Court of the United States.

1. Error *will* lie from the Supreme Court of the United States to the highest court of law or equity of a State, under the 25th section of the Judiciary Act:

(*a*) Where a statute of the United States is technically in issue in the pleadings, or is relied on in them, and is decided against by rulings asked for and refused, even though the case may have been disposed of generally by the court on other grounds. *State of Minnesota* v. *Bachelder*, 109.

(*b*) Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does *not* impair it, whereby the second statute remains valid under the Constitution of the United States. *Bridge Proprietors* v. *Hoboken Company*, 116.

2. It will *not* lie where a certificate, coming up with the record from the highest court of law or equity of a State, certifies only that on the "*hearing*" of the case a party "*relied upon*" such and such provisions of the Constitution of the United States, "*insisting*" that the effect was to render an act of Congress void, as unconstitutional, which said claim, the record went on to say, "was overruled and disallowed by this court," and where the record itself shows nothing except that the statute which it was argued contravened these provisions, was drawn in question, and that the decision was in *favor* of the statute, and of the rights set up by the party relying on it. *Roosevelt* v. *Meyer*, 512.

3. An appellant, under the 25th section of the Judiciary Act, from the highest court of law or equity of a State to the Supreme Court of the United States, under the provision that "where is drawn in question the construction of *any clause of the Constitution*, or of a *statute* of the United States, and the decision is *against* the title," right, &c., so set up, need not set forth specially the clause of the Constitution of the United States on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution, it is enough. *Bridge Proprietors* v. *Hoboken Company*, 116.

4. The Supreme Court of the United States has no power to review by *certiorari* the proceedings of a military commission ordered by a gene-

JURISDICTION (*continued.*)

ral officer of the United States Army, commanding a military department. *Ex parte Vallandigham*, 243.

5. A bidder at a marshal's sale made on foreclosure of a mortgage in a Federal court below, may, by his bid, though no party to the suit originally, so far be made a party to the proceedings in that court as to be entitled to an appeal to the Supreme Court. Whether or not, this court will not dismiss an appeal by such person on mere *motion* of the other side; the decision involving the merits of the case, and such an examination of the whole record as can only be made on full hearing. *Blossom* v. *Railroad Company*, 655.

II. OF CIRCUIT COURTS OF THE UNITED STATES.

6. Where a declaration claims a sum not sufficiently large to warrant error to this court, but where the plea pleads a set-off of a sum so considerable that the excess between the sum claimed and that pleaded as a set-off would do so,—the amount in controversy is not the sum claimed, but the sum in excess, in those circuits of the United States courts, where by the law of the State adopted in the Circuit Court, judgment may be given for the excess as aforesaid. *Ex. gr.:* A declaration in assumpsit claimed *one* thousand dollars damages,—a sum insufficient to give the Supreme Court jurisdiction: more than *two* thousand being required for that purpose. The plea pleaded a set-off of *four* thousand, and by the laws of Ohio, adopted in the Federal courts sitting in that State, judgment might be given for the *three* thousand in excess, if the set-off was proved. *Held*, that *three* thousand, and not *one* thousand, was the amount in dispute; and accordingly, that the jurisdiction of the Supreme Court attached. *Ryan* v. *Bindley*, 66.

7. When, to authorize the re-examination of a final judgment of the Circuit Court of the United States, the matter in dispute must exceed the sum or value of $2000, that amount—if the action be upon a money demand, and the general issue be pleaded—must be stated both in the body of the declaration and in the damages claimed, or the prayer for judgment. When the amount alleged to be due in the body of the declaration is less than $1000, an amendment merely in the matter of amount of damages claimed, so as to exceed $2000, will not give jurisdiction to this court, and enable it to review the final judgment in the case. *Lee* v. *Watson*, 337.

JURY. See *Court and Jury.*

LEASE. See *Rent.*

MARSHAL.

The marshal of the United States is not responsible on his official bond for the act of his deputy in discharging sureties on a replevin bond, in any case where the attorney of the plaintiff in that suit, though he gave no direct and positive instructions to the deputy, has still done that which was calculated to mislead the deputy, and to induce his erroneous act. And in the consideration of a question between the

MARSHAL (*continued*).

deputy and attorney, it is to be remembered that the former is but a ministerial officer, unacquainted with the rules which discharge sureties from their obligations, while the latter, in virtue of his profession, is supposed to be familiar with them. *Rogers* v. *The Marshal*, 644.

MINNESOTA. See *Statutes of the United States*, 1, 2.

MISSOURI. See *Statutes of the United States*, 3.

MORTGAGE. See *Practice*, 16, 17.

Growing timber constitutes, in view of the law, a portion of the realty. Hence, in any case of a mortgage of timber land, when the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber which may have been cut down and so severed from the realty, is discharged, and the timber reverts to the mortgagor, or any vendee of his. A sale of it by the mortgagee, or assignee of the mortgage, after such payment, is a conversion for which an action will lie by the mortgagor or his vendee. *Hutchins* v. *King*, 53.

MUNICIPAL BONDS. See *Negotiable Instruments*, 1.

1. Where a county issues its bonds payable to bearer, and pledging the faith, credit and property of the county, under the authority of an act of Assembly, referred to on the face of the bonds by date, for their payment, and those bonds pass, *bonâ fide*, into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that the act of Assembly, referred to on the face of the bonds, authorized the county to issue the bonds only and subject to certain "restrictions, limitations, and conditions," which have not been formally complied with; nor that the bonds were sold at less than par, when the act authorizing their issue, and referred to by date on the face of the instrument, declared that they should, "in no case," nor "under any pretence," be so sold. *Mercer County* v. *Hacket*, 83; and see *Gelpcke* v. *City of Dubuque*, 175; *Meyer* v. *City of Muscatine*, 384; and *Van Hostrup* v. *Madison City*, 291.
2. Where the votes of three hundred and twenty-six citizens were given in favor of a municipal loan, and of five only against it, and the city issued the bonds, no one interposing to prevent the issue, all parties acting in good faith, the city cannot afterwards object to the regularity of the preliminary proceedings, and set up that the vote was not taken in the form in which, under the charter, it ought to have been taken.

MUNICIPAL POWERS.

1. Where a charter gives a city corporation power to borrow money for any object in its discretion, and a statute of the State where the city is, enacted that "bonds of any city" issued to railroad companies "may have interest at any rate not exceeding" a rate named, and "may be

MUNICIPAL POWERS (*continued*).

sold by the company at such discount as may be deemed expedient"—*Held*, in a case where the city had already actually issued its bonds to aid the construction of railways, and those bonds were in the hands of *bonâ fide* holders for value, that the power to borrow for such a purpose and issue the bonds existed; and this, even although the power to borrow, as given in the charter, was found among powers of a nature strictly municipal; such, in fact,—except as, under the decision now made, might respect the power to "borrow money,"—being the only powers given in the charter at all. The statute, in connection with the power, gives the requisite authority. *Meyer* v. *City of Muscatine*, 384; *Gelpcke* v. *City of Dubuque*, 220.

2. A city having power to borrow money, may make the principal and interest payable where it pleases. *Ib.*
3. An authority to a city corporation to subscribe for stock in a railway company, "*as fully as any individual*," authorizes also the issue by the city of its negotiable *bonds* in payment of the stock. *Seybert* v. *City of Pittsburg*, 272.
4. An authority to a city corporation to take stock in any chartered company for making "a road or *roads to* said city," authorizes taking stock in a road between other cities or towns, from the nearest of which to the city subscribing there is a direct road; the road in which the stock is taken being in fact a road in extension and prolongation of one leading into the city. *Van Hostrup* v. *Madison City*, 291.
5. A contract made by the city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt—as well interest to become due as interest already due—is not a "borrowing of money," but is a contract for the payment of a debt; and, as the last, will be sustained, when, if the former, it might fall within prohibitions against the city's borrowing money except on certain terms. *Gelpcke* v. *City of Dubuque*, 221.

NEGOTIABLE INSTRUMENTS. See *Court and Jury*, 2.

1. Corporation bonds payable to bearer, though under seal, have, in this day, the qualities of negotiable instruments. And a party recovering on the coupons will be entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable. *Mercer County* v. *Hacket*, 83; *Gelpcke* v. *City of Dubuque*, 175; *Meyer* v. *City of Muscatine*, 384.
2. The indorsement of negotiable paper with the words "*for collection*," restrains its negotiability; and a party who has thus indorsed it, is competent to prove that he was not the owner of it, and did not mean to give title to it or to its proceeds when collected. *Sweeny* v. *Easter*, 166.
3. Where a banker, having mutual dealings with another banker, is in the habit of transmitting to him in the usual course of business negotiable paper for collection, the collection being in fact sometimes on account of the transmitting banker himself, and sometimes on ac-

NEGOTIABLE INSTRUMENTS (*continued*).

count of his customers, and fails, owing his corresponding banker a balance in general account,—

I. Such corresponding banker cannot retain to answer that balance any paper so transmitted for collection, and really belonging to third persons, if he knew it was sent for collection merely; and as respects the knowledge of or notice to the receiving banker, it is unimportant from what source he have derived it.

II. Neither can he retain it, if he did not know that it was so sent, unless he have given credit to the transmitting banker, or have suffered a balance to remain in his hands, to be met by the paper transmitted or expected to be transmitted in the usual course of dealings between them.

III. But if the receiving banker have treated the transmitting banker as owner of the transmitted paper, and had no notice to the contrary, and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the transmitting and now failed banker, to be met by proceeds of such negotiable paper transmitted, then the receiving banker is entitled to retain the paper or its proceeds against the banker sending it, for the balance of account due him, the receiving banker aforesaid. *Sweeny* v. *Easter*, 166.

4. Where negotiable paper is drawn to a person by name, with addition of "cashier" to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation. *Baldwin* v. *Bank of Newburg*, 234.

NEW HAMPSHIRE. See *Mortgage.*

NEW JERSEY. See *Constitutional Law.*

NOTICE TO QUIT. See *Action*, 3.

OFFICIAL BOND. See *Marshal.*

PARTNERSHIP. See *Fiduciary Relation.*

PATENT. See *Court and Jury*, 1.

I. GENERAL PRINCIPLES.

1. Patents for inventions are not to be treated as mere monopolies, and therefore as odious in the law, but are to receive a liberal construction, and under a fair application of the rule that they be construed *ut res magis valeat quam pereat.* Hence, where the "claim" immediately follows the description, it may be construed in connection with the explanations contained in the specification; and be restricted accordingly. *Turrill* v. *Railroad Co.*, 491.

2. Where a patent is for a combination of distinct and designated parts, it is not infringed by a combination which varies from that patented,

PATENT (*continued*).

in the omission of one of the operative parts and the substitution therefor of another part substantially different in its construction and operation, but serving the same purpose. *Eames* v. *Godfrey*, 78.

3. In cases where an invention for which a patent is sought comes within the category of a machine, the patent must be for *it*, and not for its "mode of operation," nor for its "principle," nor for its "idea," nor for any "abstraction" whatsoever. *Burr* v. *Duryee*, 531, 579.

4. A grant of a right by patentee to make and use, and vend to others to be used, a patented machine, within a term for which it has been granted, will give the purchaser of machines from such grantee the right to use the *machine patented* as long as the machine itself lasts; nor will this right to use a machine cease because an extension of the patent, not provided for when the patentee made his grant, has since been allowed, and the machine sold has lasted and is used by the purchaser within the term of time covered by this extension. *Bloomer* v. *Millenger*, 340.

II. PATENT OFFICE.

5. *Query:* Whether "the making of the case which incloses the internal works of a lock, with two faces just alike, and so well finished-off in point of style, that either side may be presented outwards, is a matter which could be patented, if no locks with such cases had ever been made before?" *Jones* v. *Morehead*, 155.

6. The practice of surrendering valid patents, and of granting reissues thereon in cases where the original patent was neither inoperative nor invalid, and where the specification was neither defective nor insufficient,—the purpose being only to insert in the reissue expanded or equivocal claims,—is declared by the Supreme Court of the United States to be a great abuse of the privileges granted by the 13th section of the Patent Act of 1836, authorizing a surrender and reissue in certain cases, and is pointedly condemned. *Burr* v. *Duryee*, 531.

7. If an applicant for a patent choose to withdraw his application for a patent, intending, at the time of such withdrawal, to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the seventh sections of the Patent Acts of 1836 and 1839. *Godfrey* v. *Eames*, 317.

III. VALIDITY OF PARTICULAR PATENTS.

8. The machine patented to Seth Boyden, January 10, 1860, for an improvement in machinery for forming hat-bodies, is no infringement of any of the patents granted to H. A. Wells for the same thing. The patents to Wells, so far as they related to an improvement in the *process* of making hat-bodies, were for a process not original with him, and are void. *Burr* v. *Duryee*, 531.

9. The patent granted, September 9th, 1856, to Cawood for an "improvement in the common anvil or swedge-block, for the purpose of welding-up and reforming the ends of railroad rails," &c., is a patent in

PATENT (*continued*).

which special devices are described as combined and arranged in a particular manner, and as operating only in a special and peculiar way for a special purpose, and to effect a special result. *Turrill* v. *Railroad Co.*, 491.

10. The claim of Sherwood, under his patent, granted in 1842, and extended in 1856, for "a new and useful improvement in door-locks,"—so far as the claim is for "making the cases of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left-hand door, substantially as described;" that is to say, the *first* claim in this schedule, is for a thing which is not original with him and void. *Jones* v. *Morehead*, 155.

11. This *part* of the invention known as the Janus-faced lock, not being original with Sherwood, no action lies by him or his assignees, for using it in combination with other inventions not patented by him; nor can persons so using it be made infringers by an argument which, assuming the validity of Sherwood's invention, mingles it with these other parts, and then treats the whole as a *unit*, and gives to him or his assignees damages equivalent to the net profits on the manufacture of the entire lock. *Ib.*

PENALTY. See *Rent.*

PLEADING. See *Admiralty*, 2; *Equity*, 3, 4.

1. Where, by State statute, power is given to connecting railway corporations to merge and consolidate their stock, and such merger and consolidation has been judicially decided by the Supreme Court of the State to be a *dissolution in law* of the previous companies, and the creation of a new corporation with new liabilities; in such case, where the declaration avers that the defendant had agreed that stock of one of the connecting railroads should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the statute, the stock of the railway named was merged and consolidated *by the consent of the party suing*, with a second railway named, so forming "one joint stock company of the said two corporations," under a corporate name stated; such plea is good, though it do not aver that the consolidation was done without the consent of the defendants. And a replication which tenders issue upon the destruction of the first company, and upon the fact that its stock is destroyed, rendered worthless, and of no value, traverses a conclusion of law, and is bad. *Clearwater* v. *Meredith*, 25.

2. Such a plea as that just mentioned contains two points, and two points only, which the plaintiff can traverse,—the fact of consolidation and the fact of consent; and these must be denied separately. If denied together, the replication is double, and bad. *Ib.*

3. When a plaintiff replies to a plea, and his replication being demurred to, is held to be insufficient, and he withdraws that replication, and substitutes a new one—the substituted one being complete in itself,

PLEADING (*continued*).

not referring to or making part of the one which preceded—he waives the right to question in this court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one. *Ib.*

4. On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleading, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. This rule of pleading declared and applied. *Ib.*

POWER OF ATTORNEY. See *Interpretation of Language*, 1.

PRACTICE. See *Attorney-General; California*, 2; *Case Stated; Evidence*, 4; *Intendment.*

1. The objects of a citation on appeal to the Supreme Court of the United States being *notice*, no citation is necessary in a case where, in point of fact, by agreement of parties, actual notice of an intention to appeal appears on the record, and where, moreover, by such a construction as the court was inclined to put on part of the case, the appeal was taken in the same term when the decree was made. *United States* v. *Gomez*, 701.
2. Where an instruction, though not in the best form of words, is sufficiently intelligible, and has been rightly interpreted by the jury in reference to the evidence, a reversal will not be ordered in the indulgence of a nice criticism. *Rogers* v. *The Marshal*, 644.
3. A bidder at a marshal's sale made on foreclosure of a mortgage in a Federal court below, may, by his bid, though no party to the suit originally, so far be made a party to the proceedings in that court as to be entitled to an appeal to the Supreme Court. Whether or not, the court will not dismiss an appeal by such person, on mere *motion* of the other side; the decision involving, perhaps, the merits of the case, and such an examination of the whole record as can only be made on full hearing. *Blossom* v. *Railroad*, 655.
4. It is the duty of counsel, excepting to propositions submitted to a jury by the court below, to except to such propositions distinctly and severally; and although the court below may err in some of the propositions—which in this case it did—yet, if the propositions are excepted to *in mass*, the exception will be overruled, provided *one* of the propositions be correct, which was the case here. *Rogers* v. *The Marshal*, 644.
5. The Supreme Court of the United States will refuse to consider objections to the documentary evidence of title produced on the trial of an action of ejectment, unless they are presented in the first instance to the court below, if they are of a kind which might have been there

PRACTICE (*continued*).

obviated. *Houghton* v. *Jones*, 702; *United States* v. *Auguisola*, 352; *Schuchardt* v. *Allens*, 359.

6. The Supreme Court of the United States cannot give judgment as on a case stated, except where facts, and facts only, are stated. If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement. *Burr* v. *The Des Moines Railroad Co.*, 99; *Pomeroy's Lessee* v. *State Bank of Indiana*, 592.

7. Generally speaking where a case is brought to the Supreme Court upon a writ of error issued under the 22d section of the Judiciary Act, and there is neither bill of exceptions, case stated, nor special verdict brought up, the judgment will be affirmed; legal presumption being in favor of a judgment regularly rendered. *Pomeroy's Lessee* v. *State Bank of Indiana*, 592.

8. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when *in fact* they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this court on the case as, by common consent, they presented it,—the court benignantly "dismissed" it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape, by which it could be here reviewed. But the case was special, and the dismission was with costs. *Burr* v. *The Des Moines Co.*, 99.

9. In a case where the Supreme Court of the United States, after an examination of very voluminous records, did not doubt that the court below was acting upon a sincere conviction that it possessed full power and authority to make certain orders, which this court now decided that it had made under a misapprehension of its powers, and without authority of law, and that it was influenced by a high sense of duty, and by what it believed to be for the best interests of all parties concerned, in what this court characterized as "a most complicated, difficult, and severely contested cause," and that it needed but to be advised by the *opinion* of this court, on a motion which had been made for a writ of prohibition against it, the said court below, this court, for the present, withheld the appropriate remedy, giving its *opinion* that the court below had no jurisdiction, and was acting against law, with liberty to counsel to apply hereafter to this court, if necessary. *Bronson* v. *La Crosse Railroad*, 405.

10. In an appeal to the Supreme Court by the United States from a decree of one of the District Courts of California, where the proceeding below was to have a land title confirmed under the act of March 3, 1851, an assertion by the counsel of the United States that the controversy is between individuals wholly, and that the United States have no interest in the case, is sufficient to satisfy the Supreme Court of that fact so far as respects the United States itself. But it is not sufficient, the record itself not showing the fact, to satisfy the court, as respects

PRACTICE (*continued*).

the opposing party. Hence, although, if the Supreme Court have no jurisdiction because the controversy is between private individuals wholly, the court below had none either, yet where the fact of such individual interest in the suit rests wholly on the admission of the United States here, and the opposing party is not represented here by counsel, this court will not reverse the decree below, but will only dismiss the case. *United States* v. *Morillo*, 706.

11. Where, under the act of Congress of June 14, 1860, relating to surveys in California, parties are permitted by the District Court below to appear and contest a survey and location, the order of the court permitting such appearance and contest should be set forth in the record. Only those persons who, by such order, are made parties contestant, will be heard on appeal to the Supreme Court. *United States* v. *Estudillo*, 710.

12. Where, under this act, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the District Court, and its action on the subject is not subject to revision on appeal. *Ib.*

13. No "exception" lies to overruling a motion for a new trial, nor for entering judgment. *Pomeroy's Lessee* v. *State Bank of Indiana*, 592.

14. The entries on a judge's minutes—the memoranda of an exception taken—are not themselves bills of exception, but are only evidence of the party's right seasonably to demand a bill of exceptions; memoranda, in fact, for preserving the rights of the party in case the verdict should be against him, and he should desire to have the case reviewed in an appellate tribunal. No exceptions not reduced to writing, and sealed by the judge, are a bill of exceptions, properly speaking, and within the rules and practice of the Federal courts. The seal, however, being to the *bill* of exceptions, and not to each particular exception contained in it, it is sufficient if the bill be sealed, as is the practice in the first and second circuits, at its close only. *Ib.*

15. Where an objection is to the ruling of the court, it is indispensable that the ruling should be stated, and that it should also be alleged that the party then and there excepted. *Ib.*

16. When a bond is given for appeal to the Supreme Court of the United States in a bill of foreclosure of mortgage, the condition of the bond being simply that the appellant shall pay *costs and damages*, it does not operate to stay a sale of mortgaged premises already decreed. *Orchard* v. *Hughes*, 73.

17. Independently of the rule of court prescribed by the Supreme Court of the United States, 18th April, 1864, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left

PRACTICE (*continued*).

due after the sale of the mortgaged premises; and this applies to the Territorial court of Nebraska, as much as to the courts of States organized under the Judiciary Act of 1789. *Ib.*, 74.

18. A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form, cannot be entered in that shape *nunc pro tunc* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. *Gray* v. *Brignardello*, 627.

19. Where the question was, whether a party should be heard on appeal, and the effect of refusal to hear him would be to leave in full force a decree which was alleged to have been entered through collusion of a district attorney of the United States, and which the court was "not prepared to sanction," it was *held*, that an order to enter up a decree was not to be taken as the date of a decree entered subsequently, *now for then;* but that the date was the day of the actual and formal entry. *United States* v. *Gomez*, 701.

PUBLIC POLICY. See *Fiduciary Relation.*

REAL ESTATE. See *Mortgage.*

RECORD. See *Evidence*, 10, 11.

RENT.

Where a lease of $3000 a year, payable in *monthly* instalments, stipulated that if the tenant underlet or attempted to remove any of the goods on the premises without the landlord's consent, then, at the sole option and election of the landlord, *the term should cease,* AND MOREOVER, in either of said cases, "one whole year's *rent,* to wit, the *rent* of $3000 over and above all such rents" as have already accrued, shall be and is hereby reserved, and shall immediately accrue and become due and owing, and shall and may be levied on by distress and sale of all such goods as may be found on the premises: *Held,—in a case where a removal and consequent levy had been made while the lease had yet more than a year to run*—that although the clause in the lease was obscure, the $3000 was "rent," intended to be secured in advance, and in a gross sum instead of in the monthly shape, and was not a penalty above and independent of the other and usual rents. *Dermott* v. *Wallach*, 61.

RHODE ISLAND.

The well-settled principle, that aliens may take land by deed or devise, and hold against any one but the sovereign until office found, exists in Rhode Island as elsewhere; not being affected by the statute of that State which allows them to hold land "*provided*" they previously obtain a license from the Probate Court. *Cross* v. *De Valle*, 1.

SALE.

Where goods have been sold and delivered, the contract of sale is so far completed that the vendor cannot hold the vendee to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it, as that "no claims for deficiencies or imperfections will be allowed, unless made within seven days from the receipt of goods." *Schuchardt* v. *Allens*, 329.

SCIENTER.

In an action for false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and if averred, need not be proved. *Schuchardt* v. *Allens*, 359.

STATUTES.

A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscriptions of stock by such city or county, such bonds *may bear an interest*" at a rate specified, and "*may be sold* by the company," in a way mentioned,—*implies* that a city (whose charter gave it power to borrow money for public purposes), had power to subscribe to the stock and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly. *Gelpcke* v. *The City of Dubuque*, 220.

STATUTES OF THE UNITED STATES. See *Warrant and Survey*, 2.

1. Neither the act of Congress of 3d March, 1849—the organic law of the Territory of Minnesota, which declared that when the public lands in that Territory shall be surveyed, certain sections, designated by numbers, shall be and "hereby *are*" "*reserved* for the purpose of being applied to schools"—nor the subsequent act of February 26th, 1857, providing for the admission of that Territory into the Union—and making the same reservation for the same object—amounts so completely to a "dedication," in the stricter legal sense of that word, of these sections to school purposes, that Congress, with the assent of the Territorial legislature, could not bring them within the terms of the Pre-emption Act of 1841, and give them to settlers who, on the faith of that act, which had been extended in 1854 to this Territory, had settled on and improved them. *State of Minnesota* v. *Batchelder*, 109.
2. The decisions of the receiver and register of lands for the Territory of Minnesota are not of conclusive efficacy. They may be inquired into and declared inoperative by courts. *Ib.*
3. Under the act of Congress of June 10, 1852, giving to the State of Missouri certain lands for railroad purposes, and the act of that State of September 20, 1852, accepting them and making provision in regard to them, the location of the lands was not fixed within the meaning of those acts by the mere location of the *road;* nor was it fixed until the railroad company caused a map of the road to be recorded in the office for recording deeds in the county where the land was situated;

STATUTES OF THE UNITED STATES (*continued*).

this sort of location being the kind required by the last act. *Baker* v. *Gee*, 333.

4. An act of Congress (July 15, 1862) repealed all Circuit Court powers given to certain District Courts of the United States. A subsequent statute (March 3, 1863) enacted, "That in all cases wherein the District Court had rendered *final judgments or decrees* prior to the passage of the act, said District Court shall have power to *issue writs of execution*, or other *final process*, or to use such other powers and proceedings as may be in accordance with law, *to enforce the judgments and decrees aforesaid*," anything in said act of July 15th, 1862, to the contrary notwithstanding: *Held*,—

I. That the District Court acquired only such powers as might be necessary to insure the execution of any final process that it might issue; that is to say, such powers as might be necessary to regulate and control its officers in the execution of their ministerial duties.

II. That the words "judgments and decrees," within the meaning of this act, were such judgments and decrees as disposed of the whole case, so that nothing remained to be done but to issue "final process."

III. That even if the statute in question conferred larger powers, and gave the court more general jurisdiction over its former cases, such court could not, pending an appeal by a party in whose favor it had decreed, exercise them on the application and in favor of such party; the Supreme Court, however, in order to guard against misconstruction, saying, that where a decree had been rendered affecting property in litigation, the court below, being in custody of such property, had full power to adopt proper measures to protect it from waste or loss; and where a railroad was the property, reasonably to apply its revenues for its conservation, but not to appropriate them beyond this, and among litigating parties. *Bronson* v. *La Crosse Railroad Company*, 405.

TARIFF. See *Customs of the United States.*

USAGE. See *Evidence*, 6, 7.

USURY.

1. Where the rate of interest is fixed by law at so much *per annum*, a contract may lawfully be made for the payment of that rate, before the principal comes due, at periods shorter than a year; even although the effect of this may be, by allowing the party to reinvest and so compound his interest, to get more than the rate fixed. *Meyer* v. *City of Muscatine*, 384.

2. A person contracting for the payment of interest may contract to pay it either at the rate of the "place of contract," or at that of the "place of performance," as one or the other may be agreed on by himself and the creditor; and the fact that the rate of the place at which it is agreed that it shall be paid is higher than the rate in the

USURY (*continued*).

other place, will not expose the transaction to the imputation of usury, unless the place agreed on was fixed *for the purpose* of obtaining the higher rate, and *to evade* the penalty of a usurious contract at the other place. *Miller* v. *Tiffany*, 298.

3. The general doctrine of equity that a party complaining of usury can have relief only for the excess above lawful interest, applies to the case of a person standing in the position of a claimant through bill in equity of priority on a *fund*, another claimant upon which, as defendant, is the alleged usurer. The fact that the suit is a mere contest between different parties for a *fund*, and a contest, therefore, in which each claimant may, in some senses, be considered an *actor*, does not force the alleged usurer into the position of a complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover a usurious debt; that is, expose him to the loss of the entire claim. *Spain* v. *Hamilton's Administrator*, 604.

4. Where the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious. Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the legal interest, is "uncertain and so curious," that intentional bad device cannot be affirmed. *Ib.*

WARRANT AND SURVEY.

1. As a general rule a warrant for public lands of the United States should be so located and surveyed that the surplus left to the United States shall be in one connected piece. But a large discretion must be left in this class of cases to the surveyor, and the rule is not one of universal application. Hence, in a California case, where the surplus was left in two very large parcels, one of three thousand five hundred and the other of two thousand acres, the rule was held to be controlled by the facts that the survey was located as desired by the claimant, that it had a reasonably compact form, and that it included two "adobe houses," probably twenty years old, now and long inhabited by the heirs of the original grantee, the present owners of the claim, and one of which houses would be excluded, if the survey were made in the more usual form. *United States* v. *Vallejo*, 658.

2. The State of Virginia issued, in 1784, a warrant for a soldier of the Continental establishment, which was entered in her own borders south of the Ohio. The land having been surveyed, a patent issued; everything proceeding in ordinary form. But a part of the tract surveyed having been previously granted away by the State, never came into the soldier's possession or control, nor in any way benefited him—*Held*, in a case where the new entry and survey were free from objection on their face, that the warrants, which called for no specific tracts anywhere, were not so far "satisfied" or "merged" as that a new and effective entry and survey might not be afterwards made in another district open to the soldier, to wit, in the Virginia Military

WARRANT AND SURVEY (*continued.*)

District in Ohio, and which would be protected against any subsequent location by the proviso of the act of March 2, 1807, providing that no location should be made on any tracts of the district which had been previously surveyed. *Niswanger* v. *Saunders*, 424.

3. Where a survey of land, under the military rights referred to, is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, a second enterer is met by the statute, and cannot obtrude on the existing survey by a second location. *Saunders* v. *Niswanger* (11 Ohio State, 298), overruled. *Ib.*

WISCONSIN. See *Statutes of the United States*, 4.

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